1743. *February* 5.

MAXWELL of Dalſwinton, 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 ſought, 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 counterclaims 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-poinding, Cadboll was preferred to the extent of the debt, on which he had arreſted.

Tulloch's eſtate being adjudged, Sir Robert Monro raiſed an adjudication to be within year and day; and it being objected to him, that he could take decreet for no more than the ſurplus of the ſum for which Cadboll was preferred: 2*do*, 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 decreet, 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 diſponee from Sir Robert Monro, 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 effeiring 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

pay the whole demand, and was not allowed to make his defences in the adjudication, but theſe reſerved : No 26.

The Lord Ordinary refuſed this demand, and, 28th November, 1746, found a balance due on the adjudication; ſuch as aroſe on reckoning the intereſt and penalties on the ſums due; in which was included Cadboll's debt, in the perſon then of the adjudger.

Pleaded, in a reclaiming bill, That no accumulations ought to be allowed, as the debtor was not owing the full demand, and was not allowed to make his defences; but the purſuer inſiſted to take decreet for what he was not bound to pay: Cadboll's arreſtment was a good defence; and, though the purſuer had purchaſed it, yet he made no intimation thereof to the defender, nor uſed that debt as the title of his diligence; and it was allowable to make uſe of arguments, ariſing from the ſtrictneſs of forms, to defend againſt penal conſequences: Nor was it only in point of form, that it was neceſſary to found upon the tranſmiſſion, but alſo in ſubſtantial juſtice; for otherwiſe, it remained ſtill in the purſuer's power to convey that debt, retaining in his own perſon the adjudication. 2*do*, The defender was not bound to pay, till relieved of his engagements for Cambuſcurry, which he neither was at pronouncing the decreet, nor as yet: When that was done, he ſhould be ready to pay the balance; but, as this was a good defence for not-payment, he could not be ſubjected to any penalty.

Anſwered, When an adjudication was pronounced, reſerving *contra executionem*, and any deduction was afterwards made from the ſum, the conſequence ought not to be the ſtriking off the whole penalty and accumulations, but the reſtricting the adjudication to what it ought to have been pronounced for; that this one was rightly taken for the whole bond, comprehending the arreſted ſum: For, if that objection had been then to have been conſidered, it would have been anſwered, That the arreſtment was only an incumbrance on Sir Robert's right, and was then in his perſon, as it ſtill is; nor could it weigh, that he might have aſſigned the debt whereon it proceeded, as he had not done it, but pleaded on it now, as he might have done at pronouncing the decreet. 2*do*, As Tulloch and Cambuſcurry were mutually engaged for one another, and their claims of relief pretty near equal, when they adjuſted matters between them, beſides which the bond purſued on was granted; Tulloch's claims ought not to be ſet up as a pretence for not paying his liquid bond, when they were compenſed by Cambuſcurry's upon him. Theſe, it could not be pretended, were cleared at the date of the adjudication, whatever might be the caſe now, which was a queſtion wherein the Lord Ordinary had pronounced an interlocutur, and which lay before the Court, upon petition and anſwers.

The queſtion was firſt put, Whether accumulations ſhould be allowed on the arreſted ſum? And then, Whether they ſhould, notwithſtanding, be allowed on the remainder?

No 26.

THE LORDS found, That the adjudication did only ſubſiſt as a ſecurity for the principal ſum, annualrents, and neceſſary expences.

Act. *Lockhart.* Alt. *H. Home.* Clerk, *Forbes.*

D. Falconer, v. 1. p. 261.

1747. *November* 6.

Ross of Calroſſie, and other poſtponed Creditors of Ross of Eaſterfearn, *againſt* BALNAGOWAN and DAVIDSON.

No 27.
An adjudication not annulled, but reſtricted to a ſecurity, notwithſtanding of an inexcuſeable *pluris petitio*.

IN the ranking of the creditors of Eaſterfearn, it was *objected* to an adjudication, produced for Balnagowan and John Davidſon, aſſignees thereto, from Roſs of Ankerville, That the ſame was void and null, as proceeding upon a decree of conſtitution, at the inſtance of Ankerville, for a ſum much beyond what was due; and that not obtained through overſight or miſtake, but *peſſima fide*, on the part of Ankerville; in ſo far as, after Eaſterfearn had alleged, upon a fitted account between Ankerville and him, as in Ankerville's own hand, reſtricting the ſum of L. 9540 purſued for, to the ſmall balance of L. 1284 Scots; and that the matter had thereafter been allowed to lie over, till Eaſterfearn's affairs had gone into ſuch diſorder, that no appearance was made for him in any proceſs; Ankerville at a ſide-bar calling, repreſented by his procurator, that he had produced in the clerk's hands the fitted account founded on, which noways proved the defender's allegeance; and none appearing for the defender, the Ordinary decerned for the L. 9540 libelled; although that very account then produced, reſtricted the balance due, to the ſum of L. 1284.

Had the practice of the Court in former caſes, been followed in this, the objection muſt have been ſuſtained; for, hitherto the Lords have been in uſe to conſider adjudications, to be of their nature indiviſible, and therefore *ſtricto jure*, to be either valid or null *in totum;* but nevertheleſs, in reſpect of long practice, to ſuſtain them *ex equitate*, as a ſecurity for what was truly due; eſpecially where the queſtion was only between the creditor and the debtor; but rarely in a competition of creditors; and only where the debt was ſmall, and proceeded from ſome innocent miſtake. But wherever the defect appeared to proceed from deſign, the Lords have been in uſe, in a competition of creditors, to ſet aſide the diligence *in totum*; in ſo much, that where an adjudication proceeded upon different debts, contained in one accumulation, becauſe of a groſs error of *pluris petitio* with reſpect to one of the debts, the adjudication was found void *in totum*, even as to that debt, againſt which there lay no exception; 1ſt December 1738, Baird of Cowdam againſt the other creditors of Catrine, (*No* 19. *h. t.*)

But in this caſe, a very different reaſoning prevailed, viz. That although when appriſings were in uſe, wherein there was a value put upon the lands by the meſſenger, appriſings behoved either to ſubſiſt or to fall *in totum*; becauſe, where there was a *pluris petitio*, there was no aſcertaining, without a new jury, how