

1737, June 30. JAMES BAILLIE *against* WATSON of Saughton.

No 10.

A special adjudication is not redeemable, unless upon payment of the accumulate sum, viz. the principal sum, annualrents, and a fifth part more.

THE question betwixt these parties was, Whether, in the redemption of a special adjudication, the creditor is entitled to a fifth part more than the principal sum, and annualrents accumulate in the decret.

The arguments for the reverser were : That, by the first clause of the act 1672, concerning special adjudications, it is statute, ' That the Lords shall adjudge such part of the debtor's estate, as shall be worth the principal sum, and annualrents then resting to the creditor, and a fifth part more, in respect the creditor wants the use of his money.' Whereby it is plain, the fifth part does not become a debt on the reverser, nor ought the adjudication to be led for payment thereof ; as the act only provides, That subjects, equal in value to the accumulate sum, and a fifth part more, shall be adjudged ; consequently, since the statute does not direct, that this fifth part shall be added to the accumulate sum, and become a debt on the reverser, it is impossible, in the case of a redemption, he can be bound to pay it. The reason likewise assigned in the law, for adding the fifth part, viz. In respect the creditor wants the use of his money, and is necessitate to take land for the same, plainly shows, That, when the creditor gets back his money, he is by no means entitled to the fifth part ; for, in that event, the only reason assigned for allowing it ceases. Nor does the posterior clause, concerning the redemption, admit of this construction, as the lands are thereby declared redeemable, ' upon payment of the principal sum and annualrents.' Now, there can be no doubt but these words must have the same meaning here, as in the former clause, viz. ' The principal sum and annualrents thereof, resting to the creditor ;' under which characteristic, the fifth part more can never be comprehended. It is true, the extent of the subject adjudged, must be equal in value to the principal sum and annualrents, and a fifth part more ; but the extent, or value of the subject adjudged, cannot augment the sum, for payment whereof such subject is adjudged. Nor is it any objection to this sense of the words, That, at this rate, the adjudger, in the event of a redemption, shall not only lose his penalty, - but even the expences of his diligence ; seeing a statute must be taken as it stands, and cannot be altered but by the legislative power that introduced it. However, if it shall seem just that the expences be given to the creditor upon redemption, the same, by an equitable interpretation, may be found to fall under the words of the clause, ' The expences of the infestment ;' which may include the expences of the diligence led previous thereto.

For the adjudger, it was *contended* : That, by the state of our law, with respect to apprisings and adjudications, it was plain, *imo*, That the accumulate sum, in an adjudication, bears annualrent from the date of the decret, though the sum, before that period, did not bear annualrent ; and that, in consequence of the statute 1621. *2do*, When, by the act 1672, special adjudications are allowed to be led, not only for the principal sum and annualrents, but also for a fifth part,

more, the accumulate sum was to bear annualrent. *3^{tho}*, Neither by the ancient nor modern law, an apprising or adjudication could be redeemed, but upon payment of the accumulate sum contained in the adjudication, and annualrents grown due thereon since the decret; in so far as these were not satisfied by the creditor's intromission. It is true, there is this difference betwixt the law as it now stands, and as it stood formerly, viz. That, by the statute 1469, the lands were valued, and no more was apprifed than was sufficient to answer the accumulate sum; so that there was no accounting for the *interim* rents, nor for the by-gone annualrents; and the redemption was upon payment of the accumulate sum: But, by the act 1621, when apprifings were general of the debtor's whole estate, and annualrents were declared to be due upon the accumulate sum, there behoved to be an accounting before redemption, super-intromissions imputed to the accumulate sum; and, if the rents did not answer the annualrents, the debtor behoved to make good the deficiency of the annualrents, as well as the accumulate sum, before he could redeem: And so the law stands, with respect to general adjudications, upon the statute 1672. But, in special adjudications upon that law, if the creditor attain the possession, there is no accounting for rents; seeing he has lands answerable to his accumulate sum, which includes the fifth part, as well as the original debt; and therefore, in that case, the adjudication is redeemable, upon payment of the accumulate sum in his adjudication, with the expences of infestment, &c.: But, if he is barred from the possession, or if it does not yield the rent; then the adjudication is not redeemable, but upon payment of the accumulate sum and annualrents.

The law so standing, it would be a very extraordinary interpretation of this act, That, though it allows the creditor to adjudge for a fifth part more, *i. e.* has impignorate the lands for security thereof; yet it should allow this pledge to be redeemed, without payment of the fifth part, for which it was impignorate. *2^{do}*, That the act should allow the creditor a fifth part more for the want of the use of his money, as more beneficial than the penalty, which may be adjudged for in the general adjudication, and yet the lands should be no security for this fifth part, but that they should be redeemable without payment thereof; when it must be admitted, that a general adjudication for the penalty, is not redeemable without payment of the penalty, and interest grown due thereon.

As to the argument, That a special adjudication is supposed by the act to be redeemable, upon payment of the principal sum and annualrents, for which it did proceed, it was *answered*, The intention of the clause was not to settle the conditions of the reversion, these being established by the common law, viz. That the pledge could not be redeemed, without payment of the debt for which it was impignorate. And as, by the former part of the clause, the lands were to be adjudged in security of the principal sum and annualrents, and a fifth part more; it needed no statute to determine, that, upon payment of these, together with the growing annualrents, from the date of the decret, the lands should be redeemable. But what it singly intended, was to limit the legal of

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such special adjudication, that it should not endure so long as that of a general one. The observation anent the fifth part's being added, only because the creditor is necessitate to take land for the same, and that therefore, when he got his money, the reason of it ceased, is to misconstrue the law; for the creditor wants the use of his money when he cannot obtain payment, but is forced to adjudge; which, being a sale the creditor is obliged to make, therefore the law gives him a fifth part more, without any consideration of what shall afterwards occur, whether the debtor happen to redeem the lands or not.

THE LORDS found, That the redemption could not proceed, but upon payment of the principal sum, annualrents, and a fifth part more; and therefore found the order of redemption void.

Fol. Dic. v. 1. p. 6. C. Home, No 66. p. 113.

1740. January 15. ELIZABETH MIRRIE *against* HAMILTON of Murdifton.

No. 11.

An adjudication upon the act 1672, found to be competent, where there had been no constitution obtained against the defender; which, in a comprising led before that act, would have been necessary.

INGLIS of Murdifton, disposed his estate of Murdifton to Alexander Inglis, *alias* Hamilton, and certain heirs of tailzie substituted to him, containing reserved powers to burden, &c.; and, soon thereafter, he bequeathed several legacies to his friends; particularly, he granted a bond to James Pollock for 10,000 pounds Scots, payable after his own death; and, at the same time, he disposed his other estate, real and personal, to trustees, to be applied for payment of his debts and legacies. Upon Pollock's decease, his relict, as executrix-creditor to him, brought a process on the passive titles, for payment of the 10,000 pounds Scots, against Hamilton of Murdifton, the disponent, who had succeeded to the estate of Murdifton, and who likewise had had some intromissions, as one of the trustees; in which it was found, that the estate of Murdifton was affectable for payment of the 10,000 pound bond. Upon this declaratory decree, without insisting to have Murdifton personally liable, she brought an adjudication against him upon the statute 1672.

The defence *pleaded* was, That as no apprising could have passed against him before the statute 1672, so neither could the adjudication introduced by it, in place of apprising, go against him; especially, as he was not found personally liable. In support of this, it was observed, That the adjudications introduced by the statute, were introduced in place of apprisings, as was plain from the express terms of the act; and, that it did not supercede the adjudications formerly competent, where there could be no comprising; particularly adjudications *ad factum præstandum*, in implement of an obligation to disponent; adjudications *contra hereditatem jacentem*, &c.; for all such remain as they were before the statute; and that no adjudication, in terms of the statute, is competent in place of those ancient ones, the one introduced by that act, having only come in place of comprising; therefore, where a comprising was not competent before the statute, neither is an adjudication upon the law now competent. Further, no comprising was