

(Pafs *periculo petentis*.)

November 1666, Chein, (*No 7. b. t.*); 13th January 1672, Master of Salton, (*See HEIR PORTIONER*); 22d July 1664, Livingston, (*No 6. b. t.*); and lately a defence of prescription, (which is the very case in hand,) was repelled betwixt Thomson and Archibald.—*Replied*, 'Tis very true, the Lords will not stop adjudications on every allegiance, where the pursuer is a true creditor, and the apparent heir's contingency in blood is notour, and there is a general fame that land once belonged to their family; but where none of these appear, and where there is no striving for diligence, but 'tis the first adjudication, and so no *periculum in mora*, the Lords will not easily pass such adjudications; and my Lord Stair, part 2. tit. 2. thinks, in such cases, some evidence should be given of the interest in the land.—THE LORDS found, Where adjudications are sought on apparent heirs bonds, and there is no notoriety of their predecessors having been heritors of that land, and that there is no concurrence of creditors striving for diligence, there ought to be no decret of adjudication, till they give some document that they once had right to the land craved to be adjudged, by a sasine, or some other evident, and that he had a contingency in blood. (*See IMPROBATION.*)

*Fol. Dic. v. 1. p. 12. Fount. v. 2. p. 41.*

1700. June 21.

LORD ARCHIBALD HAMILTON, and SIR JAMES OSWALD, *against* SIR CHARLES MURRAY of Hadden.

LORD ARCHIBALD, as creditor of Hadden, raises an adjudication of his lands for L. 300 Sterling. At calling, Sir Gilbert Elliot of Stobs compares, and *alleges*, there can be no adjudication, because Hadden was denuded of these lands in my favours, by an irredeemable disposition, whereon I am publicly infest under the great seal; so you cannot adjudge my lands for Hadden's debt.—*Answered*, I will not debate your right *hoc loco*, though it be but recent within these two or three years, and from a father-in-law to his goodson, and so liable to much suspicion; my summary process of adjudication cannot be stopped *hoc ordine*, but I must be allowed to go on, reserving your defences and right *contra executionem*, when I come to seek possession, or pursue for mails and duties; and that the Lords decided so 22d November 1664, Livingston *contra* Lord Forrester and Creditors of Grange, (*No 6. b. t.*), where the Lords adjudged, though it was instructed by a back-bond, that the debtor's right was only a trust; only they qualified it to be burdened with the back-bond. Yea, on the 15th November 1666, Cheyne *contra* Christie, (*No 7. b. t.*), they adjudged simply.—*Replied*, If I were delaying, then it were unreasonable to stop the adjudication; but I offer *instante* to produce all my papers in the reduction, and to instruct my undoubted right to the lands, and debate preference; and whether my right be recent or old, *non refert*, seeing I can instruct its onerous cause, though *inter conjunctos, et*

No 9.

No 10.

An offer to instruct *instante*, that the debtor was denuded, and that the party so offering was himself proprietor; refused to be received summarily, as an exception. The adjudication passed, reserving all defences *contra executionem*.

(Pafs periculo petentis.)

No 10. *frustra fit per plura*, and only accumulates expences, and forces all Hadden's other creditors to adjudge: And you have no prejudice, seeing there is none before on this subject. The Lords considered it was hard to put creditors to debate *in initio* their authors or debtors right, which might be abstracted or concealed; and therefore they may adjudge at their peril, whatever they suppose belong to their debtor; and afterwards, if you have a right exclusive of mine, if I by incident diligences cannot recover what may elide it, then you'll be preferred. Others thought it extravagant to let him adjudge other men's lands, under the pretence of being his debtors; though it is an usual practice, where lands have been sold off many years ago by my predecessor; yet I the apparent heir will grant a bond, whereon adjudication may follow against me, and thereon I may call for reduction of these ancient rights; only, in Inverebry and Forbes of Tulloch's case, against Ballogie and others, 7th February 1699, (*No 9. b. t.*) the Lords found he behaved to adduce some adminicles of his contingency in blood, and of his predecessors being heritors of that land, being *in re antiqua*.—THE LORDS here refused to take in the reduction summarly, especially Stobs being minor, and therefore adjudged, reserving all Stobs's defences *contra executionem*.

Reporter, Mersington.

*Fol. Dic. v. 1. p. 12. Fount. v. 2. p. 98.*

1707. March 19.

THOMAS BUCHANAN of Sandfide, *against* The MARQUISS of MONTROSE.

No 11.

Adjudication is led on an apparent heir's bond. A third party offers instantly to show, that the heir's interest in the estate is excluded. The adjudication passes, reserving that party's interest *contra executionem*.

THOMAS BUCHANAN having obtained a decret of adjudication of the estate of Buchanan, upon a bond granted by Janet Buchanan of Leny, apparent heir to the deceased Laird of Buchanan; the Marquis of Montrose craved it might be stopped, in respect he was content instantly to debate and exclude the apparent heir's interest in that estate.

*Answered* for Sandfide, 'Tis a novelty to stop a decret of adjudication at the instance of a third party upon pretence of excluding the debtor's right: For an adjudication is the only title whereby the creditors of an apparent heir can quarrel third parties pretences, or force a production of their rights. Yea, the debtor himself has not been allowed to propone defences to exclude adjudication, and hinder completing of the diligence: Much less can any third party pretend interest; and if it were otherways, it would be very inconvenient to creditors whose diligences are preferred according to dates.

THE LORDS allowed the adjudication to go out, reserving the Marquis's interest *contra executionem*.

*Fol. Dic. v. 1. p. 12. Forbes, p. 156.*