such a *pluris petitio* as must restrict the effect of the diligence. If the diligence had proceeded upon the infeftment of annualrent in the bond, the termly failzies might, as *debita fundi*, and had they been attached *habile modo*, by a poinding of the ground and letters of comprising, have been accumulated; but as it had been deduced, in terms of the act 1672, and consequently upon the personal obligation, the adjudger could only accumulate the ordinary penalty; and, at all events, could not accumulate and adjudge for both. 29th Nov. 1677, Orrock *against* Morrice, No 39. p. 128. 27th Jan. 1699, Mackenzie *against* Creditors of Cockburn, No. 31. p. 259. No. 6.

The defender answered:

When an adjudication was led upon a personal bond, it was in practice grounded both upon the personal obligation and the real right, the one without prejudice of the other. The first included the principal sum and penalty for non-payment; the last the arrears of annualrent and termly failzies, properly considered as *debita fundi;* but precisely of the same nature with the penalty, and intended to secure punctual payment of the interest in the same way as the penalty secured payment of the principal. Whenever a term's annualrent was allowed to run in arrear, the termly failzie, corresponding to it, became due; and, like every other debt, might be the ground of an adjudication. The law and practice accordingly authorised the diligence that had been used equally in the one case as in the other; and as both obligations had been legally incurred, they were equally, without restriction, liable to be accumulated in the diligence. Bankton, B. 3. T. 2. § 99.

Though other objections were urged, it was upon this that the Judges decided the question; and the following interlocutor was accordingly pronounced: "Restrict the adjudication in question to the principal sum, annualrents "thereof, and necessary expenses, to be accumulated at the date of the de- "cree, with the annualrents of the said sum thus accumulated after the date "of the said decree of adjudication till payment."

Lord Ordinary, *Monboddo.* For Park, *G. Ferguson.*
Clerk, *Ross.* For Craig, *R. Blair.*

R. H. *Fac. Coll. No. 104. p. 317.*

1776. *February* 9. FRANCIS STRACHAN *against* SIR JOHN WHITEFORD.

No. 7.
One having a disposition in security over lands, held and possessed by his debtor on minute of sale without infeftment, cannot complete

James Aird was proprietor of the lands of Brackenhill, in which he was infeft. Agnes Mackenzie his spouse was infeft in an yearly annuity out of them, in the event of her surviving her husband.

James Aird conveyed these lands to James Aird, his son, and Isobel Foggo, his spouse, for a liferent annuity. The son was infeft.

The whole parties afterward, by a minute of sale, sold the lands to Mr. Matthew Stuart, professor of mathematics in the university of Edinburgh, obliging themselves to grant a disposition, containing procuratory and precept in his favour.

No. 7. his right, by adjudication in implement of the minute of sale led against the granter of that minute as the person last invested with the feudal right.

No such disposition was granted; but Mr. Stuart having entered into possession, granted an heritable bond over the lands to Sir John Whiteford, who was thereupon infeft.

Sir John obtained decree of adjudication in implement of the minute of sale against James Aird younger, and against his spouse.

Sir John was infeft in the lands in virtue of a charter under the great seal, proceeding upon the decree of adjudication, and this charter, containing a confirmation of the base infeftments in the persons of the Airds, and of all the other subaltern infeftments, subsequent to that of the last immediate vassal of the Crown.

Professor Stuart's affairs having gone into disorder, he conveyed these lands to Francis Strachan, Writer to the Signet, in trust, and assigned to him the whole writs and evidents.

To complete his title, Mr. Strachan led an adjudication in implement of the minute of sale, and then instituted a reduction of Sir John's adjudication, and of the charter and sasine following upon it.

In bar of this action, Sir John pleaded;

Where a person has obtained a right to lands, whether absolute or only in security, and where the right of the author to these lands is not completed, the holder of the right may, by the force of legal diligence, supply the want of infeftment in the person of his author, without communicating any benefit to third parties, in prejudice of his own right. If the method which the defender adopted be inept, a contrary doctrine would be true. No other method can be pointed out, by which the defect could be supplied, without running the risk of giving a preference to other creditors.

It is no doubt competent for an assignee to pursue, either in his own name or in the name of the cedent, but it is no necessary measure for an assignee to carry on his diligence in the name of his cedent. On the contrary, if he can render his right complete by prosecuting in the name of his author, it must also be in his power to render his right equally complete, by prosecuting in his own name.

Indeed it is by prosecuting in his own name only, that this can be accomplished with safety. An adjudication in implement, for example, obtained in the name of Professor Stuart, and a charter and sasine expeded thereupon, would as a *jus superveniens* in his person have validated a first infeftment, flowing from him in favour of another party; so that the vigilant creditor would, by the force of his own diligence, be cut out of his preference by the creditor who was doing nothing.

Nor would it have done to have first adjudged the minute of sale upon the personal obligation in the heritable bond, and then to have made that adjudication the ground-work of an adjudication in implement against the Professor's author: For by doing this, every personal creditor of Mr. Stuart would have been entitled, by adjudging within year and day of the defender, to have been

preferred *pari passu* with him upon the Professor's estate. This is saying, that a disposition to a creditor in security of his debt of a personal right to lands, is no better than so much blank paper, and that the disponee is in no better situation than if he had relied upon the debtor's mere personal obligation; whereas a personal right to lands is a valuable and substantial estate, which the holder may render complete in his own person by infeftment. No. 7.

It would have been a superfluous step to have led an adjudication against Professor Stuart, in order to carry the minute of sale, when by the heritable bond, and the assignation therein contained, the defender had all the right to that minute which Mr. Stuart could give him, in so far as respected the security granted by the heritable bond. The only use of an adjudication is to transfer, by an act of the law, a right from the debtor to the creditor, for the creditor's payment or security, which the debtor ought to have done voluntarily; and it would have been both nimious and idle, upon the part of the creditor, to lead an adjudication against his debtor, in order to transfer a right which the debtor had formerly, by his voluntary act and deed, himself transferred to the creditor in security of his debt.

A voluntary conveyance from the person in the right, where the granter is under no legal incapacity, is in every respect as efficacious as a legal conveyance. It is impossible, in such a case, that the act of the law can do more than the act of an unlimited proprietor. Now the defender's right is altogether the same as if he had an express conveyance to the minute of sale. A conveyance to writs and evidents in general carries a right to every writing of and concerning the subjects conveyed. Procuratories and precepts are executed, charters expeded, and infeftments taken upon no other title than a general assignment to writs and evidents. It is not necessary for a general disponee, who is at the same time heir at law, to expede a general service, or to lead an adjudication where he is not heir at law, in order to carry any unexecuted procuratories or precepts that might have been in the person of the defunct. But if a general disposition have all the effect of a general service, and entitle the disponee to execute any procuratory or precept, that stood in the disponer, as much as if they had been specially conveyed; then a general assignment to writs and evidents respecting a particular subject must have the same effect as if every writing relative thereto had been specially and expressly assigned.

It is a misapprehension to say, that Sir John, by his bond, was no more than a creditor to Mr. Stuart, and that however he could have adjudged the lands from that gentleman in his character of creditor, yet he could not adjudge the lands themselves in implement, to pertain to himself heritably and irredeemably, without any legal or reversion. An adjudication against Professor Stuart by Sir John as a creditor, in virtue of the obligation in his bond, would have been a most improper step of diligence. A charter of adjudication and infeftment can only vest the feudal right of the lands in the person of the adjudger, where the feudal right stood in the person of him against whom the adjudication is

No. 7. led either really or *fictione juris*. In the present case, the lands were not vested in the debtor's person, and the minute of sale contained no warrant of infeftment. Although, therefore, an adjudication carries a personal right containing a warrant for infeftment, yet as the minute of sale did not contain such a warrant, the right to the lands could not have been completed without a second adjudication against Mr. Stuart's author in implement thereof, which is the very step which has been followed. And having, by the assignment in the bond, a good right to the minute of sale in so far as it was necessary for completing his security, no other course could have been taken than that of leading an adjudication against the person in whom the feudal right of the lands stood in implement of the minute of sale.

In the second place, it is no solid objection to the adjudication, that the lands are adjudged heritably and irredeemably. It is true, that as the minute of sale was conveyed to Sir John only in security of his debt, redeemable and under reversion upon payment of that debt, a right of reversion necessarily arises in favour of Profesor Stuart; but this right of reversion in favour of that gentleman is no reason why the lands should have been adjudged under reversion from James Aird, who had no right to any reversion, as the right conveyed by the minute of sale was absolute and irredeemable. An adjudication in implement must always be in terms of the obligation in implement of which it was led; and when, from the want of right in Professor Stuart, Sir John was obliged to have recourse to an adjudication against his author, not in implement of the heritable bond, but in implement of the minute of sale betwixt them, and which minute was conveyed to Sir John by the general assignment in the bond, it is impossible that the adjudication could have proceeded in any other terms than heritably and irredeemably. Sir John had not, it is true, an heritable and irredeemable right to the lands; but the right of reversion, which lay against him, was competent not to James Aird, but to Professor Stuart, who was the only person interested therein.

Even supposing that it was wrong to adjudge the lands heritably and irredeemably, yet this objection does not resolve into a *pluris petitio*. The objection truly resolves into this, that a greater estate has been adjudged from the person against whom it is led, than what ought to have been adjudged from him. But this is no solid objection, provided the estate *de facto* adjudged comprehends that estate which ought to have been adjudged. Here the adjudication being of the full and absolute property of the lands, comprehends every inferior right and interest in it. And as the adjudication has not been led for more than Sir John was entitled to adjudge for, it can be no objection that he has adjudged a greater estate or interest than what could be adjudged from the person against whom the adjudication was led.

Answered for the pursuer,

It is not denied that an assignee may pursue or do diligence, either in his own name or in the name of his cedent, as effectually as the cedent could have

No. 7.

done, provided the full right that was in the cedent stands conveyed to him. But if the assignment is only granted *sub modo*, or for a particular purpose, or if it is only a part of the cedent's right, the assignee cannot go beyond the terms or nature of his assignment, so as under that title to sue for or recover more than was truly meant to be conveyed to and vested in him. Were it otherways, the utmost confusion and the most absurd consequences would follow. The holder of such a right, as stood in Professor Stuart, might lawfully grant twenty such bond as this, and each of the creditors would then have an equal title to claim the full right of their cedent as if they had purchased the entire property of the lands from him, or they might pursue his authors for getting that right of property completed in the person of each of them, which solely belonged to and was only intended to be completed in the person of the debtor himself.

The defender is not a purchaser or disponee of the lands from Professor Stuart. He is no more than a personal creditor by bond, with an obligation from him, to obtain a valid infeftment in the lands mentioned in the bond, in security of his debt and annualrent. It is obvious, therefore, that any claim or action which could be competent to the defender, either for obtaining implement of the obligation for infeftment contained in his bond, or completing the security thereby intended to be given to him, must have lain against Mr. Stewart, with whom alone he contracted, and not against the cedent in the right of those lands with whom the defender never contracted, and who stood under no obligation to the defender, either immediately, or as come in place of the Professor.

There is no solid foundation for saying, that the minute of sale was conveyed to Sir John by the assignment in the bond. It is a mere general assignment of the writs and evidents thrown into the same clause of the bond with the assignment to the rents, and can import no more than a special power to found upon those writs, in evidence of the granter's right, as well as to levy the rents in competition with Professor Stuart himself, or any person who should pretend to dispute his title, and to evict the possession of the lands or rents from the creditor. An assignment to this effect would be implied in any heritable bond, though not expressed; and it can have no stronger effect when it is expressed. Even had the minute of sale been expressly assigned, such an assignment would still have carried only a limited and qualified right, a right to defend and support his heritable bond by any aid he could draw from the minute, as well as other title deeds in the person of the granter. It would be only an assignment *sub modo*, or *ad hunc effectum*, of supporting his security as a creditor. The absolute and complete right of property under the minute still remained in Professor Stuart, subject to the burden of the defender's debt, and upon paying of that debt there would have been no need of a reconveyance of the minute from the defender. All right under it in the defender's person would have evanished,

No. 7. and Professor Stuart's right continued afterward entire, as if no such bond or assignment had ever been granted.

Besides, the defender, instead of adjudging from his debtor his right to the lands in security of his debt or implement of his obligation, has adjudged the whole lands, and got them declared to belong not to Professor Stuart, the only true and absolute proprietor, but to himself, and that not in satisfaction or security of his debt, but heritably and irredeemably. It is in vain to urge, that although the lands are thus heritably and irredeemably adjudged, yet the defender's right is to be understood as no more than a right in security. The right is declared irredeemable in the decree obtained, which is a contradiction in terms to the supposition that the right is only in security. Although Aird was the only person cited to defend in the process, yet the defender might certainly have concluded that only so much of the lands should be adjudged to him as would satisfy or secure his debt, subject to redemption by his debtor, to whom the irredeemable property belonged. Nor is it sufficient to remove this objection, that upon payment Professor Stuart might compel the defender to denude in his favour. Although the Court might give relief to the party chiefly injured by a wrong or irregularity, that will never sanction the wrong itself, nor render the diligence by which it is committed valid or effectual in prejudice of third parties.

Professor Stuart alone, or one who had acquired full right from him, could have adjudged the lands from Aird in implement of the Professor's right. Adjudications in implement have been devised for supplying the want of procuratories and precepts, in order to obtain to the disponee, or true proprietor, an entry from the superior to the feudal right of his own property. Such adjudication led by any other than the person who is virtually and substantially proprietor, is in itself void; because having no title to the absolute irredeemable property of the lands, he has no right to have them adjudged to him. Sir John, neither in law nor in justice, can pretend to be absolute and irredeemable proprietor of the lands, and yet that is the right and the only one obtained by his adjudication.

The case of a creditor who first adjudges from his debtor his personal right to lands under the act 1672, and then adjudges the lands from the debtor's cedent or author, in implement of the debtor's right, is totally different from the present. Such an adjudger becomes by his first adjudication a general or total disponee of the lands, and assignee to the whole personal right that was in the debtor, and consequently the debtor's author can properly implement to him the obligation he stood under to the debtor of conveying the real or feudal right; and the adjudication itself will show that he holds the right not irredeemably; but under the legal reversion to the debtor. The defender here had neither by adjudication or voluntary conveyance any right to the property of the whole lands, but was only a partial creditor of Professor Stuart.

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It is no good argument that the defender, if the mode of diligence which he pursued be inept, could have adopted no other. But in fact he might have adopted other methods. He might have charged Professor Stuart, at any time after his bond, with horning on the obligation to infeft, or he might have maintained an action for compelling him to get the feudal title of the lands completed in his person; or he might *qua* creditor have adjudged the lands or minute of sale from Professor Stuart for satisfaction of his whole debt, and might then have pursued an action against James Aird, the Professor's author, for compelling him to establish the feudal right in his own person, in implement of the minute; or he might have maintained such an action against Aird, in the name of Professor Stuart himself, for the purpose of compelling him to infeft the Professor; and upon his failure have likewise adjudged in implement. All these methods were probably avoided, because the defender foresaw that he would have been in no better state than a common adjudger, and that the other creditors adjudging within the year would have come in *pari passu* with him.

The Court pronounced the following interlocutor. "The Lords having "resumed the consideration of this process, with the report formerly made by "Lord Hailes, and advised the same, with the memorials and informations "*hinc inde*, Find, that the adjudication led by Sir John Whiteford was led im- "properly, therefore reduce the same, together with the charter and infeftment "following thereon, and remit to the Ordinary to proceed accordingly, and "farther to do as he shall see just."

A reclaiming Petition against this interlocutor was refused without answers.

Lord Reporter, *Hailes*. Act. *George Wallace, Rae*. Alt. *M'Queen*.

J. W.

1776. *December* 20.

GEORGE LANG *against* ROBERT GILCHRIST and WILLIAM WALLACE.

No. 8.

A creditor cannot insist for a general decree of adjudication, after an offer is made by the debtor to pay him the whole sum.

ROBERT GILCHRIST granted an heritable bond to George Lang for the sum of £100 Sterling, containing the ordinary clauses, and binding him to infeft Lang in a tenement of land, with the yeards and pertinents thereof, and in which he was accordingly infeft. Gilchrist having afterward become bankrupt, executed a trust disposition of the said heritable subject in favour of William Wallace for behoof of his creditors. Lang, about the same time, raised a summons of adjudication against Gilchrist, concluding that the said heritable subjects should be adjudged from Gilchrist, and declared to pertain and belong to him. Against this Gilchrist pleaded, that the trust disposition was designed to satisfy both the pursuer and his other creditors, and that there were sufficient funds for payment to him as a preferable creditor. At any rate, it was insisted that the defender was entitled, this being the first adjudication, to take a