1738. *November* 3. BALFOUR *against* WILKIESON.

No 18.
An adjudication led for more than due, where the question was between the debtor and an assignee, not between creditors, was sustained for the principal sum and annualrents accumulated, and for the annualrent thereof, and for necessary expences, but without accumulation for the expences.

IT being contended, that an adjudication led for more than was due, is *in rigore juris* null *in totum*; being in its nature indivisible, and similar to other legal diligences, which must be either unexceptionably good, or null *in totum*; and, that though the Lords, *ex nobili officio*, may sustain such an adjudication, where innocently led, as a security for the sums that would be due, supposing no adjudication had been led; there is no law for accumulations, which have no foundation in equity; yet, in this case, where the question was betwixt the debtor and an assignee, who knew not of the payments made to his cedent; THE LORDS sustained the adjudication for the principal sum, and annualrents, accumulated at the date of the adjudication, and annualrents thereof, and for necessary charges; but found no accumulations due upon the necessary charges. What moved the Lords, in this case, was, that though the objection, *in rigore juris*, was sufficient to cut down the adjudication, so as to take off all accumulations; yet, the practice where the question was with the debtor, and not with the competing creditors, had a long while run the other way *.

Fol. Dic. v. 1. *p.* 7.

1738. *December* 1. CREDITORS OF CATRINE *against* BAIRD of Cowdam.

No 19.
An adjudication annulled; in so far as it regarded a bill bearing annualrent and penalty, held by the adjudger *in trust*; and yet sustained, as to *his own claims*, which were articulately libelled.

IT being objected to an adjudication, that the accumulate sum was partly made up of a bill bearing annualrent and penalty, which behoved to void the adjudication *in totum*; seeing it was not an articulate adjudication; but all the debts brought into one accumulate sum; the adjudger yielded, that this behoved to be the consequence, did the bill in question belong to himself; but he *pleaded*, That he was only a trustee for the behoof of another, and it would be hard, that his barely executing the commission entrusted to him, should have the effect of cutting

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* The same case is thus stated by Lord Kilkerran.—Though, *stricto jure*, an adjudication being once opened, is null to all effect, and no room left for the arbitriment of the judge, it being in its nature indivisible; and, as other legal diligences, either formal or null *in totum*; yet, where the defect is small, and proceeding from an innocent mistake, the Lords have, by a long practice, been in use, *ex æquitate*, to sustain the adjudication as a security; especially where the question is only with the debtor, and not with competing creditors.

And accordingly in this case, where the adjudication was led for more than was due, and the question only with the debtor, in respect it was led by an assignee, who knew not of the payments made to his cedent; the adjudication was sustained as a security for the principal sum, annualrents, and necessary expences, at the date of the adjudication. Notwithstanding, it was argued, that though equity, which was the only ground for sustaining it at all, might be pleaded for sustaining it as a security for principal and annualrent, already due; yet, there was no foundation in equity for accumulations.

But, upon a petition and answers, this interlocutor was altered so far, that, as to the necessary charges, it was only sustained for these, without accumulations.

Kilkerran, (ADJUDICATION.) *No* 9. *p.* 2.