1776. *February* 8. FRANCIS STRAHAN, Trustee for the Creditors of Dr Matthew Stewart, *against* SIR JOHN WHITEFORD.

ADJUDICATION.

One having a disposition in security over lands held and possessed by his debtor on minute of sale, without infeftment, cannot complete 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.

[*Faculty Collection, VII.* 188 ; *App. I.* ; *Adjudication, No.* 7.]

COVINGTON. This is a very anomalous sort of right under which Sir John claims. In a question with the creditors he held it to be an adjudication of the lands ; but, with Dr Stewart, an heritable bond. I cannot find, either in books or in precedents, any thing of this nature. Sir John Whiteford had a double remedy ; he might have led an adjudication in implement in name of Dr Stewart, or he might have adjudged from Dr Stewart, and taken infeftment, which would have validated his own infeftment. But what has been done in this case is quite a novelty. I have inquired at men of better knowledge than myself, and they never heard of such a thing. The adjudication is in itself a contradiction. Suppose that Sir John, instead of an heritable bond, had got a tack with an infeftment in the old form, with an assignation to writs and evidents, and upon that had adjudged the lands to belong to him from Airds, Doctor Stewart's author, Would that have been good? It is impossible that it should. The objection which Sir John makes to his completing his right in the person of Doctor Stewart, is, that this would have brought in other creditors. I doubt as to that; but, supposing that it would, *that* was the fault of Sir John's doers. If they had looked into the records, they would have seen whether Doctor Stewart had granted other infeftments; and as he had not, they would have secured the interest of their client.

KAIMES. If the question had been of an assignation of a simple minute of sale, Sir John Whiteford might have adjudged from Airds. He might have taken another method, by first infefting his author, and then himself. The name of an adjudication in implement misleads us. If the question were as to a purchaser, the Act 1661 would not apply. But *here* both parties are creditors. Sir John says, Here is an adjudication in implement, but *ad quem effectum?*—not to get the estate, but to secure the debt. A creditor, in whatever way he makes up his title, must still be considered as a creditor on the footing of the Act 1661.

MONBODDO. In new cases, such as this, I see no harm in trying new forms, if agreeable to principles. If Dr Stewart had secured his minute of sale, in security to Sir John, Sir John might have led an adjudication, either in his own name or in the name of Doctor Stewart. The same thing in effect has been done *here*: The lands are disponed, and he is assigned to the writs and evi-

dents: What could that be but the minutes of sale? It is the same thing as if the minute of sale had been *nominatim* assigned. It has been observed that Sir John put himself in two shapes: *that* was very proper; it would have been an error had he only adjudged an heritable bond from Airds, who had no right of reversion. If Sir John had made a circuit, it is admitted that he would have validated his prior infeftment. He has done what is equivalent.

Justice-Clerk. The heritable bond conveyed *rights and evidents, i. e.* the minute of sale. On the common principles of law he might have adjudged in the name of Doctor Stewart from Airds, but he might also have adjudged in his own name, as being in the right of his author. This denuded Airds, because Airds was bound to denude in favour of Doctor Stewart's assignee. But this, from the very nature of the adjudication, would be no more than a security for payment of the bond. When a minute of sale is assigned, it matters not what was the intention of the assignation. Why will the law deny the effect to it? I cannot see that Sir John has been guilty of any departure from the principles of the feudal law. As to the equity of the matter, *that* is out of the question; for surely Sir John contracted, *bona fide,* believing that Dr Stewart was infeft. As to a *pari passu* preference, by the Act 1661, *that* does not apply to this case, for the competitors are not adjudgers from Doctor Stewart.

Gardenston. Of the opinion first delivered. This adjudication seems to be perfectly erroneous. It is an adjudication upon the right of a creditor; whereas the diligence ought to have been in the right of the person who was in the right of the purchase, or minute of sale. We ought to distinguish between Sir John Whiteford's right and Doctor Stewart's right by the minute of sale. The conveyance to the minute of sale did not vest it in Sir John, for Doctor Stewart was not denuded. The right of the author ought first to have been made perfect before Sir John could make *his* right perfect. That could only be done by some proceeding in the name or on account of Doctor Stewart.

Alva. The obligation on which Sir John adjudged, was the same sort of obligation with that in which the Airds were bound.

Kennet. This seems a very anomalous right. The assignation to writs and evidents does not imply a conveyance of the right itself. Sir John had a method of completing of his titles in the name of his author; but *that* he did not follow.

Covington. It is an evident mistake that the assignation to writs and evidents implied a conveyance. Suppose that the right in Doctor Stewart had contained a procuratory and precept, Sir John might have completed his author's right in that, but he could not have infeft himself.

President. I never could understand that the assignation to writs and evidents conveyed the right itself. Whenever I see an innovation in form, I am cautious of admitting it; for I cannot know the consequences of it. There is no example of such a diligence.

Kaimes. Gave up his opinion, and yielded to the opinion that the assignation to writs and evidents did not convey the minute of sale.

On the 8th February 1776, "The Lords reduced Sir John Whiteford's adjudication."

Act. D. Rae. *Alt.* R. M'Queen. *Reporter,* Hailes.

Diss. Justice-Clerk, Monboddo.

N.B. Here there was a strange original blunder, which, for more security, was sought to be amended by another blunder.

1776. *February* 16. MACKENZIE BROWN *against* THOMAS CARMICHAEL and OTHERS.

PRISONER.

A debtor, after having been liberated on the act of grace, may be again imprisoned on the same diligence.

IN November 1775, the pursuer was incarcerated in the tolbooth of Peebles, on a caption at the instance of Thomas Carmichael, his creditor. On 23d December following, the pursuer was liberated under the Act of Grace. His creditors being displeased with his subsequent conduct, and alleging that he improperly interfered with the management of a factor appointed by them, he was again apprehended and imprisoned on the same diligence, on 26th January 1776. The pursuer applied for relief to the Court, by petition, craving that he might be set at liberty. The application was opposed by the creditors, who

PLEADED,—That the proper and only remedy open to the pursuer, in such a case, is to apply for the benefit of the *cessio bonorum.*

The Act 1696 does not prohibit the proceedings complained of, and the creditors are ready now to aliment the petitioner. The statute was intended solely for relief of the burgh, and did not at all abridge the creditor's right of imprisoning.

Abercrombie against *Brodie,* 19*th June* 1759; *Pollock, Nov.* 1769.

The following opinions were delivered:—

COVINGTON. The Act of Parliament 1696 is partly intended for the relief of unhappy prisoners. It binds the creditor-incarcerator to aliment. When the creditor withdraws the aliment, this implies a consent to liberation. I would not say that the creditor is barred from doing diligence again, yet I think that, if he means to incarcerate again, he ought to charge again, or give some other intimation, that the debtor might have warning, so as to prevent incarceration anew.

MONBODDO. I doubt whether the debtor could have been incarcerated even on the same debt. By refusing to aliment, the creditor seems to renounce his right of charging on the same debt.

KAIMES. A *cessio bonorum* is the proper mode for setting a man free who has remained so long in prison as to give evidence that he means to make no concealment. A man in such case cannot be again incarcerated on the same debt, unless there is a change of circumstances. But the act of grace stands on a different footing; it is for the sake of royal burghs, while the debt and the diligence remain. If that is the case, what hinders the creditor again to imprison the debtor? It is said that here there is a presumed consent. Why so?