

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 inexcusable *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 *peffima 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 allegiance; 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. b. 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 behaved either to subsist or to fall *in totum*; because, where there was a *pluris petitio*, there was no ascertaining, without a new jury, how

much, or what part of the lands apprifed, fhould be retained by the apprifet, to fatisfy what might be truly due; and therefore, it was neceffary that the lands fhould be of new apprifed. Yet, as in adjudications there is no value put upon the lands, but great eftates are daily adjudged for trifling fums, there was nothing in law, or the nature of the thing, why, notwithstanding of a *pluris petitio*, the adjudication fhould not fubfift for what is truly due; as well as an infeftment of annualrent, granted for two debts, would fubfift, for the one debt truly due, although it fhould afterwards appear, that the other debt had been paid, before the annualrent-right was granted.

And, upon this reasoning, the adjudication was in this cafe fufained, as a fecurity for the L. 1284, contained in the fitted account; though hardly can a cafe occur, where lefs can be faid to excufe the *pluris petitio*.

*Fol. Dic. v. 3. p. 5. Kilkerran, (ADJUDICATION.) No 17. p. 17.*

1751. December 3.

CREDITORS OF CASTLE-SOMERVILLE, *against* Mr JOHN LOOKUP.

DAVID FRENCH of Frenchland, borrowed 2000 merks; for which he, together with James Somerville of Caftle-Somerville, and Robert Thomson, Merchant in Glasgow, granted bond, 7th February 1719.

Robert Thomson paid, and obtained affignation, 15th February 1722, in thefe terms: 'That he might obtain payment and relief of the hail fums from the faid David French; and of the half from the faid James Somerville;' whereon he adjudged, 1723, David French's eftate, for the accumulate fum of 1896 pounds: This he difponed to Mr John Lookup, minifter of Calder, who recovered 697 pounds out of the principal debtor's eftate, at Whitfunday 1731.

Mr John Lookup, 4th December 1734, adjudged the eftate of Caftle-Somerville, for the half of the fums in the bond; with intereft from the date, and penalty effeiring thereto.

In the ranking of the creditors of Caftle-Somerville, it was *objected* to this adjudication, That it was led for more than was due by James Somerville, co-cautioner with Robert Thomson, feeing Mr Lookup had received part of the debt out of the principal debtor's eftate; which ought to be applied equally to the relief of the two cautioners.

*Pleaded* for Mr Lookup, Being affigned to the bond, he was in place of the original creditor, and entitled to adjudge for the whole debt; and, though againft his co-cautioner, he might be obliged in equity to reftrikt his demand to the half; yet this ought not to annul his diligence, which in law he was entitled to lead.

*2do*, Somerville not having adjudged French's eftate, can have no advantage from what was drawn out thereof, in virtue of the accumulation made by Thomson's diligence; and therefore, the intereft received by Mr Lookup, on the fum in his adjudication, cannot be ftated, in fo far as it rofe on the accumulation.

No 27.

No 28.

A cautioner paid, for the principal debtor. He obtained partial relief out of his eftate. He adjudged the co-cautioner's eftate, for the half of the original debt, not the half of the balance. The adjudication reftrikted.