

(EXTINCTION.)

No 17.

stances of *pluris petitio*, entitles the petitioner not only to have deduction from the accumulate sum of interest, but also to cut off the interest claimed upon the balance of that accumulate sum from the date of the decret of adjudication, down to the term from which the price of the estate now sold bears interest, and refused the petition *quoad ultra*; and remitted to the Lord Ordinary to proceed accordingly.

It appears that in this case, the separation of the articles in the decree, was the operation of the extractor only, not the act of the judge; in the same manner as in the case of Landale against Carmichael. But the distinction had not at that time been thought of.

Almost all the cases recorded in this Dictionary relative to *pluris petitio*, under the division 'Of the DEBT which is the FOUNDATION of DILIGENCE,' were quoted in the argument.

Major Maxwell had likewise raised an action of reduction of the bond, on the head of usury; because one of Lord Camelford's trustees, viz. Dagge an attorney, had taken a large premium for agreeing to the loan; but the Court held, that Lord Camelford not having been himself accessory, could not be affected by this illegal act of his trustee. (See USURY.)

Lord Ordinary, *Alva*.

For the Trustees, *Blair, Abercromby, Wolfe Murray*.

For Major Maxwell, *Wight, H. Erskine, Dalzell*.

Geo. Robertson, W. S. Agent.

John Syme, W. S. Agent.

* * The following case likewise regards the effect of *pluris petitio*:

1797. June 9.

The COMMON AGENT in the Ranking and Sale of John Mackinnell's property,
against THOMAS GOLDIE.

No 18.

An adjudication led on a decree for a random sum, set aside on account of a *pluris petitio*.

JOHN MACKINNELL was the managing partner, and kept the books of Carlisle, Mackinnell, and Company. The concern having been unsuccessful, it was dissolved in 1782; but no settlement then took place with Mackinnell, and he died a few years after, leaving both his own affairs, and those of the Company, in disorder.

At his death, he was considerably indebted to the Company; but from the irregular manner in which he had kept the books, it would have required a tedious investigation to have ascertained the amount.

His other creditors having immediately proceeded to adjudge his heritable property, George Macmurdo, the surviving partner of the Company, brought an action of constitution against his representatives, for the random sum of L. 1500, as the amount of the debt which he owed the Company, with interest from the

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date of the decree, which was obtained in 1789; and afterwards Macmurdo led a general adjudication, in the usual form, for the sum contained in the decree.

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The books of the Company having been put into the hands of an accountant, it was ascertained, but not till about fifteen months after the date of the adjudication, that the debt really due by Mackinnell to the Company was L. 396 : 3 : 4½, with interest from 3d August 1794, besides a claim, not liquidated, to a small amount.

Macmurdo afterwards conveyed his adjudication to Thomas Goldie, who produced it as his interest in a ranking and sale of Mackinnell's property.

The Common Agent contended, That it was null on account of the *pluris petitio*; 7th March 1794, Macneil's Creditors against Saddler; p. 122. of this Dictionary.

The Lord Ordinary 'sustained the objection.'

Goldie, in a reclaiming petition, argued, That the adjudication should be sustained, at least as a security for the principal sum actually due, with interest and necessary expences, especially as the *pluris petitio* had arisen, not from any fault on the part of the adjudger, but from the misconduct of the common debtor himself, in not keeping distinct books, which rendered it impossible to ascertain the amount of the debt, in time to enable Mr Macmurdo to come in *pari passu* with the other creditors. The petitioner further stated the same authorities, and in substance the same general argument with the defenders in the case of Macneil's Creditors against Saddler.

Two of the Judges doubted of the soundness of the judgment in that case. They thought that a general adjudication, as being merely a *pignus praetorium*, should be sustained as a security for the real amount of the debt, notwithstanding a *pluris petitio*, however large, if it did not arise from fraud. But the rest of the Court thought the judgment in the case of Macneil right, and that the point was settled by it. In cases, (it was observed) where the creditor cannot ascertain the extent of his claim, the remedy is to lead an adjudication *in security*, the legal of which never expires.

THE LORDS refused the petition, without answers.

Lord Ordinary, *Glenlee*.

For the Petitioner, *Hay*.

Clerk, *Home*.

Davidson.

Fac. Col. No 35. p. 80.

* * * See 'Of the DEBT which is the foundation of the DILIGENCE.'

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See Morice against Orrock, 20th July 1678. Stair, v. 2. p. 637, under the Title JURISDICTION.

See Lady Crowdieknows against the Creditors, from D. Falconer, v. 1. p. 93. and 124. under the Title COMPENSATION.

See Alison against Auchinlecks, p. 114. v. 1. of this Dictionary.

REDEMPTION of APPRISINGS and ADJUDICATIONS.

1625. July 2.

DR. KINCAID against HALIBURTON.

No 1.
Competent in an action of redemption, to take account of intromissions. Found, that he who redeems, ought to pay to the compriser, the year's duty due to the superior, although the superior had given it *gratis* to the compriser. Also, must pay the expences, although the compriser had got the business done *gratis*.

IN an action of redemption betwixt Doctor Kincaid and Haliburton, for redeeming of lands comprised by Haliburton, and which were thereafter comprised by Dr Kincaid, and who by virtue of his comprising, and legal reversion, intended the said redemption: In the which process, the parties comparing, and disputing in the cause, the defender *alleged*, That the pursuer ought to exhibit and consign the sums, for the which he had comprised, together with a year's rent of the lands, due to the superior, for admitting him his vassal upon the comprising, with the expences made thereupon, and profits thereof, conform to the act of Parliament, *anno* 1621, which being assigned and given up to him, he was content to renounce the comprising.—It was *answered*, That the defender ought not to have the whole sum assigned to him, whereupon comprising was deduced, nor the year's duty and expences, and profits foresaid, in respect that by virtue of his comprising, the defender had intromitted with more of the duties of the lands, than would satisfy him of all his expences, made upon the deducing of his comprising, and for the satisfaction to the superior, and all the profits thereof; and as much as would pay him the half of his principal sum, conform to the rental of the land, which he offered to prove was intromitted with by the defender, by virtue of his comprising; and the defender *contending*, That this trial ought not to be taken in this way, but that the pursuer ought to pursue thereupon by another action, and that he ought to be compelled to exhibit the money before the Lords, as is usual in all redemptions.—THE LORDS found, That it was competent in this same action, *hoc loco et ordine*, to take trial, what quantity