

No 29. Agnes and Margaret, both as being her children, and as representing their father ; and if her intromission were not to impute, the burden of her aliment would be thrown upon the other creditors. But further, as her two daughters lived in family with her, the greatest part of the rents must have been applied to their aliment and education : And though they were then minors, and their titles not made up ; yet their possession, as apparent heirs, must have the effect to extinguish the debt, at least to the extent of the annualrents of the adjudication ; and the mother must be considered as having acted as pro-tutor for them.

From the time Samuel Auchinleck entered to the possession, there can be no doubt, that the rents must be imputed in extinction of the adjudication. If he had even paid the rent to his mother-in-law, the widow of John, it would not alter the case, as his wife had the right to these rents in preference to her mother ; and therefore he could not plead upon such undue payment.

' THE LORDS found the rents, during the life of Robert Auchinleck, impute ; also those during the life of John ; also the intromissions of the widow of Robert, to the extent of the third of the annualrent-right, of which she had a terce : But found, That the intromissions of the widow of John do not apply.' (See EXTINCTION of Apprising and Adjudication.)

For the Creditors, *Ferguson*.

Fol. Dic. v. 3. p. 4. Fac. Col. No 159. p. 282.

Johnston,
(now Sir Wm Pultney.)

1760. December 16.

PERSONAL CREDITORS OF BROWN of Cairnton, *against* GORDON.

No 30.
An adjudication annulled *in totum*, on account of *pluris petitio* ; in a competition with personal creditors.

In the ranking of the creditors of Cairnton, the following interests were produced : *1mo*, An adjudication led by Gordon. *2do*, A number of personal creditors gave in their claim, none of them constituted by adjudication.

Objected for the personal creditors, to Gordon's adjudication : Mr Gordon has adjudged for L. 463 Scots more than is due ; and consequently the adjudication must be null and void. In some instances, indeed, notwithstanding a *pluris petitio*, adjudications have been sustained as security for the sums justly due. But this has only been found in the following cases : *1mo*, Where the question has occurred between the creditor and the debtor himself ; because he ought to have appeared, and objected to the adjudication. *2do*, Where the partial payments, for which credit has not been given, were not made to the adjudger himself, but to his predecessor, and of which he might have been ignorant. *3tio*, Where, if the adjudication be annulled, the effect would be, to give the other creditors a preference, and to cut the adjudger entirely out of his payment. The present case is very different. There is no excuse for the *pluris petitio* ; it consists almost entirely in omitting to give credit for the contents of three receipts, granted by

Mr Gordon, the adjudger, for money paid to himself. The objection is insisted upon, not by the debtor himself, but by his creditors; not with a view to forfeit Mr Gordon entirely of his debt, but to prevent him from excluding them; and the only effect of annulling the adjudication will be, to bring in the personal creditors *pari passu* with the adjudger.

No 30.

Answered for Gordon: That though it may be just, that he should be deprived of the penalties and accumulations of his adjudication, on account of the *pluris petitio*, it would be unjust to forfeit him entirely of the preference he had established to himself by his diligence, because he had adjudged for a little more than was due, without any design. Of old, indeed, the practice was to annul adjudications for the smallest *pluris petitio*; but of late, that rigour has been softened, and adjudications, in such cases, are restricted to securities. It is true, that if the adjudication is annulled, the adjudger will not lose his whole debt by the *pari passu* preference; but it is certain that he will lose a considerable part of it.

There is no evidence, that the present overcharge was made by design, or by fraud. Fraud is never to be presumed; and accordingly, in several cases, adjudications have been sustained as securities, though the *pluris petitio* was greater than in the present case; because there was no evidence of fraud; 22d December 1722, Henderson against Graham, (No 37. *b. t.*); 3d July 1739, Creditors of Cunningham against Montgomery. (No 23. *b. t.*)

There could not be a stronger *pluris petitio*, than what was usual in general adjudications, led soon after the act 1672; by which the creditors adjudged, not only for principal sum, annual rent, and penalty, but also for a fifth part more. In such cases, however, the adjudications were only in use to be restricted to securities; till, by the act of federumnt, 26th February 1684, the Court declared, that they would annul them *in totum*.

‘THE LORDS reduced the decret of adjudication *in totum*.’

A&C. Scrymgeour.

Alt. Burnet.

Clerk, Justice.

Fol. Dic. v. 3. p. 4. Fac. Col. No 259. p. 480.

Patrick Murray.

1769. March 7.

ROBERT RUTHERFOORD *against* WILLIAM and THOMAS BELLS, Children of WILLIAM BELL, and ELIZABETH and JOHN MURRAYS, his Grand-Children.

WILLIAM BELL, wine-cooper in Leith, was creditor to Thomas Rutherford, baker in Edinburgh, his father-in-law, in L. 314 : 15 : 10d. Sterling.

He conveyed the debt to Elizabeth Rutherford his spouse, in liferent, and as trustee for behoof their children, with a power of division, as she should think fit.

In leading an adjudication *cognitionis causa*, against Robert Rutherford, heir of Thomas, Elizabeth Rutherford neglected to deduct the rents of certain te-

No 31.

An adjudication, sustained as a security, notwithstanding of a *pluris petitio*, which admitted of some excuse.