

1705. June 21.

The LADY INNERLEITH and Mr JAMES CATHCART, her Assignee, *against* Sir WILLIAM COCKBURN, and JOHN RENTON of Lamerton, and his Tenants.

IN an action of mails and duties, against John Renton of Lamerton, and his tenants, at the instance of the Lady Innerleith, as deriving right from the deceased Sir James Rothead, her husband, to an adjudication led upon bonds, granted to him by the Lairds of Langton and Cockburn, as principals, and Lamerton and the Lord Sinclair, as cautioners.

Alleged for the defenders: The adjudication is null, being led for more than was due; in so far as the sum adjudged for, is accumulated at a term prior to the date of the adjudication; and the annualrents thereof, till that time, are a clear overcharge, and the same thing upon the matter, as if the lands were decerned to belong to the adjudger, at a term preceding the adjudication.

Answered for the pursuer: If accumulating the sums, at a term preceding the date of an adjudication, were sustained as a nullity, few adjudications in Scotland would be unquarrelable, and safe from overturning; for nothing is more ordinary. But here annualrents are only decerned from the date of the adjudication; so that the debtor has no prejudice; and the *pæna plus petitionis*, which is the legal foundation of the objected nullity, cannot take place. Again, though the sum be accumulated at a preceding term, the lands are only adjudged from the date of the decret; and the adjudication contains no legal assignation to mails and duties with a retrospect.

THE LORDS found no nullity or ground of restriction in the adjudication; for they made a distinction betwixt adjudications accumulating at a preceding term, without decerning for annualrents from that term; and such as decern for annualrents from the date of the accumulation: Holding, that the first sort ought to be sustained, and the latter annulled or restricted.

Fol. Dic. v. 1. p. 8. Forbes, p. 7.

1707. March 25.

WILLIAM INNES, Writer to the Signet, *against* The EARL of BREADALBANE.

WILLIAM INNES, writer to the signet, having pursued a declarator of expiration of the legal, of an adjudication, upon the estate of Breadalbane, to which he had right: It was *objected* for the Earl of Breadalbane, That the legal could not expire; because the adjudication was null; at least, could only subsist as a security for principal sum and annualrent; in the bond it was led upon, and for the necessary charges:—In regard the annualrent and penalty were accumulated in a principal sum, at a term preceding the date of the adjudication, and made to bear

No 13.

A sum adjudged for, was accumulated at a term, prior to the date of the adjudication. This no nullity; as the annualrent of the accumulated sum was decerned for, only from the date of the diligence.

No 14.

In a declarator of expiry of the legal; *Objected*, that the accumulation had been made at a term prior to the date of the adjudica-

No 14.
 tion.—Found
 not to be a nul-
 lity; annual-
 rent not be-
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 cumulated
 sum. This,
 therefore, left
 to the opera-
 tion of the
 law, became
 due only from
 the date of
 the adjudica-
 tion.

annualrent from that term ; whereas, annualrent of the accumulated sum, should only run from the date of the decret, by virtue whereof it bears annualrent.

Answered for the pursuer : The decret of adjudication is dated the 11th of March, and the annualrent and penalties are only accumulated at the Candlemas preceding, which is but a short space ; and it has been the custom, till of late, to accumulate at a term preceding the decret. *2do*, Though the sums are accumulated at the term of Candlemas, it doth not follow that the accumulated sum was to bear annualrent from that term ; since the decret mentions not when the annualrent should commence, nor decerns for any annualrents at all, but leaves them in indefinite terms to the regulation of law ; which imports annualrent only from the date of the adjudication.

Replied for the defender : The smallness of the interval betwixt the preceding term, and the date of the decret, is not the question, but the legality and method of proceeding : And though, perhaps, several adjudications be led the same way, that is but *corruptela, non consuetudo* ; and *communis error non facit jus*. And the accumulating of annualrents and penalties, from a term preceding the adjudication, was found sufficient to restrict the adjudger, in the case betwixt the Children of Preston, against Mr Thomas Lermont ; because, till the date of the adjudication, there was no warrant for the accumulation, and the exacting annualrent of annualrent without law, is usury. *2do*, It is evident, from the decret, That accumulating at a preceding term could be for no other end, than to make these accumulations bear annualrent.

Duplied for the pursuer : The accumulating at the preceding term, was for the adjudger's own security, and to free him from the hazard of adjudging for more than was due ; and from the trouble of counting broken terms, in which he might easily err. As to the decision in the case of the Creditors of Preston, it does not meet ; for there the sums were accumulated a considerable time before the adjudication, and decerned to bear annualrent from the date of the accumulation, which cannot be pretended in this case. And it was decided in the cases of the Lady Innerleith against the Laird of Cockburn ; (*No 13. b. t.*) and of the Seamen of Prestonpans against Doctor Smelholm ; That, where annualrents and penalties, accumulated at a term preceding the decret of adjudication, are not decerned to bear annualrent from the date of the accumulation, that is no nullity or ground for restricting the decret.

THE LORDS repelled the nullity, proponed against the adjudication, and found it no ground of restriction ; for they thought, that since the decret mentioned not from what time the accumulated sum should bear annualrent, the term of its commencement was left to the regulation of law ; which imports annualrent only from the date of the adjudication.

Fol. Dic. v. 1. p. 8. Forbes, p. 161.