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houses of such of them as removed; and refused to sustain the arrears of rent as an article of discharge, in respect he did not instruct his having done diligence against the tenants.' And as to the period from which he is to account, 'found, That he is to be accountable for the year's rent at the next term after the whole year's rent was due; and therefore must account for the year's rent due at the Whitsunday, at the Martinmas following, and so on in a progressive way; and the LORDS 'adhered.'

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N. B. Although the entering to possess is taken into the interlocutor, as on a decree of mails and duties, that was, because so the case happened in fact to be. But the case will be the same, where the adjudger takes up the total possession of the subject adjudged, though without a decree of mails and duties. Nor is it necessary in order to make such adjudger accountable by a rental, to say that he has debarred another; it being enough that he has debarred the debtor. True, if the debtor has had a promiscuous possession, no other creditor can complain of that, unless he has been debarred; but if the common debtor has not had a promiscuous possession, the adjudger in the total possession must account by a rental, even to the debtor himself.

*Fol. Dic. v. 3. p. 16. Kilkerran, No 19. p. 19.*

1794. November 25.

DAVID LANDALE *against* JOHN CARMICHAEL, and Others.

JOHN GIBSON of Durie, in 1765, adjudged the lands of Little Balcurvie from the predecessor of David Landale.

The summons of adjudication set out with narrating, *seriatim*, three separate grounds of debt, and concluded, that the lands should be adjudged for the same, as they should be *jointly* or *separately* accumulated. No appearance being made for the debtor, decree was pronounced in terms of the libel. In the grand decerniture of the extracted decree, as well as in the abbreviate of the adjudication, the debts were separately accumulated.

The adjudger immediately entered into possession, and, in 1776, obtained, in absence, a decree of declarator of expiry of the legal. No account of his intromissions was then produced.

In 1791, David Landale, in right of the reverfer, brought a reduction and declarator, in order to set aside the decrees of adjudication and of expiry of the legal, against John Carmichael, the adjudger's representative, and James Christie, who had by that time purchased the adjudged lands.

The reasons of reduction were, *imo*, That the debts were extinguished by intromissions within the legal. *2do*, That there was a *pluris petitio* on two of the

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It is essential to an *articulate* adjudication, that the debts should be separately accumulated by the act of the judge. In this case, although the debts were separated by the extractor in the grand decerniture, a *pluris petitio* in one of the articles, occasioned the legal to be opened up, for an accounting.

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The defenders denied that the debts were extinguished by intromissions within the legal. They admitted that there was an overcharge on one of the debts, and that if this debt had been the only one contained in the summons of adjudication, this circumstance must have prevented the legal from expiring, and entitled the reverser to be restored against the decree of declarator; but they maintained, that the adjudication in question was articulate, and that therefore it was sufficient to support the decree of expiry that any one of the debts was accurately calculated in the summons; and farther

*Pleaded:* The adjudication in the present case, proceeds upon three distinct grounds of debt, each of which might have been made the subject of a separate adjudication. The debts are narrated *seriatim* in the summons, which concludes, that the lands shall be adjudged for them, as they shall be jointly or separately accumulated. The interlocutor of the Lord Ordinary was therefore applicable to either conclusion, and warranted the separate accumulation in the grand decerniture and abbreviate. Indeed, the latter is sanctioned by the subscription of the Lord Ordinary.

The adjudication being therefore articulate, an overcharge upon one of the debts can no more prevent the property of the estate from being carried off on account of the rest, than if a separate adjudication had been led for each, and one of them only had been defective; 28th July 1789, Lord Camelford's Trustees against Maxwell\*.

If it were competent to adjudge against different debtors in the same summons, an overcharge against one of them, could not hurt the diligence against the rest. The same principle must be conclusive against the pursuer in this case, where there was only one debtor indeed; but where the debts were separately narrated, accumulated and adjudged for, and might be separately conveyed.

*Answered:* To make an adjudication articulate, it is not sufficient that the debts be narrated *seriatim* in the summons; there must also be an interlocutor of the Court, accumulating them separately. This, however, was not the case, where the summons contained an alternative conclusion, and the judge decerned simply in terms of the libel, so that the accumulating the debts separately in the grand decerniture and abbreviate was merely the operation of the extractor.

Farther, supposing the adjudication had been properly articulate, the legislature makes no distinction betwixt such and other adjudications. General adjudications, when defective in any particular, have in no instance been supported, farther than as a security; Stair, b. 3. tit. 2. § 30.; Bankton, b. 3. tit. 2. § 4.

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\* The case which immediately follows.

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para. 59.; Erskine, b. 2. tit. 12. § 35.; Fol. Dict. vol. 1. p. 7.—9.; 20th July 1678, Morice against Orrock, Stair, v. 2. p. 637. See JURISDICTION; Harc. p. 68. *voce* Comprising, March 1683, Baillie against Gairner, (p. 101. v. 1. of this Dictionary); Kilk. Adjudication, 1st December 1738, Creditors of Catrine against Baird, (p. 107. v. 1. of this Dictionary); 6th November 1739, Montgomery against the Creditors of Cunninghame, (p. 109. v. 1. of this Dictionary); 16th December 1760, Creditors of Brown against Gordon, (p. 116. v. 1. of this Dictionary); 28th November 1783, Heir of Porteous against Nasmith, (p. 120. v. 1. of this Dictionary.)

The opposite doctrine would be adverse to the object of the act 1672, c. 19. which was to prevent estates from being carried off at an undervalue, as it would be an easy matter for the creditor to split his debt into a number of distinct accumulated sums, in which case there would be little chance that one of them at least should not be accurately calculated in the adjudication. The doctrine of the defenders would likewise involve this singular consequence, that where a valuable estate was adjudged in the same summons for two separate debts, the one of them trifling, and the other considerable, and there was a *pluris petitio* on the latter, the property of the estate might be carried away for the former, while a personal claim for the large debt would still remain against the debtor.

THE LORD ORDINARY reported the cause on informations.

The Court, by the narrowest majority, (17th May 1793) repelled the reasons of reduction.

Upon advising a reclaiming petition, with answers, replies and duplies, a hearing in presence was appointed; after which the LORDS, (7th March 1794) before answer, ordered memorials on the point, 'how far the alleged *pluris petitio* on 'one or two of the articles adjudged for, has the effect to open the decret of 'declarator?'

Upon advising the memorials, the Court, with only one dissenting voice, were of opinion, That the adjudication in question was not articulate, and that therefore parties, in consequence of the overcharge, must enter into a count and reckoning, in the same manner as if no process of declarator had been brought. It is essential to an articulate adjudication, (it was observed) that the debts should be separately accumulated by the act of the judge. As in the present case, there was an alternative conclusion in the libel, and as the pursuer did not make his election at the bar, the separate accumulation which afterwards took place is to be considered merely as the act of the extractor, and cannot affect the question.

The Court had therefore no occasion to determine what would have been the effect of the adjudication, if it had been articulate; at the same time, it did not appear quite clear, that even in that case the judgment would have been different. On the one hand, it was observed, that in articulate adjudications, a *pluris petitio* on one article no more affects the rest, than if a separate summons

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had been brought for it. On the other, a doubt was expressed, how far there was any difference between articulate and other adjudications, at least in questions concerning the expiry of the legal.

THE LORDS “ found, That the adjudication in question is not an articulate adjudication; and proceeds on a *pluris petitio*; therefore the LORDS repelled the defence, founded on the decret of expiry of the legal: Found, That said adjudication can only be sustained as a security for the principal sums truly due, and interest thereon: Found, That it is unnecessary at present to determine any other points of law in the cause;” and remitted to the Lord Ordinary to proceed accordingly.

Lord Ordinary, *Monboddoo*.A&S. Solicitor-General Blair, Geo. Fergusson, M<sup>c</sup>Cormick, Fletcher.

Alt. Dean of Faculty Erskine, Tait.

Clerk, Sinclair.

*Douglas*.*Fol. Dic. v. 3. p. 16. Fac. Col. No 132. p. 299.*

\* \* IN placing this case, the Editor trusted to the arrangement of the Folio Dictionary, till too late for inserting it under the division to which it more properly belongs, viz. ‘ Of the DEBT which is the foundation of the DILIGENCE.’— But the *Index materiaram*, which points out the contents of every case, renders such a circumstance of the less importance.

In such a case, those whose department it is to prepare summonses, must be desirous to know the precise terms of the libel.

The libel of adjudication, after narrating the debts *seriatim*, as contained in the decree of constitution, proceeds thus: ‘ And albeit it be of verity, that the said sums of money are all yet truly resting owing unpaid, &c.; wherefore necessary it is for the pursuer, that conform to the acts of Parliament made anent adjudications, such part of the lands and others under-written, to which the said Thomas Landale might have made up titles, as heir to his said father, or others his predecessors, viz. All and hail, &c. (here the lands are described.) And then the summons contains the usual alternative of a general adjudication: ‘ Or otherwise, all and sundry the lands above-mentioned, with all right, title, &c. ought and should be adjudged, decerned, and declared, by decret foresaid, to pertain and belong to the said pursuer, and his forefairs, heritably, but redeemable, conform to act of Parliament, for, and in payment and satisfaction of the foresaid principal sums and bygone annualrents thereof, with the penalty contained in the said decret arbitral, incurred through failzie, together with the expences contained in the decret above-mentioned, as the same shall extend to, and be jointly or severally accumulated at the date of the decret, to follow on the said summons.’

The words of the sentence of the judge, are ‘ Adjudges, decerns, and declares in absence, conform to the conclusions of the libel.’

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The following are the terms of the grand decerniture: ' The Lords of Council and Session forefaid, have adjudged, decerned, and declared, and hereby adjudge, decern, and declare, all and fundry the lands and others above-mentioned, with all right and title competent to the faid Thomas Landale, &c. to pertain and belong to the faid John Gibson purfuer, his heirs and assignees heritably, but redeemable always, conform to the act of Parliament, in payment and satisfaction of the fums of money, principal, annualrents, liquidated penalty, and expences above and under-written.' Then the debts are *feriatim* mentioned, and *feriatim* and *separatim* accumulated.

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It may be proper to compare the above libel, sentence, and decerniture, with those in the case of Lord Camelford's Trustees against Major Maxwell of Dalwinton, referred to above, where the decision was different. That case, not till now reported, follows.

1789. July 28.

Lord Camelford's TRUSTEES *against* MAXWELL of Dalwinton.

LADY CAMELFORD'S portion of L. 40,000, was vested in trustees, who had power to lend the money on mortgage.

For L. 11,000 of this money, Hugh Maxwell, as commissioner for Major William Maxwell, his brother, granted an heritable bond over the estate of Dalwinton.

L. 3000 of the principal sum having been paid, upon assignation to the bond to that extent, an adjudication was led for L. 8000, the balance of principal sum, with interest and penalty, libelling in the following terms: ' There now only remains due to the faid John Sargent and Henry Dagge, (the trustees) in virtue of the faid heritable bond, a principal sum of L. 8000, with the interest of the whole L. 11,000, from the date of the faid heritable bond, to the date of the faid assignation; deducting only L. 2112:15:4, paid at different times, to account of faid interest; and whole interest of the faid balance of L. 8000, from and after the date of the faid assignation, during the not-payment: And albeit the forefaid principal sum of L. 8000, and annualrents, be yet resting and owing, and unpaid; and that the faid John Sargent and Henry Dagge, have oft and divers times, desired and required the faid Major William Maxwell, to make payment to them of the same; yet he not only refuses so to do; but also will not secure them thereanent; wherefore, &c. such parts and portions of the lands, and others, after-specified, pertaining, &c. ought and should be decerned and declared, to pertain and belong to the faid John Sargent and Henry Dagge, their heirs and assignees, as will be worth and will satisfy the faid John Sargent and Henry Dagge, of the fums of money, principal and interest, before specified; and a fifth part more, in respect they will thereby want the use

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What an articulate adjudication.

The effect of *pluris petitio*.