

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-

fender should clear accounts within six months thereafter; which was not done.—  
 THE LORDS restricted the adjudication to the principal, annualrents, and composition paid to the superior, without accumulation of annualrent upon annualrent; and found, That the adjudication being in absence, without probation of the rental of the lands adjudged, albeit the creditor behoved to libel a fifth part more in his summons, being uncertain whether the debtor would compare or not; yet, that the creditor ought not to have extracted a decret for the fifth part more, seeing the adjudication did pass, of the whole estate.\*

*Fol. Dic. v. 1. p. 6. Sir P. Home, MS. v. 1. No 40.*

No 2.

1682. *March.* LORD CARDROSS *against* COLVILL.

THE LORDS found, That a citation in an adjudication, interveening between a disposition and infeftment, was no *medium impeditum*; the infeftment on the disposition, being before the perfecting of the adjudication. And the act of Parliament equiparates the citation to a comprising, viz. A citation to a denunciation, and an adjudication to a decret of apprising.

*Harcarfe, (COMPRISING,) No 278. p. 66.*

No 3.  
 Effect of citation.

1683. *March.* KER *against* RUTHVEN.

PATRICK KER of Farnily, having obtained a decret against Edward Ruthven; as representing the Earl of Bamford, his grand-father, for payment of the sum of 5000 merks, and annualrents contained in his grand-father's bond; which, being assigned to Mr William Weir advocate, and he having adjudged from Edward Ruthven, upon the late act of Parliament concerning adjudications, so much of the sum of 1600 merks; for security of which, Edward Ruthven was infeft in an yearly annualrent out of the Earl of Callendar's estate, as did effeir and correspond to the principal sum and annualrent, contained in the said bond, and a fifth part more, conform to the act of Parliament; and the adjudication being disposed to Mr David Mayne writer, and he having distressed the Earl of Callendar, he raised a suspension of double poinding against Mr David Mayne and Edward Ruthven.—It was *alleged* for Edward Ruthven, That the adjudication ought to be restricted to the principal sum and annualrents; and the adjudger

No 4.  
 A fifth part more, may be included in adjudications of rights of annualrent.

\* This case is also reported by President Falconer, thus:—In an action of reduction, pursued at the instance of Geddie against Telfer, of several adjudications, deduced against Geddie, whereunto Telfer had right; the LORDS found the following reason of reduction, relevant to retrench the principal sum and annualrents, and composition paid to the superior, without accumulation of annualrent upon annualrent, viz. That the adjudication being in absence, without probation of the rental of the lands adjudged, the decret bore a fifth part more; which the LORDS found, because, albeit the creditor behoved to libel the same in his summons, being uncertain whether the debtor would compare or not; yet that he ought not to have extracted a decret therefor, when the party did not compare.

*President Falconer, No 6. p. 3.*