1684. *January.* LADY KINCARDINE *against* THE CREDITORS.

No 5.
Effect of citation.

IN a competition. betwixt a citation on the new act of Parliament, anent adjudications, and a wadſet, it was *alleged*, That the wadſet was the firſt real right.

Anſwered: By the late act of Parliament, citation on a ſummons of adjudication, is declared equivalent to appriſing; and ſo, the citation in queſtion, being before the wadſet, muſt be preferred.

THE LORDS ſuſtained the anſwer; but here the caſe was not fully debated, and the citation was firſt; which was a great ſpeciality.

Harcarſe, (COMPRISING.) *No* 300. *p.* 72.

1684. *February.* CRICHTON *against* ANDERSON.

No 6.
Effect of citation.

IN a competition, betwixt a creditor who had arreſted the rents of his debtor's lands, and another, who, before the arreſtment, had executed a ſummons of adjudication; it was *alleged* for the adjudger, That, ſeeing by act of Parliament, citation upon a ſummons of adjudication, was equivalent to an appriſing and a charge againſt the ſuperior, the rents muſt be his from the time of the citation, which preceded the arreſtment; and he was not *in mora*, of perfecting his diligence of adjudication, after the arreſtment.

Anſwered: The deſign of the act of Parliament, is not to prejudge legal diligence; and therefore, the arreſtment ought to be preferred, though poſterior to the citation.

THE LORDS ſuſtained the anſwer relevant.

Harcarſe, (COMPRISING.) *No* 301. *p.* 72.

1684. *February* 16*. WILSON *against* HOME.

No 7.
Appriſers and adjudgers may be reſtricted in their poſſeſſion. Special adjudications only, can contain a fifth part more. General adjudications, with that clauſe, will be reſtricted to principal, annualrent, and penalty.

WILLIAM WILSON, merchant in Edinburgh, having adjudged the eſtate of Rentoun from Sir Alexander Home, and being infeft, purſues a removing from the houſe and mains of Rentoun.—*Alleged* for the defender, that the adjudication was null, being led for a greater ſum than was due, in ſo far as it was not only deduced for the principal, annualrent, and penalties, contained in the bonds; but for a fifth part more, whereas the hail eſtate being adjudged, the defender not having compeared and produced the rights, that the purſuer might have been reſtricted to a part of the lands, the adjudication did paſs as an appriſing; which could only have been for the principal, annualrent, and penalty, and not for a fifth part more; which was only provided, in the caſe, if the creditor was reſtricted to a part of the lands, as appears by the act of parliament concerning adjudications. And albeit, the adjudication could be ſuſtained for the juſt ſums, yet the defender cannot be removed from the houſe and mains; becauſe it is

* The date in the MS. is by miſtake, December 1683.

No 7. provided by a clauſe in the act of parliament for ordering the payment of debts betwixt debtor and creditor; that where the lands and others compriſed, exceed the yearly rent in value, the annualrent of the ſums contained in the appriſing, and the expences deburſed in expeding infeftments thereupon, and the debtor ſhall deſire the creditor to poſſeſs the lands and others compriſed; the Lords of Seſſion are empowered to appoint the appriſers to poſſeſs ſuch of the lands and others during the legal reverſion, as the Lords of Seſſion ſhall think meet and reaſonable, not being beneath, of yearly rent and value, of the annualrent of the ſums. And ſeeing the mains of Rentoun is allocate to Sir Alexander, for an annuity granted to him by his father out of the eſtate, the reſt of the eſtate being to be employed for payment of creditors, conform to a tack ſet to Sir Patrick Home his brother; and Sir Alexander is content that the purſuer have a locality out of any other part of the eſtate he pleaſes, for payment of his annualrents, as was decided the 27th June 1662, Wilſon *againſt* Murray, (*See* APPRISERS and ADJUDGERS may be Reſtricted in their Poſſeſſion); where, in an action of removing, and mails and duties, purſued at the inſtance of an appriſer, THE LORDS, upon that clauſe of the act of parliament, betwixt debtor and creditor, found that the purſuer, during the running of the legal of appriſings, could only have right to ſo much of the appriſed lands as he ſhould chuſe, worth 8 per cent., and to count for the ſurplus, more than his annualrents and public burdens, excepting the defender's houſe and mains; and the 10th February 1675, Lady Torwoodhead *againſt* Gardner, (*See* next Subdiviſion); where the Lords found an appriſing both againſt the principal and cautioner's eſtate not to be expired, in reſpect of an order uſed by the principal, though not declared; and therefore, the appriſer's poſſeſſion was reſtricted to his annualrent during the legal, by the act, Debtor and Creditor. And the foreſaid clauſe in the act of Parliament, ought to have the effect of one general law, as well as that clauſe prorogating the legal of appriſings, and bringing in appriſings led within year and day *pari paſſu* together.—*Anſwered*, That the ſummons, whereupon the adjudication proceeded, being libelled in the terms of the act of Parliament concerning adjudications, craving the lands to be adjudged for payment of the principal ſum, annualrents, and a fifth part more; and the defender not having compeared and deſired the benefit of the act of Parliament, and produced the writs, that there might be only a part of the lands adjudged for payment of the ſum, with a fifth part more; the adjudication behoved to proceed in the terms it was libelled; and it being declared by the act of Parliament, that where the debtor does not compear, then it ſhall be leiſome to the creditor, to adjudge all or any right belonging to his debtor, in the ſame manner as he might have appriſed; and ſeeing the purſuer might have compriſed for the principal, annualrents, and ſheriff fee; the fifth part more, in that caſe, comes in place of the ſheriff fee; and, the moſt that can be deſired is only, that the fifth part more be reſtricted to the ſheriff fee, as in the caſe of an appriſing. And albeit, the fifth part, be ſomewhat more than the ſheriff fee, and *utile per inutile non vitiatur*; that can be no ground to annul the adjudication; and the foreſaid clauſe in the act of Parliament, Debtor and

Creditor, cannot have the effect of a general law; but can only be underſtood, as to ſuch debtors, as have taken the benefit of the act of Parliament; or of ſuch compriſings, as have been led ſince the year 1652; or whereof the legal was not expired before the year 1652, mentioned in the clauſe immediately preceding, as is clear from the whole tenor of the act; in ſo far as the former part of the act bears, That all perſonal execution ſhall be forborne for principal ſums, for the ſpace of ſix years, providing the debtor compear and take the benefit of the act, betwixt and a certain day; and, for the more eaſe of thoſe debtors, that ſhall take the benefit of that act, it is provided, that if they offer the creditor a part of his debt, not within the third of the ſum, the creditor ſhall be holden to accept thereof; and the legal of reverſions of compriſings, which was formerly limited to ſeven years, is prorogate to ten years; and all compriſings deduced ſince January 1652, whereof the legal is expired; or deduced before that time, and the legal not expired before January 1652, ſhall be redeemable within three years. And thereafter it is ſubjoined, that in caſe the lands and others compriſed, exceed in yearly rent and value, the annualrent of the ſums contained in the appriſing, and the debtor ſhall deſire the creditor to poſſeſs the lands compriſed; it ſhall be lawful for the Lords of Seſſion, upon a ſupplication made to them by the debtor, and a citation of the compriſer, to appoint the creditor to poſſeſs ſuch of the lands, bearing the legal reverſion, as the Lords ſhall think fit; which clauſe can only be underſtood in relation to the preceding part of the act, which is only, as to ſuch creditors, as had taken the benefit of the act, Debtor and Creditor; or compriſings deduced ſince, or whereof the legal was not expired before January 1652; to which the foreſaid clauſe is immediately ſubjoined; and if that clauſe were otherwiſe underſtood, it would overturn the foundation of all legal ſecurities by adjudication or appriſing, which is the great ſecurity of the lieges, and is introduced in favours of creditors, that they may affect their debtor's eſtate, and poſſeſs the ſame in whole, or in part, as they pleaſe, ay and while they be paid. And they would be in a worſe caſe, than if they had not appriſed; becauſe it would be in the power of the debtor to force the creditor to poſſeſs lands lying at a diſtance; and, where the tenants are deſperate and irreſponſal, and might be forced to accept of a partial poſſeſſion, and to enter to the poſſeſſion of victual, in place of money, which is *aliud pro alio ſolvere*; and debtors might free themſelves of perſonal execution, by forcing their creditors to poſſeſs, ſo that after this, no man ſhould ever compriſe for his debt; for, that which the law has introduced in favours of creditors, for their further ſecurity, would prove a ſnare to them, which is downright contrary to the analogy of our law; and ſo cannot be extended beyond the general cauſe, to which the clauſe relates; eſpecially this being a correctory law, is not to be extended beyond the ſubject matter, which gives the riſe to the law; which was the caſe of ſuch debtors, for a certain time, who had taken the benefit of the act of Parliament, and whoſe eſtates were compriſed ſince the 1652, and the legals expired; or compriſed

No 7.

No 7. before 1652, and not expired before that time; whereof the legal is prorogate for three years after the act; and albeit, this clauſe ſeems to be conceived in general terms, yet it can only be underſtood in relation to the former part of the act, and clauſe immediately preceding. There are many clauſes in that act, which ſeem to be generally conceived, which have only the effect of temporary laws; ſuch as that clauſe in relation to wadſets, granted ſince the year 1649, and reſtricting the ſame to the ordinary annualrent, and making the wadſetters count for the ſurplus; and that clauſe granting power to redeem wadſets, notwithſtanding the irritant clauſe were incurred; all which are but temporary laws, albeit conceived in general terms; and it is evident by this act, and all our laws, that where the King and Parliament deſign a general law, it proceeds always upon a ſpecial narrative and conſideration; eſpecially correctory laws, and does diſtinctly ſtate, what was formerly obſerved, and the reaſon of the alteration; and then ſtatutes, that it is to be obſerved in time coming, which is not done in this caſe; and, therefore, cannot be underſtood to be a general law. And albeit, the clauſe immediately preceding, relating to the prorogating of the legal of appriſings, from ſeven years to ten years, be a general law in that caſe; and that this clauſe is immediately ſubjoined, it cannot have the effect of a general law; becauſe the foreſaid clauſe, concerning the prorogation of the legal of appriſings, ſtatutes, both as to the appriſings that are deduced, and that ſhall be deduced in time coming, which is not done in this caſe; there being nothing ſtatute that ſhall be obſerved in time coming, and therefore, muſt be only underſtood in theſe ſpecial caſes mentioned in the preceding part of the act; next there are ſeveral clauſes in this act, which are ſubjoined to clauſes, that are declared to be general laws, and yet have only a temporary effect; ſuch as that clauſe, That if the creditor of ſuch debtors, that had taken the benefit of the forbearance from perſonal execution, ſhould be willing to take the debtor's lands and eſtate, in ſecurity and ſatisfaction of his debt, then the debtor ſhould be obliged to give ſecurity, or ſell his lands with ſuch warrandice as the Lords ſhall appoint; which is no general law, but only an ordinance in this particular caſe; and this clauſe ought to be underſtood after the ſame manner; and, it is a certain principle, that a creditor may poind his debtor's goods, out of any part of his debtor's eſtate, or within his houſe; and may affect the rents by arreſtments, and purſue for making furthcoming; and if the creditor may poind and arreſt, much more may he poſſeſs any part of his debtor's eſtate, upon the account of the compriſing. For, by that ſame reaſon in the analogy of law, that a debtor could debar his creditor, from poſſeſſing his houſe and mains, by virtue of his appriſing, he might debar him from poinding and arreſting his goods, upon the mains, or in his houſe, which were abſurd to pretend. And albeit, theſe lands be allocate to the defender for his annuity, yet no proviſion of the father, of an annuity in his favours, or locality granted by the Lords, can prejudge a lawful creditor; as alſo the purſuer cannot be obliged to accept of a locality out of any other lands, ſeeing there is no part of the eſtate free of incumbrances; there be-

ing a number of other adjudications for great ſums, which will much more than exhauſt the value of the eſtate. And the practice alleged, doth not meet this caſe, it not having proceeded upon a full debate; and that which is now alleged, was not then repreſented; as alſo, it being but about a year after the act of Parliament, by which the legals of expired appriſings were prorogated for three years, it is evident, that deciſions have been only in the caſe of theſe appriſings, the three years not being then expired, and ſo cannot be underſtood to be a rule in time coming.—THE LORDS found that the foreſaid clauſe in the act of Parliament, had the effect of a general law; and that thereby the Lords of Seſſion are empowered, in all appriſings, during the running of the legal, to reſtrict the appriſer to ſuch a parcel of the appriſed lands as they think juſt, not being beneath, in yearly rent, the value of the annualrent of the ſums contained in the appriſing, and expences of obtaining infeftments thereupon; and that the ſaid clauſe in the act, was not only to be underſtood, in the caſe of appriſings ſince the year 1652, and the legal expired; or deduced before the 1652, and the legal not expired at that time, the legal of which appriſings was prorogated three years by the ſaid act; but alſo of all ſubſequent appriſings and adjudications coming in place of appriſings; and remitted to one of their own number to grant a locality to the purſuer out of any other part of the eſtate free of incumbrances. The LORDS were much divided in this caſe, and the interlocutor was only carried by one vote; but as to this point, and as to the other defence; the Lords unanimouſly ſuſtained the adjudication, as to the principal ſum, annualrent and penalty; but not as to the fifth part more; and ordained an act of ſederunt to be made, that in time coming, in ſuch caſes where the adjudication is led of the debtor's whole lands, that it ſhould only be deduced for principal, annualrent and penalty, and not for a fifth part more, otherwiſe the adjudication is null*. No 7.

Fol. Dic. v. 1. p. 6. Sir P. Home, MS. v. 1. No 514.

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* This caſe is likewiſe reported by Preſident Falconer, as follows:—In the action of removing, purſued at the inſtance of William Wilſon, merchant in Edinburgh, againſt Sir Alexander Home.

It was alleged for Sir Alexander, that the purſuer being a compriſer or adjudger of Sir Alexander's eſtate, and the legal not being expired, could not purſue him to remove from his houſe and parks of Rentoun, in regard, by a clauſe in the act of Parliament 1661, anent Debtor and Creditor, it is expreſsly provided, That the Lords of Seſſion, upon ſupplication made by the debtor before the legal be expired, may reſtrict the creditor to poſſeſs ſuch lands as they think fit, the yearly rent not being under the annualrent of the ſums contained in the appriſings or adjudications; likeas, the Lords of Seſſion, by a deciſion 27th June 1662, betwixt Wilſon and Sir William Murray of Newton, Found that Wilſon might be reſtricted during the running of the legal of his appriſing, to a parcel of the eſtate, and appointed the creditor to make choice thereof, (excepting the houſe and mains), and that if the rent thereof ſhould be above the annualrent and public burdens, he was to be countable for what was over and above.

It was replied for the purſuer, That that clauſe was temporary, and did only extend to the prorogations of compriſings, the legal whereof being expired, was prorogated by that act, viz. compriſings deduced after 1652, whereof the legal was expired before the act; but does not extend to compriſings deduced after the date of the act, ſuch as the purſuer's adjudication is; and at the time of the foreſaid deciſion, which was in anno 1662, the years of the prorogation of the legal of the appriſing therein mentioned were not expired.

The act of federunt, relative to decrees of adjudication, dated 26th February 1684.

*** The act of federunt, made on the above-mentioned occaſion, is as follows:—The Lords of Council and Seſſion conſidering, That by the 19th act of the 3d ſeſſion of his Majeſty's 2d Parliament, concerning adjudications, it is ſtatute and ordained, 'That, in place of compriſings, the Lords 'of Seſſion, upon proceſſes raiſed before them, at the inſtance of any cre-'ditor againſt his debtor, ſhall adjudge and decern to the creditor, in ſatis-'faction of his debt, ſuch part of the debtor's eſtate, conſiſting in lands, and other 'rights, which were in uſe to be appriſed, as ſhall be worth the principal ſum, and 'annualrent, then reſting to the creditor, and a fifth part more beſides the compo-'ſition to the ſuperior, and expences of the infeftment.' Likeas, by the ſaid act, it is provided and declared, 'That in caſe the debtor ſhall abſtract the writs and 'evidents of the lands, and other rights to be adjudged, and ſhall not produce a 'ſufficient right thereof, and deliver the ſame, or tranſumpts thereof, to the cre-'ditor, as the Lords ſhall judge neceſſary; and in caſe he ſhall not renounce the 'poſſeſſion of the lands, and other rights to be adjudged, and ratify the decreet 'of adjudication; in that caſe, it ſhall be leiſome to the creditor to adjudge all, or 'any right belonging to his debtor, in the ſame manner as he might have appriſed 'the ſame, conform to the act of Parliament 1661, anent the payment of debts 'betwixt debtor and creditor, in all points, under the reverſion, and with the 'power competent to other creditors, expreſſed in the ſaid act: And albeit it appears, by the foreſaid act of Parliament, that where the adjudication is ſpecial, and proceeds upon probation of the rental, and the debtor's production of the writs, the decreet ought to be for the principal ſum, annualrents thereof, and a fifth part more, without the penalty of the bond; but where the adjudication is general, in abſence of the debtor, without probation of the rental, the decreet ought to be for the principal ſum, annualrent, and penalty (if any be), contained in the bond, or other writ, which is the ground of the adjudication; yet, by miſtake of the clerks, and their ſervants, ſome decreets of adjudication have been extracted, adjudging the debtor's whole lands, in ſatisfaction of the princi-

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THE LORDS found, That the clauſe of the act of Parliament was not temporary, but was a perpetual law, and did regulate compriſings as well deduced after the act as before; and therefore found, that they had power to reſtrict the purſuer's adjudication, and ordained him to chuſe the lands he deſired to poſſeſs, except the houſe and mains.

It was alleged, 2do, for the defender, That this adjudication was null, being a general adjudication of the whole eſtate, for principal, annualrent, and penalty, and a fifth part more; whereas, by the late act, anent adjudications, the fifth part more was only allowed where the adjudication was particular, of a certain parcel of the eſtate effeiring to the ſum; but where it was general, it came in place of a compriſing, and ſo the decreet could have been extracted for no more than principal, annualrent, and penalty.

THE LORDS found, That the adjudication being general, was unwarrantable as to a fifth part more; and therefore reſtricted the ſame to the principal, annualrent, and penalty; but did not annul the ſame ſimply, it being deduced before the Lords gave inſtruction to the clerks for certification of that abuſe. But they appointed an act of ſederunt to be made and printed, diſcharging adjudications of this nature to be for a fifth part more, and declared if any ſhould be, they would find them null accordingly. There is an act of ſederunt framed to this purpoſe, dated 26th February 1684.

Preſident Falconer, p. 57.

No 8.

pal ſum, annualrents, penalty, and a fifth part more: And the Lords, in ſome caſes which have occurred before them, being unwilling hitherto to annul theſe adjudications, have reſtricted the ſame to the principal ſum, annualrents, and penalty accumulate, contained in the decreet; in regard the ſtile of the ſummons concluding a fifth part more, has given occaſion to the foreſaid error: But, finding it expedient that the lieges be in a certainty as to this point for the future, they declare, That if, hereafter, any decreets of adjudication, proceeding without probation of the rental, and adjudging the debtor's eſtate in general, without reſtriction, ſhall be extracted for a fifth part more, they will not ſuſtain and reſtrict theſe decreets of adjudication, but will find the ſame void and null, as if they had never been pronounced. And, to the end the lieges may be certiorate herein, ordain this act to be publiſhed at the market croſs of Edinburgh.

Acts of Sederunt, Edit. 1790, *p.* 159.

1708. *November* 18. VEITCH *againſt* MAXWELL.

No 8.
Both alternatives of the act 1672 ought to be libelled in the ſummons of adjudication.—An adjudication wanting this requiſite, is reſtricted to a ſecurity for principal ſum and annualrent.

LORD MINTO reported, Veitch and Lady Maxwell. Mr William Veitch, miniſter at Dumfries, being creditor to Lancelot Grierſon of Dalſkairth; he obtains an adjudication againſt his ſon, and thereon purſues mails and duties againſt the tenants, and a removing. In which proceſs, compearance is made for Lady Mary Maxwell, daughter to the Earl of Nithſdale, now Counteſs of Traquair,——*alledging*, She ought to be preferred, as having adjudged the ſame lands ſeveral years before, and charged Lag, the ſuperior.——*Anſwered*, Though my adjudication be without year and day, yet it is the firſt effectual adjudication by the 62d act 1661, being infeft; and the moſt you can plead is to come in *pari paſſu* with me: But, 2*do*, Your adjudication is null; becauſe both your ſummons, and the decreet following thereupon, is diſconform to the 19th act 1672, which contains an alternative, that if the debtor compear, produce a progreſs, and renounce poſſeſſion, then the creditor muſt be reſtricted to a portion of land, and a fifth part more; but if he abſtracts the writs, and does not renounce, then the decreet goes for the whole: But, *ita eſt*, the Counteſs's ſummons does not repeat the alternative clauſes of the ſaid act, but only narrates the grounds of her debt, and that ſhe cannot get payment,; and therefore, by the ſaid act 1672, craves the debtor's whole lands to be adjudged, omitting the firſt clauſe, and only founding on the ſecond alternative, which is penal, in caſe the defender do not obey and obtemper the firſt clauſe, which ought to have been libelled, as well as the ſecond; and the decreet following on ſuch lame and defective ſummons is, *ipſo jure*, null; and Mr Veitch ought to be preferred thereto.—*Replied*, No law requires the libelling the whole act. This was only introduced by the writers to the ſignet to make long papers, to be a pretence for a long account; and, undoubtedly, this ſhort way is the moſt juſt and rational; for it is the defender's part to found on the firſt alter-