After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Arthur Onslow.*
For Respondents, *Ilay Campbell.*

[Mor. p. 120.]

SIR JAMES NASMYTH, Bart. — *Appellant;*

JOHN SAMSON, Heir-at-Law of DAVID SAMSON deceased, and JOHN AITKEN, — *Respondents.*

House of Lords, 4th April 1785.

ADJUDICATIONS—PENALTIES—*PLURIS PETITIO.*—Circumstances in which held, where the termly penalties due by a bond were included in the accumulated sum of an adjudication, that these formed a *pluris petitio*; and the adjudication so far objectionable as to reduce it to a security for payment of principal and interest in the bond.

Certain property, which originally belonged to John Porteous, having been adjudged by Sir James Nasmyth, and he having entered into possession in virtue of his adjudication, a judicial sale and ranking of the creditors was then brought. The estate was bought by Sir James Nasmyth, the principal creditor. Sixty years after the date of the adjudication, the heir of Porteous brought a challenge of the title in Samson's name. His chief grounds of challenge consisted in objections to the adjudications which grounded the judicial sale.

It was objected to the adjudication for the accumulated sum of £11,346. 13s. 4d. Scots led upon the debt *originally due* to Bertram of Nisbet, and assigned to Sir James Nasmyth, that the termly penalty of 100 merks for failure in payment of each half-year's interest contained in the bond, and adjudged for, being equal to one-third of the interest, was exorbitant, and therefore the adjudication ought not to be sustained; and that the other adjudication upon the same debt for £1480 Scots of interest was unnecessary; that interest being included in the first adjudication.

The Court pronounced this interlocutor:—"The Lords Nov. 20, 1763.
"sustain the objections to the first article in the state of
"the interests produced in the ranking, being an adjudica-
"tion at the instance of Sir James Nasmyth against the
"common debtor, for the accumulated sum of £11,346. 13s.

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"4d. Scots, to the effect of striking off from that sum the "liquidated penalty and termly failures contained in the "bond adjudged for, and find that the adjudication can only "subsist as a security for the principal sum contained in the "bond and interest due thereon, to be accumulated at the "date of the decreet; sustain the objection to the second "article in the state, being an adjudication at the instance "of Sir James Nasmyth against the common debtor for the "accumulated sum of £1480 Scots." On reclaiming petition the Court altered the interlocutor reclaimed against, and found "That the adjudication in question can only sub-"sist as a security for the principal sum and interest accu-"mulated at the date of decreet of adjudication, and remit "to the Lord Ordinary to proceed accordingly." The appellant presented another petition, but it was refused; and the case was therefore remitted to the Lord Ordinary to proceed and determine therein.

Mar. 20, 1784.

June 26, 1784.

July 8, 1784.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1. There is no ground in equity, and therefore it would require very clear grounds in law to deprive the appellant of the moderate penalty in question stipulated in his bond, and adjudged for upwards of sixty years ago; and the appellant judicially offered to show, by calculation, that the very loss he sustained by want of payment of the interest upon the debts due to him by his debtor, is greatly more than the amount of this penalty. The respondent declined the calculation. The creditor, therefore, is not desiring any undue advantage of the debtor, while the latter's heir, at the distance of sixty years, endeavours to take the advantage of legal niceties against him. One purpose and object of the penalty for nonpayment, is to answer the damage and inconvenience of lying out of the money. Another is, to answer the expense of recovering it. The appellant and his predecessor have been at great expense, but if the penalty be cut off these must be lost. 2. In law there was no *pluris petitio* or charge more than was legally due. The adjudication was taken precisely in terms of the personal obligation in the bond on which it was founded. By that bond the debtor had become bound to pay principal, interest, penalty, and termly penalties to the full extent of the sum adjudged for. Every shilling, therefore, was legally due; and supposing that either part or the whole of the termly penalties could afterwards be restricted by a court of equity, that does not infer any illegal over-

charge or *pluris petitio* in the prior adjudication. The creditor could not possibly adjudge otherwise than in terms of the obligation granted by the debtor, nor regulate himself by any restriction not yet made. The excess being cut off by equity, the adjudication should stand as to the remainder, just as if part of the accumulated sum had been paid. In the Court below, it was stated by the respondent that the termly penalties were referable to heritable security only, and could not be adjudged for under the personal obligation in the bond. This seems to have moved the Court, and led them to think that the termly penalties were not *in obligatione*. But when the fact and the law, as applicable to that fact, are fully explained and understood, the objection must at once disappear, because it is manifest that the termly penalties were contained under the personal obligation, and properly adjudged for in virtue thereof. An heritable bond consists of two parts, a personal obligation and a real right of levying payment out of the lands; an ordinary adjudication may be led for all that is contained in the personal obligation and no more. An adjudication of a peculiar nature following upon a decreet of poinding the ground, may be taken for what can be levied in virtue of the real right. The real right is often confined to the annual rent or interest, which being also in the personal obligation, adjudications of both these kinds may be led for it. Termly penalties are sometimes only in the real right, and not in the personal obligation, and thus cannot be adjudged for in an ordinary adjudication, not being *in obligatione;* and if adjudged for there is a *pluris petitio,* more being adjudged for than the debtor had bound himself to pay. Such was the case of Park *v.* Craig in 1771. Sometimes the termly penalties are both in the personal obligation and in the real right; sometimes they are in the personal obligation and not in the real right, which is the present case, and in such case they not only may but must be adjudged for by an ordinary adjudication, and cannot be recovered otherwise. 3. Not one adjudged case has been pointed out where the Court, in the case of any excess in the stipulated penalties, went farther than to cut off that excess. On the contrary, in all former cases, where the question has occurred, the adjudication has been sustained for principal, annual rent, and ordinary penalty, cutting off only any excess or exorbitance in the stipulated penalty. The case of Park *v.* Craig, 16th Nov. 1771, referred to by the respondent, can be no precedent here, because the termly penalties

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in that case were not on the personal obligation. And there was no poinding of the ground. In short, it was quite different in its circumstances, yet the adjudication, even in that case, notwithstanding all the objections stated to it, was sustained as a security, not only for principal and annual rent, but also for necessary charges. 4. Even in the case of a real *pluris petitio*, or overcharge of more than is due by the obligation of the debtor, the effect of that, both according to the nature of adjudications, and the practice for more than half a century past, is not to void the adjudication totally, but only to restrict it to what is fairly due, deducting the overcharge. Penalties are due, not only in law but in equity, and it would, therefore, be a hardship if the adjudication were not to stand good as to the sums to which no exception is taken.

Pleaded for the Respondents.—1. Adjudications, like other diligence, are, in their nature, indivisible. When a creditor seizes the effects or estate of his debtor, by a rigorous process of the law, he must be prepared to show, not only that every step is regular, but that the precise sum demanded is due by law. It is not sufficient for him to say, that a part was indisputably due, and he will hold the diligence as for one *part* only. An adjudication is, in law, a transfer of the estate of the debtor to the creditor, in satisfaction of the debt mentioned in it;—if that debt was not due, in the strictest and most entire sense, there is no transfer,—the whole proceeding is nought, and the creditor has himself to blame. Upon these principles, which will be found laid down by every authority, any irregularity or overcharge in the adjudication does, in strict law, void it altogether; but the Court of Session, in exercise of its equitable powers, has been in the practice, where the irregularity or overcharge is not gross, to sustain the adjudication challenged, as a security to the creditor for what is due in equity. Sitting as a Court of equity, they will not cut down a just debt on account of informality or mistake, in a process which the creditor has relied on for securing his payment; but neither will they decree payment of penalties, which the creditor has no title to but by law, and in consequence of observing all the forms, and keeping within the bounds of strict law in the process. Accordingly, in the present case, the Court has given the appellant his principal and the interest thereof accumulating, or converting both into a principal at the date of the adjudication, with the legal interest of the sum then accumula-

ted from that day; but, judging that there was an error and overcharge in the adjudication, they have denied him the penalties. The only question then is, Whether there was an overcharge or *pluris petitio*, by including in the accumulated sum of the adjudication £466. 13s. 4d., as penalties or termly failures, incurred by nonpayment of the interest or annual rent. And it will not escape observation, that the appellant has decided this against himself, for from the beginning he has admitted, that the adjudication could only *stand* as a *security*, and argues the question, as to the extent to which that adjudication, as a security, should stand. He even confesses that the termly failures or penalties were too large, and that they ought not to have exceeded a fifth-part of the sum due for interest, and beseeches the Court to restrict it accordingly. It follows that his claim is not *at law* but *in equity*, and from equity he cannot demand a legal penalty. 2. Apart altogether from these admissions, penalties for nonpayment of interest cannot enter an adjudication. General adjudications, like the present, stand precisely on the footing of the old apprisings. By the common law, the creditor had a right to apprise for the penalty, but *that* meant only the penalty annexed to the nonpayment of the debt. As there could be no charge of interest before the Reformation, neither could there be a penalty for not paying interest. Since the Reformation, there is no statute authorizing such an exaction, nor is there a single *dictum* in the law books to give countenance to it. It is owing entirely to the error of conveyancers, that termly failzies are stipulated in personal obligations, which, in modern practice, accompany real securities; and the short of the error is this, while the taking of interest directly was prohibited, the usual mode of securing money in Scotland was by grant of an annual rent, of the nature of a perpetual rent charge out of lands, redeemable by the debtor on payment of the sum borrowed. The creditor could not avowedly demand his principal; his only way of compelling payment indirectly was, by entering on the lands, and apprising them for the annual rent.—When the doctrines of the Canon law had lost their force, it became usual to insert in the grant, a personal obligation by the debtor to pay the annual rent regularly, under penalty for each term's failure. Finally, the mode which prevails at this day was adopted, of the debtor's granting a personal bond or obligation for the sum borrowed, payable at a certain time, with the interest, under

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a penalty; and, in aid of the personal, a real security was granted by the same instrument, and then conveyancers, without attending to the alteration or change of circumstances, kept up the form of annexing penalties to the nonpayment of the interest, while they also annexed their penalty to the nonpayment of the debt in general. 3d, But further, acting upon those principles, and dealing with it as an error, the Court of Session have refused to sustain action for penalties, when they are included in the accumalated sum of apprising and adjudications, and have, in all cases, considered it as a *pluris petitio*, sufficient to destroy the diligence in law, and to restrict it to a security *in equity*. And several decisions support this proposition, Orrock *v.* Morrice, Stair, 29th Nov. 1677; Craig *v.* Park, 15th Nov. 1771, and other cases.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Alex. Wight, Wm. Adam.*
For Respondents, *Ilay Campbell, Ar. Macdonald.*

JOHN STEWART & Co. Merchants, Greenock, *Appellants;*

JOHN DUNLOP & Others, Merchants, Glasgow, *Respondents.*

House of Lords, 8th April 1785.

INSURANCE.—Circumstances in which presumed knowledge and concealment of arrival of news of the capture of the vessel insured, before the insurance was effected, held to vacate the policy.

The appellants, merchants in Greenock, had been trying to effect an insurance on their ship Peggy, and cargo, for her voyage from St. John's, Newfoundland, to St. Lucia, but had not succeeded in doing so at the premium offered, 15 guineas per cent., until the West India mail arrived, which brought accounts that the French fleet had made an attack upon the island of St. Lucia in the month of May preceding, and had taken the island of Tobago, and that Barbadoes was threatened. This news appeared in the newspapers and Lloyd's List, but no accounts reached the appellants.