

No 28.

*3tio*, Suppose Mr Lookup, in virtue of his adjudication on Frenchland's estate, had drawn out thereof any sum, short of the half of the debt, he might have adjudged on Castle-Somerville for the other half, to secure himself to the extent of the relief Somerville should be found owing him.

*Pleaded* for the other creditors: Mr Lookup had, at leading his adjudication, received payment of part of the debt, out of the principal debtor's estate; he ought therefore to have deducted that out of the gross debt, and craved relief against his co-cautioner only for half of the balance. The interest of the accumulate sum, on the adjudication of Frenchland, comprehended interest of the original bond; and yet, in his adjudication of Castle-Somerville, he states the whole interest thereon as due. He must account for the full sum he received; stating it against the sums due on the original bond, whether or not it arose by accumulations on Frenchland; for co-cautioners must act *bona fide*, and not take advantages against each other.

THE LORDS found, That the adjudication deduced by Mr John Lookup against James Somerville, was deduced for more than was due to him; and found, That it ought to be restricted to, and subsist as a security for, the principal sum and annualrents only, due to the said Mr John Lookup.\*—(See CAUTIONER.—SOLIDUM, *et pro rata*.)

Muckle, Reporter.

Act. H. Home.

Alt. A. Macdowal.

Clerk, Justice.

Fol. Dic. v. 3. p. 5. D. Falconer, v. 2. p. 293.

1759. January 13.

CREDITORS of ALISON of Dunjop, against AGNES and MARGARET AUCHINLECKS.

No 29.  
No nullity in an adjudication, that the accumulate sum had been left blank in the decree.

IT was *objected* by the competing creditors of Dunjop, against an adjudication produced for Agnes and Margaret Auchinlecks, which had been led by Robert Auchinleck, their grandfather, That the accumulate sum was blank in the decree of adjudication.

THE LORDS, upon advising petition and answers, found, That the accumulate sum not being filled up, is no nullity in the adjudication.'

Restricted, because credit had not been given, for rents re-

It was further *objected*, That allowance had not been given for certain rents possessed by Robert, the adjudger, before the date of the adjudication: And the fact been clearly proved,

\* Lord Kames, in his second Volume of Remarkable Decisions, notices the same case, thus:— In a ranking of the creditors of Castle-Somerville, an objection was stated against the interest produced for Mr John Lookup, that he had knowingly adjudged for more than was due; and though here was a plain *mala fide pluris petitio*, yet, out of regard to equity, the Court sustained the adjudication, as a security for the principal and interest, without expences or accumulations: After which, there can scarce be any prospect of cutting down an adjudication *in totum* for a *pluris petitio*.  
*Remarkable Decisions, No 127. p. 271.*

' THE LORDS found, That the adjudication can only subsist as a security for the principal sum, annualrents, and necessary expences, accumulated at the date of the adjudication, and the interest thereafter.'

Robert, the adjudger, continued in possession of the rents after the adjudication, till his death in the year 1718. John, his son, then entered to the possession of two-thirds, and Robert's widow of one-third, during her life; and, after John's death, his widow continued in possession of the lands, and kept her two daughters, Agnes and Margaret, in family with her. Thereafter Agnes, one of the daughters, married Samuel Auchinleck; and he entered to the possession, first of a part of the lands, and soon after of the whole, and continued in possession till Whitsunday 1755.

The competing creditors insisted against Agnes and Margaret, who now claimed upon the adjudication, That the several possessions of John the apparent heir, of Robert the father's widow, and of John's widow, and of John's daughters, before they made up titles to the adjudication, must all be imputed in extinction of the sums contained in the adjudication.

*Answered:* John had no right to the adjudication during his apperency; much less had his widow, or the widow of his father, any pretence of right; and his daughters never possessed but under his widow, from whom they obtained the possession.

*Replied:* John, as apparent heir, had an undoubted right to the annualrents of the adjudication; and therefore the rents received by him must be imputed in extinction of these; and, as the competitors cannot make up a title to the adjudication, without passing by John, who was above three years in possession, they must be answerable for the whole of his intromissions.

As to Robert's widow, her right stood thus: Robert's adjudication, proceeded in part upon an heritable bond, upon which he stood infest; and his widow was by law entitled to a terce of the annualrent of that bond; and therefore her intromission must, to that extent, impute in payment of the adjudication. *2do,* If she was entitled to any further liferent-provision from her husband, her possession must impute to the extent of her full provision; because the heirs of her husband, now claiming upon the adjudication, have no interest to object to the imputation of a sum, which she uplifted out of the only fund she had access to, for her payment of a debt, which they and their father John were bound to make good to her, as representing Robert. *3tio,* Agnes and Margaret had intromitted with their grand-mother's effects; and therefore cannot dispute allowance of the intromissions she had with the rents of this subject.

As to John's widow, though she was not entitled to a terce, yet any liferent-provision, made to her by her husband, would be sufficient to make her intromissions impute; because John's daughters, who represent him, by passing by him, and serving to their grand-father, cannot object to her having recovered her alimentary provision, by continuing to possess the lands which her husband had possessed. Nay, supposing no liferent-provision, she was entitled to an aliment from

No 29.  
ceived by the  
adjudger, be-  
fore the date  
of the de-  
cree.

How far pay-  
ments to the  
relict, and the  
apparent heir,  
ought to be  
sustained?

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