1769. *February* 1. COMPETITION AMONG THE CREDITORS OF AUCHINBRECK.

ADJUDICATION—PENALTY.

Penalties in an Adjudication not restricted.

[Vide *Dictionary*, 268.]

SIR James Campbell of Auchinbreck contracted debts beyond the value of his estate. There were two classes of creditors whose interest was opposed in the present competition. The first class consisted of creditors to whom Auchinbreck had granted heritable securities, under which they held a preference. The second class consisted of personal creditors. The latter having adjudged the debtor's estate, the heritable creditors were obliged to do the same; and they accordingly led adjudications for payment of the principal sums and penalties contained in these heritable bonds and annualrents due thereupon.

In the ranking which followed, the preference of the heritable creditors for the principal sums and interest thereof due to them was admitted. But it was maintained, by the postponed creditors, that the penalties contained in the heritable bonds, which were accumulated in the adjudications led by the heritable creditors, with the proportional interest thence arising, ought to be disallowed, in so far at least as they exceeded the real expenses incurred by these creditors.

PLEADED for the postponed creditors,—That, although, in strict law, the penalties in bonds may be due, upon the debtor's failing to pay at the term stipulated, yet, in equity, they are restricted to the creditor's actual expenses: that, by the original nature of apprisings, as explained in the statute of Alexander II., the creditor was only to have lands assigned him to the extent of the principal sum, with damages, expenses, and interest: that, by the Act 37th James III., the lands were to be apprised only to the *avail of the debt*: and that, although afterwards, by the covetousness of creditors, and the unwillingness of debtors to surrender their lands, it came to be the practice for creditors to apprise great estates for small debts, and to accumulate the penalty in lieu of the real expenses,—this practice was an abuse; and that, therefore, the same equity which restricts penalties in personal securities, must be equally effectual to restrict it to the actual expenses, when accumulated in an adjudication, especially in questions with competing creditors: *Wiseman* against *Hamilton*, 1753,—*Creditors of Sutherland* against *Gordon*,—*Earl of Panmure* against *Durham*, 30*th November* 1680.

ANSWERED by the real Creditors,—1*mo*, That, supposing equitable considerations to prevail here, and that the penalties were to be allowed only to the extent of indemnifying them for the loss and expenses actually incurred by them,

they could show that the penalties stipulated in these bonds are truly not sufficient for that purpose: But, *2do*, that, whatever may be the amount of their expenses, and loss from delay of payment, they have a right to draw their penalties, as well as the rest of their debts, in virtue of their adjudications: that the restriction of penalties on personal securities, where no adjudication has been led, is foreign to the point in dispute; because it is the adjudication which establishes the creditor's right to draw the penalty out of the lands adjudged, as an indemnification not only for his expenses, but for the inconvenience of lying out of his money: that this is consistent with the statutes referred to, as penalties are truly sums to which the *damage and expense* of the creditors are liquidated by agreement: that the practice of adjudging for penalties, and recovering them out of the lands, has been established for above a century: that, at one time, it was even the practice, in leading a general adjudication, not only to accumulate the penalty, but also to adjudge for a fifth part more, as in a special adjudication: that it was necessary to pass the Act of Sederunt, 26th February 1684, to correct that practice: that the decisions cited do not support the doctrine rested upon them,—the adjudication having been restricted, in the case of *Wiseman*, on account of nullities which left the Court at liberty to restrict it; and there were also specialties in the case of the *Creditors of Sutherland*.

The Lords "found that, in this case, the penalties cannot be restricted."

Diss. Pitfour, Kaimes, Strichen. (Kaimes because creditors concerned.)

The following opinions were delivered:—

AUCHINLECK. Penalties were added to obligations in order to enforce performance: hence, they were anciently stipulated to be paid for the reparation of such and such a church, and therefore could not be restricted by the parties: but this practice has been mitigated in later times. In the case of *Joseph Allan of Castlebrocket*, the Court, from considerations of equity, restricted a penalty to neat expenses. In adjudications, penalties are accumulated, because the Court thought this necessary for answering expenses after adjudging. As to the case of *Sir Hugh Hamilton*, I do not think that the Court proceeded upon any nullities in the adjudication: the specialty was a most rapacious demand by Sir Hugh. There the adjudication was taken when little interest due, and the payment was demanded immediately after. But, when a man is put to the necessity of adjudging, and his claim hangs on unsatisfied for 30 years, there the equity of restricting dwindles away. A proportion of penalties cannot be granted, for the right that is in the creditors is a right upon the principal sum, and the penalty relates to it.

MONBODDO. I can adjudge for principal, sum, and penalty, although no interest be due. How can the court restrict what the law allows? A penalty is a liquidation of the *interesse*. The civil law is the only system of equity that I know; it is the *Prætor's edict* commented upon by the Roman lawyers. By it, if the *interesse* was liquidated by consent of parties, the judge could not interpose to diminish it.

KAIMES. Penalties are daily restricted in practice; as in the case of *Sir Hugh Hamilton*, which was determined upon plain rules of law,—*Nemo debet locupletari aliena jactura*, and that diligence must not be used *in necem debitoris*. Here there was a loss rather than a gain by the adjudication. But then we are not to consider accidental damages: no sum can be demanded but what is actually laid out. If we adopt any other rule, we shall embarrass ourselves in our decisions.

JUSTICE-CLERK. In the case of *Sir Hugh Hamilton*, there was no good objection to the adjudication; I was a lawyer in the cause, and endeavoured to show objections, but could not. In that case there was strong equity. The law lays down a rule not to be departed from, unless in order to bring in equality between man and man. Whenever exorbitant penalties are demanded, I am ready to exert Prætorian powers; but here I see nothing exorbitant,—rather the contrary. It never could be the sense of the statute that penalties were to be ascertained precisely by the neat expenses laid out.

GARDENSTON. In personal obligations, penalties are always restricted to expenses: But, as to real obligations, the law has made a difference by statute 1672: A creditor, regularly, and *de jure*, is entitled to penalties. If I saw a case so circumstanced as that the penalty was exorbitant, I might restrict it; but I see a rule established, and no reason for departing from it here.

PITFOUR. Penalties might be restricted, as in the case of *Panmure*, *Sir Hugh Hamilton*, &c.

PRESIDENT. I am clearly of opinion that the court may interpose, and restrict both in bonds and in adjudications: but then this must not be gone into, in consequence of accounting: there must be a glaring equity: that rule does not apply here. When a creditor is not regularly paid, when the penalty is not great, and when some expense has been incurred, I cannot go into calculations in order to restrict the legal penalty.

On the 1st February 1769, The Lords found, "that, in this case, the penalties cannot be restricted."

Act. A. Lockhart. *Alt.* D. Rae. *Reporter*, Gardenston. *Diss.* Pitfour, Kaimes, Strichen; [Kaimes, because creditors concerned.]
