

were not so, adjudications in implement would be elufory and ineffectual, unless the fuperior did freely and voluntary make them good; which would be a manifest defect in the law; and as neceffity did introduce them, the fame neceffity must give them their full effect. And as to the fuperior's privilege of redeeming, that might be valuable, when firft introduced; but fuperiors have not of late laid any claim to it: nor can it be of ufe; becaufe, when diligences pafs now, they generally exceed the value; and vaffals defigning to alienate, grant bonds, even gratuitous, to what value they pleafe, which a fuperior cannot impugn.

' THE LORDS preferred the fecond adjudger, who firft charged the fuperior.'

Dalrymple, No 49. p. 62.

No 5.

ADJUDICATION IN SECURITY.

1684. January 2.

BRUCE *against* HEPBURN.

In the action of mails and duties, purfued by Mary Bruce againft Sir Patrick Hepburn, wherein ſhe craved, That ſhe having adjudged, upon contract of marriage with John M'Pherson, the fum of 8000 merks, due by Sir James Keith to Dougal M'Pherson, father to the ſaid John, in liferent, and to the ſaid John in fee; whereupon there was a comprifing led, both at the inftance of the liferenter, and fiar of Sir James Keith's eftate; the ground of her adjudication, was an obligation, in the ſaid contract of marriage, by her husband; whereby he was obliged to employ, for her liferent ufe, the fum of 15,000 merks, upon land or annual-rent, and alfo to make payment thereof termly; in which adjudication, the adjudges not only for bygones, that were then due, but in time coming, the terms being come and paft, and for fulfilling other obligations contained in the ſaid contract. It was *alleged* for Sir Patrick Hepburn, That he having the firft adjudication for liquid fums of money, ſhe being within year and day, could only come in *pari paffu* with him, as to the bygones that were due, at the time of the adjudication; but not as to what ſhould be due thereafter, ſeeing that was not liquidate; and an adjudication was a judicial fale, and behoved to be for liquid fums.

It was *replied* for Mary Bruce, That the contract did not only contain an obligation, to pay, but alfo an obligation to employ immediately after the marriage; and ſo ſhe might adjudge this fum that belonged to her debtor, for a ſecurity to her, not only as to bygones, but in time coming during her life; and that the obligation was an obligation *ad faciendum*, viz. To employ: And the husband not having voluntarily fulfilled his obligation, this was the only remedy the wife had for her ſecurity; and that it was denied that all adjudications were

No 1.

An adjudication, in ſecurity of provisions in a contract of marriage; ranked both for bygones, and for future annual-rents, &c. *pari paffu*, with an adjudication for liquid fums.

No 1.

for liquid sums as a judicial sale; seeing, in this case, it was only for a security, and the legal was never to expire during her life.

THE LORDS sustained Mary Bruce's adjudication, as a security to her, not only for by-gones, but in time coming during her life; and ordained her to come in *pari passu* with Sir Patrick for both. *

Fol. Dic. v. 1. p. 4. President Falconer, No 75. p. 50.

1714. January 27.

JAMES ANDERSON of Stobcorse, and WILLIAM ANDERSON, Merchant in Glasgow,
against WILLIAM GILHAGIE, and HUGH WALLACE of Kenniehill.

No 2.

An adjudication in security, of provisions in a contract of marriage, found to require no previous charge.

JAMES and William Andersons, at whose instance, execution upon William Gilhagie's contract of marriage with Agnes Anderson, was provided to pass against him, for securing 20,000 merks to the said Agnes in liferent, and to the children of the marriage in fee; finding the husband to be in a broken condition, raised a summons of adjudication of his lands of Kenniehill, as conveyed, under trust for his behoof, to Hugh Wallace; who, being admitted a contradictor for his interest, *alleged*, That no such adjudication could be decerned, in implement of the contract of marriage, without a previous constitution of the provision; and personal execution, by a charge and denunciation against the husband, as uses to be, in all adjudications on obligations *ad factum prestandum*; even where the fact is specific, or liquid, as an obligation to dispose particular lands or tenements; and much rather where the obligation is general, to employ a certain sum of money, without determining or confining the husband to this or that special subject.

Answered for the pursuer, 1mo, As this process is, at least upon the wife's part, very favourable, and of the nature of *dotalitia actio*; so personal execution against the husband, at the instance of his wife, or trustees in her name, and upon her account, is neither necessary nor becoming; nay, would seem *contra bonorem matrimonii*, and might readily occasion discord betwixt the husband and wife, which law is ever careful to prevent. *2do*, Previous horning, or personal diligence, in order to adjudge, is only necessary in adjudications for implement of dispositions, or the like illiquid facts; whereas, here adjudication is craved for security of a certain liquid debt, which uses to be granted; 2d January 1684, Bruce against Hepburn. (*No 1. b. t.*)—THE LORDS found, That the adjudication might proceed without a

* The same decision is thus mentioned by Lord Fountainhall, v. 1. p. 256.—Sir Patrick Hepburn of Blackcastle against Mary Bruce. *Alleged*, her adjudication is null; in so far as it adjudges, for her current annuity and liferent, for all years and terms subsequent to the date of her decree of adjudication, during her lifetime; seeing that is an uncertain event, and nothing can be the ground of an adjudication, but a liquid sum, whereof the terms of payment was past, at the time of the adjudication.—*Answered*, The terms are now past; and she may adjudge lands for security of her liferent in time coming, as well as for by-gones.—THE LORDS were divided on this; but at last they sustained the adjudication, even for years to come, as a security of her annuity, for all subsequent years during her lifetime.