

1743. February 5.

MAXWELL of Dalwinton, and RIDDELL of Glenriddell, against MAXWELL of Barncleugh.

## No 25.

*Pluris petitio* is only inferred from the decree, not from the libel.

THE objection to an adjudication, that the libel, upon the first alternative, concluded, that the lands should be adjudged, corresponding, not only to the principal sum and annualrents, and fifth part more, but also to the penalty, was not sustained, even to the effect of opening the legal; in respect, the adjudication proceeded, not on the said first alternative, but upon the second.

For, even though there had been the like error in libelling upon that alternative, on which the adjudication did proceed, yet if, when the decree came to be pronounced, that error, of *pluris petitio*, had been rectified, and decree only fought, and obtained, for the sums truly due, the error, in the libel, would have been no nullity.

*Fol. Dic. v. 3. p. 4. Kilkerran (ADJUDICATION), No. 14. p. 10.*

1747. June 30.

GORDON against BAIN of Tulloch.

## No 26.

A bond for L. 500 is assigned. The assignee adjudges for the whole sum, although part of it had been arrested, previous to his assignation, and although the debtor had counter-claims against the cedent.—The adjudication restricted to a security.

KENNETH BAIN of Tulloch, and Roderick Dingwal of Cambuscurry, were bound together in several obligations; and having made a clearance between themselves, and settled the several debts which each was bound to relieve the other of, Tulloch, besides, granted bond to Cambuscurry for L. 500 sterling, which he assigned to Sir Robert Munro of Foulis; but, before the assignation, arrestment had been used in the hands of the debtor, at the instance of M'Leod of Cadboll; and, in a multiple-pounding, Cadboll was preferred to the extent of the debt, on which he had arrested.

Tulloch's estate being adjudged, Sir Robert Munro raised an adjudication to be within year and day; and it being objected to him, that he could take decret for no more than the surplus of the sum for which Cadboll was preferred: *2do*, That the debtor had right of retention until he was relieved of certain debts, in which he was bound for Cambuscurry;—Decreet was pronounced, reserving all exceptions *contra executionem*.

It must be observed, that, before the decret, Sir Robert had purchased the debt, on which Cadboll's arrestment proceeded, but did not plead upon it in that process.

John Gordon, merchant in Edinburgh, as disponent from Sir Robert Munro, insisted, in a process of mails and duties, on the adjudication; and the above defences being proponed and insisted on, as relevant, not only to reduce it to the sum for which it ought to have been pronounced, with penalty effecting thereto, but to cut down the accumulations altogether; which, being penal, ought not to be incurred, when, by reason of the *pluris petitio*, the debtor was not bound to