

1704. June 21.

JAMES SINCLAIR *against* SINCLAIR of Barack.

No 5.

Of two adjudications in implement; the second, on which the superior had been first charged, is preferred.

IN a competition betwixt James Sinclair and Sinclair of Barack; both founding upon adjudications led for implement of dispositions, it was *alleged* for Barack, the last adjudger: That he ought to be preferred; because he had first charged the superior to enter him, which is equivalent to an infeftment.

It was *answered*:—Both adjudications being led for implement of dispositions, the superior was not bound to enter either; because, by the feudal law, a superior was not bound to receive any other vassal, but by his own free consent; and, albeit there be several statutes obliging superiors to enter apprisers; which is also, by other laws, extended to adjudgers; upon payment of a year's rent; yet all these statutes relate to apprisings, or adjudications, for liquid sums of money; in which cases, the superior hath his option, either to enter the vassal apprising or adjudging, or to undergo and pay the debt for which the diligence is led: whereas, in an adjudication for implement, the superior would want the benefit of redeeming by payment of the debt, which law provides to him; and this very case is stated by Sir John Nisbet, as a doubt, p. i.; and the reason he gives is, that the superior has *retractum feudalem*, by paying the creditor; which takes no place in the case of dispositions; and there is no reason to oblige the superiors to receive adjudgers in implement, more than resignations upon voluntary dispositions.

It was *answered*:—That anciently conveyances of lands were little known, except by succession, marriage, or forfeiture; and most feus being originally gratuitous, the interest of the superior was great; but afterwards, conveyance of lands came to be more frequent, both by voluntary purchases and diligences, and the interest of superiors limited; especially in favours of creditors. And the first vestige of comprising, mentioned in the law, is 37th act, 5th Parl. James III. which authorises comprising of land, and obliges the superior to enter comprisers, upon payment of a year's rent; or pay the debt. Adjudications were not then, nor for some time thereafter, known; but, in process of time, adjudications were introduced, of two sorts; one upon the reunciation of apparent heirs *contra hæreditatem jacentem*, and the other for implement of facts; which was a diligence introduced, not by statute, but by custom, to make obligations effectual. And such adjudications did always proceed by process before the Lords of Session, not as comprisings; and, by the constant uniform style, the superior is decerned to enter adjudgers; and horning passes thereon of course. And the common style of dispositions bears an obligation, to infeft and lease the receiver of the disposition; which obligations were frequently the only foundation of real rights, when procuratories of resignation, and precepts of sasine did expire by the death of the buyer or seller. And by the 18th act, Parl. 1669, a year's rent was appointed to be paid by adjudgers to superiors, in the same way as comprisers; which act could only relate to adjudications *contra hæreditatem jacentem*, and in implement; because, then, comprisings were in force for liquid debts; and if it

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 ſum 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 inſtance of the liferenter, and ſiar of Sir James Keith's eſtate; 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 uſe, the ſum of 15,000 merks, upon land or annual-rent, and alſo 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 paſt, and for fulfilling other obligations contained in the ſaid contract. It was *alleged* for Sir Patrick Hepburn, That he having the firſt adjudication for liquid ſums of money, ſhe being within year and day, could only come in *pari paſſu* 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 ſale, and behoved to be for liquid ſums.

It was *replied* for Mary Bruce, That the contract did not only contain an obligation, to pay, but alſo an obligation to employ immediately after the marriage; and ſo ſhe might adjudge this ſum 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 paſſu*, with an adjudication for liquid ſums.