

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 decret; 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.

LORD MANTO reported, Veitch and Lady Maxwell. Mr William Veitch, minister at Dumfries, being creditor to Lancelot Grierison of Dalkeith; 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,—*alleging*, 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 infest; and the most you can plead is to come in *pari passu* with me: But, *2do*, Your adjudication is null; because both your summons, and the decret 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 decret 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 decret 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-

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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.

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native; and, by the way of defence, crave the benefit of restriction, which, if he omit, I was not obliged to insert the act of Parliament *ad longum*. *Duplied*, When law prescribes a *formula* for leading a diligence, it must be observed *in terminis specificis*; and, if done otherwise, it is null; *quod, lege prohibente, fit, id nullum est; si nullum est, tunc nullos sortitur effectus*; and therefore the terms of the act of Parliament were precisely to be libelled, and the omission thereof is a clear nullity.—*Triplied*, That in alternative obligations, the creditor may pursue simply for one of the two alternatives; but then the debtor may alledge the election is his, what part he will fulfil. If the obligation be to deliver *Davis or Stichus*, and I crave *Davis*, he may offer *Stichus*, and so fulfils his obligation.

THE LORDS did not think it absolutely necessary to engross public laws at length; but the constant practice, for the most part, since that act, was to libel the whole; and when writers, by mistake, claimed both the whole lands, and a fifth part more, the Lords, in Wilson's case, against Renton; (*No 7. b. t.*) and, on the 9th December 1681, Geddy *contra* Telfer, (*No 2. b. t.*) because of the mistake, restricted such adjudications only to be a security for principal sums and annualrents, striking off the accumulations: But, to discourage the practice in time coming, they, by an act of sederunt, 26th February 1684, declared it should be a nullity if so extracted hereafter; even so here, the Lords would not find Lady Mary's adjudication null for short libelling; but, in respect of the defect, they cut off its penalties, termly failies, and other accumulations, and sustained it only for a security, in so far as extended to the principal sum and annualrent*.

Fol. Dic. v. 1. p. 5. Fountainball, v. 2. p. 463.

* The same case is thus stated by Forbes.—In a competition betwixt Mr William Veitch and the Countess of Traquair, who had both adjudged the lands of Dalkairth, for debts due to them by John Grierson, the heritor;

It was *alleged* for Mr Veitch, That the Countess's adjudication is null, for that it libels only the ground of her debt, and that she could not get payment; and therefore requires the debtor's whole lands to be adjudged, in the terms of the act of Parliament 1672; without requiring the debtor to produce a free progress to land corresponding to the debt, and a fifth part more, which is an alternative in that statute. And by act of sederunt, February 26. 1684, although pursuers ought to libel both the alternatives of the act 1672; yet they should not take a decret for a fifth part more, unless the defender compeared, and disposed particular lands.

Answered for the Countess.—The act 1672, requires not all the clauses therein to be repeated in a summons of adjudication: But it is sufficient to mention the act, and conclude that the debtor's lands ought to be adjudged in the terms thereof, for payment of the sums due to the adjudger. Narrating the act in long terms, is but an art of writers, to make their clients pay the more; for there is no necessity to insert at length a public law, which all are obliged to know. Yea, even in the case of alternative obligations, the creditor may pursue performance of one member of the alternative, and will get decret for the same, unless the debtor claim his privilege of election. *2do*, The not libelling the act *ad longum*, did not hinder the debtor, against whom the adjudication was pursued, to compear and offer a progress in the terms of the act; and his neglecting to do so, was a passing from that benefit. And it is all one to the common debtor, whether both the members of the alternative were specially libelled or not; seeing he might, in either case, have had the benefit of restricting the adjudication, by satisfying the conditions required by the act; and, without that, could have had it in neither case.

The Lords repelled the nullity proponed against the Countess of Traquair's adjudication, but restricted the same, as a security for principal sum and annualrents.

Forbes, p. 281.