

S E C T. VII.

Adjudication upon a Debt *in diem*.

No 55. 1623. July 30. NICOLSON *against* BAILIE and WHITLAW.

A comprising was reduced, because the lands were denounced before the term of payment, though the comprising was not led till it was past.

Fol. Dic. v. I. p. 540. Durie.

. This case is No 3. p. 64., *voce* ADJUDICATION.

1699. July 18.

CHALMERS of Bonnington, and CUNNINGHAM, his Assignee, *against*
Mr JOHN SHAW.

No 56.
Adjudication
cannot pass
even *periculo*
petentis for a
sum of which
the term of
payment was
not come.

CHALMERS of Bonnington, and Cunningham, his assignee, craving an adjudication against Mr John Shaw, it was *objected* by Andrew M'Adam, and other creditors-adjudgers, That as to a moiety of his sum, he could not adjudge, because the term of payment of it was not yet come. *Answered*, The hail other creditors had adjudged, and if he waited till the term of payment, he would be without year and day, and so plainly lose that part of his debt, which was such a hardship as it was impossible our law could be so defective as not to have a remedy for it. *Replied*, That adjudication was *processus executivus* against the land, and by what rule could execution pass before the term of payment? *Duplied*, The exception of its not being yet due is only competent to the debtor, and not to his creditors. *2do*, The LORDS have allowed relicts to adjudge not only for bygones of their annuities, but also for terms to come. *3tio*, Adjudications on bonds of relief, though before distress, was allowed betwixt Robert Burnet and Veitch of Dawick, No 53. p. 2121. *4to*, Arrestments on bonds before the term of payment is very usual. *5to*, Removing before the term, to take effect at the term, is sustained. *6to*, Wives can pursue their husbands even while alive, *si vergens ad insopiam*, though the jointure cannot be due till after the husband's death. Some thought this could not be helped by the Lords, but needed a correctory law. However, the plurality agreed, that his adjudication should go out for the whole, though the term of payment was not come, but with this quality, that the co-adjudgers might object the nullity and anticipation as accords; and he might defend it on the principles and parallels of law; but this tacit allowance seemed to

import the LORDS' inclination to supply the defect, and sustain it, though they did not directly decide it.

No 56.

On a bill given in by the other creditors, the LORDS retracted, and found they would not, even *periculo petentis*, allow the adjudication to go for that part of the debt, whereof the term of payment was not yet come, but only for what was already elapsed.

Fol. Dic. v. 1. p. 540. Fountainhall, v. 2. p. 61.

1711. July 14.

Mr ROBERT BLAW.

IN a case of Mr Robert Blaw, schoolmaster, it was stated, if a creditor, in a bond, whereof the term of payment was suspended till after the debtor's death, might raise adjudication of the debtor's lands for security of his money, superseding execution till the term of payment were come and bygone. It being *objected*, that the diligence was preposterous, especially being the first adjudication, and this was to waken and alarm all his creditors to fall upon him at once; it was *answered*, That arrestment and inhibition might be served on conditional debts, or bonds payable *in diem*, and why not an adjudication? And it has been permitted on clauses of warrandice and relief before distress, and to widows adjudging for the bygoners of their jointures and life-rent, and likewise for years in time coming, though it only falls annually due; as was sustained to Robert Burnet against Veitch of Dawick, No 53. p. 2121. And Sir George Mackenzie, in his observations on the act of bankruptss 1621, thinks diligence may proceed on such debts, not for present execution, but yet for securing the debt. *Replied*, This would disappoint the very end of suspending my term of payment, which was to free me of any trouble; and if you have taken it in these terms, you must bide your day; and as you cannot point before the term, so neither can you adjudge; for what the one is in moveables, the other is in heritage, and so *pari jure censentur*. THE LORDS thought there could not be one general rule for this case. Where there was no hazard of dilapidation it was not to be allowed; but here it was expressly informed that the debtor was *vergens ad inopiam*, and his circumstances much worse than when he gave the bond; therefore, they remitted to the Ordinary to take what evidences he could get of his condition; and if he found it dubious, then to adjudge, unless the debtor offered sufficient caution to pay the debt when the term of payment should come; on which offer the adjudication was to stop, even as arrestments laid on upon bonds, whereof the term is not come, whether as the ground of arrestment or the debt arrested, may be loosed upon caution.

Fol. Dic. v. 1. p. 540. Fountainhall, v. 2. p. 659.

No 57.

When the term of payment is suspended till after the debtor's death, adjudication cannot pass unless on special cause shown, viz. *vergens ad inopiam*.

*** See Forbes's report of this case, *voce* PROVISION TO HEIRS and CHILDREN.