

No 14. deed, in such odious cases modified exorbitant penalties, to hinder estates from being swallowed up by such apprisings; but if that will not do the turn, they have no power to prorogate legals, and keep them open, else they might be the arbiters and disposers of all mens estates: and therefore the LORDS preferred Goodlet, and sustained his comprising to carry the right of the lands, and refused Livingston's offer to pay him *cum omni causa*.

Fol. Dic. v. 1. p. 5. Fount. v. 2. p. 226.

ADJUDICATION UPON THE ACT 1672.

* * * THE *import* of the act is as follows:—Considering how much comprisings have departed from the original design of the legislature, which never meant that great estates should be carried away for inconsiderable debts; nor that messengers, or ignorant persons, should judge in matters of so great importance: And, considering the great prejudice to trade and commerce, proceeding from the length of the legal reversion, during which, the creditor cannot command his money, and both debtor and creditor neglect the improvement of the lands; and, that even after the legal is expired, comprisings become the foundation of much fraud; the right thereof being sometimes acquired by the apparent heir of the debtor, who thereby secluded lawful creditors: And as, by the ignorance of notaries and messengers, and in consequence of many unnecessary solemnities, nullities have often happened in the diligences, and at all times they have been most expensive, by means of penalties and sheriff fees: In order to secure equally the interests of debtors and creditors, it is enacted, That in place of apprisings, the Lords of Session shall, at the instance of any creditor against his debtor, principal or cautioner, adjudge and decern to the creditor, in satisfaction of his debt, as constituted, such a portion of the debtor's estate, consisting in lands and other rights, which were in use to be apprifed, as shall be worth the sum, principal and interest, then due, and a fifth part more, in compensation of the want of the use of the money, and the necessity of taking land in lieu of it; and these over and above the composition to the superior, and the expenses of the infestment. The adjudication shall be made according to the rates of the lands and other rights in the neighbourhood, and proof shall be taken by the Lords, on the part of the creditor, and likewise of the debtor, (if he shall desire it,) of the yearly rent and value of the lands and rights, and what they have yielded for five years preceding, and what they may pay, and the rates and prices at which such lands and rights are usually sold in the neighbourhood; with power to the Lords to determine what warrandice the debtor shall be liable in to the creditor, of the lands and rights so adjudged. Upon the decret of

adjudication, it shall be lawful for the creditor, immediately to enter to the possession of the lands or other rights, and to intromit with the mails and duties thereof, in satisfaction of his annualrent, during the not redemption; and he shall not be liable to any restriction, or action of count and reckoning. If the lands adjudged be affected with liferents, or any casualty, or if the right adjudged be such as to yield no rent during the legal to be now appointed, this shall be expressed in the decrees, together with that part of the sum effeiring thereto; that in case of redemption, the creditor may have his annualrent for that part of his sum, for which he had no profit; which lands, and other rights adjudged, shall belong heritably and irredeemably to the creditor, if they be not redeemed within the space of *five years*, after the decret of adjudication, by payment or consignation of the sums, principal and interest, for which the adjudication proceeded, the composition paid to the superior, and expences, in obtaining infeftment, and interest thereof, in so far as not satisfied by possession, in manner mentioned. The creditor being once in peaceable possession, conform to the decret of adjudication, it shall not be lawful for him to use any farther execution against his debtor, except in case of eviction upon the warrandice, which the Court shall order. But it shall be lawful for the creditor to use all manner of diligence against his debtor, principal or cautioner, by horning, caption, arrestment, or otherwise, until he enter to the actual possession. Comprisings are prohibited in future, without prejudice of any comprisings led before the date of the act, or to be deduced, of lands or other rights already apprifed, of which the legal is not expired, which are to be regulated by the former laws. It is provided and declared, that if the debtor shall abstract the writs and evidents of the lands, and other rights to be adjudged, and shall not produce sufficient rights and deliver them, or transumpt of them, to the creditor, such as the Lords shall judge necessary; and, if he shall not renounce the possession, and ratify the decret of adjudication, in order that the creditor may enter summarily and without impediment, so that he may have a clear right and quiet possession; then, and in that case, it shall be lawful for the creditor to adjudge all, or any right belonging to his debtor, in the same manner as he might have apprifed them, according to the act of Parliament 1661, under the reversion, and with the power competent to other creditors, expressed in the said act. It is provided, that neither the superior, nor the adjudger, shall be prejudged by the new act; but that they shall be in the same case after citation in an adjudication, as if apprifing were led of the lands at that time, and a charge given to the superior thereupon. Decreets of adjudication shall be allowed by the Lords of Session, as apprifings used to be; and the allowance shall be registered in the same manner, and under the same certification, with the allowance of comprisings, that it may be known; and that creditors may not be disappointed, by adjudging lands already adjudged to others.

Cha. II. Sect. 19. 6th Sept. 1672. p. 501. duodecimo.

No 1.

1673. July 24.

KILBIRNY *against* CUNINGHAME.

IN an adjudication upon the late act of Parliament.—THE LORDS modified the price to be eighteen years purchase, as to the certain and constant rent, and nine years as to casual rent of coal.

Clerk, *Gibson*.*Fol. Dic. v. 1. p. 6. Dirleton, No 175. p. 70.*

No 2.

An adjudication restricted to the principal sum, annual composition, &c.; because, being in absence, and of the debtor's whole lands, it bore a fifth part more.

1681. December 9.

GEDDIE *against* TELFER.

PATRICK TELFER, merchant in Edinburgh, having deduced three several adjudications against John Geddie, steward-clerk of Faulkland; and thereupon having pursued for mails and duties; *alleged* for the defender, That the adjudications were null; being led, not only for the principal sum, annualrents, and penalties, but for a fifth part more; whereas, he ought not to have adjudged for the penalty, and fifth part more: so that the adjudication, being deduced for more than is allowed by the law and constant practice, they are, *ipso jure*, null: As also, the adjudications are null upon this ground, That they proceeded upon a citation at the defender's dwelling-house; whereas, he was out of the country, in England, for the time; and so, should have been cited at the market cross of Edinburgh, and pier and shore of Leith.—*Answered*, That the leading of an adjudication, both for penalty, and fifth part more, was no ground of nullity; because there is no law, declaring adjudications null upon that ground; but, on the contrary, it has been the constant practice, since the act of Parliament, even to adjudge for a fifth part more; albeit the debtor was absent; and, albeit the practice does not allow both the penalties, and a fifth part more; yet that can only be a ground to restrict; and the pursuer is content, to restrict his adjudications to the principal sums, annualrents, and penalties, and expences of leading the adjudications, and passing infestments thereupon: And the citation of the defender, at his dwelling-house, he being then out of the country, can be no ground of nullity; because, he being at that time declared fugitive, and intercommuned for keeping of conventicles, and being accessory to the late rebellion; and, having lurked a long time before in the country; the pursuer could not know whether he was out of the country or not, seeing no person could give him an account, whether he was in, or out of the country; so that, in such a case as that, a citation, at his dwelling-house, was sufficient: As also, the defender did thereafter ratify these adjudications; and, albeit the pursuer gave back-bond to the defender, whereby he was obliged to give him allowance and defalcation, of whatsoever in law, equity, and conscience, ought to be allowed in such cases; yet that does not derogate from the ratification; especially, seeing the defender thereby was expressly obliged to account, conform to the adjudications: As also, the back-bond was conditional, in case the de-