

(Pars periculo petentis.)

1712. January 31. CALDER against OGILVY.

MIDDLETON of Balbegno having granted a bond of provision to his younger children, and Calder of Afsuanly, as assignee, craving adjudication; comparence is made for Mr John Ogilvy, advocate, who produces a disposition of the lands craved to be adjudged, with a base infestment thereon, and repeated a reduction, and craved the adjudication to be stopped *medio tempore*; his reasons being *in jure* and instantly verified.—*Alleged*, Adjudication being a *processus executivus et summarius*, cannot be stopped by a third party's intervention; but it must be served *contra executionem* in the mails and duties. It is true, a debtor may hinder lands from being adjudged, if he instantly prove payment or compensation; but the instructions must be very clear, else they will not be received *in hoc ordine*: But much less will a right, flowing from my debtor, to his brother-in-law, bearing love and favour, compete with me, who am likewise in a reduction of his right; for at this rate, a man that has a forged defective null right, shall stop lawful creditors on pretence of nullities in their debts, and possess the estate to the scorn of justice. And if Mr Ogilvy's right be good now, it will be as good when it comes in regularly to be tried: And it was so decided betwixt the Lord Anstruther and Seaton of Northbank, as assignee by the Lady Largo, where the Lords refused to stop the adjudication; and the like betwixt Hamilton of Rosehaugh and Hags.* To which add Stair's opinion, tit. Dispositions, § 47, who quotes a decision out of Spottiswood.† Neither is he who officiously obtrudes himself, so favourable as a party called; and to allow him to quarrel my right, when I am stopt in my diligence and title to quarrel his, is like the setting two men in the field, allowing weapons to the one, but not to the other, which is neither agreeable to the rules of honour nor justice: For, when I come to repeat my reason of reduction, you'll tell me I cannot, because I am but a personal creditor, and you are infest.—*Answered*, I being proprietor, I have very good interest to stop any from adjudging my land. *Video rem meam agi*. I am not to involve you in a long plea, my nullities are intrinsic, arising *ex facie scripturæ*, and instantly verified; and such have always been received, as was found Livingston *contra* the Lord Forrester's heirs, 22d July 1664, (*No 6. b. t.*); and Boyd *contra* Boyd, 26th July 1676, (*No 1. b. t.*); and recently, Commissary Campbell got his lands seored out of the adjudications against Dalmahoy. And Hamilton of Bangour stopt the Lady Ormiston's adjudication, on his repeating reasons of reduction verified by the decret; and I will not suffer my cause to be wounded by your adjudging. And as it is in self-defence, so here *principiis obstandum*;

No 12.
Reasons of
reduction
and nullity,
which may
be instantly
verified, will
be received.

* See General List of Names.

† Cairncrofs against Lord Drumlanrig, p. 43. v. 1. Quarto Dictionary.

(Pais periculo petentis.)

No 12. and if your right be null, you cannot complain ; for *damnum quod quis sua culpa sentit sentire non videtur*. And Stair is misapplied ; for tit. Competitions, § 27. yields, that exceptions instantly verified are competent against adjudications ; and it must be still so while our good laws against multiplying of processes stand in vigour ; and a present trial saves expences to both parties.—THE LORDS found, before any adjudication, Ogilvy might insist in such reasons of reduction and nullity as were instantly verified ; but ordained him to condescend thereon, that it might appear of what kind they were. My Lord Forglen having proposed, if he might vote in this case, one of the parties having married his niece ; the LORDS found he might be declined in any cause immediately carried on by his niece, but not in her husband's concerns, not derived from her. (See DECLINATOR.)

Fol. Dic. v. 1. p. 12. Fount. v. 2. p. 714.

1734. July 19.

DUFF against OGILVIE.

No 13.

AN apparent heir having granted a bond in trust, in order to lead an adjudication against his predecessor's estate, a piece of land sold by the predecessor, wherein the purchaser was infest and in possession, was struck out of the adjudication ; the purchaser offering to hold the adjudication as led, in so far as to be a title to found all objections against the purchase.

Fol. Dic. v. 1. p. 12.

1615. December 14.

ALEXANDER MONTEITH against SIR GEORGE ELPHINSTON.

No 14.

By the older decisions, the superior, was not bound to infest the appriiser, without instructing his author's right.

IN the suspension raised by Alexander Monteith against Sir George Elphinston, who had comprised the right of two ploughs of land of Dunbreck, from Lord Salton ; the LORDS found, that Alexander Monteith could not be obliged to infest him upon the comprising, except Sir George would show that the Lord Salton was infest. *Item*, In the same cause, the LORDS found, That Sir George ought to pay to the superior, for his infestment, 80 pounds which is the annualrent of the principal sum of 1200 merks, whereupon the lands are wadset : And so the LORDS found, That in a wadset comprised, the superior of the wadset ought to have the benefit of the act of Parliament : And also they found, That the said duty ought to be paid to the superior of the wadset ; notwithstanding it was replied, that by the contract of wadset, the superior was obliged to infest the Lord Salton, because that should be craved *ex contractu*, and not upon the comprising.

Fol. Dic. v. 1. p. 13. Hope, (SUPERIOR.) v. 2. Folio 73. MS.