

(Pals periculo petentis.)

No 4.
to proceed
under the
burden of the
obligations in
the contract.

being granted to the pursuer for an onerous cause, he may seek payment and adjudge for the sum, albeit the cedent has not performed his part of the contract, as has been several times decided, and the wife's friends may go on in diligence against James Bell the cedent, for fulfilling his part of the contract, as accords.

THE LORDS allowed the adjudication to proceed, but with the burden of the obligation of the contract of marriage in favours of the wife.

Fol. Dic. v. 1. p. 11. Sir Pat. Home, MS. v. 2. No 782.

1707. December 16.

TOD against SCOT.

No 4.
An adjudication allowed to proceed, reserving all defences, although the ground of it was under suspension.

GRISSEL SCOT being relict of Muirhead of Stevenson, and having had great intromissions with his sheep and other stocking, there is a submission entered into betwixt her step-son young Stevenson, and her, and by a decreet-arbitral, she is decerned to pay him 3000 merks. John Tod, merchant in Glasgow, being creditor to the Laird of Stevenson, he arrests and obtains a decreet of forthcoming, and thereon raises a summons of adjudication; her defence is, I have raised a reduction of that decreet of forthcoming, because the debt arrested being only conditional, can never be the foundation of an executive process, till all be implemented and fulfilled to me. *2do*, I have suspended the decreet-arbitral on clear nullities, and the suspension is not yet discussed. *Answered*, Adjudications are most favourable diligences, lest creditors be cast without year and day; and *esto* this be the first, yet she is old and valetudinary, *et vergens ad incipiam*, and if she die, he loses his debt; and all that was prestable on Muirhead of Stevenson's part is fully performed; and though a suspension stops personal execution, yet it cannot be obruded against a real diligence for my further security; and if you prevail in reducing or restricting the decreet-arbitral, the adjudication will fall, or be restricted, in consequence.

THE LORDS would not stop the adjudication, being *processus et iudicium summarium*, but reserved all defences *contra executionem* to the mails and duties there to be received.

Fol. Dic. v. 1. p. 11. Fount. v. 2. p. 404.

1711. November 8.

The LORD and LADY ORMISTOUN against JOHN HAMILTON of Bangour, and his Tutrix.

No 5.
In a process of adjudication, reasons of reduction of the decree on which it is founded; are

BANGOUR having raised reduction of a decreet, obtained at my Lord and Lady Ormiston's instance, against him as heir served *cum beneficio inventarii*, to the Lord Whitelaw, for L. 33,849: THE LORDS allowed Bangour's reduction to be received *incidenter*, in a process of adjudication upon the decreet, as to reasons *in jure*, and instantly verified; but found, that he behoved to proceed in the

(Pais *periculo petentis*.)

common course, as to other reasons *in facto*, requiring a term to prove them ; and refused to discuss even the relevancy of these *incidenter* to stop adjudication, reserving the same *contra executionem*.

Fol. Dic. v. I. p. 11. Forbes, p. 538.

No 5.
received *incidenter*, if instantly verified.

1664. July 22.

ALEXANDER LIVINGSTON *against* HEIRS OF LINE and DAUGHTERS of the
LORD FORRESTER.

ALEXANDER LIVINGSTON, as assignee to a debt, owing by the deceased Lord Forrester, having charged his daughters, and heirs of line, and they renounced ; whereupon he pursues adjudication ; compearance is made for the Lord Forrester, who produced his infeftment, and alleged the lands therein comprehended, could not be adjudged ; because the defunct was denuded thereof before his death ; and, as he could stop the apparent heirs, if they they were craving themselves to be entered heirs to their fathers, so the adjudger, in their place, could not crave infeftment. The pursuer *answered*, The defence was not competent *hoc loco*, and the defender would not be prejudged by any infeftment, or adjudication, if he had sufficient right. And therefore, as in an apprising, he might apprise *omne jus*, that the defunct had, and thereupon be infeft ; so he has the like benefit in adjudication, which has been ordinarily sustained, *periculo petentis*.

THE LORDS sustained the adjudication, as to all right the apparent heirs could have had in the lands, but not as to the property ; and therefore would not discern the pursuer to be infeft ; but sustained the decret of adjudication ; that thereby he may have right to reversions, and clauses resolutive, or other personal clauses ; which they thought would be sufficiently carried by the decret of adjudication, without infeftment, and would not be prejudged by another adjudger, obtainer of the first infeftment ; but this was beside the ordinary course wherein adjudications used always to be granted *periculo petentis*, that thereby *omne jus* may be carried ; and, as in apprisings, it has been ordinarily found, that the superior must infeft the appriser, to complete his legal diligence, albeit the superior instruct, that himself has a right to the lands ; because his receiving of the appriser, in obedience, will not prejudge his right ; and it were unreasonable to force an appriser, or adjudger to dispute the point of right, when all the writs and evidences are in their adversary's hands ; and the creditors being mere strangers ; who upon their apprisings, or adjudications, can only have title to exhibition of the rights, and afterward be obliged to dispute ; but here, the case was notour to many of the Lords, being near the town of Edinburgh, that the Lord Forrester had infeft his goodson in his estate.

Fol. Dic. v. I. p. 12. Stair, v. I. p. 221.

No 6.
Adjudication passes *periculo petentis*, without necessity to instruct the debtor's right.