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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

competent, without a previous decret against the party, whose lands were to be comprised, decerning him to pay the debt; neither could there be any comprising, without a previous searsh for, and poinding of the debtor's moveables, if they could be found; and, *in subsidium* only, his lands were to be sold by the sheriff, to the highest bidder. And, as no apprising could have gone against the defender for this legacy, for which he has not hitherto been found liable; consequently neither can his lands be apprifed, *in subsidium*, for payment thereof. Besides, when the plan of the statute is considered, it will be apparent, that the regulations therein laid down, can only apply to the case, where there is a decret against a debtor, for payment of a liquid sum: For, *1mo*, The statute supposes a process to be brought at the instance of a creditor against his debtor; now, where there is no debtor, but lands found affectable, it is not within the description of the statute. *2do*, When one is not liable to pay, with what justice can he be decerned to dispone, or consent to an adjudication of his lands equal to the debt, and a fifth part more, and to cede the possession of his lands? This may be just, with respect to a debtor, who is personally bound to pay; but as to one whose lands only are affectable, why should he pay a fifth part more than the sum with which his lands are affectable? Again, where a debtor refuses to give lands in satisfaction, &c. it may be just to allow his whole heritable estate to be adjudged in satisfaction, in terms of the second alternative of the act; but, where one is not personally liable, but a particular right is burdened, where is the justice, that his other estate should be adjudged in payment of that debt? Besides, Murdiston's heirs of line, and the trust-estate itself, ought to be discussed before his lands of Murdiston can be affected.

*Answered*: That it seldom happens, where a debt is due, and particular lands affectable, that some one or other is not personally liable to pay; nor can the pursuer admit, that the defender is not personally liable, *in valorem* of his intromissions, though hitherto she has not obtained judgment in these terms: It cannot, therefore, be matter of surprize to find our lawyers, when treating of apprisings, handling the subject as it commonly occurred, where the debtor was personally liable. It was upon this hypothesis, that the law seems to have thought it reasonable, that the personal estate should be first attached and poinded, before there should be access against the lands. But, if the case shall be supposed, even as the law stood when apprisings were to be allowed, that there was a debt to which Murdiston himself was personally liable, though payment could not be demanded before his death, that he had transmitted his estate in such form, as that the disponee or institute should not be personally liable, though the lands themselves should still be affectable for payment; the pursuer can make no doubt, but, even as the law then stood, the lands would have been comprised for payment of this debt, though neither the person, nor moveable estate of the disponee, could be reached. Before the statute 1672, there was originally no form of process known, whereby the property of lands could be reached for payment of a liquid debt, but by an apprising; and, wherever the debt was liquid, apprising was competent,

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only with the exception, that where the debtor was personally liable, his moveables behaved to be first searched for, and pointed, before the lands could be appraised: And upon this plan it was, that where the debt was illiquid, as where it consisted in *obligatione ad factum præstandum*, it was necessary, by a proper process, to liquidate that obligation. But, as the law was still defective, so far as no remedy was competent, whereby creditors might recover payment where the debtor was dead, and that the apparent heir did refuse to acknowledge the succession; or where lands had been sold, but the purchaser's right not completed; there the Court did supply that defect by a remedy, till then unknown; whereby, in the one case, they adjudged the *hereditas jacens* upon the heir's renunciation; and, in the other, did adjudge the particular lands in implement of the disposition. But, wherever the claim was liquid, or such as might be rendered so, the only remedy was an apprising; and, since the statute, adjudication; without regard whether the proprietor be personally liable or not; and as it is optional to him to give a partial progress or not, the whole lands fall to be adjudged, where such partial right is not consented to; as it is impossible to think, that a case should occur, where particular lands are affectable for payment of a particular debt; and that no form of process should be competent, whereby to make that payment effectual against the lands; and the pursuer knows of no other method but this adjudication. As to the second objection, it was answered, That however this defence may be competent against the effect of the adjudication, when payment comes to be demanded, it is not competent at present to stay decret of adjudication, as the estate itself is here the debtor; besides, there is no person who can represent Murdiston *qua* heir of line; the whole estate having been conveyed, partly to the defender *quoad* the lands of Murdiston, and the remainder by the trust-disposition.

THE LORDS found, That adjudication upon the act 1672 is not competent in this case; there being no constitution against the defender, upon which a comprising might have been led before the act. But, upon a reclaiming petition and answers, the LORDS found, That adjudication upon the act 1672 was competent in this case.

*Fol. Dic. v. 3. p. 3. C. Home, No 139. p. 238.*

1762. January 14.

Mrs BARBARA FARQUHAR against WILLIAM MOWAT & Co. Merchants in Aberdeen.

No 12.

A person adjudging an estate, under sequestration, not obliged to accept of a part, in terms

WILLIAM MOWAT and company, having stoppt payment in 1756, they made a surrender of their effects to certain trustees, for behoof of their whole creditors; but some of these creditors, who were unwilling to accede to the trust-right, having proceeded to lead adjudications, for attaching the bankrupt's heritable subjects, a question arose betwixt them and the trustees, which was determined in.