

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, Moribland*.

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.

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: *imo*, From Burton's not deducting the partial payments he had received before its date; and, *2do*, 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-

No 35.

No 36.

A *pluris petitio*, proceeding from culpable negligence, found to void an adjudication *in toto*.

No 36.

ed trustees for that very purpose; and that, in fact, part of the L. 82 : 15 : 6 paid to Burton by Hathorn, was received by him as in full of Agnew's composition; so that in justice, Mr Burton's adjudication should have been led only for his own half of the debt, deducting the partial payments which he had received on his own account.

Mr Burton, in *defence*, stated, *imo*, That owing to Hathorn and him having had other transactions together, it happened, that although credit had been given him by Hathorn for the dividend of L. 82 : 15 : 6, on 20th April 1784, this circumstance did not come to his knowledge till July 1789, when he immediately wrote to his agent at Edinburgh, to deduct that payment from the sum for which he had directed the adjudication to be led; and, that it was owing to the inadvertency of his man of business, that this had not been done. That his receipt for this dividend, although dated in April 1784, was not, in fact, signed by him for eight years after; it having been antedated by Hathorn, from a desire that it should not appear from his vouchers, that any dividends belonging to Hooks' creditors had remained so long in his hands. That the L. 20 paid by Murray was received by Agnew, and not by him; and that its not having been deducted in leading the adjudication, arose from an uncertainty, whether it would be admitted as a good payment by Hooks' other creditors, it having been made after his bankruptcy. *2do*, Mr Burton denied that Mr Agnew had accepted a composition for his half of the debt; and although pretty strong circumstances were brought forward by the common agent in proof of his allegation, the Court did not seem to consider it as fully established.

These explanations, it was contended by Mr Burton, evinced, that he had never any intention of concealing the partial payments which he had received; and that therefore, agreeably to the present practice of the Court, the adjudication should at least be sustained, as a security for the principal sum truly due, interest and necessary expences accumulated, as at the date of the decree; Kilkerran, No 17. ADJUDICATION, (*No 27. b. t.*); 13th January 1759, Creditors of Dunjop, (*No 29. b. t.*); 7th March 1769, Rutherford, (*No 31. b. t.*)

THE LORD ORDINARY, ' in respect the said Alexander Burton has not made it appear, that the *pluris petitio* in his adjudication was owing to an innocent mistake, therefore, sustained the said objection, as sufficient to reduce his adjudication *in totum*, leaving him to rank as a personal creditor for what may be found due to him.

On advising a reclaiming petition for Burton, with answers, &c. it was

*Observed on the Bench*: A general adjudication is no doubt more of the nature of a *pignus pratorium*, than of a sale; yet, as a decree of expiry of the legal, although in absence, may convert it into a right of property, it must not be laid down as a general rule, that no *pluris petitio* shall have the effect of annulling an adjudication. In the present instance, the conduct of Mr Burton was slovenly, and even culpable.

'The Court' adhered,' and found Mr Burton liable in the expence of the answers, &c.

No 36.

Lord Ordinary, *Swinton*.  
Clerk, *Menzies*.

For Common Agent, *D. Cathcart*.Alt. *Hay*.*Fac. Col. No 200. p. 480.**Davidson.*

1722. December 20. HENDERSON against GRAHAM of Kilmardinny.

AN adjudication being led upon several grounds of debt, it was *objected* against some of the bonds, That they were null, upon the head of usury, in regard annualrent was pactioned, from terms prior to the dates of the bonds, and yet no evidence given, that the debtor received the money at these terms; on the contrary, the bonds bearing the receipts of the money indefinitely, the present time only could be understood.—THE LORDS found the objection against the bonds, not sufficient to annul them, as usurious; but sustained it, to open the legal of the adjudication, and cut off the penalties and accumulations of the said bonds; and sustained the adjudications for the principal sums, penalties, and accumulations of all the bonds whereon the adjudication proceeded, except the bonds quarrelled.

No 37.  
Usurious itipulation.

An adjudication restricted, as to bonds, on which more interest than appeared to be due, was charged; and yet sustained in full effect, as to other bonds.

\* \* \* Here the case was cited, determined a year or two before, betwixt Halyburton of Newmains, and the Lady Monboddo; where an adjudication having been led upon a bond, without deducing the retention, betwixt Martinmas 1672 and 1673, which was a trifle, and by oversight; the Lords did reduce it to a security, for principal, annualrents, and necessary expences, not only as to that debt, but as to several others, against which no exception could be made.

*Fol. Dic. v. 1. p. 9.*

1724. June 12.

THE CREDITORS of RODERICK FORBES of BRUX, against Sir JAMES GORDON of Park, and JAMES ERSKINE, brother to Pittodrie.

IN the ranking of the creditors of BRUX, it was *objected* to the adjudications produced by Sir James and Mr Erskine, *imo*, That they were led for sums which were not in their persons, at the time when they charged their debtor's representative to enter heir in general to him; and therefore, as to such sums, they were void. *2do*, That the charter from the King, under the Great Seal, upon Mr Erskine's adjudication, was void, as flowing *a non habente potestatem*, in respect that the lands held of the late Earl of Mar; and on the 18th June 1718, at which

No 38.  
An adjudication annulled, because the sums were not in the adjudger's person, at the time of charging the debtor's represen-