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ties effeiring, which were in Sir James Nafmith's perfon when the diligence was led.'

Lord Ordinary, *Wefthall*. *Partibus ut fupra*.
Craigie. *Fol. Dic. v. 3. p. 6. Fac. Col. No 142. p. 223.*

*** This cafe was appealed. The following was the judgement of the Houfe of Lords:

April 4. 1785.

'ORDERED and ADJUDGED, That the appeal be difmiffed, and the interlocutors 'complained of, be affirmed.'

Partibus ut fupra.

1794. *March* 7.

The CREDITORS of Neil Macneil, *againft* JAMES SADDLER.

No 35.
An adjudication found to be null, which was led upon a decree for *payment* of the random fum of L. 10,000; although it referved all objections *contra executionem*; no proof of the debt having been produced when the decree was obtained; and the fum really due having turned out to be only L. 800:10:7 4-12ths, currency of St Chriftopher's.

WILLIAM SADDLER, of the ifland of Nevis, merchant, in 1758, entered into copartnerfhip with Neil Macneil. Their trade was carried on in the ifland of St Chriftopher's, under the management of the latter, who, upon the diffolution of the company, in 1761, was entrufted with winding up their affairs.

In 1763, Macneil eloped from St Chriftopher's, carrying with him effects belonging to the company, to a confiderable amount.

Saddler, knowing that Macneil, at this time, had heritable bonds, for L. 6722 fterling, over the eftate of Taynifh, in Scotland, fent a power of attorney to a man of bufinefs in Edinburgh; and, at the fame time, defired him to attach thefe bonds for payment of the large balance which he then imagined, Macneil owed him. Having, however, no accefs to the company-books, which were in Macneil's cuftody, he had no means of afcertaining the amount of his claim againft him. His information to his agent here was, confequently, in very general terms: 'That Macneil, after receiving every fhilling he could, had eloped 'from this ifland, and carried with him L. 7000 or L. 8000, and had taken pro-'tection in the Danifh ifland of St Croix; where he is not only protected, by that 'government, in his perfon, but his effects; by which his creditors will be de-'frauded of their money; amongft whom, I am the moft confiderable fufferer.'

Without receiving any farther information from Saddler, his agent executed an arreftment, *jurifdictionis fundandæ caufa*; and, on the 24th February 1764, raifed a fummons of conftitution againft Macneil, for payment of the random fum of L. 10,000; which, it was ftated, 'would appear to be due to the purfuer, upon 'a juft count and reckoning.'

When the fummons came into Court, appearance was made by the defender's attorney, who denied the libel; and ftated, 'That it was led for a random fum, 'unfupported by evidence.' To which it was *anfwered*, That there were already adjudications led againft the defender; and that, therefore, in order to put the

pursuer *in pari casu* with them, it was necessary that decree should be pronounced, reserving all defences *contra executionem*. Accordingly, in February 1765, a decree was obtained under this reservation.

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Saddler's agent soon after raised a summons of adjudication, narrating the decree of constitution, and the reservation which it contained; and, on the 8th August 1765, he obtained a decree, adjudging Macneil's interest in the estate of Taynish, for *payment* of the accumulated sum of L. 10,724 sterling.

In 1780, this adjudication was produced as an interest for James Saddler, the heir of William, in the ranking of Taynish; but, as the decree of constitution had proceeded without any evidence of the debt, the company books, which had been recovered from Macneil, were transmitted to this country; and a remit having been afterwards made to an accountant, to ascertain the precise balance due by Macneil; the accountant made a report, that no more than L. 800 : 10 : 7 4-12ths, currency of St Christopher's, was due.

The other adjudgers, of Macneil's bonds on the estate of Taynish, contended, That the adjudication was null *in toto*; and

Pleaded, 1*mo*, The decree of constitution, and, of consequence, the adjudication, is fundamentally void, as having been obtained without any proof of the debt; (*See* PROOF.) Neither will the reservation which it contains, of all objections *contra executionem*, support it. The only cases where such reservations have any effect, are those requiring dispatch, where the pursuer shews proof of his libel, *ex facie* legal and sufficient, and the defender states defences which cannot be instantly verified.

2*do*, Supposing it had been competent for Mr Saddler to have adjudged, he mistook the proper form.

As his claim was illiquid and contingent, in place of adjudging for payment on the act of 1672, he ought to have led an adjudication *in security*, the legal of which never expires; President Falconer, No 102. (*See* WHAT SUBJECTS are carried by ADJUDICATION); Forbes, 12th July 1711, Blaw against his Father, (*See* PROVISIONS to Heirs and Children); Fac. Coll. 16th February 1759, Nisbet against Stirling, (*See* ADJUDICATION in SECURITY); 14th November 1781, Brown and Collinson against the other Creditors of Sir Thomas Wallace, (*See* ADJUDICATION in SECURITY.)

3*tio*, The extravagant *pluris petitio* would of itself be fatal to the adjudication, even if it were otherwise unexceptionable. It is led for L. 10,724 sterling; and it turns out, that there is only L. 800 : 10 : 7 4-12ths, currency, due.

In adjudications upon the act 1672, as well as in the old apprisings, the debt, for which the lands are adjudged, is, in law, held to be a price commensurated to their value, for which the lands are sold under reversion; and, as it does not follow, that because the debtor allows them to be adjudged, and sold for a particular sum, he would have done so, if the sum had been less, the consequence must be, that an adjudication ought to be set aside, when the debt turns out to be less than the

No 35. ſum adjudged for. Accordingly, in practice, a *pluris petitio* is always fatal to the diligence, as a proper adjudication. In very favourable caſes, indeed, ſuch as where partial payments have been made without the knowledge of the creditor, or where the debt is found to be leſs than what was ſuppoſed, in conſequence of the ſubſequent deciſion of points of law, it is ſuſtained as a ſecurity for the debt, without the accumulations; but this is converting it into a right of a quite different nature, and may be regarded as one of the ſtrongeſt exertions of the *nobile officium* of the Court. In caſes like the preſent, however, where the *pluris petitio* is conſiderable, and where there is no plea of favour on the part of the creditor, the adjudication is always reduced *in toto;* Fac. Col. 16th December 1760, Creditors of Brown againſt Gordon, (*No.* 30. *h. t.*); 4th February 1784, Apparent Heir of Porteous againſt Sir James Naſmith, (*No.* 34. *h. t.*)

Anſwered, 1*mo*, The debt, for which the adjudication was led, aroſe, not from any clear document by which its amount could be inſtantly verified, but from a fraudulent act on the part of Macneil, which made it impracticable for Saddler to give his attorney, in this country, preciſe information reſpecting the extent of the balance due to him, or to tranſmit any voucher for inſtructing it. And, as other creditors of Macneil were adjudging the fund *in medio*, the year and day muſt neceſſarily have elapſed, before more accurate information could have been got from the Weſt Indies. In this ſituation, the adjudging for a random ſum, reſerving all defences *contra executionem*, was a meaſure juſtified by the neceſſity of the caſe; as otherwiſe, the preference given to adjudications within year and day, would often amount to an abſolute excluſion of juſt creditors reſiding in foreign countries.

2*do*, The adjudication in queſtion was ſubſtantially one in ſecurity; for, as it proceeded on a decree of conſtitution, containing a reſervation of all defences *contra executionem*, it appeared, *ex facie*, to have been obtained for a debt, not yet properly liquidated. The legal, therefore, could never expire; it being thus admitted, that the ſum which the debtor was to pay, in order to redeem it, was to be the ſubject of after diſcuſſion.

3*tio*, When adjudications were ſubſtituted in place of appriſings, although they ſtill bore the form of ſales under redemption, they came in reality to be conſidered merely as ſecurities for debt; and hence the voiding an adjudication *in toto*, on account of a *pluris petitio*, became as unneceſſary as it was rigorous. If led for more than the real debt, nothing can be more ſimple than to reduce it, *quoad exceſſum*, allowing it to ſubſiſt as a ſecurity for what is juſtly due. Accordingly, for a long time paſt, the practice has been merely to reſtrict the adjudication to that ſum, ſtriking off penalties and accumulations; Kilkerran, p. 17. 6th November 1747, Roſs againſt Balnagown and Davidſon; (*No* 27. *h. t.*) 3d December 1751, Creditors of Caſtle Sommerville againſt Lookup, (*No* 28. *h. t.*)

The Lord Ordinary reported the cauſe, on informations.

Obſerved, on the Bench: Where grounds of debt are produced, and there is

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not sufficient time to discuss defences stated against them, decree ought to be pronounced, reserving all objections *contra executionem*. But here the adjudication proceeded on a decree pronounced, without any evidence of the debt. In such a case, the pursuer must take care that his demand be not beyond what is justly due; whereas, here the *pluris petitio* is perhaps the greatest that has ever occurred in this Court. Creditors taking decrees for random sums, with a view to adjudge, should always conclude for less than the real amount of their claim; or, if they wish to take every chance, they should separate the sum clearly due to them from that for which they have only a doubtful claim, and make a distinct conclusion for each.

The Court unanimously 'sustained the objections to William Saddler's adjudication; and found, That, in virtue thereof, James Saddler is not entitled to be 'ranked upon the subject in question.'

Lord Ordinary, *Craig*. For Saddler, *Solicitor-General Blair*, *John Clerk*.
For Macneil's other Creditors, *M. Ross*, *Morthland*. Clerk, *Home*.

Fol. Dic. v. 3. *p.* 6. *Fac. Col. No* 113. *p.* 250.

Davidson.

1796. *February* 4.
ANDREW MACWHINNIE, Common Agent in the Ranking of the Creditors of Alexander Hooks, *against* ALEXANDER BURTON.

No 36.
A *pluris petitio*, proceeding from culpable negligence, found to void an adjudication *in toto*.

ALEXANDER HOOKS became bankrupt in 1782, when his personal estate was sequestrated.

In 1783, Alexander Burton and Nathaniel Agnew paid a debt, as cautioners for him, amounting to L. 342 : 10 : 11.

By receipt, bearing date 20th April 1784, Burton acknowledged his having received L. 82 : 15 : 6 from John Hathorn, factor on Hooks' sequestrated estate, as a dividend on this debt; and, in March 1784, Burton also received L. 20 further to account of it, from Robert Murray, a debtor of Hooks. In May 1789, Mr Agnew granted an assignation of his half of the debt, in favour of Burton, on the narrative that Burton had paid him the amount of it.

Burton, thus in right of the whole debt, in 1790, led an adjudication upon it, over lands belonging to Hooks, without deducting the partial payments of L. 82 : 15 : 6, and L. 20 which he had previously received.

In a ranking and sale of Hooks' heritable property, which was afterwards brought, the common agent contended, That Burton's adjudication should be set aside *in toto*, on account of the *pluris petitio* which it contained, and which he alleged arose in two ways: 1*mo*, From Burton's not deducting the partial payments he had received before its date; and, 2*do*, He stated, that Agnew, previous to the date of his assignation in favour of Burton, had compounded his share of the debt with Hathorn, Burton, and certain other persons, whom Hooks had appoint-