No 14. ting, ſignifying nothing, the *animus*, the deſign of the intromiſſion being neceſſary to be conſidered, without which there is no *application*, and conſequently no *extinction*.

'THE LORDS found the intromiſſions imputable.'

Rem. Dec. v. 1. No 18. p. 38.

1752. *January* 14. DALRYMPLE *againſt* LYON.

No 15.
In accounting for intromiſſions, in conſequence of an adjudication on a bond, which contained a penalty exceeding the fifth part of the principal ſum, the exceſs was diſallowed.

JOHN LYON and Robert Dalrymple having ſeverally obtained adjudications within year and day of each other, of certain houſes in Port-Glaſgow, againſt their debtors Alexander Watſons, elder and younger; Lyon obtained a decree of mails and duties, and thereupon entered to the poſſeſſion of the whole ſubjects contained in his adjudication.

When Robert Dalrymple underſtood him to be paid by his intromiſſions, he brought a proceſs of reduction and declarator of extinction againſt Lyon, wherein the following queſtions *inter alia* occurred.

It was *objected* by the purſuer to one of the grounds of the defender's adjudication, being a bond for 200 merks, That it contained a penalty of L. 40 Scots, and that the ſame ought to be reſtricted to a fifth part of the principal ſum.

Anſwered for the defender, That though the Lords may in ſome caſes have reſtricted exorbitant penalties to a fifth part, yet that is not on account of any law that penalties ſhall not exceed a fifth part, but from an equitable conſideration of the intereſt of parties, that the penalty may not exceed the neceſſary expence in recovering payment; and as for that reaſon, where the ſum is great, it might not be wrong, even to reſtrict the penalty to a leſs ſum, ſo where the ſum is ſmall, as in this caſe, and that the penalty of a fifth part cannot defray the neceſſary expence, there is no equity in reſtricting the penalty, which has, by conſent of parties, been agreed on.

THE ORDINARY 'reſtricted the penalty to a fifth part of the principal ſum, and found, That L. 13 : 6 : 8 Scots, in which it excceeded the ſaid fifth part, was to be deduced from the accumulate ſum in the adjudication.' And the LORDS 'adhered.'

In what caſe an adjudger accounts by a rental, and from what period his intromiſſion imputes.

A more material queſtion was determined concerning the method of the defender's accounting for the rents, Whether he was to account by a rental, and from what time he was to be charged with the year's rent?

With reſpect to which the ORDINARY 'found, That the defender having entered to the total poſſeſſion of the ſubjects adjudged, upon a decree of mails and duties, he was not only accountable by a rental, but was obliged to have done exact diligence for recovering the rents from the tenants, and to have let the

houſes of ſuch of them as removed; and refuſed to ſuſtain the arrears of rent as an article of diſcharge, in reſpect he did not inſtruct his having done diligence againſt the tenants.' And as to the period from which he is to account, 'found, That he is to be accountable for the year's rent at the next term after the whole year's rent was due; and therefore muſt account for the year's rent due at the Whitſunday, at the Martinmas following, and ſo on in a progreſſive way; and the LORDS 'adhered.' No 15.

N. B. Although the entering to poſſeſs is taken into the interlocutor, as on a decree of mails and duties, that was, becauſe ſo the caſe happened in fact to be. But the caſe will be the ſame, where the adjudger takes up the total poſſeſſion of the ſubject adjudged, though without a decree of mails and duties. Nor is it neceſſary in order to make ſuch adjudger accountable by a rental, to ſay that he has debarred another; it being enough that he has debarred the debtor. True, if the debtor has had a promiſcuous poſſeſſion, no other creditor can complain of that, unleſs he has been debarred; but if the common debtor has not had a promiſcuous poſſeſſion, the adjudger in the total poſſeſſion muſt account by a rental, even to the debtor himſelf.

Fol. Dic. v. 3. *p.* 16. *Kilkerran, No* 19. *p.* 19.

1794. *November* 25.

DAVID LANDALE *againſt* JOHN CARMICHAEL, and Others.

No 16.
It is eſſential to an *articulate* adjudication, that the debts ſhould be ſeparately accumulated by the act of the judge. In this caſe, although the debts were ſeparated by the extractor in the grand decerniture, a *pluris petitio* in one of the articles, occaſioned the legal to be opened up, for an accounting.

JOHN GIBSON of Durie, in 1765, adjudged the lands of Little Balcurvie from the predeceſſor of David Landale.

The ſummons of adjudication ſet out with narrating, *ſeriatim*, three ſeparate grounds of debt, and concluded, that the lands ſhould be adjudged for the ſame, as they ſhould be *jaintly* OR *ſeparately* accumulated. No appearance being made for the debtor, decree was pronounced in terms of the libel. In the grand decerniture of the extracted decree, as well as in the abbreviate of the adjudication, the debts were ſeparately accumulated.

The adjudger immediately entered into poſſeſſion, and, in 1776, obtained, in abſence, a decree of declarator of expiry of the legal. No account of his intromiſſions was then produced.

In 1791, David Landale, in right of the reverſer, brought a reduction and declarator, in order to ſet aſide the decrees of adjudication and of expiry of the legal, againſt John Carmichael, the adjudger's repreſentative, and James Chriſtie, who had by that time purchaſed the adjudged lands.

The reaſons of reduction were, *imo*, That the debts were extinguiſhed by intromiſſions within the legal. *2do*, That there was a *pluris petitio* on two of the