

ed before an inferior judge, within whose jurisdiction these acres lay ; albeit it was alleged for Mr Ker, That as no inferior judge can discuss the competition of heritable rights, far less are they competent to adjudge them from the debtor to the creditor. And adjudications, upon renunciations to enter heir, were, long after apprisings were warranted by statute, introduced by the Lords of Session, *ex nobili officio*, for supplying the defect of our law, which argues, that they cannot be pronounced by inferior judges. (See JURISDICTION.)

Forbes, p. 297.

No 8.
tained before
an inferior
judge.

1769. December 23.

The CREDITORS of the deceased GEORGE MARSHALL against JAMES HAMILTON of Pencaitland.

IN the competition of the adjudging creditors of George Marshall, it was alleged, that Pencaitland could not come in *pari passu*, with the rest ; because his adjudication, was not within year and day of the first effectual adjudication, obtained at the instance of James Scott, before the sheriffs of Edinburgh, upon a *cognitionis causa*, against the apparent heir renouncing.

Answered for Pencaitland : He ought to come in equally, because his adjudication is within year and day of the first adjudication before the Lords : And no respect could be had to that before the sheriffs ; because it was pronounced, *a non suo iudice* : In so far as the Lords are only proper judges in adjudications, now since the twenty-fourth article of the regulations, ordaining all abbreviates of adjudications, to be signed by the Lord Ordinary ; especially considering, That the rolls and minute-book do properly publish and certiorate the lieges, when there is a course of diligence against a debtor ; and men are not bound to know, nor can know, what is done before inferior judges. *2do, Esto*, such a decret of adjudication, before an inferior judge, were sustained, it cannot be the rule of preference before the Lords, where the form of process requires longer diets, and more days : As in competitions betwixt arresters, the obtainer of a decret of forthcoming in the Session, if he hath not been, *in mora*, will be preferred, conform to the date of his arrestment, to a posterior arrester, obtaining the first decret before an inferior court. And, if it were otherwise, all adjudications would be led before inferior courts, for fear of coming too late, by the more tedious form of the Session.

Replied for the other creditors : The act of Parliament 1661, bringing in adjudgers within year and day, *pari passu*, must, as being a correctory law, be strictly interpreted. The act of regulation, concerns only decreets of adjudication before the Lords : For those before sheriffs, and their abbreviates, can only be subscribed by the sheriff, pronouncer thereof, as was done in this case. *2do*, Whatever may be pretended in the case of forthcomings, constitutions, and the like, before the Lords, requiring delay by the course of the rolls ; that cannot be alleged for

No 9.
Adjudica-
tions, upon
decrees cog-
nitionis causa,
led before the
sheriff, re-
quire no ab-
breviate.

No 9. second, or posterior adjudgers, whose adjudications pass summarily, without going to rolls.

THE LORDS found, That Pencaitland's adjudication, not being within year and day of the first adjudication, before the sheriff, cannot come in, *pari passu*, with the rest; for the Lords thought, that the signing of abbreviates by a Lord, conform to the regulation, concerned only adjudications before the Session; since the signing of abbreviates came in place of allowances; and adjudications, on a *cognitionis causa* before the sheriffs, were not in use to be allowed, and consequently required no abbreviate to be signed. *

Fol. Dic. v. 1. p. 3. Forbes, p. 373.

* Lord Fountainhall, vol. 2. p. 546, states the following additional particulars:—There arose a threefold competition; 1^{mo}, Betwixt the creditors and children. 2^{do}, Betwixt the creditors themselves. And 3^{io}, Betwixt the children of the first and second marriage.—As to the first, Forrest, Scot, Alves, and other creditors of the said George, craved to be preferred to George, Helen, and Susanna Marshall's, his children, and Mr Alexander Farquharson, husband to the said Helen; because, he being heir of his estate, and they only creditors by the destination of succession in their mother's contract of marriage, or by bonds of provision; these were all but gratuitous deeds in the eye of the law, when they offered to compete with extraneous onerous creditors; and when both are *in damno vitando*; it was more reasonable, that his children should be losers, than his just and lawful creditors, whose money he had received; and so had the Lords uniformly decided, Dirlton, 14th November 1676, Inglis against Beswell; 10th February 1688, the children and creditors of Robertson competing; and 21st November 1682, Marjoribanks's bairns and creditors, marked by President Newton.—*Answered* for the children, Their mothers brought a considerable tocher with them, and the father's condition, at the time of his granting their bonds of provision, must be considered; for then he had an opulent fortune, and was so far from being *lapsus*, that he was able to pay all his debts, and his bairns portions too. And that by this rule and distinction, the Lords brought in the children of Douglas of Mousall equally with his creditors, 11th December 1679; and did the same more lately, since the revolution, in the competition betwixt the creditors and bairns of my Lord Preston. The Lords thought it unjust to put creditors to explication, and inquiries into their debtor's solvency, when he gave latent bonds of provision to his children; and therefore preferred Marshall's creditors to his bairns, both of the first and second marriage, and would not bring him in *pari passu* with the creditors.—The second competition was betwixt the creditors among themselves; and in the ranking, it was objected by Scot against James Hamilton's adjudication, that it was without year and day of his; in so far as his was led and decerned on the 16th of July 1705, and yours is not till the 30th of July 1706; and so 16 days above the year.—*Answered*, Scot's adjudication is before the Sheriff of Edinburgh, and mine is before the Lords; whereas the act 1672, introducing adjudications, in place of comprisings, speaks only of the Lords of Session; and it is most unequal to take them before inferior courts, because there they can be got very summarily; whereas adjudications raised before the Lords of Session, must abide the *inductio legalis*; which may cast them without the year; and neither fault nor *mora* on the pursuer's part.—*Answered*, The act of Parliament, speaking of adjudications before the Session, is not exclusive, nor privative of inferior judges; and there be many such adjudications decerned by them, which have always been sustained, just as apprisings at first were led before the sheriffs; and so may adjudications substitute in their place. And, as to the delays, it is true, the first adjudication runs the seeing and returning, and the course of the roll; but all the subsequent ones pass summarily; and the act of Parliament 1661, bringing in all led within year and day, *pari passu*, as if they were contained in one apprising, gives no countenance to any latitude, whether upon decreets of Session or the inferior courts. The Lords found the sheriff's adjudication good and warrantable; and that Pencaitland's not being within year and day of it, he could not plead the benefit of coming in with it *pari passu*.—The third competition was betwixt the children of the first and second marriage among themselves. For the first, It was contended they were *prior tempore*, and so *potior in jure*; and they had bonds of provision, which were very moderate, and much short of what their mother brought with her.—*Answered*, You have no contract of marriage; and