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. *h. t.*); 3d July 1739, Creditors of Cunningham againſt Montgomery. (No 23. *h. t.*)

There could not be a ſtronger *pluris petito*, than what was uſual in general adjudications, led ſoon after the act 1672; by which the creditors adjudged, not only for principal ſum, annualrent, 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 ſederumnt, 26th February 1684, the Court declared, that they would annul them *in totum*.

'THE LORDS reduced the decreet of adjudication *in totum*.'

Act. *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.

No 31.
An adjudication, ſuſtained as a ſecurity, notwithſtanding of a *pluris petitio*, which admitted of ſome excuſe.

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

He conveyed the debt to Elizabeth Rutherfoord 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 Rutherfoord, heir of Thomas, Elizabeth Rutherfoord neglected to deduct the rents of certain te-

No 31. nements, which ſhe had poſſeſſed for ſome time, in virtue of an heritable bond of corroboration, granted in ſecurity of the debt.

Robert Rutherfoord inſiſted in a reduction upon this ground, among others, that there was a manifeſt *pluris petitio*, ſufficient to ſet aſide the adjudication altogether.

Pleaded for the defenders, There was properly ſpeaking no *pluris petitio* in this caſe, for the payments of intereſt by intromiſſion with the rents, were not made, till after the date of the ſummons; and, the whole objection amounted to this, that in taking decree, an old paralytic woman had neglected to inſtruct her man of buſineſs, to deduct a ſmall ſum which ſhe had received. In ſuch circumſtances, to reduce the adjudication *in totum*, or to inflict any further puniſhment, than ſtriking off the penalties, or perhaps the accumulations likewiſe, was contrary to the practice of the Court, even, during a period, when the rigour of law, and ſtrict adherence to form, were carried to a length inconſiſtent with the more enlarged ideas of the preſent age.

In the caſe, Balfour *againſt* Wilkieſon, (No 18. *h. t.*), where a queſtion occurred between the debtor and an aſſignee, notwithſtanding of a *pluris petitio*, ariſing from payments made to the cedent, the adjudication was ſuſtained for the principal ſum and annualrents, accumulated at the date of the adjudication, and annualrents thereof, and for neceſſary charges; becauſe, though in ſtrict law, the objection was ſufficient to ſtrike off all accumulations; yet, where the queſtion was with the debtor, and not with competing creditors, the practice had, for a long time, run the other way.

This practice is founded upon principles. Juſtice is ſatisfied, if the wrong be redreſſed, and a much greater wrong would enſue, were the effect of an undeſigned error, in a trifling ſum, to ſet aſide the diligence, and forfeit the debt. Indeed, whatever advantage might be taken, of an error in point of form, in favour of competing creditors, the ſame indulgence is not due to the debtor himſelf. If the penalties be ſtruck off, or in ſome caſes the accumulations alſo, he has gained enough; but a caſe can hardly be imagined, where it would be juſt to go a greater length.

Anſwered for the purſuer, In certain favourable caſes a *pluris petitio* has not been ſuſtained to its full effect; as where an adjudication had been led for a trifle too much, and where the miſtake had been occaſioned by a payment at a great diſtance of time, which did not conſiſt with the knowledge of the purſuer, an aſſignee perhaps, or a truſtee. But the caſe is very different here, where decree has been taken for the whole ſum originally due, without giving credit for conſiderable recent payments, made to the purſuer herſelf, and vouched by her diſcharge. Neither was this a mere overſight. In the courſe of the action, the purſuer repeatedly and poſitively denied, that any partial payment whatever, had been made, nor did ſhe depart from that denial, till driven from it, by production of her own diſcharge.

No 31.

Lord Bankton, v. 2. lib. 3. tit. 2. ¶ 75., says, 'If the adjudication is essentially defective, or led for more than was due by the party, to whom the partial payment was made, it will be wholly annulled.' And his opinion is supported by an after judgment, in the question between Rose of Kilravock, and Rose of Clava, where an adjudication was *funditus* reduced upon a very inconsiderable *pluris petitio*.

'THE LORDS sustained the adjudication as a security for principal sum, annualrents, and necessary expences, accumulated at the date of the adjudication.'

Act. *Nairne.* Alt. *Swinton, jun.* Clerk, *Ross.*
Geo. Ferguson. *Fol. Dic. v. 3. p. 5.* *Fac. Col. No 94. p. 173.*
(Lord Hermand.)

1775. *July* 27. WILLIAM HART *against* JOHN and JAMES NASMYTHS.

No 32.
It is a *pluris petitio* to adjudge for termly failzies.

HART upon the title of an adjudication, led at his instance in 1774, insisted in an action of mails and duties, before the Court of Session, against the tenants in possession of the tenement adjudged. In this action, compearance was made for John and James Nasmyths, and an interest was produced for them, viz. an heritable bond over the tenement in question, for L. 480 Scots, as far back as the 1731, to which the Nasmyths had acquired right; a decree *cognitionis causa*, and an adjudication, at their instance, both before the sheriff of Hamilton in 1742; a charter of adjudication from the superior, and infeftment thereon; and lastly, a decree of expiration of the legal, obtained in absence in 1756. Upon these titles, the Nasmyths contended, that they had a preferable and absolute right to the subject; for, that the common debtor was totally denuded, by an expired legal, long before the pursuer obtained his adjudication; and consequently, that nothing could be carried by his adjudication.

Objected for the pursuer: That the foresaid adjudication, founded upon by his competitors, was null and void; at least, ought to be restricted to a simple security; because it was led for more than was justly due, and which would appear from the following state of the debt: The principal sum in the bond is L. 480; interest from Martinmas 1731, to 18th August 1741, the date of the decree of adjudication, L. 234; penalty L. 96; total L. 810. But in place of this, which ought to have been the accumulate sum, in the decree of adjudication, it appears to have been taken for the accumulate sum of L. 905.

The *answer* made to this objection was, That the difference was composed of the termly failzies, which amount to about L. 100 Scots.

'THE LORDS sustained the objection to the decree of adjudication in question upon the *pluris petitio*, in adjudging for the termly failzies, as well as the penalty in the bond. And a reclaiming petition was afterwards refused without answers.'

Act. *M'Queen.* Alt. *Northland.* Clerk, *Campbell.*
Fol. Dic. v. 3. p. 5. *Wallace, No 187. p. 112.*