

1697. February 24.

THOMAS KINCAID *against* The L. of COCKBURN'S CREDITORS.

## No 12.

A bankrupt estate being sold, and the creditors ranked, the preferable creditors claimed not only principal and annualrent, but penalties, which cut off the posterior creditors. They were found, *prime loco*, entitled to the penalties, in opposition to the application of the postponed creditors, made after decree had been extracted.

THOMAS KINCAID of Auchinreoch gives in a bill to the Lords, representing he was a considerable creditor to Cockburn of that ilk, and that the estate being now sold, and the creditors ranked, the preferable creditors craved payment, not only of their principal sums and annualrents, out of the price in the purchaser's hands, but likewise of their penalties, by which posterior creditors will be exceedingly prejudged; and therefore craved, that principal and annualrents might be allowed to each creditor, conform to his preference, before any get their expenses; and then, if there be a superplus, the same to be divided equally among them for their penalties. It was doubted, on the one hand, how preferable creditors could be cut short of their penalties, especially in so far as they had actually debursed it in diligences against their debtor, it being as due as the stock; and on the other hand, penalties are but due by personal obligements; and in some former rousps of Carlourie, &c. the LORDS had taken that method, as favourable to posterior creditors. However, the LORDS demurred somewhat upon it; for it was *alleged*, That the former practices were in respect the creditors had consented thereto. But the LORDS refused it in this case, because of the decret of ranking being extracted, it was not *debito tempore* craved; likewise, if they had been cut off from their penalties on Cockburn's estate, they would have recurred on my Lord Sinclair's whose estate they had likewise adjudged, as cautioner for Cockburn, his father-in-law.

1700. July 4.—IN the ranking of the Creditors of the Laird of Cockburn, mentioned 24th February 1697, it occurred to be debated, if the infeftments of annualrent were not only preferable *quoad* their principal sum and annualrents, but also for their penalties and termly failzies; at least for their debursed expenses, to be modified by the Lords. Some thought them real, and to affect the reversion, seeing the debtor could not redeem, without he likewise paid their expenses. Others thought the buyer at the roup noways liabls thereto, but only for the principal and annualrents, and the expenses were personal *quoad* him; though the price seemed to come in place of the land out of which the annualrent is upliftable. Yet the LORDS found the creditor-infeftter had no action in law against the buyer, to force him to pay the penalty; but likewise found the buyer could not force the annualrenter to denude or convey his right, till he were satisfied of all, seeing he had provided for his expenses by the same security, whereon he had trusted the *sors* and stock; but that the annualrenter had right of retention of his right till he were paid, seeing the acts of Parliament, about rousps, did not design to take away private parties' rights, or cut them off from the expenses. It was *urged* against this, That it might

disappoint that useful and necessary law of selling by roup; for, where many annualrenters affected such an estate, the buyer could not disburden the lands of these infestments, without giving them likewise their penalties, which would exhaust more than the price he was to pay; for he could not compel them to take their principal sum and annuals, unless he likewise offered the penalties. But it was *answered*, That the 6th act 1695, provided a clear remedy for this, where the buyer is allowed to consign the price in the Town of Edinburgh's hands, where the creditors are unwilling; and in that case he is declared free, and the lands disburdened; and the infesters, rather than have their money consigned, only to pay them 3 *per cent.* will think it better to accept of their principal and bygone annuals; which method makes room for posterior creditors to get something; whereas, if the annualrenters got their expenses, it might exhaust the whole price. I find, by the Roman law, retention was allowed, but action refused to one who has bestowed melibrations in building on another man's ground, where the *dominus soli* vindicates the whole; § 30. *Instit. De Rer. Divis.*

*Fol. Dic. v. 2. p. 54. Fountainhall, v. 1. p. 770. & v. 2. p. 101.*

1702. January 9.

SIR JOHN COCHRAN of Ochiltree *against* The LORD MONTGOMERY.

THE Lord Ross, Lord Montgomery, and seven others, gave a written commission to Sir John Cochran to bid at the roup of the poll, imposed by the act of Parliament 1693, and not to exceed L. 40,000 Sterling, unless he were allowed by Colonel Erskine and Sir Thomas Kennedy to bid further. Sir John was preferred as the greatest offerer, but he exceeded their commission in L. 4100 Sterling. Thereafter the tacksman and partners entered into a contract, whereunto there were about 22 assumed; and the Lord Montgomery, by a missive letter, declared his willingness to be one of that number; and sent a commission and warrant to William Cunningham of Brownhill to vote for him at the meetings as his proxy, and accordingly he is marked in two sederunts as acting for my Lord Montgomery. The tack eventually falling to be detrimental, and my Lord Montgomery conceiving himself not bound by the foresaid letter and proxy, neither of them being formally recorded in the society's books, Sir John Cochran pursues him to relieve him of a proportional part of the loss and damage resulting from the tack.—*Alleged* for my Lord, *absolutor*, because you exceeded our commission in bidding beyond the L. 40,000 to which you was limited.—*Answered*, I had the concurrence and allowance of the two assessors adjoined to me, and they being present and not contradicting, are presumed to have given their consent.—THE LORDS found taciturnity was not a sufficient concurrence nor acquiescence here, but *ex officio* ordained them to be examined

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The Lords acquitted one of many contractors, who had resiled, he paying the penalty, the words 'by and attour performance' not having been in the deed.

The tacksmen of a branch of the revenue assumed partners, under the *proviso*, that these partners should find caution by a certain day, or pay a penalty. One of them was found free on paying the penalty.