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THE DECISIONS

OF THE

COURT OF SESSION

No. 5. [26] Earl of LAUDERDALE v. WOLMET. July 15, 1664.

A decree of certification, against a decree of valuation, obtained by a donator during Cromwell's usurpation, found to accresce to the true proprietor when restored.

The Earl of Lauderdale pursues a spuilzie of the teinds of Wolmet, against Major Biggar; who alleged absolvitor, because the lands of Wolmet were valued and approven.—The pursuer replied, That the said decreet of valuation was improven, by a decreet of certification obtained there-against, at the instance of Swinton, having right to these teinds for the time; by a gift from the usurper.—The defender duplied, That no respect ought to be had to the said certification; 1st, Because this pursuer derives no right from Swinton; being only restored to his own right; and Swinton's right from the usurper found null: so that, as the pursuer would not be burdened with any deed of Swinton's, to his prejudice; neither can he have the benefit of any deed of Swinton's to his advantage. 2dly, The said certification was most unwarrantable; in so far as the decreet of valuation, being in the register of the valuation of teinds, the defender was not obliged to produce it; but the pursuer ought to have extracted it himself. 3dly, All parties, having interest, were not called to the said certification, viz. Mr. Mark Ker, the wadsetter, by a public infetment; in whose right Major Biggar, now succeeds. And lastly, The defender alleged, that he had a reduction of the certification, upon minority and lesion; and the unwarrantable extracting of it.—The pursuer answered to the first, That seeing Swinton did use the pursuer's right, all real advantages, which were not personal, but consequent upon the real right, and which belonged not to Swinton, personaliter, but as pretended proprietor; do follow the real right itself; and accresce to the true proprietor; as if he had acquired a servitude, or had reduced the vassal's right, *ob non solutum canonem*. To the second, Oppones the certification, wherein compearance was made, for Wolmet; and three terms taken to produce; and no such defence was alleged, as that the valuation was in a public register. To the third, The pursuer needed not know the wadsetter; because it was an improper wadset; the heritor possessing by his back-bond, as heritable possessor, seeing the decreet of valuation was at the heritor's instance, it was sufficient to reduce it against his heir; for it would not have been necessary to have called the wadsetter, to obtain the decreet of valuation; but the then heritable possessor: so neither is it necessary to call the wadsetter, to the reducing or improving thereof. To the last, No such reduction, seen, nor ready; neither the production satisfied.

The Lords repelled the defence, and duplies; in respect of the certification; which they found to accresce to the pursuer; but prejudice to the defender, to [27] insist in his reduction, as accords: and declared, that if the defender used diligence, in the reduction, they would take it to consideration, at the conclusion of the cause.

Fol. Dic. v. 1, p. 1. *Stair*, v. 1, p. 213.

No. 6.

CAMPBELL v. STIRLING. January 1666.

A miln built on an estate, during the incumbency of a liferenter, found to accresce to her.

Archibald Campbell of Ottar, by contract of marriage, and infeftment following thereupon; did provide Anna Stirling, his spouse, to the lands of Kinnaltie, by charter; carrying *cum molendinis et multuris*. At this time there is no miln upon the lands; but, during the marriage, he builds one; and, after his death, the relict possesseth both lands and miln: whereupon she and her present husband, and tenants, are pursued by this Ottar; for the duties of the miln.—It was alleged, absolutor, because the miln was built upon the husband's lands; which she liferented; being infeft, *cum molendinis*; and *edificia* built by the heritor, *cedunt solo*; and consequently to the liferenter.—It was answered, That milns being *inter regalia*, are not transmitted, without an express disposition and infeftment; and the general clause of a charter cannot do it.—Replied, That the general clause gives her good right, unless there had been a going miln, at the time of the infeftment; in which case, it might have been questionable, unless the lands and miln had been erected into a barony; but where there was no miln; and a new miln is built; the miln accresceth to the liferenter, during the liferent; as well as if she had built it herself, after the husband's death:—which the Lords found accordingly. Withall the Lords declared, That if, after building the miln, her husband did thirle any other lands thereto, beside her liferent lands; that she is not to have the benefit of any such restriction.

Gilmour, p. 130, No. 180.

No. 7. Earl of LAUDERDALE v. Viscount of OXFORD. February 28, 1666.

The benefit of interruption of prescription, made by a donator during the usurpation, found to accresce to the true proprietor when restored.

The Earl of Lauderdale, being infeft in the barony of Musselburgh; which is a part of the abbacy of Dunfermline; and was erected into a temporal lordship, in favour of the Lord Thirlston, thereafter Chancellor, the Lord Lauderdale's grandfather, in anno 1587; before the act of annexation, wherein the erection of Musselburgh, to the Lord Thirlston, is expressly excepted; thereafter, in anno 1592, the Queen was infeft by the King, in liferent, in the abbacy of Dunfermline; with the consent of the Lord Thirlston, as to Musselburgh, and his resignation, to that effect. Shortly after, that same year, the King gave the Queen, an heritable, and irredeemable right, of the whole abbacy of Dunfermline; which was confirmed by a printed act of Parliament. The Queen lived till the year 1618: after which the King was served heir to his mother, in the [28] abbacy of Dunfermline, and infeft therein, being then Prince. The King gave an heritable and irredeemable right, to the Lord Oxford's authors, of the teinds of Coutsland, as a part of the Lordship of Musselburgh, in anno 1641. And shortly thereafter, his Majesty did renew the Earl of Lauderdale's infeftment, of the Lordship of Musselburgh, with a novodamus; Lauderdale being forefaulted by the usurpers, Swinton got a donative of the lordship of Musselburgh; and, among the rest, of the teinds of Coutsland; and did raise inhibition and reduction of their rights. After the King's restoration, the Earl of Lauderdale obtains his infeftment confirmed in Parliament; with an express exception therein, that it should not be derogated by the act, *salvo jure*; raises inhibition of the teinds; and pursues action of spuilzie; and also of reduction.—It was alleged for the defender, absolutor; because he stands infeft in the teinds libelled, by infeftment, granted by the King, before the Earl of Lauderdale's infeftment pursued on; and by virtue of his infeftment, King Charles I. and Queen Anne, his authors, have been in peaceable possession, uninterrupted, since the year of God 1593: and therefore their right is accomplished, and established by prescription.—It was answered, for the pursuer,

That the defence ought to be repelled ; because, since the death of Queen Anne, who died in anno 1618, till the interruption made by Swinton, by inhibition and reduction, in anno 1656, there are not 40 years run ; and, till the Queen's death, the Earl of Lauderdale's grandfather could not pursue ; because he had granted resignation in her favours, for her liferent ; *et contra non valentem agere non currit prescriptio* : so wives' provisions, in their contracts of marriage, prescribe not from their date, but from the time of their husband's death ; all obligations prescribe only from the term of payment ; and infeftments, and obligements of relief, from the distress.—It was answered, for the defender, That this defence stands still relevant ; 1st, Because, as to any interruption made by Swinton, it cannot be profitable to the pursuer ; because he derives no right from Swinton : And as to the Queen's liferent infeftment, consented to by Thirlston, the Queen never accepted of the same ; but of an heritable right from the King that same year ; by which heritable right only, she possessed, and did all deeds of property ; by entering of vassals, and granting of feus ; which a liferenter could not do : Which heritable right, Thirlston could not misken ; because, by a special printed act of Parliament, it is confirmed in Parliament, and passed the Great Seal, himself being Chancellor.—It was answered, for the pursuer, That the defence and duply ought to be repelled, in respect of the reply ; because the confirmation of the Queen's heritable right in Parliament was, *salvo jure* ; and he was secured by the act *salvo jure*, in the same Parliament ; and that he knew thereof, at the passing of the Great Seal, is but a weak presumption ; and such knowledge could not prejudice him ; nor was he in any capacity to pursue upon his own right, for attaining possession ; seeing the Queen's liferent right, and heritable right, were both compatible ; and it was evident, the Queen would exclude him, by his consent, in the liferent right ; neither can the Queen's acceptance be questioned, after so long time ; seeing the [29] acceptance of the liferent was to her advantage and profit, before she got the fee, and did exclude Thirlston's prior right ; which would have undoubtedly reduced the Queen's right ; and was excepted in the general act of annexation ; and would not fall under the act *salvo jure*.—It was also severally alleged, that this Earl of Lauderdale's late right was confirmed in Parliament 1661 ; and all other rights declared void ; and that the ratification should have the force of a public law, and not be derogated by the act *salvo jure*.—It was answered, for the defender, That, *in prescrizione longissimi temporis non requiritur tempus utile, sed continuum* ; in consideration whereof, the time of the said prescription is made so long ; and, therefore, captivity, absence *reipublicæ causa*, want of jurisdiction, or the like, are nor respected ; 2dly, Thirlston *valebat agere* ; because he might have reduced the Queen's infeftment of fee ; or declared his own right of fee to be effectual after her death. And, as to the late act of Parliament, albeit it does exclude the act *salvo jure* ; yet that is *parte inaudita* ; and, upon the impetration of a party, *suo periculo* ; but the Parliament have never assumed power to take away the private rights of subjects ; except upon another or better right ; otherwise no man in Scotland can call any thing his own ; but a confirmation in Parliament, with such a clause surreptitiously obtained, shall take away the unquestionable right of any other.—It was answered, for the pursuer, That the Parliament had not encroached upon the just right of any other ; but had only restored the pursuer to his grandfather's right ; and seeing there is no question, but that right was prior and better than the Queen's, and the defender's, and was in no hazard ; but, as to the point of prescription, that being a rigorous statute, the Parliament might well excuse the pursuer, for not pursuing the King and Queen ; but rather patiently to abide their pleasure, till they were denuded, in favours of private parties.—It was answered, for the defender, That all our private rights, especially of property, are founded upon positive law ; and there is none stronger than the right of prescription ; and, therefore, if the Parliament can take that away, as to one person, and not generally, they may annul the right of any private person whatsoever.

The Lords were unwilling to decide in the whole points of the debate ; but did, in the first place, consider the right of the parties, without the act of Parliament, in favours of the Queen ; or the late act, in favours of the Earl : And, in the point of right, they repelled the defence of prescription ; in respect of the duply of Swinton's interruption ; which they found to accresce to the pursuer *cujus jure utebatur* ; and found, that before the Queen's death, the prescription could not run, in respect of the Queen's infeftment of liferent, consented to by Thirlston ; which would exclude him from any action, for attaining possession : And they found, that he was not

obliged to use declarator, or reduction, which might be competent in the cases of distress, or the rights of wives, or any other right; which yet do always exclude prescription, till action may be founded thereupon, that may attain possession. (See PRESCRIPTION.)

Fol. Dic. v. 1, p. 1. Stair, v. 1, p. 370.

No. 9.

[31] RUTHVEN v. GRAY. July 19, 1672.

A minor assigns a bond gratuitously. The assignee leads an apprising. The assignation is quarrelled upon minority and lesion. The assignee offers to retrocess to the assignation, but not to the apprising.—Ordained to convey the apprising; which, being led upon the minor's debt, must follow it, and accresce to the minor.

Anna Ruthven, having granted an assignation of a bond of 4000 merks, granted by her father, to Alexander Seaton; he thereupon, and upon several other debts, appries the estate of her father, Sir Francis Ruthven; which right, came by progress, in the person of William Gray of Hayston; in satisfaction of which apprising, Sir Francis disposes a part of his lands, irredeemable, and Hayston renounces the rest. The said Anna Ruthven pursues a reduction of the assignation, granted by her to Seaton, now belonging to Hayston, upon minority and lesion; which reduction, contains a declarator, that Hayston ought to dispoise to her a part of the lands whereto he had right, effeiring to her sum; and having instructed her minority, she insists in the reduction.—The defender alleged, That the act of this process was extracted without his knowledge, otherways he would have alleged, as he now alleges, That the assignation having been made to Seaton, his author, who is liable in warrandice, there ought to have been no process sustained, till Seaton was called; who only knew, and might have alleged, that there was no [32] lesion; because the foresaid assignation was, for an equivalent cause, onerous. 2dly, There is neither law nor obligation upon the defender, to assign his right to this pursuer, but only to repone her; for he might have torn, or burnt, his apprising, or discharged the debtor for nothing; which would not have hurt the pursuer; for the reduction would take off his discharge, as falling in consequence.—The pursuer answered to the first, That it was incompetent now, after litis-contestation, and that it was not relevant; for though, in reductions of heritable rights, authors, liable in warrandice, must be called, that holds not in personal rights; but the defender ought to have intimated the plea to his author. 2dly, The assignee's right being a procuratory, *in rem suam*, the reduction doth only take away that member of it; that it is not *in rem suam*; but it remains still a procuratory; so that, what was done by the assignee, as procurator, accresces to the constituent, as if he had used inhibition, or interruption; and generally, the Lords have ever ordained parties to assign their rights, where the assignation is not hurtful to them, and profitable to the other party.

The Lords repelled the defences; and ordained the defender to dispoise a proportionable part of the lands; but the defender having offered to prove, that there was no lesion, because there was an equivalent sum paid for the assignation: The Lords would not sustain the same, unless it were offered to be proven, that the sum was profitably employed for the minor's use.

Fol. Dic. v. 1, p. 2. Stair, v. 2, p. 107.

No. 12.

[33] Earl of CASSILLIS v. MONTGOMERY of Lainshaw. January 24, 1696.

Found that a person forfeited and restored, *per modum justitiæ*, might use any benefit the donator had obtained, during the forfeiture; such as a decree of preference, &c.

Phesdo reported the competition betwixt the Earl of Cassillis, and James Montgomery of Lainshaw. The first point was, Having once produced his tack of the teinds in the process, he might not take it up again when he found the Earl, who had newly raised and cast in a reduction of the said tack, on this head, that it was

set before a prior one had expired, was going to hold the production satisfied.—The Lords found a party might take up any writ (not quarrelled as false), before allegiances were proponed thereon, or liti-contestation made in the cause. The next point was ; during Lainshaw's forfeiture, Strathallan, donator thereto, had obtained a decreet of preference, on Lainshaw's tack of these teinds of Kirkmichell, before Cassillis's right ; and Lainshaw, now founding on that decreet, as *res judicata*, to exclude Cassillis ; still he alleged Lainshaw had no right to the same, the forfeiture being *funditus*, rescinded, and all following thereon taken away.—Answered, That is only so far as the restored persons were lesed ; but it [34] were a very sinister interpretation, to make a detorsion, of what is designed for a benefit, to my prejudice ; for, put the case, that the donator had interrupted the prescription, which was running against the rebel, or set a profitable tack ; would not these accresce to one restored, *per modum justitiæ* ? And, on the 13th of July 1664, between the Earl of Lauderdale and Bigger of Wolmet (No. 5, h.t.) a certification, obtained by Swinton, when donator, was found to belong to Lauderdale, that he might found on the same.—The Lords generally inclined to think, the forfeited person might use any benefit the donator had obtained ; even as the improvements of a tutor accresce to a minor ; *melio rem facere potest conditionem pupilli sed non deterio rem* ; but, falling to consider this decreet of preference, they found it not to be a preference in time coming, but only for some bygone year's teinds ; and found it no sufficient active title to compete with Cassillis for subsequent years, without the tack itself were produced. (See PROCESS.)

Fol. Dic. v. 1, p. 1. Fountainhall, v. 1, p. 704.

No. 14. [35] DUNDAS of Breastmill v. SINCLAIR of Carlourie. July 11, 1706.

An ancient charter of lands, *cum molendinis et multuris*, sustained to infer immunity from thirlage, in favour of a succeeding heritor, who derived no right from the obtainer of the charter.

The Lord St. John, or preceptor of Torphichen, feus his mill, called the Breastmill, to one Dundas, in 1558, and thirls his whole barony of Oldliston thereto. James Dundas, now of Breastmill, pursues a declarator against Harry Sinclair of Carlourie, of thirlage and astrictiion, and for astrictiion multures.—Alleged, 1mo, That his lands of Over and Nether Carlourie, are no part of the lands astrictiion ; in so far as their rights mention them only to lie within the barony of Liston ; which is different from Oldliston ; which only is thirled by the original charter of the mill in 1558.—Answered, The designations are materially the same ; and his lands are part of the barony of Oldliston.—The Lords repelled the allegiance, unless Carlourie would prove, that Liston was a separate distinct barony from Oldliston.—Alleged, 2do, That the Lord St. John, superior of this mill, feued out the lands of Over Carlourie in 1543, to one Kincaid, *cum molendis et multuris* ; which freed these lands of all thirlage, being 13 years before the mill was feued out ; after which, the superior could not, by any subsequent deed, thirl or astrictiion these lands, by his charter of the mill to Dundas.—Answered, Harry Sinclair, now of Carlourie, cannot found on that exemption and immunity given to Kincaid ; unless he can instruct a connected progress from him down to himself ; for it is *jus tertii* for him, to found on a charter whereto he shows no right.—Replied, If the deed were within these forty years, there might be some pretence to cause an heritor to show a connection, for establishing his right of property ; but this charter of exemption being more than 150 years ago, it is impossible to demand a connected progress, only to exeem from a servitude ; unless they will say, that Kincaid, or some in his [36] right, had done some positive deed to astrictiion the lands, which they had got free, *et tanquam optimum maximum*. For, the superior being divested of the thirlage, by his charter in 1543, it was not in his power, by any subsequent deed, to resume the thirlage without Kincaid's consent.—Duplied, It was undeniable, but there might be two different progresses to the same land, with different holdings, reddendos and immunities ; and yet the one cannot claim the privileges of the other. As, for instance, one holds lands in simple ward, another has taxed them ; he who bruiks them by a simple ward-charter, cannot, for defending against his

marriage, found on the taxing-charter of the other, from whom he derives no right.—Triplied, This case is not alike; for that is the privilege of the *dominium directum* and superiority; but this is an unfavourable servitude; the presumption lying for liberty and immunity.—The Lords at first found, That Carlourie could have no benefit of the charter of immunity, given to Kincaid; unless he instructed a connected title to these lands, from Kincaid. But afterwards, upon a bill and answers, and advising a probation, the Lords altered, and found it proven, That when Carlourie came to Breastmill, he paid a lesser duty than the in-town multures; and that the mill-horses, and not his own, carried the grain to the mill; and that they had not been in use, these forty years, of mending the mill-dams, carrying stones, or any such services: Therefore the Lords found, by a plurality of six against five, That the charter to Kincaid having extinguished any thirlage of these lands, it could not revive again without their own consent; and the lands were simply free, without the necessity of connecting a progress up to Kincaid, or down from him to the present heritor and possessor. Some thought the very paying of outten-town multure was a liberation from the thirlage; but others said, though there were sundry tacit implied ways to infer exemption from thirlage, as well as express discharge thereof; yet the paying a lesser duty than the rest of the astricted lands, was not such a presumption as could import a total liberation; but only a freedom *pro tanto*; these thirlages being regulated by use and wont of possession. In the point of connecting; some made a distinction, that if it was to a predecessor to whom they might succeed *jure sanguinis*, then a progress was necessary; but, if only an author, or singular successor, then it was not necessary, when he had another valid right to the lands without that.* (See THIRLAGE.)

Fol. Dic. v. 1, p. 1. Fountainhall, v. 2, p. 342.

* Forbes reports the same case, thus:—In the declarator of thirlage, at the instance of James Dundas of Breastmill, against Henry Sinclair of Carloury, for declaring his lands of Over Carloury astricted to the pursuer's mill, which is the mill of the barony of Oldliston, whereof Over Carloury is a part:

Alleged for the defender: That the Lord Torphichen granted a charter, in anno 1543, to Kincaid, of these lands of Over Carloury, *cum molendinis et multuris*, prior to the pursuer's charter of astriction; which must infer an immunity from thirlage, in favours of the defender, the present heritor.

Replied for the pursuer: The defender can have no benefit of immunity, by the charter granted to Kincaid, unless he can instruct a connected right from him. For, as there may be different pro-[37]-gresses to the same land, with different holdings, reddendos, and immunities; as oft falls out, in the case of several adjudgers from a ward vassal, whereof one procures a charter, taxing the ward, and other casualities; while another's charter continues in the terms of simple ward: So the latter could not claim the privileges granted to the former, without deriving right from him.

Duplied for the defender: Though none can plead right to the lands, by virtue of any charter granted to a person he does not succeed to; the freedom and immunity of lands from thirlage, or any other servitude, may be conveyed without a connected progress: Because, liberty is presumed, and servitude must be proved, and cannot be inferred without a positive deed constituting the same; yea, even when constituted, is taken off and extinguished, by any discharge or renunciation, without farther solemnity, Stair's *Instit. tit. Servitutes Real, § 24*. So that the lands becoming free thereby, are transmitted, with that freedom, to any succeeding heritor, without necessity of an express provision thereanent in his right. Nor can they ever be brought under the servitude again, but by the deed of the proprietor for the time. The parallel adduced, of a superior's taxing the ward-duties, in favours of one of several competing vassals, is no ways applicable to this case: For the casualities of superiority, remain with the superior; whose granting a taxing charter, can only be profitable to the person who has right to that charter; whereas a servitude being renounced or extinguished by the superior's deed, nothing remains with him to be given to any person by a subsequent grant; and the lands become and remain free for ever, unless a new servitude be imposed by the proprietor.

The Lords found, That the defender had the benefit of immunity from the thirlage, by the charter granted to Kincaid, of the lands of Over Carloury; albeit he instructed not a connection of his title from Kincaid; and therefore declared these lands free of the astriction. (See THIRLAGE.)

Forbes, p. 120.

No. 17. [39] WILLIAM DUNCAN, Merchant in Edinburgh v. DAVID MILLER,
Merchant there. July 23, 1713.

Found that an inhibition, used by an assignee, would accresce to a posterior assignee, after reduction of the first assignation ; if not reduced *ex capite fraudis*.

In an action of declarator, at the instance of Jean Livingston, and her husband, against the creditors of John Robertson (who, as heir to Gilbert Robertson, his father, sold the lands of Whitehouse to Jean Livingston) for purging the lands of all incumbrances, arising from their debts and diligences ; there arose a competition betwixt William Duncan and David Miller. William Duncan pretended to be a real creditor for 6000 merks, the remains of the price of the lands owing by Gilbert Robertson to George Aikenhead, his author, per bond.

David Miller claimed preference for the half of the sum of 1400 merks, principal, and annualrents thereof, contained in a bond, granted by Gilbert Robertson to Helen Matthison, in Stirling, assigned by her to Robert Ranie and David Miller, upon this ground : That James Miller, writer in Edinburgh, to whom Helen Matthison had formerly disposed her debt, with a power to alter, did, upon a process for payment against John Robertson, use inhibition for security thereof ; which inhibition, now that James Miller's right is reduced, accrues to David Miller, the second assignee ; because the power to alter, reserved to Helen Matthison, in her assignation to James Miller, made his right to be of the nature of a factory, or trust, for the cedent ; and any diligence done by factors, or trustees, accrues to the constituents, their heirs or assignees. July 14, 1667, Scot v. Sir Laurence Scot. (Stair, v. 1, p. 472. See TRUST.) And it has been frequently found, that diligence, used by donators of forfeitures, for securing the subject gifted to them, accrued to the forfeited persons and their heirs, restored *per modum justitiæ*, without necessity of assignation, or conveyance, by the donator.

Answered for William Duncan :—James Miller's inhibition cannot subsist in the person of David ; because, 1mo, Though inhibition be, in some sense, a real burden upon the inhibited person's lands, at least becomes such by a posterior adjudication ; yet, as to the inhibitor, it is a merely personal diligence, reaching only deeds done to his prejudice ; and hath no effect in favours of third parties, not deriving right from him. 2do, Inhibition is effectual to the inhibitor himself, only in so far as concerns the right on which it is founded : Therefore, this inhibition, founded on Helen Matthison's disposition, is without any foundation ; now when that disposition is annulled and out of doors. 3tio, James Miller's right was not of the nature of a factory, or trust, but was elicited from Helen Matthison, [40] by fraud and circumvention ; and reduced upon that head ; so that as James Miller's right was null, *ab initio*, the inhibition, used by him, was null in consequence. 4to, Granting that James Miller was a factor or trustee ; yet the inhibition being used eleven years after that trust, or factory, was revoked by the second assignation, in favours of Ranie and David Miller, intimated by a summons of reduction of James' right, it was simply null, and cannot be effectual to any person.

The Lords found the inhibition accresced to David Miller, the second assignee, reducer of the disposition in favours of James, unless it be made appear that the said disposition was reduced *ex capite fraudis* ; in which case, they remitted to the Ordinary to hear parties procurators.

Fol. Dic. v. 1, p. 2. Forbes, p. 709.

No. 11. [49] TRUSTEES of MUNGO GRAHAM'S CREDITORS v. JOHN HYSLOP.
August 3, 1753.

An adjudication, *contra hereditatem jacentem*, may be led before the sheriff, if the lands be within his jurisdiction.

David Viscount of Stormonth, anno 1662, granted an heritable bond for 4000 merks, to John Carmichael, and the heirs therein named, obliging himself to grant

infetment, "in all and sundry his lands, heritages, and others whatsoever, pertaining to him, wherever the same lie in this kingdom, for an annualrent of 240 merks yearly, to be uplifted and taken furth of the readiest mails, profits, and duties thereof, at Whitsunday and Martinmas, by equal portions": And the bond contains a precept of sasine, in the same indefinite terms. This bond, upon which infetment never was expedite, was vested, by progress, in Mr. Robert Richardson, writer to the signet; who, having died insolvent, Patrick Chalmers, one of his creditors, having charged the apparent heir to enter, brought a process upon the passive titles, before the sheriff of Edinburgh; and, upon the renunciation of the apparent heir, obtained first a decret *cognitionis causa*; and thereafter, October 1701, a decret of adjudication *contra hæreditatem jacentem*, in the same court. And, according to the practice of the sheriff-court of Edinburgh, an abbreviate of [50] this adjudication, signed by the judge, was recorded by the clerk to the bills, in the same manner, as is observed with respect to abbreviates of adjudications, pronounced by the Court of Session, pursuant to the regulations 1695 and 1696. Under this adjudication, the trustees for the creditors of Mungo Graham, claimed the debt contained in the foresaid heritable bond, due by the Viscount of Stormonth.

On the other hand, John Pringle, upon a charge to enter, brought a process upon the passive titles, against the apparent heir, before the Court of Session; and, upon a renunciation, obtained a decret *cognitionis causa*; and thereafter, a decret of adjudication *contra hæreditatem jacentem*, anno 1703; under which adjudication, John Hislop claimed.

The Viscount of Stormonth brought the parties to debate their interest, by a multiplepoinding; where it was objected by Hislop, against his competitor, 1mo, That the sheriff has no power to pronounce an adjudication *cognitionis causa*; which is an extraordinary remedy, introduced by the sovereign court, and competent only there. 2do, That the Viscount of Stormonth having no lands within the shire of Edinburgh, the sheriff had no power to adjudge this heritable bond, which has an especial reference to the debtor's lands, more than he could adjudge the lands themselves. It was answered to the first, That a jurisdiction is, *de praxi*, established in the sheriff of Edinburgh, to pronounce decreets of adjudication *cognitionis causa*. To the second, two answers were made: 1mo, That the precept of sasine, contained in this heritable bond, is informal and null; because, an order to give infetment in all the debtor's lands in general, is not sufficient for giving infetment of any lands in particular; and therefore, this bond is to be considered in no other light than as a personal bond, like a bond heritable by destination, or a bond secluding executors. 2do, Supposing the precept of sasine to be formal, the bond, however, before infetment, continues to be a personal right; and for that reason, might regularly be adjudged from the apparent heir, renouncing within that jurisdiction where the apparent heir had a *forum*.

The Lords were all of opinion, That a precept, to give infetment in lands, described in general to belong to the granter of the precept, is a sufficient warrant to give infetment in every particular tenement; which, by production of the granter's infetment, is vouched to come under the general description. They were also of opinion, That the heritable bond in question, being a *jus ad rem*, granted for no other end than to establish a land security, must be subjected to the same jurisdiction, to which the lands are subjected. And accordingly, the following interlocutor was pronounced: "The Lords sustain the objection to the decret of adjudication, obtained before the sheriff of Edinburgh; viz. That the lands of the debtor, in the heritable bond, lay all out of the sheriff's jurisdiction."

With regard to the preliminary point, of the power of a sheriff to pronounce an adjudication *contra hæreditatem jacentem*, the following argument will evince that he has this privilege. A general charge to enter heir, bears, "That where [51] the complainer has sundry actions to intent at his instance, as well before the Lords of Session, as other inferior judges, &c." *Ergo*, a decret *cognitionis causa*, before the sheriff, upon the heir's renunciation, is valid. And, of consequence, the sheriff must have a power to put such a decret in execution, in the only manner possible; which is by an adjudication *cognitionis causa*. Nor is this an extension of the power, which the sheriff has by the common law. By the act 36, Parl. 1469, it appears, that the sheriff, after pronouncing decret upon the brieve of distress, proceeded, by his own authority, not only to poind the moveables, but also to apprise the land.

With regard to the second point; what settled my opinion, was the case of a purchaser entering into possession upon a disposition, containing procuratory and precept, without actual infeftment. The lands lie within one county, and the purchaser dies in another county, where he had his domicile. It appears evident, in this case, that the sheriff, within whose jurisdiction the lands lie, is the only inferior judge competent in this case to pronounce a decret of adjudication *cognitionis causa*; for the disposition, which has no other operation or effect, than merely to be a title to the lands, cannot be considered as a separate and independent subject, to be attached by any sort of execution, but that which affects the land. In general, title-deeds are not a subject for execution. The land is taken in execution, which belongs to the debtor; and the same right is conveyed to the creditor, which the debtor had, complete or incomplete; and with the land, the debtor's title is conveyed, as an accessory, of whatever nature the title be. The point would be more doubtful, in the case of an obligation to grant infeftment without a precept. (See JURISDICTION.—SASINE.) *Select Dec. p. 65.*

No. 4. [62] Creditors of Sir THOMAS WALLACE-DUNLOP v. Messrs. BROWN and COLLINSON, Bankers in London. November 14, 1781.

Adjudication decreed, in security of contingent claims.

Sir Thomas Wallace sold a part of his lands to Messrs. Brown and Collinson, at twenty-nine years' purchase, according to a signed rental; which Sir Thomas became bound to warrant for twenty-seven years.

Upon this obligation of warrandice, Messrs. Brown and Collinson led an adjudication in security against Sir Thomas's other lands and estates; to which, in the ranking of Sir Thomas's creditors, it was

Objected by the creditors: No illiquid debt can be secured by adjudication; Erskine, b. 2, tit. 12, § 9; Stair, b. 3, tit. 2, § 15. An adjudication in security is of that sort which has come in place of apprisings; with this difference only, [63] that the legal never expires. It is, therefore, properly a sale under a perpetual power of redemption; but still it is a sale; and as such requires a liquid price. The adjudication in question, however, is founded on as a security, not only for the deficiencies alleged to have been already incurred, and which have not been liquidated by any decree, but also for deficiencies, which do not now, and may never exist.

Answered by the adjudgers: It is admitted, that an adjudication for payment cannot proceed, except upon a liquid debt. But this rule does not hold with respect to adjudications in security. And the reason of the distinction is obvious. By the old form of apprisings, as much of the debtor's heritage was given to the creditor as was reckoned equivalent to his debt; and unless the debt was liquid, the sheriff could not possibly determine what quantity of lands it was proper to make over. The same reason holds in special adjudications upon the first alternative of the act 1672: and, even in general adjudications for payment, it is necessary that the debt should be liquid, in order that the debtor may know the precise amount of the redemption-money.

But these reasons do not apply to adjudications in security: for though they are always general, and extend to the debtor's whole heritage; yet, as the legal never expires, the property can never be thereby transferred to the adjudger. Neither is it here necessary, that the debtor should know the precise amount of the debt; because he may at any time recover his lands, upon shewing that the creditor has been fully satisfied.

Accordingly, this sort of adjudication has ever been considered as a competent way of affecting the debtor's heritage, in security of such debts as can only be liquidated, *de anno in annum*, or of such as cannot properly be the foundation of an adjudication for payment. Thus, a widow may adjudge in security of her liferent; a cautioner in security of his relief; and a purchaser in security of his warrandice; Bankton, b. 3, tit. 2, § 78; Hamilton v. Chiesly, 24th February 1675. (See ADJUDICATION IN IMPLEMENT) Bruce v. Hepburn, 2d January 1684, observed by Fountainhall

and Falconer) (No. 1, h.t.). These several claims are not more liquid than the present. Like it they are contingent on future events ; but they are all equally capable of being secured by adjudication.

The Court had no difficulty upon the competency of the adjudication, as a security for both the past and the future deficiencies ; and therefore “ repelled the objection.”

Lord Reporter, WESTHALL.—For the Objectors, J. SWINTON.—Alt. ROBERTSON.—Clerk, ORME.

Law.

Fol. Dic. v. 3, p. 2. *Fac. Col.* No. 1, p. 1.

No. 25. [110] MAXWELL of Dalswinton and RIDDELL of Glenriddell v. MAXWELL of Barncleugh. February 5, 1743.

Pluris petitio is only inferred from the decree, not from the libel.

The objection to an adjudication, that the libel, upon the first alternative, concluded, that the lands should be adjudged, corresponding, not only to the principal sum and annualrents, and fifth part more, but also to the penalty, was not sustained, even to the effect of opening the legal ; in respect, the adjudication proceeded, not on the said first alternative, but upon the second.

For, even though there had been the like error in libelling upon that alternative, on which the adjudication did proceed, yet if, when the decree came to be pronounced, that error, of *pluris petitio*, had been rectified, and decree only sought, and obtained, for the sums truly due, the error, in the libel, would have been no nullity.

Fol. Dic. v. 3, p. 4. *Kilkerran* (ADJUDICATION), No. 14, p. 10.

No. 35. [122] The Creditors of NEIL MACNEIL v. JAMES SADDLER. March 7, 1794.

An adjudication found to be null, which was led upon a decree for payment of the random sum of £10,000 ; although it reserved all objections *contra executionem* ; no proof of the debt having been produced when the decree was obtained ; and the sum really due having turned out to be only £800, 10s. 7½d., currency of St. Christopher's.

William Saddler, of the island of Nevis, merchant, in 1758, entered into copartnership with Neil Macneil. Their trade was carried on in the island of St. Christopher's, under the management of the latter, who, upon the dissolution of the company, in 1761, was entrusted with winding up their affairs.

In 1763, Macneil eloped from St. Christopher's, carrying with him effects belonging to the company, to a considerable amount.

Saddler, knowing that Macneil, at this time, had heritable bonds, for £6722 sterling, over the estate of Taynish, in Scotland, sent a power of attorney to a man of business in Edinburgh ; and, at the same time, desired him to attach these bonds for payment of the large balance which he then imagined Macneil owed him. Having, however, no access to the company books, which were in Macneil's custody, he had no means of ascertaining the amount of his claim against him. His information to his agent here was, consequently, in very general terms : “ That Macneil, after receiving every shilling he could, had eloped from this island, and carried with him £7000 or £8000, and had taken protection in the Danish island of St. Croix ; where he is not only protected, by that government, in his person, but his effects ; by which his creditors will be defrauded of their money ; amongst whom, I am the most considerable sufferer.”

Without receiving any farther information from Saddler, his agent executed an arrestment, *jurisdictionis fundandæ causa* ; and, on the 24th February 1764, raised a summons of constitution against Macneil, for payment of the random sum

of £10,000; which, it was stated, "would appear to be due to the pursuer, upon a just count and reckoning."

When the summons came into Court, appearance was made by the defender's attorney, who denied the libel; and stated, "That it was led for a random sum, unsupported by evidence." To which it was answered, That there were already adjudications led against the defender; and that, therefore, in order to put the [123] pursuer in *pari casu* with them, it was necessary that decree should be pronounced, reserving all defences *contra executionem*. Accordingly, in February 1765, a decree was obtained under this reservation.

Saddler's agent soon after raised a summons of adjudication, narrating the decree of constitution, and the reservation which it contained; and, on the 8th August 1765, he obtained a decree, adjudging Macneil's interest in the estate of Taynish, for payment of the accumulated sum of £10,724 sterling.

In 1780, this adjudication was produced as an interest for James Saddler, the heir of William, in the ranking of Taynish; but, as the decree of constitution had proceeded without any evidence of the debt, the company books, which had been recovered from Macneil, were transmitted to this country; and a remit having been afterwards made to an accountant, to ascertain the precise balance due by Macneil; the accountant made a report, that no more than £800, 10s. 7½d., currency of St. Christopher's, was due.

The other adjudgers, of Macneil's bonds on the estate of Taynish, contended, That the adjudication was null *in toto*; and

1mo, The decree of constitution, and, of consequence, the adjudication, is fundamentally void, as having been obtained without any proof of the debt; (See PROOF.) Neither will the reservation which it contains, of all objections *contra executionem*, support it. The only cases where such reservations have any effect, are those requiring dispatch, where the pursuer shews proof of his libel, *ex facie* legal and sufficient, and the defender states defences which cannot be instantly verified.

2do, Supposing it had been competent for Mr. Saddler to have adjudged, he mistook the proper form.

As his claim was illiquid and contingent, in place of adjudging for payment on the act of 1672, he ought to have led an adjudication in security, the legal of which never expires; President Falconer, No. 102. (See WHAT SUBJECTS are carried by ADJUDICATION); Forbes, 12th July 1711, Blaw against his Father. (See PROVISIONS to Heirs and Children); Fac. Coll. 16th February 1759, Nisbet *v.* Stirling. (See ADJUDICATION IN SECURITY); 14th November 1781, Brown and Collinson *v.* the other Creditors of Sir Thomas Wallace. (See ADJUDICATION IN SECURITY.)

3tio, The extravagant *pluris petitio* would of itself be fatal to the adjudication, even if it were otherwise unexceptionable. It is led for £10,724 sterling; and it turns out, that there is only £800, 10s. 7½d., currency, due.

In adjudications upon the act 1672, as well as in the old apprisings, the debt, for which the lands are adjudged, is, in law, held to be a price commensurated to their value, for which the lands are sold under reversion; and, as it does not follow, that because the debtor allows them to be adjudged, and sold for a particular sum, he would have done so, if the sum had been less, the consequence must be, that an adjudication ought to be set aside, when the debt turns out to be less than the [124] sum adjudged for. Accordingly, in practice, a *pluris petitio* is always fatal to the diligence, as a proper adjudication. In very favourable cases, indeed, such as where partial payments have been made without the knowledge of the creditor, or where the debt is found to be less than what was supposed, in consequence of the subsequent decision of points of law, it is sustained as a security for the debt, without the accumulations; but this is converting it into a right of a quite different nature, and may be regarded as one of the strongest exertions of the *nobile officium* of the Court. In cases like the present, however, where the *pluris petitio* is considerable, and where there is no plea of favour on the part of the creditor, the adjudication is always reduced *in toto*; Fac. Col. 16th December 1760, Creditors of Brown *v.* Gordon (No. 30, h.t.); 4th February 1784, Apparent Heir of Porteous *v.* Sir James Nasmyth (No. 34, h.t.).

Answered, 1mo, The debt, for which the adjudication was led, arose, not from any clear document by which its amount could be instantly verified, but from a fraudulent act on the part of Macneil, which made it impracticable for Saddler to give his attorney, in this country, precise information respecting the extent of the

balance due to him, or to transmit any voucher for instructing it. And, as other creditors of Macneil were adjudging the fund *in medio*, the year and day must necessarily have elapsed, before more accurate information could have been got from the West Indies. In this situation, the adjudging for a random sum, reserving all defences *contra executionem*, was a measure justified by the necessity of the case; as otherwise, the preference given to adjudications within year and day, would often amount to an absolute exclusion of just creditors residing in foreign countries.

2do, The adjudication in question was substantially one in security; for, as it proceeded on a decree of constitution, containing a reservation of all defences *contra executionem*, it appeared, *ex facie*, to have been obtained for a debt, not yet properly liquidated. The legal, therefore, could never expire; it being thus admitted, that the sum which the debtor was to pay, in order to redeem it, was to be the subject of after discussion.

3tio, When adjudications were substituted in place of apprisings, although they still bore the form of sales under redemption, they came in reality to be considered merely as securities for debt; and hence the voiding an adjudication *in toto*, on account of a *pluris petitio*, became as unnecessary as it was rigorous. If led for more than the real debt, nothing can be more simple than to reduce it, *quoad excessum*, allowing it to subsist as a security for what is justly due. Accordingly, for a long time past, the practice has been merely to restrict the adjudication to that sum, striking off penalties and accumulations; Kilkerran, p. 17, 6th November 1747, Ross v. Balnagown and Davidson (No. 27, h.t.); 3d December 1751, Creditors of Castle Sommerville v. Lookup (No. 28, h.t.).

The Lord Ordinary reported the cause, on informations.

Observed, on the Bench: Where grounds of debt are produced, and there is [125] not sufficient time to discuss defences stated against them, decree ought to be pronounced, reserving all objections *contra executionem*. But here the adjudication proceeded on a decree pronounced, without any evidence of the debt. In such a case, the pursuer must take care that his demand be not beyond what is justly due; whereas, here the *pluris petitio* is perhaps the greatest that has ever occurred in this Court. Creditors taking decrees for random sums, with a view to adjudge, should always conclude for less than the real amount of their claim; or, if they wish to take every chance, they should separate the sum clearly due to them from that for which they have only a doubtful claim, and make a distinct conclusion for each.

The Court unanimously "sustained the objections to William Saddler's adjudication; and found, That, in virtue thereof, James Saddler is not entitled to be ranked upon the subject in question."

Lord Ordinary, CRAIG.—For Saddler, Solicitor-General BLAIR, JOHN CLERK.—For Macneil's other Creditors, M. ROSS, Morthland.—Clerk, HOME.

Davidson.

Fol. Dic. v. 3, p. 6. Fac. Col. No. 113, p. 250.

No. 16. [148] JAMES BLAIR and JOHN NAIRN v. ROBERT FREEBAIRN. July 22, 1737.

The office of King's printer granted to a person, his heirs and assignees, found to be adjudgeable.

The question betwixt these parties was, Whether or not a gift from the Crown to the said Robert Freebairn, his heirs, assignees, and substitutes, of being the King's sole printer for 41 years, was adjudgeable? The arguments urged for the defender were, That every debtor ought to dispoise in satisfaction of a just debt, and, if he refused, the law would do it for him; but, where he could not, the law cannot interpose. It was further pleaded, in general, That, if a right may be assignable, but not without the consent of a third party, no creditor, until such consent is obtained, can pretend to adjudge, under colour that his debtor unjustly refuses to assign.

It was likewise argued: That there are several offices, where a *delectus personæ*

is absolutely necessary ; and, to intrust the officer with chusing his successor in such offices, would be dangerous to the constitution : *e.g.* To suppose a bench of judges, who had right to their offices by dispositions or adjudications, would be absurd. It is true, there is no statute concerning this matter ; but, where personal qualifications are necessary, incroachments against this rule are secured by the law of common sense and public utility. And, if a grant of them were given to assignees, it is believed, such a clause would have no effect. Now, to apply these things to the case in hand, it may not be improper to observe, that, although monopolies are reckoned illegal, and a great grievance to the subject, yet the necessity of government, and the good of the nation, forced a monopoly to the King's printer ; for, if irreligious and heretical persons had the power of publishing religious books, seeds of schisms and heresies would, with great ease, be sown, to the subversion of religion ; or, if seditious persons had a power of printing, for acts of Parliament, what they thought fit, dangerous consequences might follow ; which made it necessary, that the sole right of printing should be in one appointed by the Crown : So that, from the nature and circumstances of this office, it cannot be adjudged. Besides, if this is allowed, the consequence would be, that a taylor would become the King's smith, and *vice versa* ; though both offices were [149] given (or are supposed to be given), to persons who are in a condition properly to discharge the duty of the office, and which is supposed here, as appears from the preamble to this grant.

It is a separate question, Whether or not, if a salary were annexed to an office, the salary might be adjudged ; as the profits which arise to the King's printer, might, by diligence, be carried off by his creditors ; but the office itself can never be conveyed in that manner. Indeed, a King's printer may enter into articles of agreement concerning the profits, which he may be compelled to stand to ; but he can no more be denuded of his office by adjudication, or disposition, than a burgess can of burgesship, or any other person of the freedom of an incorporation.

And as the freedom of a burgh, or of an incorporation, cannot be conferred without the consent of the community or incorporation ; so none can be King's printer without the consent of the Sovereign. Nor is it any objection, that this grant is to assignees ; because, in consistence with the rest of the gift, they cannot extend further than substitutes, who are likewise mentioned, and for whom the defender is answerable. But, even supposing assignees did mean something different from substitutes, it would reach no farther than assignations, with consent of the Crown : For, to suppose the defender could dubb every one he pleased with being King's printer, and put it in the power of a street-cadie to print Bibles and acts of Parliament, can never be supposed to have been the meaning of the Crown.

Answered for the pursuers : There is no right whatsoever, which is *in patrimonio* and descends to heirs, that can be with-holden from creditors, as they have a right to affect every such subject belonging to their debtor, whether it goes to assignees or not : But here the grant is expressly conceived to assignees : Therefore, it is odd to plead, it cannot be assigned, without a new consent from the Crown, when, by such construction, there could be no meaning at all in adding assignees ; seeing, without that addition, an assignation, founded on such consent, would be valid. At the same time, it can be no doubt, there are many offices which would be monstrous to suppose transmissible, either to heirs or assignees ; but where an office is granted to these, or either of them, it is a proof that personal skill and fitness was not the motive of making such a grant, else it would never have been communicable to persons unknown to the granter. Such a gift partakes more of the nature of a right and privilege, than of an office of trust ; and this is the case of grants which do not necessarily require to be exerced by the patentee himself, but may be sufficiently executed by others.

The defender's anxiety to prevent the printing of heretical or seditious books, is unnecessary in the present question, because such abuse is not to be supposed ; and, if it were, it could not be guarded against by excluding assignees or adjudgers, as the first patentee might be guilty of such an abuse as well as an adjudger. Nor is it a good answer, That he is entrusted by the Crown ; for, besides that one may counteract his trust, it is idle to talk of that, where the grant is to heirs [150] who must be unknown to the granter, and consequently cannot be the objects of a particular *delectus* or trust reposed in them.

The instance of the offices of the King's taylor or smith do not apply ; seeing, if these were granted to assignees, they behoved likewise to fall to adjudgers. Neither

is the case of a burgess, or member of an incorporation, to the point, unless it could be shown, that such privileges were transferrable to assignees : At any rate, it is *jus tertii* for the defender to make this objection to his own creditors.

The Lords found the office of King's printer adjudgeable.

Fol. Dic. v. 3, p. 9. C. Home, No. 68, p. 116.

No. 17. Sir ALEXANDER COCKBURN *v.* CREDITORS of Langton. July 10, 1747.

The office of principal Usher to the King, found to be adjudgeable.

The office of principal Usher to the King, was granted heritably to the predecessor of Sir Alexander Cockburn of Langton. What was the precise date of the original grant, does not with certainty appear ; but there is, in the records, a grant by King Robert the II. ratified in Parliament, to Alexander de Cockburn, therein designed, "dilecto nostro armigero." This grant disposes to him the three baronies of Bolton, Caridden, and Langton, in free forestry and warren, with the burgh of barony ; and then adds, "Itaque quod dictus Alexander, hæredes vel assignati sui intersit vel intersint tres sectas capitales, viz. Sectam itineris justiciarii tent. inter vicecomitatum de Berwick super Tuedam, sectam itineris justiciarii tent. apud Edinburgh, et Parliamentum nostrum tent. apud Sconam : et quod dictus Alexander vel hæredes sint principales ostiarii nostri ad nostra Parliamenta, generalia concilia, et festa, capiendos de nobis et successoribus nostris per dictum tempus, liberationem pro duobus armigeris, duobus arcutenentibus, cum gladiferis et equis pertinentibus eisdem." And the charter contains a reddendo of a pair of gilded spurs of blanch farm, *pro omni alio onere*. From the 1647, downward, there is a connected progress of grants from the crown, of the said office, to Sir Alexander's predecessors, and their heirs-male ; with this variation, by charter under the Great Seal in the 1674, that there is a fee, or yearly pension of £250 sterling, annexed to the office, in place of the livery, or maintenance formerly given to principal usher's attendants, to his esquires, archers, sword-bearers, and his and their horses, and their grooms.

The creditors of Langton, who had adjudged the office, as well as the land estate, having brought a ranking and sale of the estate, comprehending the said heritable office, and the fees thereof, Sir Alexander, apparent heir male of the family, being advised that this office was a right annexed to the person, and not to the estate, and consequently not transmissible by voluntary conveyance, nor by legal diligence, brought a declarator to have it found and declared, "That this office is not a patrimonial estate, capable to be aliened from the family, or to [151] be affected by creditors ; but that it must descend to the heirs of the family in their right of blood, and that the pursuer's taking and holding this office cannot subject him to the debts of his predecessors."

In support of these conclusions, the arguments urged for the pursuer were what follow. Property, no doubt, implies a power of disposal, whether the subject of the property be land, moveables, or an office. But, by the establishment of the feudal law, which comprehended offices as well as lands, the superior was understood proprietor, and the vassal had nothing but the *ususfructus*, or the use of the subject. The grant made to the vassal of the land was not understood an alienation of the property, but only a right to enjoy the fruits instead of wages, to enable him to perform the services contained in the grant. At first, these grants were during pleasure ; they were afterwards continued for life ; and at last extended to the grantee's male descendants. Accordingly, when a vassal died, his right of usufruct died with him ; and his son had no other right to the land, but what depended upon the superior's obligation, contained in the original feudal right, to renew the grant in favour of the grantee's male descendants. This claim was competent to the heir, not as deriving any right from his ancestor, but as creditor to the superior. See 2d of Statutes, Rob. 1, cap. 6, which directs the manner of laying this claim.

Among the Romans, where lands were allodial, an heir claimed the land in right

of his ancestor ; and there was necessary an *aditio hæreditatis*, to be a legal and public testimony of the heir's will, to subject himself to all the ancestor's debts and engagements, which was a necessary consequence among them of an heir's taking up an ancestor's estate. An *aditio hæreditatis* was not necessary among us, nor is such a form known in our old law. With regard to moveables, if they were not conveyed by testament, the church had the management and distribution. And as to land, the heir might safely demand a renovation of the feu from the superior, without any form of *aditio* ; because an heir, by this new grant, became only subjected to perform the feudal services to the superior, without being liable for any of his ancestor's debts. As he took nothing in the right of his ancestor, there was no foundation in law nor equity, to burden him with his ancestor's debts. After the Roman law was introduced into Scotland, the great regard paid to that law among the modern nations in Europe, led us by degrees to vary the principles of our old law, so as to accommodate them, as much as possible, to this new adopted law. Thus, a special service is commonly held to be the form of *aditio* in land estates. But when we consider the thing attentively, we will find, that a special service is not at all of the nature of an *aditio hæreditatis*, to transmit the defunct's right into the person of his heir : The whole procedure of it shows, that it is intended for no other purpose, but to obtain a renewal of the feu from the superior, and to derive a right from him, not at all from the defunct.

By the feudal law, and by the practice of this country, an heir of ward-land is not entitled to demand a renovation of the feu from the superior, till he be of [152] full age for performing the services for which the land was granted to his family. By the common principles of law, a minor is entitled to take up his father's right, as well as a major is. Here a minor has no claim to the land ; which proves that he derives no right from the predecessor. His claim lies against the superior, who, in the original covenant, gave the land to the vassal and his male descendents, upon condition of his military service, and for maintaining them during their service. But it is implied in such a grant, that the superior is not bound to give his land to an heir who is not capable to bear arms ; and therefore he is not bound to give the heir possession till he be of full age, when he is understood fit for war.

Thus a vassal, by the feudal law, is in reality but a liferenter, or *usufructuarius*, as much after heirs were introduced into feus as before. The heir is called to be servant to the superior, and he gets his wages or fee from the superior, who assigns him the same portion of land that his father formerly had, for the same service. But, in this matter he is to be considered as heir designative only. He derives no right from his father, if it be not birth and blood. After the father's death, the land returns to the superior, who bestows it of new upon the son, according to his promise in the original grant.

To come close to the present point, when the feudal law came to be in vigour, grants of all kinds were formed upon the plan of it, not excepting grants of honour and of offices. The office-bearer was the vassal, and he held his office of the granter his superior, under the condition of performing the duties of his office, of whatever nature these were. Dignities, originally, were always granted along with land, or with jurisdiction ; and even, at present, where they are granted without relation to either, they imply a *reddendo* of the being the King's counsellors, and of attending him in Parliament.

It is no wonder then, that by the original constitution of feudal holdings, the subjects or privileges thereby held, were put altogether *extra commercium*. Many things concurred : There was a *delectus personarum* ; there was a standing contract betwixt the superior and his vassal ; a subject granted for services to be performed by that very vassal, which subject could not be taken from the vassal without the superior's consent, as being destined for a certain purpose ; and lastly, there was properly no subject in the vassal, which could be alienated, every vassal being properly an *usufructuarius*, and the heir deriving right not from his predecessor, but from the superior.

But in progress of time, when nations were civilized, and the arts of peace cultivated, military prowess was of less importance. Peace produced industry, and industry produced commerce : Money came to be of general use ; and, by the increase of money, land acquired a value which it had not originally. Vassals were willing to alien their land for money, and superiors were easily brought to consent, upon

getting a part of the price. Thus the commerce of land crept in by degrees ; and when a man purchased land for a full price, it was a natural consequence, that he should have more power over it, than if he had got it, as a [153] gratuity for military service. In process of time, feus came to be considered as patrimonial, which originally were beneficiary only : They came to be granted without limitation, to the purchaser, and to his heirs whatever. In a word, they are now in England in every shape allodial ; and equally so in this country, except as to the form of transmission.

To this day, traces of our old law so far remain, that land cannot be directly alienated without the superior's consent. But then, there is a remedy provided against this restraint by an adjudication. So soon as land came to be patrimonial, it was a natural consequence, that it should be attachable, for payment of the vassal's debt. This gave rise to apprisings and adjudications ; which the superior is bound to complete, by granting a charter to the creditor. And, under the notion of debt, every sort of conveyance may be thus made effectual.

Land is the most natural subject of commerce ; and a desirable purchase, as being the most permanent commodity of any that is designed for the use of man : and this natural aptitude for commerce, could not fail, in time, to get the better of the feudal law. But offices, and dignities, are of a quite contrary nature. It is, in a great measure, inconsistent with the policy of a well-governed country, that these should be *in commercio*. It is, even, a stretch, to make them hereditary ; of which our legislature was extremely sensible, in the reign of James II., when the evil was, in part, remedied, by forbidding heritable offices to be granted in time coming. It would be still a wider stretch, to make such rights saleable, and adjudgeable by creditors ; which might well deserve to be repressed by law, had it ever crept into use. But, whatever faint attempts have been made, every good man must be pleased to find, that such a gross corruption has never gained an establishment among us ; and, every good man must heartily wish, that it never may.

Thus, the strict rules, of the feudal law, continue, among us, in their original force ; so far, as they concern offices and dignities. These cannot be alienated, without consent of the superior. And, though, by statute, the superior is bound to accept a creditor, for his vassal, who adjudges land for payment of debt ; yet, adjudgers of offices and dignities, have no such privilege. The statute takes place, only in lands, and other patrimonial subjects ; and, neither the spirit, nor letter of the law, can be stretched, to comprehend offices and dignities, which are strictly beneficiary, not at all patrimonial.

It is very true, that the office, of heritable usher, is not of the first magnitude : Perhaps, it does not require any particular skill, or activity, to perform the duty of the office. But, then, it is a grant, from the Crown, to a certain family, selected to serve as usher ; and, the King cannot have other ushers imposed upon him, but whom he has chosen. Every heir is entitled to the office, as called to it personally, by the grant ; and not as deriving any right from his predecessor. At the same time, it cannot pass observation, that the defenders seem to give little attention to consequences, when they urge, the meanness of the office, as an argument in their favour. Were the judgment, in this case, to affect the pursuer only, it [154] would not deserve any regard, further than so far as justice is concerned. But, it makes the present question of the utmost importance, that it is a leading case ; for, whatever judgment is here given, must be applicable to offices of the highest trust and importance, as well as the lowest. If the office of usher be found adjudgeable, the Court cannot stop short ; but must find the same, as to all the hereditary offices in the kingdom ; the greatest in power and dignity not excepted.

This train of reasoning may be reduced, into a narrow compass. The nature of these offices preserves them from being *in commercio* ; and, when we consider the manner of their establishment by feudal holding, it must be yielded, there was a time when they were *extra commercium*, as much as land was. Land is now *in commercio* ; and it is good policy it should be so. The direct contrary obtains, in dignities and offices : It would be a gross abuse, to bring them into commerce. These things being yielded (and there is no disputing any of them), it remains, upon the defenders, to make out, that this abuse, however gross, is sanctified by practice and custom. If they can bring full evidence of this, there is no help for it ; they must gain their cause. But, if they can only give a few instances, where heritable sheriffships have been adjudged, and, at best, acquiesced in, without challenge (not one single instance,

where the same, upon challenge, has got the countenance, and authority, of a court of law, such instances can only shew, that the abuse is creeping in ; which, instead of being a favourable circumstance for the defenders, ought to rouse the attention of the public, and engage the Court of Session, by a judgment, upon the point of right, to put an end, at once, to this encroachment upon law and good policy. What an appearance must it have, to see the twofold power of a magistrate, and of a judge, put to sale in a market, under the title of a sheriffship ? A thing, that would be remarked, as uncouth, even in the history of savages. And yet, the consequence is evident ; for, if a sheriffship be found adjudgeable for debt, such a judgment must pave the way, to bring it absolutely into commerce. In a country, where offices are venal, it is no wonder, that everything else should be bought and sold. But, the pursuer rests, in the humble assurance, that the Court of Session will never give countenance to such a gross corruption.

As the defenders laid great weight, upon the many instances, produced by them, of heritable offices passing by retours (concluding, from thence, that heritable offices are considered, in our practice, to be patrimonial, and, consequently, attachable, for payment of debt), the pursuer endeavoured to remove the weight of these instances, by observing, that there is no instance of a service, where nothing was intended to be taken up but an office, or a dignity. The instance of Charles II.'s serving heir to the Duke of Lennox, in order to carry the heritable offices of high admiral, and high chamberlain, does not hold true in fact : The brieve was taken out to serve the King heir in the earldom of Lennox ; and these offices went into the retour, as being annexed to the earldom, and contained in the charter from whence a description of the lands was taken. And it must be [155] obvious, that instances of retours of lands where offices and dignities are also engrossed, can be of no weight to prove, that, in our practice, retours are necessary to connect the heir's title to an office, or dignity ; since the retour, at any rate, is necessary for the land. But, as this matter is of importance, the pursuer will consider it a little more at large.

There can be little doubt, that the renovation of the feu, in the person of every heir, was requisite, in dignities and offices, as well as in land. What was the precise form of the renovation, in these cases, is a little dark. Our lawyers are silent upon this head ; probably because the thing has not often occurred : For, originally, offices, and dignities, were always annexed to land ; and the renovation of the feu, by infeftment, upon a retour, carried, along, the whole connected rights. In England, at this very day, we find traces, of the renovation of the feu, in dignities : The heir of a peer cannot take his seat in Parliament, at short hand, but must be introduced, by two other peers, in a form prescribed by custom ; and, probably, there has been some such thing in Scotland. But, however this be, one thing is extremely plain, that a service, and retour, can never be requisite, for making up the heir's title, in a dignity, or office, unless where annexed to land. It is obvious, that a service and retour is calculated for land only. The questions, which are put to the inquest, do, all of them, regard the land, in which the predecessor died infeft ; and the verdict, or answers, made by the jury, are adapted to the questions. At the same time, in giving the heir possession of his father's dignity, or office, there was no necessity of an inquisition, as in the case of land. The King, though he is not supposed to know the condition and circumstances of every one of his vassals, can scarcely fail to be personally acquainted with every one of his nobles, and with every one of his office-bearers ; and, therefore, for ought appears, the heir was admitted in these cases, whatever was the form of the admission, without any preceding inquisition.

And this is the true reason, and foundation of the rule, that service is not necessary in dignities, and in offices. An heir-apparent, of a peer, may, without any solemnity, assume his predecessor's title ; which, of course, gives him all the privileges belonging to it. The case is the same, with regard to an office. And it would appear, that, if there has been any particular form, in these cases, of renewing the feu in the person of the heir, the same has worn out of practice, as the strict forms of the feudal law are universally wearing out. And so, with regard to dignities and offices, the case, among us, at present, comes to be much upon the same footing with what has always been the law of France, lands not excepted, that *mortuus sedit vivum* ; which, in plain English, is, that the heir is entitled to take up his predecessor's right at short hand, without needing a renovation of the feu from the superior.

The pursuer thought it necessary, to explain this matter at large ; both as tending to support one branch of his libel, viz. that he is entitled to take up the office of usher, without a service, and, consequently, without being subjected to the debts of his predecessor ; and also, as furnishing, in his apprehension, a strong [156] additional argument, in support of the first branch of his libel, viz. that the subject is not adjudgeable. For to say, A subject may be taken up by an heir, without incurring a passive title, and to say, That a subject is not adjudgeable, are propositions intimately connected ; the one must be a consequence of the other : The reason is, that a man can withhold from his creditors no subject, which he can turn into money, for their payment : Every such subject may be attached by legal execution ; and the heir, who takes up such a subject, must be liable in a passive title, as intromitting with a fund which ought to go to creditors for their payment. If, therefore, there be a subject which is not attachable by creditors, we may safely conclude, that the heir may take up the same, without incurring a passive title ; as *e converso*, if there be a subject which the heir may take up without incurring a passive title, we may as safely conclude, that the same is not attachable by creditors. This seems to be resting upon a secure foundation : Let us apply. It is *tritisissimi juris*, that an heir may take up his predecessor's peerage, without danger of incurring any passive title ; *ergo*, a peerage is not adjudgeable, It was never dreamed, that the taking up an hereditary office makes the heir liable to his predecessor's debts ; *ergo*, an hereditary office is not adjudgeable. It is said, that the Earl of Moray purchased the sheriffship of Moray from Dunbar of Westfield. Let us suppose the family-estate to be quite gone, and the heir of the family of Moray reduced to his peerage and sheriffship : Will it be said, that he cannot take up the sheriffship, without incurring a passive title ? Such doctrine is not to be met with, in our law books ; and the pursuer will take the contrary for granted, till the proposition be proved from principles, or from authority. But he has no occasion to rest upon the negative proposition : He has the express authority of the Court of Session for him. A process, upon the passive titles, was brought against the Earl Marishal ; and the passive titles, condescended on were, his using the title, and exercising the office. "The Lords found peerages and offices not to be *in commercio* ; and, therefore, that the defender's using the title of Earl, and exercising the office of Marishal, infer no passive title, 2d February 1682, Bower of Kilmidrum *contra* Earl Marishal." (See PASSIVE TITLE.) Here is a judgment in point, that a heir's taking up, and exercising, a hereditary office, makes not a passive title. The reason given, in the decision, is, that offices and dignities, are not *in commercio*, cannot be bought and sold. And it is a necessary inference, that they are not adjudgeable for payment of debt. This direct authority, of the Court of Session, in the pursuer's favour, is worth a hundred instances, if so many could be brought, of heritable offices being sold privately, and connived at, without challenge.

It has been urged, by the defenders, "That the jurisdiction of a baron, or of a lord of regality, are merely territorial ; are inherent qualities, or privileges, belonging to the land ; and go, along with the land, to every purchaser." The nature of an office, which has no relation to land, is very different. It may, occasionally, be annexed, or united, to land ; as any two things may be united by a charter ; however incapable of natural union : But such an union is as easily dis-[157]-solved as it is established. Alienation of the land, by the vassal, dissolves the union ; and, therefore, an adjudication of the land will not carry, along with it, the office : On the contrary, the adjudging the land is one of the ways by which the union is dissolved.

The case being reported by Lord Arniston, "the Lords found the office in question adjudgeable." The pursuer reclaimed ; and, with the answers, was given in, a large excerpt from the records, tending to shew, that offices had deviated from their original nature, as well as land, to become patrimonial, in place of being beneficiary ; and, therefore, that, by practice, offices were become the subject of commerce, as well as land ; though the former was not so thoroughly established as the latter. When this cause came to be considered, upon the petition and answers, with the said excerpts, the judges were all of opinion, that it was an irrational practice to subject offices, like this in question, to be distrained for payment of debt. But, then, it was thought, that the practice had gone too far to be altered ; and that it might be of dangerous consequence, to many, who possess such offices, by legal, or voluntary conveyance, to find this office not adjudgeable. And, for that reason, they adhered to their former interlocutor, the President alone dissenting. But they stopt there ;

and refused to find, that the office must be carried by a service, so as to subject the heir to all the debts of his ancestor.

This judgment was affirmed, upon an appeal to the House of Lords, in the following terms :

“ Ordered and adjudged, That the appeal be dismissed, and the interlocutors complained of, be affirmed.” *Fol. Dic. v. 3, p. 9. Rem. Dec. v. 2, p. 125.*

No. 19. [164] GEORGE OUGHTERLONY of London, Merchant *v.* The Earl of SELKIRK. November 28, 1755.

An adjudication of the lands, found to comprehend the mines.

Sir Alexander Murray of Stenhope, obtained a charter of mines from the Crown. It recited the 12th unprinted act, Parl. 12, Ja. VI. 1592, and granted to Sir Alexander, his heirs and assignees, all the mines found, or to be found, in his lands in the county of Peebles.

After the date of this charter, the creditors of Sir Alexander did diligence against his estate. The Earl of Selkirk adjudged the lands ; Oughterlony adjudged both lands and mines.

[165] In a competition of the creditors of Stenhope, the question occurred, Whether the mines were carried by the adjudication which mentioned the lands only ?

Pleaded for Oughterlony, who adjudged both the lands and the mines : He who has right to lands, may, in terms of the act 1592, demand a charter of mines. This faculty of demanding will be carried by an adjudication of lands : But after this faculty has been exercised, and a charter of mines obtained, the lands and the mines are held under different titles, and must be separately adjudged. Thus an adjudication of lands may carry the right which the proprietor has of purchasing the teinds of those lands ; but such adjudication will not carry the teinds already belonging to the proprietor of the lands.

Pleaded for the Earl of Selkirk, who adjudged the lands only : By the act 1592, the proprietor of lands may demand a charter of mines, and he alone may work them ; he cannot work them after the lands have been adjudged from him. Unless, therefore, the adjudication of lands carry the mines, the grant of the mines must become ineffectual, and the intention of the act 1592 be frustrated.

“ The Lords found, That the adjudication of the lands comprehends the mines.”

Reporter, STRICHEN.—For Oughterlony, Sir D. DALRYMPLE & LOCKHART.—Alt. MILLER & BROWN.—Clerk, JUSTICE.

Dalrymple.

Fol. Dic. v. 3, p. 9. Fac. Col. No. 167, p. 249.

No. 20. MARION WILSON *v.* ALEXANDER FALCONER. December 7, 1759.

The office of keeper of the register of sasines, granted during life, with power to name a deputy, found not to be adjudgeable.

Alexander Falconer, keeper of the register of sasines for the shire of Berwick, in which office he had a power to name a deputy, being debtor to the pursuer, she raised an action of adjudication of this office.

Pleaded for Falconer, The office is not adjudgeable ; because it is not a patrimonial estate. The defender has only his commission during life, or so long as he executes the office properly ; it does not go to heirs ; and it cannot be assigned : But an adjudication is a legal assignation.

In the nomination of a person to this office, there is a *dilectus personæ*. Diligence and fidelity are requisite in the execution of it, for which there can be no security, if it may be attached indiscriminately by any creditor of the officer. The Crown has invested him with certain powers. His register, and extracts from it, bear faith in all courts. These powers he may commit to a deputy; but no court has a power to transfer them to creditors. Some few instances may indeed be given, where offices of trust have been adjudged; such as that of sheriff, usher, and printer to the King, &c. But the principles on which these decisions were founded, are not void of difficulty. Besides, these were cases very different [166] from the present. In each of them there was an heritable patrimonial interest; they passed by charter and sasine, as land-rights do, or descended to heirs. They were granted in perpetuity, or for a certain term of years; and might be assigned, bought and sold, without the approbation or accession of the Crown, as any other thing in property may. But this office is of uncertain duration; it is granted for life, or *quamdus se bene gesserit*; it cannot be transferred from one person to another, without a new commission from the Crown; and it is not in any shape given by the Crown as a patrimonial estate or property.

Pleaded for the pursuer, That in law and reason every person's estate, whether heritable or moveable, whether in liferent or fee, whether it is an estate vested for a long or a short endurance, ought to be subjected to the diligence of his creditors. It is admitted, that many heritable offices of trust, in which a *dilectus personæ* was proper in a very high degree, and which were vested by the Crown with great powers, and a public character, such as those of Constable, Justiciar, Chamberlain, Sheriff, Steward, Mayor, Bailie, Forester, Coroner, King's Usher, and King's Printer, have been so far considered as property, that they have been adjudged; and, as such offices have been adjudged, when granted heritably, or for a term of years, a good reason does not occur, why they might not have been adjudged, had they been granted only for life.

There is no difference in the nature of the thing betwixt an heritable office, and an office for life, except in the endurance. The terms of the grant, in other respects, are the same, the duties of the offices are the same. A prohibition to alienate is not more implied in the one than in the other; and an heritable office is not more the property of the possessor than a liferent one is, for the terms of their respective endurance. It appears then incongruous, that the one should have it in his power to withhold his estate from his creditors, and that the other should not have the same power. In other subjects, this distinction is not observed; a terce, a courtesy, the liferent of an heir of entail, or any other liferent of a land estate, may be adjudged as well as the fee of it. Suppose the liferent of an office is granted to a man, and the fee of it to his son, it will not be disputed, that the liferent of this office would be adjudgeable for the debt of the father, as his property. By parity of reason, the liferent of an office ought to be subjected to the diligence of creditors, although the fee of it is not given away, but remains in the Crown.

Every objection arising from the importance of this office, from the *dilectus personæ*, the care and diligence requisite in executing it, and the powers vested in the officer by the Crown, ought to have applied with more weight against the adjudication of the high heritable jurisdictions already mentioned. Besides, the nice choice of a person to officiate in this office is not necessary, it requires only a faithful transcriber. The defender, by his commission, is impowered to name any person he pleases to be his deputy; and the creditors may be as capable to officiate, or to appoint a proper deputy, as the officer himself. By act 6, Parl. 1424, it is provided, That where officers of the law are incapable, others may be [167] appointed in their places;—but what greater incapacity can there be than bankruptcy? and who are so well entitled to enjoy the office during the incapacity, as the creditors of such officer? This question has been formerly determined in the Court of Session. The creditors of Hugh Crawford, keeper of the register of sasines for the shire of Renfrew, led several adjudications of his office from 1750 to 1753.

Replied, The argument founded on the act of James I. does not apply. The power granted of naming persons to officiate during the incapacity of officers of the law, or other officers, was only in the case of heritable offices, of which the possessor, though minor, or otherwise incapable, could not be deprived. But this is an office *ad vitam aut culpam*. If the officer is incapable of officiating, he may be deprived.

The adjudications led against Hugh Crawford were pronounced by the Lord Ordinary in the outer-house, and no appearance was made for Crawford the debtor.

"The Lords found the office not adjudgeable." *

Act. J. DALRYMPLE.—Alt. P. MURRAY.

Campbell.

Fol. Dic. v. 3, p. 9. Fac. Col. No. 201, p. 359.

* On this case Lord Kames makes the following observations :—In the year 1742, Alexander Falconer, town-clerk of Lauder, obtained a commission from his Majesty to be keeper of the register of sasines and reversions for the town of Lauder, bailiery of Lauderdale, and sheriffdom of Berwick, with the fees and emoluments thereof. The commission is for life, and empowers Alexander Falconer to appoint a deputy or deputies to act for him.

His creditor Marion Wilson, raised a process of adjudication, in order to affect this liferent-office. And it was urged for her, that all offices of profit are adjudgeable, liferent-offices as well as what are hereditary. The defender admitted, that any subject descendable to heirs, is to be understood patrimonial; and, therefore, in its nature is attachable by legal execution. But he contended, that a liferent-office is of the nature of a trust, implying a *dilectus personæ*, that it cannot be transferred by will, and therefore is not adjudgeable. This is the reason why the office of a Judge of the Court of Session is not adjudgeable; and the same reasoning is applicable to the office of keeper of the register of sasines. The Court refused to sustain the adjudication.

This decision deserves scarce to be considered as an authority. The point was but superficially handled by the pursuer, and the Court took up with the topics that were set before them, without piercing to the foundation. It seems clear, that the office itself is not adjudgeable. It was certainly not in the power of the Court of Session, by means of an adjudication, or by any means, to forfeit Falconer of his office, and in his stead to name Marion Wilson keeper of the register of sasines. This power is inherent in the Crown, and does not belong to the Court of Session. Next, to transfer the office to the creditor, is repugnant to the very nature of an adjudication, considered as a security only, which is the case during the legal. A security upon land may be granted voluntarily, in order to levy the rents; and the same security may be established by adjudication. But supposing a liferent-office to be alienable by will, so as to put the disponent in the place of the disponent, we can form no idea of a security granted upon an office; for the right to an office is in its nature indivisible, and cannot be split into parts like a right to lands, of which one may enjoy the property, and another a real security; and for that reason, a security upon an office cannot be established, whether by consent or by authority of a judge. But, as there is nothing in law to bar a voluntary conveyance of the emoluments of an office in security and payment of debt, as little is there to bar an adjudication of these emoluments. This leads to [168] the true state of the matter in debate. And the question ought to be, not whether the office be adjudgeable? but whether the emoluments be adjudgeable? When the case is considered in this light, all difficulties vanish. The *jus mariti* as far as personal, considered as the authority a man has over his wife, is certainly not adjudgeable. But the emoluments of the *jus mariti* may be adjudged. Precisely in the same manner, the office of keeper of the register of sasines being personal, is not adjudgeable. But the emoluments of that office may be adjudged. And if such adjudication be competent, it follows, that the deputy, instead of accounting to Mr. Falconer for the emoluments, must account to the adjudger. Possibly no deputy may be named; but in that case, it is Mr. Falconer's duty to name a deputy with consent of the adjudger. And if Falconer refuse to do this act of justice to his creditor, it becomes the duty of the Court of Session in his place to name a deputy. To conclude, it appears to me that wherever there is power of deputation, the emoluments may be adjudged however personal the office may be. Otherways, where there is no power of deputation, which is the case of the supreme Judges.

No. 4.

[190] TOD v. SCOT. December 16, 1707.

An adjudication allowed to proceed, reserving all defences, although the ground of it was under suspension.

Grissel Scot being relict of Muirhead of Stevenson, and having had great intrusions with his sheep and other stocking, there is a submission entered into betwixt her step-son young Stevenson, and her, and by a decreet-arbitral, she is decerned to pay him 3000 merks. John Tod, merchant in Glasgow, being creditor to the Laird of Stevenson, he arrests and obtains a decreet of forthcoming, and thereon raises a summons of adjudication; her defence is, I have raised a reduction of that decreet of forthcoming, because the debt arrested being only conditional, can never be the foundation of an executive process, till all be implemented and fulfilled to me. 2do, I have suspended the decreet-arbitral on clear nullities, and the suspension is not yet discussed. Answered, Adjudications are most favourable diligencies, lest creditors be cast without year and day; and *esto* this be the first, yet she is old and valetudinary, *et vergens ad inopiam*, and if she die, he loses his debt; and all that was prestable on Muirhead of Stevenson's part is fully performed; and, though a suspension stops personal execution, yet it cannot be obtruded against a real diligence for my further security; and if you prevail in reducing or restricting the decreet-arbitral, the adjudication will fall, or be restricted, in consequence.

The Lords would not stop the adjudication, being *processus et iudicium summarium*, but reserved all defences *contra executionem* to the mails and duties there to be received.

Fol. Dic. v. 1, p. 11. Fount. v. 2, p. 404.

No. 12.

[197] CALDER v. OGILVY. January 31, 1712.

Reasons of reduction and nullity, which may be instantly verified, will be received.

Middleton of Balbegno having granted a bond of provision to his younger children, and Calder of Assuanly, as assignee, craving adjudication; compareance is made for Mr. John Ogilvy, advocate, who produces a disposition of the lands craved to be adjudged, with a base infetment thereon, and repeated a reduction, and craved the adjudication to be stopped *medio tempore*; his reasons being *in jure* and instantly verified.—Alleged, Adjudication being a *processus executivus et summarius*, cannot be stopped by a third party's intervention; but it must be served *contra executionem* in the mails and duties. It is true, a debtor may hinder lands from being adjudged, if he instantly prove payment or compensation; but the instructions must be very clear, else they will not be received *in hoc ordine*: But much less will a right, flowing from my debtor, to his brother-in-law, bearing love and favour, compete with me, who am likewise in a reduction of his right; for at this rate, a man that has a forged defective null right, shall stop lawful creditors on pretence of nullities in their debts, and possess the estate to the scorn of justice. And if Mr. Ogilvy's right be good now, it will be as good when it comes in regularly to be tried: And it was so decided betwixt the Lord Anstruther and Seaton of Northbank, as assignee by the Lady Largo, where the Lords refused to stop the adjudication; and the like betwixt Hamilton of Rosehaugh and Hags.* To which add Stair's opinion, tit. Dispositions, § 47, who quotes a decision out of Spottiswood.† Neither is he who officiously obtrudes himself, so favourable as a party called; and to allow him to quarrel my right, when I am stopt in my diligence and title to quarrel his, is like the setting two men in the field, allowing weapons to the one, but not to the other, which is neither agreeable to the rules of honour nor justice: For, when I come to repeat my reason of reduction, you'll tell me I cannot, because I am but a personal creditor, and you are infet.—Answered,

* See General List of Names.

† Cairncross v. Lord Drumlanrig, p. 43, v. 1, Quarto Dictionary.

I being proprietor, I have very good interest to stop any from adjudging my land. *Video rem meam agi*. I am not to involve you in a long plea, my nullities are intrinsic, arising *ex facie scripturæ*, and instantly verified; and such have always been received, as was found Livingston *contra* the Lord Forrester's heirs, 22d July 1664 (No. 6, h.t.); and Boyd *contra* Boyd, 26th July 1676 (No. 1, h.t.); and recently, Commissary Campbell got his lands scored out of the adjudications against Dalmahoy. And Hamilton of Bangour stopt the Lady Ormiston's adjudication, on his repeating reasons of reduction verified by the decreet; and I will not suffer my cause to be wounded by your adjudging. And as it is in self-defence, so here *principiis obstandum*; [198] and if your right be null, you cannot complain; for *damnum quod quis sua culpa sentit sentire non videtur*. And Stair is misapplied; for tit. Competitions, § 27, yields, that exceptions instantly verified are competent against adjudications; and it must be still so while our good laws against multiplying of processes stand in vigour; and a present trial saves expences to both parties.—The Lords found, before any adjudication, Ogilvy might insist in such reasons of reduction and nullity as were instantly verified; but ordained him to condescend thereon, that it might appear of what kind they were. My Lord Forglen having proposed, if he might vote in this case, one of the parties having married his niece; the Lords found he might be declined in any cause immediately carried on by his niece, but not in her husband's concerns, not derived from her. (See DECLINATOR.)

Fol. Dic. v. 1, p. 12. *Fount.* v. 2, p. 714.

No. 22. [248] The Lady BANGOUR v. HAMILTON and OTHERS. January 26, 1681.

How year and day is to be computed.

In a competition between Mr. William Hamilton, and other adjudgers of the estate of Bangour, the Lady Bangour having also adjudged, upon the warrandice of her contract, and craving to come in *pari passu*, in respect her adjudication is dated the 31st of July 1680; and their adjudication is upon the 30th day of July 1679:—It was answered, That the account of the year ought to be by the number of days intervening, *ita est* the Lady's adjudication is not within 367 days, which is a year and a day. 2do, Year and day is only meant of a full year, and the Lady cannot pretend that she is within a year.—It was answered, That within year and day can be no otherways interpreted, than within the next day after a full year; which year is never calculated by the number of days, but is ever estimated by the return of the same day, in the next year; and though there may be more days in one year than in another, as in the leap year, it alters not the case, for *de minimis non curat lex*.

The Lords found, That the year was not to be counted by the number of days, but by the return of the day of the same denomination of the next year, and therefore found, that the creditors' adjudication, being upon the 30th July 1679, and the Lady's adjudication being upon the 31st day of July 1680, was within the year and day of the rest, and came in *pari passu* therewith.

Fol. Dic. v. 1, p. 20. *Stair*, v. 2, p. 842.

No. 7. [289] KINCAID v. GORDON. June 26, 1677.

An apprising, brought by the apparent heir, is redeemable within ten years by the creditor; and this legal was found prorogated, by a declarator, raised within the ten years, craving reckoning for apparent heir's intromissions, and offering payment of the surplus.

Mr. John Kincaid having right, by his contract of marriage, to a sum due by um-quhile Gordon of Abergeldy, pursued his son as representing him, and insisted on

that title, That he uplifted the rents of the lands of Abergeldy, wherein his father died infett in fee.—The defender having alleged, That his intromission was by right of an expired comprising, deduced against his father :—The pursuer alleged, That this apprising, coming now in the person of the apparent heir, by the act of Parliament 1661, betwixt Debtor and Creditor, is satisfiable by payment of what the apparent heir truly paid out at any time within ten years after the apparent heir's right : And within the ten years the pursuer raised a declarator, craving therein count and reckoning for the defender's intromission, and offering payment of the surplus ; which declarator is produced.—It was answered, That the said act doth only declare such apprisings redeemable within ten years, of what is resting after his intromission : But here there was no redemption, nor any order ; and this being a new statute, it is *strictissimi juris*.—It was replied, That by the daily practice, the legals of apprisings are preserved from expiring, and prorogated by such declarators, in respect they cannot know what to consign, till the appriser's intromission be determined by account.

The Lords sustained the declarator to prorogate this legal of ten years *ad hunc effectum*, to make the apparent heir liable to the pursuer for his intromission after [290] satisfaction ; and took in the declarator *incidenter* in this process, that thereby the pursuer might redeem from the defender, by payment of what was resting after intromissions. (See HEIR APPARENT.) *Fol. Dic. v. 1, p. 20. Stair, v. 2, p. 531.*

No. 14. [302] WALKER v. MACPHERSON and FORRESTER. January 1720.

An adjudication, through informalities, being reduced to a security, the intromissions had, *medio tempore*, are imputed in extinction thereof.

An adjudication of a tenement, by progress in the persons of Macpherson and Forrester, having been restricted to a security, at the instance of John Walker, merchant in Edinburgh, because more was adjudged for than was due ; the pursuer contended, That the adjudication was extinguished by the defenders and their authors intromissions, even those had after the legal reversion of ten years ; because the adjudication having been found only a right in security, and the legal still open, it must be extinguishable by intromission, whether the original creditor intromit, or his singular successor ; for such is the nature of rights in security and payment.

The defenders pled, That possession having been attained after the legal was expired, the *fructus bona fide precepti et consumpti*, while they had reason to believe themselves proprietors unaccountable, could not be imputed to extinguish the principal sums in their adjudication ; which, in this case, would be particularly hard, because if they be bound to account, it must be by a rental ; and, meantime, possessing *tanquam domini*, they have neither preserved vouchers nor documents of public burdens, reparations, wastes, bankrupt tenants, &c., to diminish the same. If, then, the pursuer's plea obtain, no man shall ever possess quietly or securely upon an adjudication ; for it will not be said, that the law ties an adjudger to keep accounts of his actual intromissions, dead, waste and poor for ever ; and yet no man can be secure, but minorities may interrupt for a long time beyond the course of prescription, during which, an adjudger, or purchaser of an estate from an adjudger (and many estates in Scotland, have no other foundation), shall not know whether he is master of an opulent estate, or if he is not worth a shilling in the world.

[303] To which it was answered, That while the pursuer pleads extinction only, and not repetition, he pleads nothing inconsistent with the *bona fides* of the defenders ; which will be plain, by taking a view of the effect of *bonæ fidei* possession in voluntary rights. Where one purchases a voluntary irredeemable right, and upon the faith of its being an effectual purchase, pays the price ; another appearing, and excluding him with a better right, his *bona fide* possession can have no other effect, but to exclude repetition of what he has uplifted and consumed : His price is lost, unless he can recover it off his author upon the warrandice ; and all he can plead, is, to retain what he hath *bona fide* intromitted with : It is the same when an adjudication is purchased, which is afterwards excluded by preferable diligence. If then this be the only effect of *bona fides*, when the right acquired is excluded by preferable right :

For what reason should it have a further effect, when one has laid out his money upon the purchase of a right that of its own nature is extinguishable, and is by intromission actually extinguished? When it is found extinguished, he is in the same case that the *bonæ fidei* possessor is, whose right is excluded by one preferable; he loses his price, and is only saved from repetition of what he has intromitted with and consumed. Hence, it is evident, that the benefit pleaded by the pursuer, of having his debt extinguished by intromission, which arises from the nature of the right, does no ways lessen or encroach upon the favour allowed to *bonæ fidei* possession: For still the *bonæ fidei* possessor is in the same state he would be, had he been excluded by another right; and consequently has all the benefit of his *bona fides*, though his intromissions be imputed in extinction of his adjudication, that *bona fides* gives in any other case.

It was replied for the defenders, They lay not their defence here simply upon their *bona fides* but upon the nature of their intromission: When one intromits by virtue of a right in security, which he *bona fide* considers as a right of property, the intromissions cannot impute in extinction of the right, for these reasons, That it is not the fact of intromitting in any case that extinguishes the right, but the creditor's intromitting in virtue of that right; and as having such a right, his application of the intromissions thereto: Just as in the common case of payment, it is not the debtor's telling over the money that extinguishes the obligation, but the creditor's acceptance *in solutum*. Thus one having a right in security, which leads him to intromit, if he intromit not as in that right, but as in some other right, or perhaps as doer for another, or as *prædo* without any right at all; however he may be accountable for his intromissions, they cannot directly impute to the extinction of the right upon which he did not intromit. In this case, indeed, the intromission was had in virtue of that right itself, which is craved to be extinguished by the intromission; but still, since the intromitter took himself to be proprietor, and never considered his right as in security only, and therefore never once dreamed to make the application of his intromissions to the extinction of that right, either *animo*, or by any other external deed; it may be thought that it comes to the same, as if he had intromitted by any separate right; the bare fact of intromit-[304]-ting, signifying nothing, the *animus*, the design of the intromission being necessary to be considered, without which there is no application, and consequently no extinction.

"The Lords found the intromissions imputable."

Rem. Dec. v. 1, No. 18, p. 38.

No. 18. [312] The COMMON AGENT in the Ranking and Sale of JOHN MACKINNELL'S property v. THOMAS GOLDIE. June 9, 1797.

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 £1500, as the amount of the debt which he owed the Company, with interest from the [313] 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.

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 £396, 3s 4½d, 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 v. 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 v. 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 prætorium*, 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.

No. 6. [321] JAMES CAMPBELL v. JOHN SCOTLAND and ALEXANDER JACK.
March 7, 1794.

A declarator of expiry of the legal is necessary in order to cut off the right of reversion.
Effect of a decree of declarator.

George Gib, in 1757, adjudged a tenement of houses for a debt nearly equal to their value. He entered into possession, and soon after sold the subject in different parts. No declarator of expiry of the legal was ever raised.

In 1790, James Campbell, in right of the reverser, brought a reduction against John Scotland and Alexander Jack, who, about ten years before, had acquired right to a part of the subject by adjudication, from the heirs of the purchasers from Gib.

The pursuer stated several objections to the original adjudication, and likewise contended, that the debts on which it proceeded, were extinguished by the intromissions of the defenders and their authors.

The Lord Ordinary took the cause to report ; and the Court, before determining the particular objections, ordered a hearing in presence, on the general question, how far, where the adjudication is liable to no objection, and the debt is not extinguished by intromissions within the legal, a decree of declarator is necessary, in order to cut off the debtor's right of reversion.

The pursuer pleaded : The common law of Scotland gave the creditor a right to attach, and to sell irredeemably a part of his debtor's estate, sufficient to extinguish his debt. In this state of the law, as there was no good reason for giving a right of reversion, that privilege, which was introduced by 1469, c. 36, might have been considered as unfavourable. But when, in consequence of a slovenly practice, unauthorised by law, general apprisings were introduced, whereby a valuable estate might be carried away for a small debt, the expiry of the legal became highly penal against the debtor. Prior to the act 1621, c. 6, which indirectly recognised general apprisings, the Court, if any case had occurred, would probably have restricted the right of the creditor to a security, and given the debtor an unlimited right of redemption;

and although afterwards they gave effect to the expiry of the legal, they canvassed apprisings so strictly, that in almost every case it was opened up. See the *DICTIONARIES, v. Apprising*.

The act 1672, c. 19, which was framed by Lord Stair, was intended to put an end to the hardships attending the former practice; but it failed in its object, by allowing a general adjudication, wherever the debtor refused to assign over a part of his estate, one fifth greater in value than the sum due by him. General adjudications, being equally penal to the debtor, are therefore liable to the same restrictions with general apprisings.

Now, it is a general rule, that penal irritancies, introduced by law, do not take effect without declarator. This holds in the case of the irritancy *ob non solum canonem*; and in that for omitting to insert the limitations of an entail, in terms of the act 1685. For the same reason, a declarator of expiry is necessary, [322] and particularly where the adjudger enters into possession, as the debt may have been extinguished by intromissions within the legal. By this measure the debtor is warned of his danger, and, in practice, a state of the adjudger's intromissions are inserted in the libel and decree of expiry, for his information. Accordingly, the mere expiry of the legal has been in no case found sufficient to deprive the debtor of his right of reversion; and, in the following cases, the Court have gone upon the supposition, that a process of declarator was necessary; 5th March 1766, *Chalmers against Oliphant*; Fac. Col. No. 34, p. 58. See *FOUNDATIONS and WARRENTS*. 7th March 1769, *Caitcheon v. Fleming*; * 3d March 1758, *Anderson v. Nasmyth*, Fac. Col. No. 105, p. 186. See *PRESCRIPTION (NEGATIVE)*.

Besides, the only plausible reason for allowing an expiry of the legal to take place at all, was, that the creditor might be indemnified for being obliged to take land instead of money. This inconveniency, however, was removed by the acts 1681, c. 17, and 1690, c. 20, which allowed any one creditor of a bankrupt, either before or after the legal was expired, to bring the lands to judicial sale. Indeed, it may be doubted whether these statutes did not operate as a virtual repeal of the former ones relating to the expiry of the legal, the admission of the competency of a judicial sale after that period, shewing, that adjudgers are considered even then not as proprietors, but as creditors.

Answered: It appears, not only from all the statutes relating to adjudications (1469, c. 36; 1661, c. 62; 1672, c. 19), but also from those respecting other matters, that the mere lapse of the legal, without any declaratory process, was intended to make the subject adjudged, the absolute property of the adjudger. It was upon this account, that the act 1681, c. 21 gives adjudgers, after the expiry of the legal, a right to vote at elections; although it was intended that persons vested with an absolute right of property, should alone have that privilege. For the same reason, when by 1690, c. 10, annuities arising from debts, real or personal, were subjected to certain assessments, creditors, possessing upon adjudica-[323]-tions, whereof the legal was expired, are exempted. It is upon this principle also, that the creditor is not obliged to account for his intromissions after the legal; 1621, c. 6; Bankt. b. 3, tit. 2, § 4, para. 65, 73; *Principles of Equity*, vol. 1, p. 381. Indeed, the summons of declarator itself, according to common style, states, that the lands have, ever since the expiry of the legal,

* The particulars of this case, which has not been collected, are these:—In 1708, two heritable bonds were granted to Edward Baillie, over a subject in the Cowgate of Edinburgh, the property of Alexander Hunter.—Baillie entered into possession. After Baillie's death, one of his creditors, in 1728, led an adjudication for payment of a debt of £4512 Scots. Patrick Tod acquired right to this adjudication, and obtained a charter. He was infeft in 1751. In 1753, he sold it to Fleming.

Caitchen, the heir of Alexander Hunter, the original proprietor, made up titles, by charter and infeftment, from the Magistrates of Edinburgh, and brought an action against Tod and Fleming, of reduction of the titles in their persons, and of count and reckoning for the intromissions of themselves and their authors, with the rents of the subjects. It appeared in the action, that the heritable debts had been extinguished by intromission in 1741; but the defenders pleaded expiry of the legal.

This plea was repelled; and Lord Kennet, Ordinary, found them liable for the whole rents posterior to 1741. Upon a representation, he limited their accounting to the rents, from that time, actually received.—His judgment was affirmed by the Court.

belonged to the pursuer. This process is not so much as mentioned, either by Stair or M'Kenzie; and that it is not necessary, was found; Fount. 22d February 1704, *Livingston v. Goodlet*, p. 73, v. 1 of this Dictionary; July 1783, *Gordon of Carnfield*.^{*} See also, *Ersk. b. 2, tit. 12, §§ 22, 26*; *Bank. b. 3, tit. 2, § 4, para. 49*; *Stair, 18th June 1675, Laird of Leys v. Forbes*, p. 286, v. 1 of this Dictionary.

The act 1681, c. 17, does not apply to this case. Its object was to force the debtor to give up his land; and it leaves all questions with co-creditors to be settled in the ranking; or perhaps it may have meant to take away the right of adjudgers, in case of the insolvency of the debtor.

The Court considered separately the necessity of a decree of declarator, and its effects. On the first point it was

Observed: The acts 1681 and 1690 do not affect the present question. Formerly the estate of a bankrupt was divided among his creditors, and they had no way of getting payment of their debts in money. The sole object of these statutes was to remedy this defect, and not otherwise to regulate the interests of debtor and creditor.

It seems to have been the idea of the Legislature, when the acts 1661 and 1672 were passed, that an expired legal should operate *ipso jure*. But for a long time back, the rigour of the law has, in this respect, been mitigated; and even the principle of the act of sederunt, 27th November 1592, with regard to conventional irritancies, has not been strictly adhered to. A more equitable practice has now succeeded, by which parties are allowed to take as little advantage of one another as possible; and a reasonable time has in general been indulged, for doing away the effect of penal irritancies. The general adjudication now in use, is evidently not a sale under reversion; but a mere *pignus praetorium*; and to convert it into an absolute right of property, by the mere lapse of ten years, would be a strong and very unjust operation of the law, and not agreeable to its analogy or spirit in other instances. The creditor is not obliged, at the expiry of the term, to take the estate, *in solutum* of his debt; and as little ought the debtor to be foreclosed without some further judicial act, if the estate be large, in proportion to the debt. In the case of *Gordon of Cairnfield*, the Court went upon specialties; and it may be doubted whether it was a good decision.

As to the effect of a decree, when obtained, the Court were agreed, that where appearance was seriously made for the debtor, all objections would be dis-[324]-cussed; and that, if they were not sustained, and the irritancy not removed, the lands, in consequence of the decree, would become the absolute property of the creditor: But it was thought more difficult to determine what should be the effect of a decree of declarator in absence. On the one hand, it was observed by some of the Judges, that though the debtor might be restored against such a decree, upon shewing objections to the adjudication, or upon proving that the debt had been extinguished within the legal, the mere inequality between the extent of the debt and the value of the lands adjudged, ought to be no ground for setting it aside. Other Judges thought, that the effect of such a decree would depend upon the whole circumstances of the case; and that the value of the lands, compared with the extent of the debt, must be taken into the account; and that it would be necessary, in every case, to inquire what time had elapsed since the expiry of the legal; whether improvements had been made upon the faith of the right being absolute; or whether matters were still entire; and in general, that it would be incumbent upon the reverser to show good cause why he should still be restored against the decree of declarator, which he could not be, without making full satisfaction to the other party.

The Lords almost unanimously found, "That the expiry of the legal does not vest the estate in the adjudger *ipso jure*."

Lord Reporter, DREGHORN.—Act. Solicitor-General BLAIR, GEO. FERGUSSON, JOHN BUCHAN HEPBURN.—Alt. Dean of Faculty ERSKINE, CULLEN, TAIT.—Clerk, Sir JAMES COLQUHOUN.

No. 7. [15] FRANCIS STRACHAN v. Sir JOHN WHITEFORD. February 9, 1776.

One having a disposition in security over lands, held and possessed by his debtor on minute of sale without infeftment, cannot complete his right, by adjudication in implement of the minute of sale led against the granter of that minute as the person last invested with the feudal right.

James Aird was proprietor of the lands of Brackenhill, in which he was infeft. Agnes Mackenzie his spouse was infeft in an yearly annuity out of them, in the event of her surviving her husband.

James Aird conveyed these lands to James Aird, his son, and Isobel Foggo, his spouse, for a liferent annuity. The son was infeft.

The whole parties afterward, by a minute of sale, sold the lands to Mr. Matthew Stuart, professor of mathematics in the university of Edinburgh, obliging themselves to grant a disposition, containing procuratory and precept in his favour.

[16] No such disposition was granted ; but Mr. Stuart having entered into possession, granted an heritable bond over the lands to Sir John Whiteford, who was thereupon infeft.

Sir John obtained decree of adjudication in implement of the minute of sale against James Aird younger, and against his spouse.

Sir John was infeft in the lands in virtue of a charter under the Great Seal, proceeding upon the decree of adjudication, and this charter, containing a confirmation of the base infeftments in the persons of the Airds, and of all the other subaltern infeftments, subsequent to that of the last immediate vassal of the Crown.

Professor Stuart's affairs having gone into disorder, he conveyed these lands to Francis Strachan, Writer to the Signet, in trust, and assigned to him the whole writs and evidents.

To complete his title, Mr. Strachan led an adjudication in implement of the minute of sale, and then instituted a reduction of Sir John's adjudication, and of the charter and sasine following upon it.

In bar of this action, Sir John pleaded ;

Where a person has obtained a right to lands, whether absolute or only in security, and where the right of the author to these lands is not completed, the holder of the right may, by the force of legal diligence, supply the want of infeftment in the person of his author, without communicating any benefit to third parties, in prejudice of his own right. If the method which the defender adopted be inept, a contrary doctrine would be true. No other method can be pointed out, by which the defect could be supplied, without running the risk of giving a preference to other creditors.

It is no doubt competent for an assignee to pursue, either in his own name or in the name of the cedent, but it is no necessary measure for an assignee to carry on his diligence in the name of his cedent. On the contrary, if he can render his right complete by prosecuting in the name of his author, it must also be in his power to render his right equally complete, by prosecuting in his own name.

Indeed it is by prosecuting in his own name only, that this can be accomplished with safety. An adjudication in implement, for example, obtained in the name of Professor Stuart, and a charter and sasine expedited thereupon, would as a *jus superveniens* in his person have validated a first infeftment, flowing from him in favour of another party ; so that the vigilant creditor would, by the force of his own diligence, be cut out of his preference by the creditor who was doing nothing.

Nor would it have done to have first adjudged the minute of sale upon the personal obligation in the heritable bond, and then to have made that adjudication the groundwork of an adjudication in implement against the Professor's author : For by doing this, every personal creditor of Mr. Stuart would have been entitled, by adjudging within year and day of the defender, to have been [17] preferred *pari passu* with him upon the Professor's estate. This is saying, that a disposition to a creditor in security of his debt of a personal right to lands, is no better than so much blank paper, and that the disponent is in no better situation than if he had relied upon the debtor's mere personal obligation ; whereas a personal right to lands is a valuable and substantial estate, which the holder may render complete in his own person by infeftment.

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It seems to have been the idea of the Legislature, when the acts 1661 and 1672 were passed, that an expired legal should operate *ipso jure*. But for a long time back, the rigour of the law has, in this respect, been mitigated; and even the principle of the act of sederunt, 27th November 1592, with regard to conventional irritancies, has not been strictly adhered to. A more equitable practice has now succeeded, by which parties are allowed to take as little advantage of one another as possible; and a reasonable time has in general been indulged, for doing away the effect of penal irritancies. The general adjudication now in use, is evidently not a sale under reversion; but a mere *pignus prætorium*; and to convert it into an absolute right of property, by the mere lapse of ten years, would be a strong and very unjust operation of the law, and not agreeable to its analogy or spirit in other instances. The creditor is not obliged, at the expiry of the term, to take the estate, *in solutum* of his debt; and as little ought the debtor to be foreclosed without some further judicial act, if the estate be large, in proportion to the debt. In the case of Gordon of Cairnfield, the Court went upon specialties; and it may be doubted whether it was a good decision.

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The Lords almost unanimously found, "That the expiry of the legal does not vest the estate in the adjudger *ipso jure*."

Lord Reporter, DREGHORN.—Act. Solicitor-General BLAIR, GEO. FERGUSSON, JOHN BUCHAN HEPBURN.—Alt. Dean of Faculty ERSKINE, CULLEN, TAIT.—Clerk, Sir JAMES COLQUHOUN.

No. 7. [15] FRANCIS STRACHAN v. SIR JOHN WHITEFORD. February 9, 1776.

One having a disposition in security over lands, held and possessed by his debtor on minute of sale without infeftment, cannot complete his right, by adjudication in implement of the minute of sale led against the granter of that minute as the person last invested with the feudal right.

James Aird was proprietor of the lands of Brackenhill, in which he was infeft. Agnes Mackenzie his spouse was infeft in an yearly annuity out of them, in the event of her surviving her husband.

James Aird conveyed these lands to James Aird, his son, and Isobel Foggo, his spouse, for a liferent annuity. The son was infeft.

The whole parties afterward, by a minute of sale, sold the lands to Mr. Matthew Stuart, professor of mathematics in the university of Edinburgh, obliging themselves to grant a disposition, containing procuratory and precept in his favour.

[16] No such disposition was granted ; but Mr. Stuart having entered into possession, granted an heritable bond over the lands to Sir John Whiteford, who was thereupon infeft.

Sir John obtained decree of adjudication in implement of the minute of sale against James Aird younger, and against his spouse.

Sir John was infeft in the lands in virtue of a charter under the Great Seal, proceeding upon the decree of adjudication, and this charter, containing a confirmation of the base infeftments in the persons of the Airds, and of all the other subaltern infeftments, subsequent to that of the last immediate vassal of the Crown.

Professor Stuart's affairs having gone into disorder, he conveyed these lands to Francis Strachan, Writer to the Signet, in trust, and assigned to him the whole writs and evidents.

To complete his title, Mr. Strachan led an adjudication in implement of the minute of sale, and then instituted a reduction of Sir John's adjudication, and of the charter and sasine following upon it.

In bar of this action, Sir John pleaded ;

Where a person has obtained a right to lands, whether absolute or only in security, and where the right of the author to these lands is not completed, the holder of the right may, by the force of legal diligence, supply the want of infeftment in the person of his author, without communicating any benefit to third parties, in prejudice of his own right. If the method which the defender adopted be inept, a contrary doctrine would be true. No other method can be pointed out, by which the defect could be supplied, without running the risk of giving a preference to other creditors.

It is no doubt competent for an assignee to pursue, either in his own name or in the name of the cedent, but it is no necessary measure for an assignee to carry on his diligence in the name of his cedent. On the contrary, if he can render his right complete by prosecuting in the name of his author, it must also be in his power to render his right equally complete, by prosecuting in his own name.

Indeed it is by prosecuting in his own name only, that this can be accomplished with safety. An adjudication in implement, for example, obtained in the name of Professor Stuart, and a charter and sasine expedited thereupon, would as a *jus superveniens* in his person have validated a first infeftment, flowing from him in favour of another party ; so that the vigilant creditor would, by the force of his own diligence, be cut out of his preference by the creditor who was doing nothing.

Nor would it have done to have first adjudged the minute of sale upon the personal obligation in the heritable bond, and then to have made that adjudication the groundwork of an adjudication in implement against the Professor's author : For by doing this, every personal creditor of Mr. Stuart would have been entitled, by adjudging within year and day of the defender, to have been [17] preferred *pari passu* with him upon the Professor's estate. This is saying, that a disposition to a creditor in security of his debt of a personal right to lands, is no better than so much blank paper, and that the disponent is in no better situation than if he had relied upon the debtor's mere personal obligation ; whereas a personal right to lands is a valuable and substantial estate, which the holder may render complete in his own person by infeftment.

It would have been a superfluous step to have led an adjudication against Professor Stuart, in order to carry the minute of sale, when by the heritable bond, and the assignation therein contained, the defender had all the right to that minute which Mr. Stuart could give him, in so far as respected the security granted by the heritable bond. The only use of an adjudication is to transfer, by an act of the law, a right from the debtor to the creditor, for the creditor's payment or security, which the debtor ought to have done voluntarily; and it would have been both nimious and idle, upon the part of the creditor, to lead an adjudication against his debtor, in order to transfer a right which the debtor had formerly, by his voluntary act and deed, himself transferred to the creditor in security of his debt.

A voluntary conveyance from the person in the right, where the granter is under no legal incapacity, is in every respect as efficacious as a legal conveyance. It is impossible, in such a case, that the act of the law can do more than the act of an unlimited proprietor. Now the defender's right is altogether the same as if he had an express conveyance to the minute of sale. A conveyance to writs and evidents in general carries a right to every writing of and concerning the subjects conveyed. Procuratories and precepts are executed, charters expedited, and infeftments taken upon no other title than a general assignment to writs and evidents. It is not necessary for a general disponee, who is at the same time heir at law, to expedite a general service, or to lead an adjudication where he is not heir at law, in order to carry any unexecuted procuratories or precepts that might have been in the person of the defunct. But if a general disposition have all the effect of a general service, and entitle the disponee to execute any procuratory or precept, that stood in the disponent, as much as if they had been specially conveyed; then a general assignment to writs and evidents respecting a particular subject must have the same effect as if every writing relative thereto had been specially and expressly assigned.

It is a misapprehension to say, that Sir John, by his bond, was no more than a creditor to Mr. Stuart, and that however he could have adjudged the lands from that gentleman in his character of creditor, yet he could not adjudge the lands themselves in implement, to pertain to himself heritably and irredeemably, without any legal or reversion. An adjudication against Professor Stuart by Sir John as a creditor, in virtue of the obligation in his bond, would have been a most improper step of diligence. A charter of adjudication and infeftment can only vest the feudal right of the lands in the person of the adjudger, where the feudal right stood in the person of him against whom the adjudication is [18] led either really or *fictione juris*. In the present case, the lands were not vested in the debtor's person, and the minute of sale contained no warrant of infeftment. Although, therefore, an adjudication carries a personal right containing a warrant for infeftment, yet as the minute of sale did not contain such a warrant, the right to the lands could not have been completed without a second adjudication against Mr. Stuart's author in implement thereof, which is the very step which has been followed. And having, by the assignment in the bond, a good right to the minute of sale in so far as it was necessary for completing his security, no other course could have been taken than that of leading an adjudication against the person in whom the feudal right of the lands stood in implement of the minute of sale.

In the second place, it is no solid objection to the adjudication, that the lands are adjudged heritably and irredeemably. It is true, that as the minute of sale was conveyed to Sir John only in security of his debt, redeemable and under reversion upon payment of that debt, a right of reversion necessarily arises in favour of Professor Stuart; but this right of reversion in favour of that gentleman is no reason why the lands should have been adjudged under reversion from James Aird, who had no right to any reversion, as the right conveyed by the minute of sale was absolute and irredeemable. An adjudication in implement must always be in terms of the obligation in implement of which it was led; and when, from the want of right in Professor Stuart, Sir John was obliged to have recourse to an adjudication against his author, not in implement of the heritable bond, but in implement of the minute of sale betwixt them, and which minute was conveyed to Sir John by the general assignment in the bond, it is impossible that the adjudication could have proceeded in any other terms than heritably and irredeemably. Sir John had not, it is true, an heritable and irredeemable right to the lands; but the right of reversion, which lay against him, was competent not to James Aird, but to Professor Stuart, who was the only person interested therein.

Even supposing that it was wrong to adjudge the lands heritably and irredeemably, yet this objection does not resolve into a *pluris petitio*. The objection truly resolves into this, that a greater estate has been adjudged from the person against whom it is led, than what ought to have been adjudged from him. But this is no solid objection, provided the estate *de facto* adjudged comprehends that estate which ought to have been adjudged. Here the adjudication being of the full and absolute property of the lands, comprehends every inferior right and interest in it. And as the adjudication has not been led for more than Sir John was entitled to adjudge for, it can be no objection that he has adjudged a greater estate or interest than what could be adjudged from the person against whom the adjudication was led.

Answered for the pursuer,

It is not denied that an assignee may pursue or do diligence, either in his own name or in the name of his cedent, as effectually as the cedent could have [19] done, provided the full right that was in the cedent stands conveyed to him. But if the assignment is only granted *sub modo*, or for a particular purpose, or if it is only a part of the cedent's right, the assignee cannot go beyond the terms or nature of his assignment, so as under that title to sue for or recover more than was truly meant to be conveyed to and vested in him. Were it otherways, the utmost confusion and the most absurd consequences would follow. The holder of such a right, as stood in Professor Stuart, might lawfully grant twenty such bond as this, and each of the creditors would then have an equal title to claim the full right of their cedent as if they had purchased the entire property of the lands from him, or they might pursue his authors for getting that right of property completed in the person of each of them, which solely belonged to and was only intended to be completed in the person of the debtor himself.

The defender is not a purchaser or disponent of the lands from Professor Stuart. He is no more than a personal creditor by bond, with an obligation from him, to obtain a valid infeftment in the lands mentioned in the bond, in security of his debt and annualrent. It is obvious, therefore, that any claim or action which could be competent to the defender, either for obtaining implement of the obligation for infeftment contained in his bond, or completing the security thereby intended to be given to him, must have lain against Mr. Stuart, with whom alone he contracted, and not against the cedent in the right of those lands with whom the defender never contracted, and who stood under no obligation to the defender, either immediately, or as come in place of the Professor.

There is no solid foundation for saying, that the minute of sale was conveyed to Sir John by the assignment in the bond. It is a mere general assignment of the writs and evidents thrown into the same clause of the bond with the assignment to the rents, and can import no more than a special power to found upon those writs, in evidence of the granter's right, as well as to levy the rents in competition with Professor Stuart himself, or any person who should pretend to dispute his title, and to evict the possession of the lands or rents from the creditor. An assignment to this effect would be implied in any heritable bond, though not expressed; and it can have no stronger effect when it is expressed. Even had the minute of sale been expressly assigned, such an assignment would still have carried only a limited and qualified right, a right to defend and support his heritable bond by any aid he could draw from the minute, as well as other title deeds in the person of the granter. It would be only an assignment *sub modo*, or *ad hunc effectum*, of supporting his security as a creditor. The absolute and complete right of property under the minute still remained in Professor Stuart, subject to the burden of the defender's debt, and upon paying of that debt there would have been no need of a reconveyance of the minute from the defender. All right under it in the defender's person would have vanished, [20] and Professor Stuart's right continued afterward entire, as if no such bond or assignment had ever been granted.

Besides, the defender, instead of adjudging from his debtor his right to the lands in security of his debt or implement of his obligation, has adjudged the whole lands, and got them declared to belong not to Professor Stuart, the only true and absolute proprietor, but to himself, and that not in satisfaction or security of his debt, but heritably and irredeemably. It is in vain to urge, that although the lands are thus heritably and irredeemably adjudged, yet the defender's right is to be understood as no more than a right in security. The right is declared irredeemable in the decree

obtained, which is a contradiction in terms to the supposition that the right is only in security. Although Aird was the only person cited to defend in the process, yet the defender might certainly have concluded that only so much of the lands should be adjudged to him as would satisfy or secure his debt, subject to redemption by his debtor, to whom the irredeemable property belonged. Nor is it sufficient to remove this objection, that upon payment Professor Stuart might compel the defender to denude in his favour. Although the Court might give relief to the party chiefly injured by a wrong or irregularity, that will never sanction the wrong itself, nor render the diligence by which it is committed valid or effectual in prejudice of third parties.

Professor Stuart alone, or one who had acquired full right from him, could have adjudged the lands from Aird in implement of the Professor's right. Adjudications in implement have been devised for supplying the want of procuratories and precepts, in order to obtain to the disponent, or true proprietor, an entry from the superior to the feudal right of his own property. Such adjudication led by any other than the person who is virtually and substantially proprietor, is in itself void; because having no title to the absolute irredeemable property of the lands, he has no right to have them adjudged to him. Sir John, neither in law nor in justice, can pretend to be absolute and irredeemable proprietor of the lands, and yet that is the right and the only one obtained by his adjudication.

The case of a creditor who first adjudges from his debtor his personal right to lands under the act 1672, and then adjudges the lands from the debtor's cedent or author, in implement of the debtor's right, is totally different from the present. Such an adjudger becomes by his first adjudication a general or total disponent of the lands, and assignee to the whole personal right that was in the debtor, and consequently the debtor's author can properly implement to him the obligation he stood under to the debtor of conveying the real or feudal right; and the adjudication itself will show that he holds the right not irredeemably; but under the legal reversion to the debtor. The defender here had neither by adjudication or voluntary conveyance any right to the property of the whole lands, but was only a partial creditor of Professor Stuart.

[21] It is no good argument that the defender, if the mode of diligence which he pursued be inept, could have adopted no other. But in fact he might have adopted other methods. He might have charged Professor Stuart, at any time after his bond, with horning on the obligation to infest, or he might have maintained an action for compelling him to get the feudal title of the lands completed in his person; or he might *qua* creditor have adjudged the lands or minute of sale from Professor Stuart for satisfaction of his whole debt, and might then have pursued an action against James Aird, the Professor's author, for compelling him to establish the feudal right in his own person, in implement of the minute; or he might have maintained such an action against Aird, in the name of Professor Stuart himself, for the purpose of compelling him to infest the Professor; and upon his failure have likewise adjudged in implement. All these methods were probably avoided, because the defender foresaw that he would have been in no better state than a common adjudger, and that the other creditors adjudging within the year would have come in *pari passu* with him.

The Court pronounced the following interlocutor. "The Lords having resumed the consideration of this process, with the report formerly made by Lord Hailes, and advised the same, with the memorials and informations *hinc inde*, Find, that the adjudication led by Sir John Whiteford was led improperly, therefore reduce the same, together with the charter and infestment following thereon, and remit to the Ordinary to proceed accordingly, and farther to do as he shall see just."

A reclaiming Petition against this interlocutor was refused without answers.

Lord Reporter, HAILES.—Act. GEORGE WALLACE, RAE.—Alt. M'QUEEN.

J. W.

No. 11. [25] **DAVID CAMPBELL and Others v. The COMMON AGENT**, in the ranking of the Estate of **EDDERLINE**. January 14, 1801.

A person before being rendered legally bankrupt, having executed a trust-deed, by which the trustees were empowered to sell as much of his estates as should pay his debts, and entail the remainder on a certain series of heirs, it was found, that the granter was not so far denuded of his property as to invalidate an adjudication led after his death, by certain non-acceding creditors, upon a special charge given to his heir-apparent.

Dugald Campbell's affairs being embarrassed, he conveyed his estate of Edderline to trustees for behoof of his creditors. At the date of the trust-disposition, he had not been rendered legally bankrupt.

By the trust-deed, the lands were conveyed to the trustees, and the survivors or survivor of them, absolutely and irredeemably, for behoof of the granter's whole creditors. The trustees were also empowered, without the consent either of the granter or of his creditors, to sell such parts of them as should be sufficient to pay the whole of the truster's debts; and after doing so, the trustees were appointed to execute a strict entail of the residue. The trust-deed was further declared irrevocable, until the whole purposes of the trust should be fulfilled.

The trustees were infet, and acted under the trust-deed. The granter died soon after the date of its execution. Soon after his death, an heritable creditor brought a judicial sale of his estate.

After the commencement of this action, several other creditors led adjudications against the estate, having previously used special charges against Colin Campbell, as Dugald Campbell's eldest son and heir.

Dugald Campbell, at the date of the trust-deed, was indebted to Neil Campbell of Inverliver in upwards of £2000. Inverliver's affairs were also under trust, and his trustees, by way of securing this debt, also led an adjudication of the estate of Edderline, but in place of charging Edderline's son to enter heir in special to his father, they took a decree of constitution against his trustees, under the qualification that they should not be personally liable, and on this decree they led their adjudication.

Afterwards, in the process of ranking and sale, they objected to the validity of the adjudications led by the other creditors, and

Pleaded: Before the date of these adjudications, Edderline was completely divested of the lands by the trust-deed. His right had resolved into a mere claim to the reversion; 7th March 1781, *Muir v. Macadam*, No. 114, p. 8688. In consequence of the infetment of the trustees, Edderline's son could not have been served heir in special to his father, because a service proceeds on the assumption, that the ancestor died last vest and seized in the lands, and if a special service was incompetent, the special charge which was meant to supply its place must be equally inept; 11th March 1756, *Dalziel v. Henderson*, No. 42, p. 16204. The only regular adjudication, therefore, is that which has been led against the trustees.

The Lord Ordinary found, "That the late Dugald Campbell of Edderline was not completely divested of the real right and property of his estate, by the trust-right and infetment thereon, founded on by the objectors, the same [26] having been a trust for the granter's behoof, though it contained a power to the trustees of selling the lands, for the purpose of paying off the granter's debts, but which power the trustees never exercised, and still stood bound, in the event of a sale, to reconvey or settle the remainder for behoof of the granter and his heirs, which did not disable his lawful creditors, not acceding to the trust-deed, from doing diligence against himself while he lived, or against his apparent heir, after his death, for payment or security of their debts; and therefore repelled the objections to the adjudications led by the other creditors against the son and the apparent heir of their debtor after his decease."

A reclaiming petition, presented by the trustees of Inverliver, was unanimously refused, without answers.

Lord Ordinary, JUSTICE-CLERK **ESK GROVE**.—For Inverliver's Trustees, **FLETCHER**.
—Clerk, **HOME**.

R. D.

Fac. Col. No. 210, p. 480.

No. 12. MARGARET BUCHANAN v. JAMES PURDON GRAY and his Administrator-in-Law. January 20, 1801.

An adjudication led on an heritable bond against the heir of the granter, restricted to a security, in respect the adjudger omitted to obtain a decree of constitution against the heir before leading the adjudication. Will the penalty in a general adjudication be restricted in a question with the debtor ?

In 1787, Isabella Gray granted an heritable bond over her lands of Chryston, for £1000 lent her by Mrs. Margaret Buchanan.

Isabella Gray died in 1790, leaving an infant son, James Purdon Gray, to whom his father John Purdon was administrator-in-law.

The interest of the loan was regularly paid till Whitsunday 1793. But the rents of the lands proving insufficient to defray the annual burdens on them, Mrs. Buchanan obtained first a decree of mails and duties, and thereafter adjudged the lands for the principal sum in the bond, bygone interest, and £200 of penalty, accumulated into one sum, bearing interest from the date of the decree.

In the process of adjudication, James Purdon Gray was cited personally, and John Purdon edictally, as his administrator-in-law.

Under these circumstances, John Purdon, in virtue of a decree of the Court of Session, sold part of the lands for payment of the debts, and out of the price he offered to repay Mrs. Buchanan the principal sum, bygone interest and the whole expenses which she had incurred. But she refused to discharge her adjudication, excepting on payment of the full sum contained in it, including the penalty.

A multiplepoinding was, in consequence, raised in the name of the purchaser in which John Purdon Gray

[27] Pleaded : 1st, The adjudication is irregular from John Purdon, not having been especially cited. Tutors and curators are allowed to be cited edictally, from a presumption that they may not be known to the pursuer ; Balfour's Practics, p. 309, *voce* Summons. But a pursuer can hardly fail to know that the pupil has a father who is his legal administrator. On account, therefore, of this irregularity, the adjudication should be restricted to a security for the sum truly due.

2dly, But although the adjudication were unexceptionable, equity requires that Mrs. Buchanan should get no more than her debt, with interest and expenses. In questions with co-creditors, the Court are in the daily practice of restricting adjudications in this manner ; and no good reason can be assigned why the same equitable mitigation should not be extended to the debtor. Had Mrs. Buchanan sought the penalty, merely in virtue of her bond, the Court would have given redress ; and her claim is not strengthened by the adjudication. While apprisings continued, they could proceed only for the debt justly due to the creditor, and when the act 1672 introduced special and general adjudications, the Legislature in the former case allowed the creditor to adjudge for a fifth part more than his debt, " in respect he was necessitate to take land " for the same ; but, in general adjudications, the former law remained so much unaltered, that the old statutes respecting apprisings, are referred to as containing the rule agreeably to which general adjudications should be led ; 30th November 1680, Earl of Panmure, No. 40, p. 128.

Answered : 1st, It has been the uniform practice for the last 150 years, to cite administrators-in-law edictally ; Stair, b. iv. tit. 38, § 23 ; Bankton, b. iv. tit. 23, § 11 ; Erskine, b. iv. tit. 1, § 8 ; 8th March 1626, Earl of Kinghorn, No. 9, p. 2180.

2dly, The practice since the act 1672 (and in most cases, it is *optima legum interpret*), has been universal, even in general adjudications, to adjudge for the penalty : Indeed, the act of sederunt, 26th February 1684, expressly authorises this ; and from its being passed so recently after the statute, there is no room for doubting, but that this was the intention of the Legislature. It would, however, be a contradiction in the law, were it to authorise the creditor to adjudge for the penalty, and at the same time call upon the Court in every case to interpose its equitable powers to restrict the penalty to the actual expenses. Accordingly, in questions with the common debtor, no such restriction has been granted, July 12, 1769, Creditors of Auchinbreck, No. 39, p. 268, 1772, Creditors of Murray, No. 40, p. 268. Winter-

session 1787, Creditors of Maxwell of Dalswinton (not reported); 4th January 1789, Gordon of Kenmuir (not reported).

The Lord Ordinary "ranked and preferred Mrs. Margaret Buchanan upon her interest produced, *primo loco*, to the funds *in medio*, for payment to her of the accumulated sum contained in the decree of adjudication produced [28] for her, and interest thereof from the date of the said decree, and till payment."

On advising a reclaiming petition, with answers for John Purdon Gray, the Court, on the first point, thought, that although it would have been better to have cited the administrator-in-law specially, yet that citation was not legally objectionable.

On the second point there was much diversity of opinion. Five of the Judges, including the Lord President, were for restricting the penalty. A general adjudication (it was observed) was to be regarded as a mere *pignus praetorium* in security of the debt, and not like a special adjudication, a *surrogatum* for it; and this being the case, it was a duty of a supreme court of law and equity, to mitigate the penalty to the expenses which the creditor had incurred, together with any loss which he could qualify from being disappointed in getting payment of the principal sum when he wanted it, or from the debtor's irregular payment of the interest.

But other five of the judges thinking Mrs. Buchanan's claim well founded, on the grounds stated for her, the Court (5th June 1799) "adhered."

Upon this a second reclaiming petition was presented for Gray and his administrator-in-law, in which, besides repeating their former arguments on the general ground, they stated, for the first time, that Mrs. Buchanan had omitted to obtain a decree of constitution against James Purdon Gray, the present debtor, before adjudging; and that on account of this flaw in the diligence, it ought to be found to be void, or at least restricted to a security for the principal sum and interest.

To this it was answered, that the debt being liquid, and the petitioner having entered heir to his mother prior to the date of the summons of adjudication, a decree of constitution was unnecessary.

The Court, on again advising the cause, thought the diligence irregular, on account of the want of the decree of constitution; and this rendering it unnecessary to enter upon the question respecting the penalty, the Judges waved its determination.

The Lords accordingly, on this new "ground (10th July 1800), restricted the adjudication to a security for the principal sum, interest, and expenses of the adjudication, and found no expenses due to either party."

And afterward, on advising a third reclaiming petition for the debtor, with answers, the Court found him entitled to £15, as the expense which he had incurred from the period at which he first stated the point on which the decision of the Court ultimately turned.

Lord Ordinary, CRAIG.—For Gray, WALKER BAIRD, J. GRAHAME.—Alt. ROBERTSON, WILLIAMSON.—Clerk, SINCLAIR.

R. D.

Fac. Col. No. 12 (Appendix), p. 23.

No. 14.

[30] ALLISONS v. BALLANTINE. December 19, 1805.

What is understood by "first adjudication" in the act 33d Geo. III. cap. 74, § 81.

In a process of ranking of the creditors, and sale of the estate of David Ferguson, merchant in Ayr, an objection was stated by William Ballantine, the common agent, to the interest produced for Mary, Jean, Burrel, and Margaret Allisons, on account of an alleged defect in their adjudication.

David Ferguson's heritable estate was understood, at the time of his death, to consist of two different subjects; but it was afterward discovered, that he had a right to a third subject, in the neighbourhood of Ayr.

The first adjudication against his estate, was obtained at the instance of Messrs. Innes, Beveridge and Company, merchants in London, on the 24th January 1794, and it adjudges lots first and second, for payment of the principal sum, interest and penalty due to them.

The greater part of the creditors also adjudged these two lots. But after the adjudications were led, upon lot third being discovered, it became necessary to lead a new set of adjudications against it.

The first adjudication of lot third that was brought into Court, was at the instance of Mrs. Elizabeth Ferguson, which was, on the 10th December 1794, appointed to be intimated in the usual manner, in terms of the bankrupt-act ; and with this adjudication the greater part of the creditors were afterward conjoined.

In order to bring the adjudication led by the Misses Allison within year and day of the first adjudication by Messrs. Innes, Beveridge and Company, which affected lots first and second, they were under the necessity of applying to the Court to dispense with the *induciae* of the second diet of their summons. And as by this time Mrs. Ferguson's adjudication against lot third had also been executed, this subject was also included in their adjudication.

Mrs. Ferguson's summons of adjudication, which was called in Court upon the 10th December 1794, had been intimated in common form ; but the twenty days did not expire, so that she could not obtain adjudication against this subject until the 28th January 1795.

Messrs. Innes, Beveridge and Company's adjudication, had been obtained upon the 24th January 1794. Misses Allison's obtained decree of adjudication upon the 24th January 1795 ; and they not only adjudged the two first subjects contained in the previous adjudication of Messrs. Innes, Beveridge and Company, but they also adjudged lot third, which was not contained in any former decree of adjudication.

[31] The common agent in the ranking and sale of the estate, objected to the decree of adjudication obtained by the Miss Allison's, That " the decree of adjudication, in so far as it affects the piece of land with the nolt faulds (lot 3), has been led in a very irregular manner ; for although it was the first adjudication against these subjects, yet it does not appear to have been intimated in terms of the act of Parliament. Neither did these adjudgers wait for the expiry of the days of intimation assigned in the adjudication at the instance of Mrs. Ferguson, which were then running, but having applied to the Court to dispense with the *induciae* of the second diet of their summons, obtained decree at once against the whole subjects. This adjudication, therefore, can only rank upon lots first and second."

The Lord Ordinary pronounced the following interlocutor : " In respect that the adjudication at the instance of Mrs. Elizabeth Ferguson, which was called before the Lord Ordinary, prior to the calling of the adjudication at the instance of the Allison's, is to be held in terms of the act 33d of the King, to be the first process of adjudication affecting lot third of the debtor's subjects, and that in said process of adjudication intimation was duly made for other creditors to be conjoined in it, find, That there was no occasion for such intimation being made in the adjudication by the Allison's, although, in consequence of a dispensation granted by the Court, decree happened to be pronounced in the Allison's adjudication, prior to the decree in that of Mrs. Elizabeth Ferguson ; therefore repels the objection to the Allison's adjudication being ranked on lot third, as well as on the other two lots."

The common agent presented a petition to the Court, and

Pleaded : The adjudication of Miss Allison's was the first adjudication affecting the third lot of the debtor's estate ; for decree in it was obtained some days previous to the decree obtained by Mrs. Ferguson. But, though a first adjudication, it was not intimated, and consequently is null and void, in terms of the 33d George III. cap. 74, § 81. If this adjudication were to be sustained, the whole of the other adjudging creditors must be set aside ; for their adjudications were conjoined with Mrs. Ferguson's, which was not the first effectual adjudication, and therefore, by the decision in the case of Kinlochaine, November 24th, 1801 (APPENDIX, PART I., *voce* BANKRUPT), their adjudications are inept.

Answered : By the first adjudication referred to in the 33d George III. must be understood that which is first called in Court, not that which is first made effectual by decree. This is obvious from the nature of the intimation, which must be made whenever the process comes into Court, and before any decree is obtained. Mrs. Ferguson's adjudication was the one which was first called, and therefore the only one which required to be intimated, in terms of the act of Parliament. The circumstance of decree having been first pronounced in the adjudication of the Miss Allison's, does not make it the first adjudication in the sense of the 33d of George III.

[32] The Lords, upon advising a reclaiming petition, with answers, adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, POLKEMMET.—Act. CATHCART.—Agent, WM. BALLANTINE, W.S.—
Alt. MACFARLAN.—Agent, GEO. TOD.—Clerk, MACKENZIE.

J.

Fac. Col. No. 231, p. 523.

No. 1. [327] The Countess of ARGYLE v. TENANTS of Dollar and the Earl of ARGYLE. December 19, 1573.

A tack was granted to the longest liver of a husband and wife. They were divorced. After the husband's death, the Lady's right continued.

Jean Stewart, Countess of Argyle, summoned the tenants of Dollar, to hear and see letters of the four forms given, and decreet conform, to compel them to answer and obey to her, of their teinds for years to run, conform to an letter of tack. The Earl of Argyle, brother to her husband, and one of the parochiners, alleged, That she shall have no letters, because the tack was made to umqle Archibald, Earl of Argyle, her husband and to her, the longest liver of them two, and to the said umqle Earl's heirs and assignees; and before the decease of the said Archibald, there was an sentence of divorce given betwixt them, for certain causes contained in the said sentence, by virtue of the whilk, the pursuer had tint all thing that she had of her husband by reason of marriage, and sicklyke all tacks that she was in by him; because it is to be supposed, that all letters of tacks set to a man and his wife, be obtained by the industry of the man; and she therefore ought and should tyne the same, by reason of the said sentence of divorce.—The pursuer alleged, That she should tyne no more, neither land nor other thing, but only so meikle as was given to her, or obtained by reason of the said marriage; and so this tack cannot come under this decreet, by reason the samen was set by her umqle husband and to her, the longest liver of them two, long after the completing of the marriage, by a stranger, and not by her husband, for the causes of marriage; and albeit such tacks may be conquest, may be supposed, and are supposed to be gotten by the man's industry, that is no cause in this case, that the woman should tyne the tack; because all things that is supposed to be by the law, is not admitted to be truth, where the contrary may stand.—Whilk alledgeance of the Lady was admitted by the Lords, and letters decerned, conform to the tack, for answering and obeying her, conform to the desire of her summons.—Thereafter the said Earl, and the rest of the defenders, alleged, That the pursuer's umqle spouse had made Mr. John Patoun cessioner and assigney to the said tack and terms to run, and profits thereof, by virtue of whilk the cessioner and assigney was in possession of the samen.—The pursuer alleged, That if the said Lord had made the said Mr. John assigney, yet he never came in possession of the samen by virtue of the assignation; [328] and if he was in possession, the same was because he was servant and collector of sundry of the Earl's rents, as chamberlain to him, amongst whilk he intromitted with the said teind, as said is, *more quo supra*, whilk he disposed again at the said Earl's command, and to his utility and profit unto his decease; and made compt and reckoning thereof to the said Earl, and others having power thereto of him, or by him, *et non alias*.—Whilk reply and alledgeance of the said Lady, was admitted by the Lords, and referred to her probation.

Colvil, MS. p. 4.

No. 2. MURRAY and Tenants v. LIVINGSTON. June 16, 1575.

A husband divorced for adultery, cannot revoke a gift made to his wife, *stante matrimonio*.

Tenants of certain lands pursued Henry Murray of Dunfermline, and Marion Livingston, for double poinding, to see whilk of them had most right thereto. The said Henry alleged, That he gave the lands to the said Marion, being his wife, not by contract of marriage, but of good will after the marriage; whilk thereafter he revoked; and, therefore, he should be answered of the duties of the said lands. And the said Marion alleged, That Henry infest her *constante matrimonio* betwixt them; and now the marriage was dissolved by sentence of divorce given against the said Henry, for adultery committed by him: And albeit he had revoked the infestment given after the decret of divorce, whilk he did not the time of the marriage, as now should not be admitted, because that he, in respect of the divorce, is *civiliter* dead; and, therefore, she should be answered of the duties of the said lands: Whilk allegiance of the said Marion was found relevant, and admitted by the Lords, and the tenants decerned to answer to her, of the mails and duties foresaid. *Colvil, MS. p. 23.*

No. 3. The Same Parties. July 9, 1576.

A husband divorced for adultery, having executed a deed of revocation of a liferent of lands he had granted to his wife: to give effect to the revocation, he was bound to prove it was executed before committing the crime, as well as before sentence of divorce.

Anent the action pursued by Christian* Livingston v. Henry Murray in Dunfermline, her sometime spouse, it was alleged by the pursuer, That there was a sentence of divorce given betwixt her and the said Henry: By the whilk sentence she was ordained to bruike her conjunct-fee, liferents, terces, and all other things due to her by virtue of the said marriage. It was alleged by the said Henry, That there were certain lands, that he had infest the said Christian in, in liferent, after the said Christian's marriage with him; the whilk liferent and infestment he had revoked; and now, after the divorce, she should not bruike the samen before the sentence of divorce, and intending of the said action. It was [329] alleged and answered by the said Henry, That he made the same before the said sentence of divorce, and intending of the said action. It was answered by the said pursuer, That the said revocation was not relevant, without he would say, that he made the same before the committing of the said crime, whereupon the said sentence of divorce proceeded. Whilk allegiance of the said Christian was admitted, and found by the Lords, that the allegiance of the said Henry was not relevant, without he would allege the said revocation to be made before the committing of the said crime, as said is. *Colvil, MS. p. 32.*

No. 5. L. INNERWICK v. The LADY. March 1589.

An heiress divorced for adultery, loses not only her conjunct fee and tocher, but also the liferent of her heritage; and the courtesy takes place as if she were naturally dead. *Fol. Dic. v. 1, p. 23. Colvil, MS.†*

* In the case above, the Lady is named Marion—The same person seems to be meant.

† The Decisions reported by Colvill Lord Culross, preserved in the Advocates Library, come no farther down than 1584. The Editor has not yet discovered where Lord Kaimes found the above.—See General List of Names.

No. 10. [333] MACKENZIE v. His WIFE. February 28, 1745.

Lenocinium. It is a competent exception against divorce, if the husband commit indecencies towards his wife, tending to corrupt her morals; although he do not expose her to prostitution for gain.

Colin Mackenzie, Chamberlain of the Lewis, pursuing a divorce against his wife, after leading the proof before the Commissaries, a defence was offered of *lenocinium* on the part of the husband, and a condescence given in of gross indecencies committed by him towards his wife, before company, of his maltreating her, and then leaving her in company with men of low rank and rude dispositions, and of his bidding his servants, and inviting other people, to ly with her: And it was urged, all this behaviour was intended to corrupt her morals, that he might thereby obtain an occasion to get quit of her.

The Commissaries allowed a proof of the condescence. A bill of advocation was offered and refused.

[334] Pleaded, in a reclaiming petition, The proof ought not to be allowed, because nociny is only where the husband exposes his wife for gain. 2do, It was not alleged he exposed her to any of the persons with whom she committed the adulteries libelled, or which he alleged were proven. And 3tio, The acts condescended on, if true, appeared to have been done out of indiscretion, and the invitations made only in jest.

Answered, The man who prostitutes his wife, is unworthy of the vindication of the law, whether he do it from gain, or from any other motive; and this is the opinion of Sir George Mackenzie, title Adultery; and was found, February 1692, Lauder against his Wife; * and he who once does this, and thereby vitiates her mind, ought to be repelled from getting free of her ever after.

The practices condescended on could be intended for no other purpose than by familiarising her with lewdness, to expose her to actual adultery; and therefore ought to be looked on as lenociny.

The Lords refused the bill.

Act. FERGUSON.—Alt. R. PRINGLE.—Clerk, FORBES.

Fol. Dic. v. 3, p. 19. D. Falconer, v. 1, p. 88.

No. 11. Mr. JAMES JUSTICE v. Mrs. MARGARET MURRAY. January 13, 1761.

A wife obtaining divorce for her husband's adultery, has right to her jointure as if he were dead, but she cannot demand back her portion.

By marriage articles betwixt Mr. James Justice and Mrs. Margaret Murray, the lady, in consideration of £500 sterling of tocher paid to the husband, was secured in a liferent-annuity of £100 sterling. Of this marriage several children were procreated, who all died in infancy. In August 1749, Mrs. Justice obtained, from the Commissaries of Edinburgh, a decree of divorce for her husband's adultery; in consequence of which she was put in possession of her liferent-annuity. But it did not occur to her or her relations, that she was likewise entitled to demand restitution of her tocher, till the year 1751, when she brought a process, for that purpose, against Mr. Justice, her late husband, libelling upon the decree of divorce, and concluding for repayment of her tocher. She obtained a decree in absence; but being diffident of her claim, she made no demand upon the funds which had been appropriated by Mr. Justice for payment of his debts.

In the year 1758, Mr. Justice brought a process, before the Court of Session, against his late wife, for reducing the said decree in absence. The case being reported to the Court, the Judges sustained the reasons of reduction, and reduced the decree. And

* See General List of Names.

what chiefly weighed with the Court, was a solemn judgment given, 8th February 1734, in a case precisely similar, *Isobel Anderson v. [335] Welsh of Locharret*, her late husband, and his creditors (No. 9). She had obtained a decree of divorce against her husband, in the precise terms of that obtained by Mrs. Justice. She was put into possession of her life-rent-annuity of 700 merks; and demanding, over and above, restitution of 6000 merks her tocher, it was found, that the decree of divorce did not entitle the pursuer to her tocher, and the husband was assolizied.

In a reclaiming petition for Mrs. Justice, her counsel insisted upon the authority of the Roman law, particularly Novell. 117, cap. 8, § 2, where Justinian enacts, That the husband convicting his wife of adultery, shall be acquitted of the *donatio propter nuptias*, and shall likewise retain the *dos* as his own property. On the other hand, that the husband convicted of adultery, shall not only make good to the wife, the *donatio propter nuptias*, but likewise return the *dos* to her. And it was said that this law was generally followed *moribus hodiernis*, for which Voet's authority was quoted, *ad. Leg. Jul. de Adulteriis*, § 11. With respect to the law of Scotland, the act 55th Parl. 1573 was appealed to, declaring, That the person divorced for non-adherence, shall lose the tocher *et donationes propter nuptias*, which must equally hold in the case of a divorce for adultery. Balfour in his Practices, page 99, lays down the same doctrine; and the same has been followed in practice from the beginning, which is made evident from the tenor of a decree of divorce before the Commissaries, declaring, where the husband is the adulterer, "That he hath amitted and lost the dote and tocher, and all other goods and gear brought with the pursuer, or any way pactioned to be paid to him *causa matrimonii, nomine dotis, et propter nuptias*; and that she is entitled to the jointure provided in her contract of marriage, in the same manner as if he were naturally dead."

In answer to this reasoning, it was urged, That where the tocher, as in the present case, is paid to the husband in ready money, it sinks among his effects, and has no longer any existence *qua* tocher. And, therefore, the wife who obtains the divorce, can have no claim either at common law or in equity. That she has no claim at common law, is clear from the effect given to divorce by all writers, ancient and modern, which is, that it gives the same benefit to the innocent party as if the guilty party were naturally dead. Hence, upon divorce for the husband's adultery, the wife is entitled to enter upon her jointure; but she has no claim to get back her tocher, because she has no such claim upon her husband's death. Neither can such claim be founded on any rule of equity; especially as the maintenance of the children, whatever be their number, lies upon the husband. And in general, as there can be no reason for giving the wife more by her husband's adultery than by his death; so there can be no justice that she should have her jointure, and also that very tocher which was the price she paid for her jointure.

There is a further consideration that ought to weigh in this case. A tocher, as now established in practice, becomes part of the goods in communion, a share of which accrues to the wife upon dissolution of the marriage. This share may [336] be more, or may be less, than the tocher. But whatever it amount to, it is what the law allots the wife, in place of restoring to her the precise sum of the tocher. This share the pursuer has already got or may get; and to demand the tocher over and above, is in effect demanding twice payment.

How comes it then that we have adopted the Roman law upon this point? for that we have adopted it, must be admitted from the authorities urged on the part of the defendant. The answer to this question makes it necessary to open up a curious article in the history of our law. By the Roman law, the property of the *dos* was not transferred to the husband. He had only the use of it *ad sustinenda onera matrimonii*; and, upon dissolution of the marriage, it returned to the wife. It did so by death; and, upon the principle above laid down, the same must have happened where the marriage was dissolved by the husband's adultery. The same must happen in Scotland with respect to every right similar to the Roman *dos*; as, for example, the rents of the wife's land-estate. The rents belong to the husband during the coverture; but supposing a divorce by the husband's adultery, he loses his right, and the possession returns to the wife.

That the form of the Roman contracts was early adopted in Scotland, appears from the *Regiam Majest.*; in the second book of which, cap. 15, § 4, it is laid down in so many words, "That the marriage being dissolved, the tocher returns and per-

tains to the wife ; likeas the gift for the marriage returns and pertains to the husband." And that the same form continued in practice, is vouched by Balfour, and by the act 1573, above quoted. Nor is it difficult to account for this practice. Marriage, among our ancestors, was held to be a sacrament ; to the celebration of which the priest was necessary. And as learning, at that time, was confined to the clergy, the practice was certainly introduced by them from the canon law, which, in that particular, is the same with the Roman law. This explains, in a satisfactory manner, the authorities quoted for the defender ; all of which, without exception, proceed upon the ancient law, and are perfectly just according to it. How long the form of the Roman contracts continued with us is uncertain ; but that our present form has been established in practice above a century is certain. The authorities, therefore, quoted for the defender, which appear to be weighty at first view, are not applicable to our present form of marriage-articles. And it is remarkable, that from the altered practice, there is not to be found one authority, *pro* or *con.*, except the decision of Locharret in the 1734, which is undoubtedly well-founded upon the present form of marriage-articles.

The Court, notwithstanding, altered, sustained the claim, and assoilized from the reduction. The plurality of the Judges went no deeper than the Roman law and the old authorities, not adverting to the change of system with respect to marriage-contracts. But the case having again been brought under review, in a reclaiming petition for Mr. Justice, and answers for Margaret Murray, the Court returned to their first interlocutor, reducing the decret in absence.

Fol. Dic. v. 3, p. 19. Select Dec. No. 172, p. 233.

No. 12. [337] ELIZABETH CLEMENT v. SINCLAIR. March 4, 1762.

A notour adúlteress, who had not been divorced, found entitled to her legal provisions.

By the common law of England, the wife's adultery did not bar her of her dower, even though a divorce had followed, Coke, 2d Inst. p. 435. Upon this account, the act 13th Edward I. cap. 34, was made, enacting, " That if a wife willingly leave her husband, and continue with her adulterer, she shall be barred for ever of her dower, unless her husband willingly, and without coercion of the church, be reconciled to her."

Elizabeth Clement, after living with her husband for three months, deserted and lived in open adultery with another man, by whom she had a child ; and being cited before the kirk-session of Crieff, she confessed her guilt, and suffered public penance before the congregation. After her husband's decease, she brought a process against his representatives, claiming the third part of his moveables, and the terce of his land. And her claim was sustained notwithstanding her adultery, which was not denied.

What moved the plurality was, That the pursuer's adultery, since there was no divorce, did not deprive her of her quality of relict, nor consequently of her legal provisions. But it was answered by those who voted against the interlocutor, That it was too limited a view of the case, to consider it merely upon the footing of common law, without considering what equity dictates. Does it not appear clear in equity, that a woman who has behaved so undutifully as a wife, ought not to be entitled to any of the privileges of a wife ; and that it would be wrong, in a court of equity, to sustain a claim for making any of these privileges effectual ? The English statute rests obviously upon this equitable foundation, and the same ought to obtain with us without a statute. Now that the principles of equity are ripened, there would be no occasion for such an act either in England or Scotland ; though there was use for the English statute, because when it was made, equity was not known.

But further, there seems to be a good foundation for objecting against this claim, even at common law. The wife's legal claim makes a branch of the marriage-contract, by which they are mutually bound to live together as husband and wife, and by which she is entitled to be alimented during the marriage, and to certain legal claims after its dissolution. Now, if she has broke her part of the engagement, he cannot be bound to perform his part. Suppose she had sued her husband for aliment after her desertion, he certainly would not have been liable ; and as little ought his heir be liable to make good her legal provisions.

Fol. Dic. v. 3, p. 19. Select Dec. No. 196, p. 261.

No. 4. [342] KIRKWOOD v. INGLIS. December 16, 1627.

Advocates and writers being summoned by an incident diligence, as havers of writs; the Lords found they might purge themselves by oath, that they had them not, nor had fraudulently put them away; and that no other kind of probation could be used against them.

*Fol. Dic. v. 1, p. 26. Auchinleck, MS.**

No. 5. BETSON v. L. GRANGE. November 14, 1628.

In an exhibition of writs, an advocate was obliged to depone as a witness, as to the defender's having the writs, although he was the defender's counsel in the cause.

In an action of exhibition of writs, Betson *contra* L. of Grange, the Lords found, That the advocate compearing for the defender, in that same cause, might [343] be used by the pursuer, as witness to prove the summons, anent the defender's having of these writs libelled, and that they ought to depone thereupon, and that it was no competent objection to repel them *a testimonio*, that the defender was their client, *cui patrocinabantur in hoc eadem causa*, against whom they could not be compelled to bear witness, in that which their client had communicated to them in secret, and thereby to publish against him, and to his prejudice, that which was either spoken, or shown to them under trust, which, if they should be subject to do, by compelling them to depone upon their oaths as witnesses, they could not but incur a great suspicion of prevarication. And it was desired, that the Lords would consider the consequence and preparative thereof, which tends to force advocates to detect the secrets of their client's cause; which allegiance was repelled, and found, that they ought to be witness; in doing whereof, the Lords found, that thereby they incurred no suspicion of prevarication; for though they were not holden to detect the secrets of the cause intrusted to them, which is to be understood, anent the counsel and advice given by them to the client, for the best and most lawful means of his defence, and prosecuting of his cause; yet that thereby they could not be freed, of being witness upon any thing libelled, and admitted to probation against their clients, being found relevant by the judge, consisting in their knowledge, and whereof possibly there was no other means of probation but by them.

Act. NICOLSON & LERMONT. — Alt. AITON. — Clerk, HAY.

Fol. Dic. v. 1, p. 25. Durie, p. 396.

No. 8. [344] — v. Mr. JOHN and HENRY ROLLOCKS. February 1, 1666.

In an exhibition of writs, the advocate and agent in the cause, were obliged to depone, their client being called. See No. 5.

In an exhibition of writs, it was alleged, That Mr. John and Henry Rollocks, being advocate, and agent in the cause, were not obliged to depone in prejudice of their clients, or to reveal their secrets; but they ought to pursue their clients; for a servant, factor, or person intrusted with the custody of writs, ought not to be examined in prejudice of their constituent, unless it were as a witness. — It was answered, That their client was called.

In respect whereof, the Lords ordained the defenders to depone concerning the having of the writs.

Fol. Dic. v. 1, p. 25. Stair, v. 1, p. 347.

* This MS. not in the Advocates Library.

No. 12. [347] Creditors of WAMPFRAY v. Lady WAMPFRAY. December 21, 1675.

In the proof of a tenor ; the defender's advocate, cited as a witness for the pursuer, bound to depone, whether he saw the writ, and what its tenor ; but not to divulge any thing communicated to him, which could not appear from the writ itself.

The Creditors of Wamphray having pursued probation of the tenor of a contract of marriage betwixt Wamphray and his Lady, whereby the Lady disposes her estate of Wamphray in favours of her husband and his heirs, constituting him fiar, whereby the estate might be liable to his debts : Witnesses were adduced for probation of the tenor, amongst whom Mr. David Dunmore advocate, was adduced as one.—It was alleged for the Lady Wamphray, That Mr. David Dunmore was not a habile witness, because he had been advocate for the Laird of Wamphray as his ordinar, and so could not be brought as a witness to discover the weakness and secrets of his cause ; for suppose that Wamphray should have consulted him how to defend against the probation of the tenor, and had acknowledged there was such a writ, he could not be adduced to depone that he knew that there was such a contract, as being known to him in manner foresaid.—It was answered, That the privilege of advocates can only relate to the secrets communicated to them by their clients ; but a contract of marriage being so solemn a deed amongst so considerable persons, can be no secret, and therefore advocates have still been put to depone upon the having of writs, though put in their hands by their clients ; and therefore, on the like reason, the probation of a tenor being only the probation of the existence of a writ, and what the tenor of it was, he ought to depone : As the Lord Gosford's oath was taken upon the tenor of a decret arbitral, upon production of an information under his servant's hand, when he was advocate, giving direction for the form of the decret arbitral, which the Lord Gosford did remember, and acknowledged that it was so.

The Lords ordained Mr. Dunmore to depone if he saw the contract of marriage in question, and what the tenor of it was ; but would not put him to depone concerning the existence or tenor of it, by what had been communicated to him by his client at consultation, otherways than by the fight of the writ itself.

Fol. Dic. v. 1, p. 26. Stair, v. 2, p. 388.

* * This case is reported by Gosford in the following manner :

The Creditors of the Laird Wamphray, against the Lady Wamphray, in the proving of the tenor of the contract of marriage betwixt the Laird and Lady, [348] at the instance of the said creditors against the Lady ; Mr. David Dunmore advocate being cited, as a witness by the creditors ; it was observed, That he could not be received, because he was an advocate, and could not be bound to depone upon his client's secrets ; and that he was employed for the parties.—It was answered, That he had not been craved to depone upon any consultation or private advice, but upon the tenor thereof ; the Lady having most maliciously destroyed her own double, and her husband's, of purpose that her husband's creditors, who were deeply engaged for him, might be defrauded ; whereas it was proved by the contract of the husband, in contemplation whereof, the creditors did engage.—The Lords did ordain the said Mr. David to depone upon the true tenor of the contract ; seeing that could not concern any private advice or secret of his calling or employment.

Gosford, MS. No. 826.

No. 16. [353] Earl of NORTHESK v. GEORGE CHEYN. July 15, 1680.

An advocate not obliged to divulge his client's secrets.

The Lords, in a declarator that a bond was merely in trust, ordained Mr. Patrick Home, the defender's advocate, to be examined as a witness, in so far as he knew the conveyance by information of other persons than his client ; but refused to examine him on the information of his client, because an advocate is not obliged to discover his client's secrets.

Fol. Dic. v. 1, p. 26. Fountainhall, MS.

No. 18. [354] Mr. JAMES KEITH v. Sir WILLIAM PURVES. January 1684.

Advocates bound to depone as to secrets of their clients, relative to the expiscation of trusts, and private fraudulent conveyances.

The Lords found, That though advocates are not bound to discover the secrets of their clients, concerning the point of right, they were yet obliged to depone in the expiscation of trusts, and private fraudulent conveyances ; and therefore Sir George Lockhart, and some other advocates, were examined about their knowledge of a trust put in the person of Mr. James Keith, by the Lord Marshal, in prejudice of Sir William Purvis ; in the reduction and improbation of the execution of Sir William's apprising, at the instance of Mr. James Keith, who had right to another apprising of the same subject. (See the particulars of the reduction here referred to, under *Quod ab initio virtuosum*, and under *Pactum illicitum*.)

Fol. Dic. v. 1, p. 26. Harcarse (ADVOCATE), p. 4.

No. 19. TOLQUHON v. THORES. January 1684.

An action to have an advocate deposed for lending his name in trust, in a matter under debate at law.

Tolquhon having raised a summons against Sir David Thores, advocate, to hear and see, &c., that he ought to be deposed, conform to act 216, Parl. 14, Ja. VI. for having lent his name in trust for one Forbes, to a right under debate at law.—It was alleged for the defender, That he is not in the case of the act of Parliament ; because the right was not only granted to him in trust upon back-bond, but also he declared, at the first calling of the process in his name, that it was a mere trust ; and so the reason of the act ceased.

This debate was laid aside at the pursuer's desire, till the event of a count and reckoning. (See COMPETENT.)

Harcarse (ADVOCATE), p. 4.

No. 27. [358] FRANCIS SCOTT v. Lord NAPIER. July 8, 1737.

A defender, cited as a haver, not obliged to depone, unless a special condescendence is given in. Lawyers, agents, &c., called as havers, bound to answer only such interrogatories as are competent to be put to their client.

In the reduction and improbation betwixt these parties, the defender produced a charter and sasine, sufficient, with forty years possession, to exclude the pursuer ; whereupon he took out a diligence in general to prove interruptions ; and, having execute it against the defender, "The Lords found he was not bound to depone, unless a special condescendence was given in of writs called for to be exhibited."

Thereafter the pursuer insisted, That the Lord Napier's doers and agents should depone, in general, as well as any other havers. To which it was objected, That they were not bound to depone otherwise than the defender himself was, they being the same with himself.—At advising whereof, "The Lords found 'That no interrogatories could be put to Lord Napier's lawyers and doers, as to any papers they had occasion to see in the course of their employment, but what might have been put to my Lord himself.'"

The pursuer reclaimed ; and set forth, That if any of the defender's lawyers, &c., have had imparted to them the knowledge of any particular writing, under confidence not to reveal the same, he was willing they should be excused from deponing upon such writing ; but as to those they have seen in the common course of their business, under no particular tie of secrecy, there could be no reason why the pursuer

should not have the benefit of their oaths, with respect to such papers, as well as of the party himself. 2do, Granting the lawyers and agents are not bound to answer to a general interrogatory, as to such writs as they have come to the knowledge of in the course of their employment; yet the pursuer [359] has reason to believe, that one of the defender's agents, who was called to depone, had an opportunity to see several writs that are now in Lord Napier's charter-chest, before he was employed by his Lordship: As to which there was no reason why he should not depone, in general, upon these, as well as any other party called. Besides, he has seen other papers, since he was my Lord's doer, in the hands of third parties, as to which he should also depone. 3tio, It was prayed, That chamberlains, factors, and other trustees, should not be comprehended under the interlocutor.

The Lords adhered.—(See EXHIBITION.)

Fol. Dic. v. 1, p. 26. C. Home, No. 67, p. 115.

No. 30. [360] MOODIE and Others v. Sir JOHN HENDERSON and Others.
December 9, 1800.

Relative to the extent of freedom of speech, to which Counsel are entitled.

In this case, which was an action of wrongous imprisonment, oppression, and damages; Sir John Henderson, one of the defenders, having been cited as a haver, emitted a deposition, upon which the opening counsel, for the pursuers, made some animadversions: In consequence of which, Sir John, who was present, used expressions, which gave occasion to the following deliverance of the Court:—"The Lords having, upon the suggestion of the Lord President, and upon a motion from the Lord Advocate, as Dean of the Faculty of Advocates, taken into consideration what passed at the bar yesterday, at the conclusion of the pleading in the conjoined actions at the instance of James Moodie and others, against Sir John Henderson and others: Find, that words used at the bar by Sir John Henderson, which implied a challenge to Mr. Hope, or tended to provoke him to give such challenge to Sir John Henderson, were highly improper; and call upon the Court to show their disapprobation thereof; and, therefore, they ordain the said Sir John Henderson to be censured from the chair: Find, that the words, used by Mr. Hope, importing that he would betray the duty of his profession, if he accepted a challenge for any thing said in his official capacity, as a counsel at this bar, were proper and commendable; and, in regard to the allegations by Sir John Henderson, that Mr. Hope used improper expressions, or made an ill-founded attack upon him, in his pleadings at the bar, supersede the consideration thereof until the cause come to be advised."

In consequence of this reservation, the Court, when they pronounced judgment in the principal cause, resumed consideration of the above matter; and the following was their interlocutor: "The Lords of Council and Session having, in terms of the reservation contained in their interlocutor, of date 28th November last, resumed consideration of the subject-matter therein alluded to; and having particularly attended to the depositions of Sir John Henderson, baronet, a haver called upon to produce writings, Find no suffi-[361]-cient ground for imputing to him any intentional variation from the truth in these depositions, the Court being satisfied, that the statements therein-contained, were agreeable, to the best of his knowledge and recollection, at the time: Find also that Mr. Hope, pleading as a counsel at the bar for the adverse party in the cause, had a right to comment, with freedom, upon these depositions, as well as upon every part of the evidence, and upon the conduct of the parties against whom he was pleading, in all matters pertinent to the cause: Find, that neither Mr. Hope, nor any of the other counsel in the cause, are liable to censure for the mode in which the pleadings were conducted, or for any expressions used by them in the warmth of pleading; and that no party concerned has any just ground of complaint against them upon that account."

No. 1.

[379] COWGRANE. December 2, 1609

A man found art and part in a spuilzie, because the goods had been conveyed directly to his house.

A man in the Lenox, pursued Denniston of Cowgrane and certain others, for the spoliation, or way-taking, resetting, with-holding, and detaining of certain his nolt; liti-contestation being made, he proved the away-taking furth of his byre of four nolt by Cowgrane, and that they were taken to the house of another Denniston that night, and kepted all that night; which the Lords found to be approbation of the spuilzie against the said pursuer, in respect of their resett. Thereafter it being alleged, That Cowgrane was dead since the act of liti-contestation, the Lords found, That no sentence could be given against him, because the depositions of the witnesses contained probation against Cowgrane.—The Lords found, That the act of liti-contestation made the quantity to divide in equal portions against all the defenders against whom any thing was proven; and therefore they deducted that part which answered to Cowgrane's part, and decerned for the rest against the remanent defenders.

Fol. Dic. v. 1, p. 28. Haddington, MS. No. 1672.

No. 2.

E. ROXBURGH v. L. LANGTOUN. January 26, 1628.

One found liable in a spuilzie of teinds, because the corns were threshed in his barn, and he disposed of them.

In a spuilzie of teinds by the Earl of Roxburgh against the Laird of Langtoun and others, it being proven that the corns spuilzied were after the spuilziation casten in the L. Langtoun's barns, and were threshen there, and thereafter disposed off by him.—The Lords found this receipt, and using of the corns, to be a ratihabition; and consequently found the spuilzie proven against him, albeit he was not the actual spuilzier, but that others were proven to have actually committed the act of spuilziation.

Act. NICOLSON.—Alt. —.—Clerk, HAY.

Fol. Dic. v. 1, p. 28. Durie, p. 334.

No. 1.

[381] HEPBURN v. SEATON. February 12, 1635.

The heir has a claim to aliment in his own right, without service.

James Hepburn, brother and apparent heir to umquhile John Hepburn, his elder brother, pursues Dame Margaret Preston, relict of umquhile Sir Robert Hepburn of Alderston, their father, she being their mother, and Isobel Seaton, relict of the said brother, who were liferenters of the whole estate, whereto he was to succeed, for a modification to him, during their lifetimes; and the said Isobel Seaton alleging, That this action should abide continuation, and also, that the act of Parliament, which was the ground of this action, ordained modifications to be granted to the heirs of the defunct; so that this pursuer being only apparent heir, and neither being infest as heir, nor retoured heir, he could have no action upon the act of Parliament, which ought to be respected, seeing the defender has action due to her against the heir of her husband, which she cannot move against the pursuer, before he be entered heir.—The Lords repelled the allegiance, seeing the action was alimentary, and so needed no continuation; and also the apparent heir ought to have modification, that he might have means whereby to live, and that the act of Parliament did militate for the apparent heir; like as the pursuit, after sentence, would furnish action against the defender, as be-

having him-[382]-self as apparent heir to the defunct; and if she pleased also, she might charge him to enter heir, and if he refused, then she had reason to dispute, why she might be freed of this modification, or make other advantage thereby.

Act. NAIRN.—Alt. —.—Clerk, HAY.

Fol. Dic. v. 1, p. 28. Durie, p. 755.

No. 3. [383] JOHN LYON of Brigton, and his Curators v. ELIZABETH GRAY Lady Carse, and CICILIA DENMURE Lady Allantoun. January 16, 1712.

Heir renouncing found not entitled to aliment.

John Lyon of Brigton, apparent heir-male to Patrick Lyon of Brigton, his grand-uncle (who came to possession of the estate as a creditor by singular titles, transmitted to him by his grandfather), finding the same exhausted by debts and two liferents, viz. One to Elizabeth Gray Lady Carse, his grand-uncle's relict, and another to Cicilia Denmure his mother, pursued an aliment against these liferenters.

Alleged for the Lady Carse: Absolvitor, because the pursuer doth not possess the estate as heir to his grand-uncle, her husband, but as heir to his grandfather, who did not only renounce to be heir to his brother the grand-uncle, but acquired singular titles and possessed *tanquam quilibet*. For aliment provided by law must go to the heirs of law, and not to heirs of tailzie or provision; and far less to the pursuer, who is only heir to a creditor, and not heir of the family or blood; seeing his accidental title of apparent heir-male, is cut off by upwards of forty years possession of the estate by singular titles, as *feudum novum* or conquest.

Replied for the pursuer: His grandfather having been undoubted apparent heir-male to the defender's husband, the necessity he was under to succeed by appraisings and adjudications for fear of debt, should not wrong the pursuer's natural claim of an aliment; which, though commonly ascribed to the act of Parliament, appointing wardaters to aliment their wards, seems rather to have arisen from the civility of our law, that judged it hard for liferenters to cut off, as it were by starving, the heir from any hope of succession. Upon which ground it may be gathered from the strain of our practicks, that a fiar having the right of blood, debarred by liferents, ought to be alimented by the liferenters, whether he came to the succession by service or singular titles; albeit the heir of a stranger purchaser could have no recourse to an aliment off a liferenter, whose right affected the purchase. Yea, the interest of blood entitled an apparent heir to aliment, even against his grandfather's second wife, to whom he had no blood-relation, 12th December 1677, Preston of Airdrie *contra* his Liferenters, No. 21.

Duplied: It being absurd to pretend, That the pursuer can both enjoy the estate as a creditor, and claim benefit as heir to the person whom his diligence and singular titles divested. Aliment can no more be decerned upon that account, than it could be decerned at the instance of the heir of a ward-vassal against the superior, when the ward-lands are possessed by an appriser. The case of Ardrrie is a single decision; besides it doth not appear, that there the estate was enjoyed by singular titles.

The Lords found the defence for the Lady Carse relevant, That the pursuer possesseth not as heir to her husband, but as a creditor by singular titles.

Fol. Dic. v. 1, p. 28. Forbes, p. 575.

No. 4. [385] SANDILAND v. his MOTHER. January 27, 1700.

A fiar has no longer title to aliment, upon the act of Parliament, after he has sold the lands.

Sandiland of Cowston pursues his mother for an aliment, as liferenting his whole estate. Alleged, The lands came by myself, which I disposed to your father in our

contract: I educated you a writer; but you deserting that, I bought you an ensign's place in the army, where you were likewise turned out, and married unworthily, and have sold the fee of the lands worth 2000 merks per annum, whereof I only liferent the half; and so an aliment being only due to an apparent heir, or a fiar, you are neither, but are denuded; and what rests to me is no more than a competency.—Answered, He can be in no worse case than an heir left with an overburdened estate by adjudications, and other diligences and rights, whether legal or conventional; and though they have renounced to be heirs, yet they have been allowed to crave an aliment off liferenters, 16th July 1667, Hamilton *contra* Symington, No. 2; *ergo a pari* a fiar who has sold his heritage for his father's debt may pursue his mother for an aliment, though he be major.—The Lords found this defence relevant to assolzie from an aliment, that he was denuded of the fee of the whole by an irredeemable disposition made by himself; and granted diligence to the defender to prove it, seeing he was no more fiar.

Fol. Dic. v. 1, p. 28. Fount. v. 2, p. 84.

No. 12.

[390] AITON *v.* COLVIL. July 25, 1705.

An aliment modified to an heir out of his step-mother's jointure, although he was major, and an advocate, but did not earn a subsistence by his profession.

Mr. William Aiton, of that Ilk, pursues Dame Margaret Colvil, his mother-in-law, for an aliment, in respect his father's estate, being 47 chalders of victual, is overburdened with her liferent of 24 chalders, and 40,000 merks of provision to her children, and other 40,000 merks of extraneous debts; so there was no sufficient estate left to sustain the heir.—Alleged, This process is either founded on the statute of James V. for superiors alimentering their ward-vassals, or *super jure naturæ*, where one pursues his own mother; none of which holds here, she being a stranger to him, and secured in a jointure by her contract of marriage, which cannot be diminished *contra fidem tabularum nuptialium*.—Answered, Much of our law is introduced by custom, time out of mind; and this of alimentering heirs is one of them; and much stronger than our positive statutes, and has been ever sustained against step-mothers having exorbitant liferents.—The Lords repelled the defence, in respect of the answer.—2do, Alleged, These aliments were only given in favour of minors, who had no other way of sustenance; but where they were come to age, and had a calling, they were never granted; for that were to encourage idleness; but so it is, the pursuer here is both major and an advocate. And Durie, in two several decisions, 11th February 1636, Sibbald, No. 9; and 21st July 1636, L. Ramornay, No. 10—tells, that the Lords refused aliments to such as had callings.—Answered, The name of an employment will not afford a man bread; neither is the race always to the swift, nor the battle to the strong; *et officium nemini debet esse damnosum*: And we have known many advocates who have risen to a great eminency and practice, who, at the beginning, have had little or no employment. And the cases cited do not meet; for, in the first, the grandfather was alive, who had a liferent reserved; and it was thought as reasonable he should bear the aliment as the mother. And [391] in the second, *non constat*; but he was an actual placed minister, and so had a sure fund to live upon; and the mother had but an aliment herself; and it was thought hard to burden one aliment with another.—The Lords also repelled this defence.—Then 3tio, alleged, That the lady was, by her contract of marriage, burdened with alimentering her own children till they were seven years old; and so cannot be farther burdened with the heir.—Answered, The children had an adventitious estate, *aliunde* whereon they might be alimented.—The Lords repelled this also.—4to, Alleged, He was served heir *cum beneficio inventarii*, and behoved to add this to the inventory, which would accresce and appertain to his father's creditors; and so he could have no benefit thereby: Likeas, there was no real diligence on the estate, by adjudications or infeftments, to debar him from possessing; and so he could claim no aliment; as was found, 13th February 1662, Antonia Birnie *contra* the Liferenters of Rossie, No. 14; and 18th December 1667, Doby *contra* the Lady Stonyhill, No. 15; where personal debts exhausting an estate, were not thought sufficient to found an aliment.—Answered, Aliments

were neither arrestable nor affectable by creditors ; and so are not to be added to the inventory ; and the law made no difference whether he was served or not : And *esto*, at the time of the father's death, there were no real diligences, but the debts merely personal ; yet how soon are they made real, by charging him to enter heir, and adjudging ?—The Lords also repelled this ; and then proceeded to the modification of the aliment ; and finding the lady had 24 chalders of victual, they fixed on the fourth part of it. But the debate arose, whether to give him six chalders of victual, or 600 merks of money ? Some were for a locality out of her jointure lands ; but that not being judged legal, they fixed on the money, and decerned her in the same ; the first half-year's payment beginning at Martinmas next. And seeing he was quarrelling her liferent in a reduction, as exorbitant ; and so it was contended he could not do both ; the Lords thought they might modify in the mean time ; for if he prevailed in his reduction, then this aliment would cease.

Fol. Dic. v. 1, p. 29. Fount. v. 2, p. 287.

No. 25. [397] ELIZABETH MIRRIE *v.* POLLOCKS. July, 1731.

It is only heirs of heritage, not of money, to whom, as heirs, aliment is due.

In a marriage-settlement, the husband obliged himself to lay out the tocher, with another sum of his own, upon good security, to himself and spouse in conjunct-fee and liferent, and to the heirs or bairns of the marriage in fee. Of this marriage, there were three children, who all died without making up any title to their father's effects, whereby the succession opened to his other next-of-kin. The relict, who, after her husband's decease, was confirmed executrix to him, married a second time ; and, after the death of her children, brought an action against the next-of-kin, for cognoscing the claims of debt to which she was entitled upon her husband's executry ; particularly for the sums bestowed by her, out of the said funds, upon the education of her children, and upon their sickness and burials.—Against this article, it was objected by the next-of-kin, that the whole effects, left by the husband, were no more than sufficient to answer the pursuer's annuity ; therefore, the aliment of her infant-children, was a proper burden upon herself, as being their mother, and liferentrix of their whole estate, which is provided by act of Parliament, in case of ward-minors, and extended by practice and analogy to other fiars.

It was answered, That the case of ward-minors is singular ; and though this statute is, by analogy extended to fiars of land, even this extension seems to be *invita juris-prudentia*. Sir George Mackenzie complains heavily of it, because it must have been a case, in the eye of the legislature, *ex proposito* omitted, and adds, “as there is not the same parity of reason, so indeed it is contrary to the faith of the marriage-contract.” However this be, the law has been extended no further than to fiars of land-estates, who are great favourites in our law ; the preserving of ancient families being of great importance with us. Here the practice stops ; and there is neither authority nor reason for extending it to fiars in moveable sums. Add, that a liferentrix of land is only obliged to aliment the heir ; but, in sums of money, the bairns are generally made heirs, as happens to be the present case ; so that she would have the burden of the whole family upon her provision ; which is unreasonable.

“The Lords found the aliment of the children, their funeral expence, and other expences bestowed upon them, may be stated by the pursuer, to affect the fee of the subjects provided to the children, if there be not sufficiency of fund otherways to pay the same.”

Fol. Dic. v. 1, p. 30. Rem. Dec. v. 2, No. 3, p. 5.

No. 27. [398] *GEORGE STEWART v. Mrs. CHARLOTTE CAMPBELL.* June 24, 1780.

Aliment not exigible by an heir of entail, from an annuitant on the estate.

James Stewart of Stewarthall, executed an entail of his estate, with the usual clauses, and likewise under this condition ; " That the heirs of entail should be obliged to apply £100 yearly of the rents towards the extinction of the debts with which the estate was affected."

He afterwards married Mrs. Charlotte Campbell ; and, in virtue of a power reserved in the entail, he settled on her a jointure of £130 per annum.

George Stewart, though a very distant relation, succeeded as first heir of entail ; when he found the situation of the estate such, that, after payment of the jointure, the rents of the lands, which amounted to £246, fell considerably short of the other annual burdens. He had no separate funds ; nor did he practise any calling to earn his subsistence ; for, though he had been bred a sailor, and was still a young man, he had withdrawn himself from that way of life.

He therefore claimed an aliment from the widow, as liferentrix of so large a part of the produce of the estate ; and having raised an action on that ground, it was

Pleaded for the defender : The defender is, by her marriage-contract, an onerous creditor on the estate, and is not bound to aliment the pursuer, her debtor. [399] Nor can he claim an aliment from her as liferentrix ; for in fact she is not such, being a creditor on the estate for the annuity payable by that contract. At any rate, there is reason to doubt if such a claim, made by fiars, ever had any proper foundation in the law of Scotland ; but certainly it cannot be supported, when coming from a healthy young man, able, like the pursuer, to earn his livelihood by his labour ; Erskine, p. 333.

Answered : It is now an undoubted rule, that liferenters are bound to aliment such fiars as are otherwise destitute of any fund of subsistence. It was established, in the case of wardholdings, by act of Parliament 1491, cap. 25, and has been, by practice, extended to that of every kind of holding ; as it is evident from Dictionary, *voce* Aliment ; whence it likewise appears, that this claim has never been denied, except either where the heir possessed separate means of subsistence, that, in the present case, are far from occurring, or where the scanty circumstances of the liferenter did not admit it ; which surely cannot be said of the defender, who has obtained £130 of jointure for her tocher of £500.

The Court distinguished the case of an annuitant from that of a liferenter ; a distinction established in the case of *Mirrie contra* Pollock, July 1731, Remark. Decis. No. 25.

" The Lords therefore sustained the defences."

Act. DAV. RAE.—Alt. ILAY CAMPBELL.—Clerk, TAIT.

Stewart.

Fol. Dic. v. 3, p. 22. *Fac. Col.* No. 112, p. 209.

No. 32. [403] *The Laird of KIRKLAND v. His MOTHER and GRANDMOTHER.* November 27, 1685.

Grandmother found obliged to bear her proportion of the heir's aliment, along with his mother.

The heir and younger children of the Laird of Kirkland, having pursued an action of aliment against their mother and their father's step-mother, by whom the estate was entirely liferented :—It was alleged for the said step-mother, That she had already given an abatement of 800 merks to the pursuer's father ; and before imposing any further aliment upon her, their mother ought to give a proportional allowance out of her provision.

The Lords did not respect the abatement given to the pursuer's father, his step-mother having yet an opulent jointure ; but found, That the heir could have nothing modified for years bygone, preceding the summons, the defenders having *bona fide* con-

sumed their whole annuities these years. And the liferented lands not being ward-lands, which by act of Parliament are expressly burdened with the heir's aliment, but lands holding feu or blanch, which are only made liable to the heir's aliment by practice, extending the act of Parliament; yet they found, That the mother having alimented her son, the heir, whose property [404] was entirely exhausted by liferents, was presumed to have done it, *ex pietate*, although action was once competent to him, for these years aliment, against the old liferenter, because no such action had been intended.

The Lords found also, That the mother was bound, *jure naturali*, to aliment the younger children *in familia*, they being young. *Harcarse* (ALIMENT), p. 5.

No. 34. [405] CUNNINGHAM of Brownhill v. Dame MARGARET RAMSAY, his Grand-Step-mother. July 12, 1715.

Not sustained as a defence for the grandmother, that she had voluntarily sold a part of a separate estate to pay the debts of the pursuer's grandfather.

The said William Cunningham, a pupil, having raised a process of aliment against his mother and step-grandmother, upon the act of Parliament 1491, cap. 25, whereby superiors of ward-lands are obliged to aliment the heirs; which, by established practice, *paritate rationis*, is extended to liferenters: Among other defences for the step-grandmother, this was proposed, That when she married the pursuer's grandfather, she was provided in an liferent of 3000 merks, out of a former husband's estate, the half whereof she allowed to be sold, and applied for payment of Brownhill, her husband's debts; and therefore had scarce enough to herself, having also several children and grandchildren of her own; whereas, [406] in all modifications of aliment, the Lords do always consider the quantity of the liferent, the quality and circumstances of the liferentrix, &c.

Answered for the pursuer, That whatever tocher or provision she brought, makes no difference here; because, still the heir, at least under pupilarity, must be alimented, which is *provisio legis*, and by no paction can be evacuated: And as the law did openly intimate to her this act, as a burden which she was in hazard to undergo, she ought to have provided for his liferent suitably; for the rule is, that whatever portion of burden each liferenter have from the fiar's estate, and whatever the portions were that they brought, yet that since he finds them liferenters, they must contribute to his maintenance.

The Lords found the defence not relevant to assoilzie the step-grandmother from contributing a proportion of the pursuer's aliment.

Act. BOSWELL.—Alt. Sir THOMAS WALLACE.—Clerk, ROBERTSON.

Fol. Dic. v. 1, p. 31. *Bruce*, No. 115, p. 143.

No. 40. [409] WILLIAM DICK v. Sir ANDREW DICK. January 13, 1666.

A father, though indigent, and with a large family, bound to maintain his son who had not ability to support himself.

William Dick pursues Sir Andrew Dick, his father, for a modification of his aliment, whereupon the question was, Whether Sir Andrew Dick himself being indigent, and having a great family of small children, and the pursuer having been educated a prentice, whether the pursuer should have a modification.

The Lords considering the great portion the pursuer's mother brought; and that he was a person of no ability to aliment himself by his industry; decerned Sir Andrew to receive him in his house, and to entertain him in meat and cloath, as he did the rest, or else two hundred merks, at Sir Andrew's option.

Fol. Dic. v. 1, p. 32. *Stair*, v. 1, p. 337.

No. 43. [410] WILLIAM MORISON, Younger of Prestongrange v. his FATHER. July 19, 1716.

The Lords decerned an aliment to an apparent heir, in proportion to his father's estate ; and refused to sustain the father's offer of alimenting him in his family, on account of the notoriety of his mal-treatment. *Fol. Dic. v. 1, p. 31.*

No. 45. [411] Children of the Earl of BUCHAN v. Lady BUCHAN. February 23, 1666.

A mother is obliged to aliment her children *jure naturæ* ; but it is sufficient that she aliment them in her family.

The six children of the Earl of Buchan pursue their mother for aliment. It was alleged absolvitor, Because their was neither law, statute, nor custom of this kingdom, obliging a mother to aliment her children. 2do, Albeit there were, she offers her to admit them in her family, and to entertain them according to her means ; but can never be obliged to pay a modification, in money, out of the family ; for, in all cases of aliment of wives, or children against parents, the offer to accept, and aliment them in the family, according to the parent's means, doth always exclude modification ; as was lately found in the case of Sir Andrew Dick and his Son.—It was answered, That the law of nature is a part of the law of this, and all other civil kingdoms ; and, according thereto, the Lords do always decide, in cases now occurring, where there was neither statute nor custom, and if aliment be due, the manner and measure is *in arbitrio judicis*, who may justly ordain their children to be bred from their mothers, seeing she hath miscarried, and married a deposed minister.—It was answered, That the law of nature, without our custom, is no sufficient law to us, and does not induce *obligationem civilem*, but only *pietatem et affectum* : Upon which ground it is, that there was necessity of this statute, to appoint an aliment for heirs against the wardatars and liferenters ; which insinuates that there was no such law before ; and, if the law of nature be the adequate rule, we are obliged to entertain the poor, and all in distress ; and therefore they might pursue us thereupon. 2do, There is no reason to put it *in arbitrio judicis*, whether a child should be educated with the parent, who must aliment him, even upon pretence of the parents' miscarriage ; for that being the indispensable right of parents to educate their children, as they see cause, especially who demand aliment of them ; it ought not to be in the arbitrament of any judge, unless it were a Parliament ; and this arbitrament would lay the foundations to encourage children to desert their parents, and to claim aliment out of their family, and to pretend the parents' miscarriages, as unfit persons to be bred with, and not breeding them in a fit way ; which accusations were prohibited by the civil law, and never admitted by our custom ; for albeit the Lords may appoint the way of education of pupils, their parents being dead ; yet tutors have no such interest as parents.

The Lords found the mother obliged to aliment the children *jure naturæ* ; which was sufficient to infer this civil obligation and action ; but found, that the offer of alimenting them in her family, was sufficient according to her means ; and they could demand no aliment, nor modification, *extra familiam* : For they found, that the Lords had thus sustained aliment to children against their fathers, not upon the act of Parliament, which is competent against all liferenters and dona-[412]-tars, without consideration of their being parents, but *super jure naturæ*, which they found would not extend to the obligation of charity, and which had no definite rule, but at the discretion of the giver, and was not allowed as a civil obligation by any nation.

Fol. Dic. v. 1, p. 32. Stair, v. 2, p. 365.

No. 46. CATHARINE DRUMMOND v. ROBERT STEWART. March 2, 1756.

A mother, who alimented an idiot son while he had no fortune, found to have no claim for repayment when he succeeded to an estate.

Catharine Drummond, mother to Robert Stewart an idiot, alimented him from the year 1721 till the year 1751. He had no fortune whatever. In that year he succeeded to the estate of Ardvorlick, of £840 Scots yearly rent. In the year 1756, Catharine Drummond brought a process of aliment against her son, concluding for aliment from the 1721 till the 1751, as well as after this last period.

"The Lords found no aliment due till 1751; and, after that period, modified £40 to the pursuer."

Act. —.—Alt. AND. PRINGLE.

Sir J. Dalrymple.

Fol. Dic. v. 3, p. 22. Fac. Col. No. 195, p. 289.

No. 47. JEAN HOME v. Assignee of Lady WEDDERBURN. July 12, 1757.

Prior aliment by a mother deemed to be *ex pietate*, notwithstanding a child's supervenient fortune.

Jean Home, with her sister Isabel, had a bond of provision from their brother for 5000 merks; but it contained a clause, "That the money should be divided betwixt them by Ninian Home, by such proportions as he should think fit to appoint, by any writ under his hand, *etiam in articulo mortis*."

This power of division was never exercised by Ninian Home. At his death, one half of the 5000 merks fell to Jean, by the legal construction of the bond.

From the date of the bond till the death of Ninian Home, which was twenty years, Jean Home, who had no fortune except the prospect of this bond, had lived in family with her mother Lady Wedderburn.

After the death of Ninian, Lady Wedderburn claimed aliment as due by her daughter Jean, for this intermediate space, in respect of her supervenient fortune.

In an action betwixt Lady Wedderburn's assignee and Jean Home, concerning this claim of aliment,

"The Lords found, That Lady Wedderburn had no claim of aliment."

For Assignee, PATRICK HOME.—For Jean Home, J. DALRYMPLE.

Sir J. Dalrymple.

Fol. Dic. v. 2, p. 22. Fac. Col. No. 43, p. 70.

No. 48. [413] The Younger Children of BISSET of Lessindrum v. Their BROTHER. December 13, 1748.

The mother found liable for a proportion of the aliment of younger children.

The daughters of the deceased James Bisset of Lessindrum, pursued Alexander their brother, and heir to their father, for an aliment, they being minors and unprovided.

The Lords appointed the mother to be summoned; for whom it was pleaded, That though she was obliged to aliment *super jure naturæ*, yet the burden was to be laid preferably on the father's heir in his estate.

[414] The Lords, considering that the heir was minor, and no appearance made for him, enquired into the circumstances of the estate; and modified an aliment, which they proportioned on the heir and liferentrix, as to them appeared equitable.

Act. and for the mother, H. HOME.—Alt. ABSENT.

D. Falconer, v. 2, No. 20, p. 23.

No. 50. [415] Children of NETHERLIE v. the HEIR. January 24, 1663.

The brother bound to aliment the younger children, according to the condition and value of the estate.

The children of umquhile Edgar of Netherlie, alleging that their father left to his heir a competent estate, and that he died before any provision or aliment appointed to them, and that the heir's tutor refused to aliment them, their mother being also dead ; therefore craved an aliment to be modified, there being no compearance in the contrary.

The Lords found the brother, as being heir to the father, of a competent estate, liable to aliment the children, being wholly unprovided ; but determined neither the time, nor the quantity, till the condition of the estate were instructed.

Fol. Dic. v. 1, p. 32. Stair, v. 1, p. 161.

No. 53. [416] HASTIE and KER his Mother v. HASTIE. November 10, 1671.

Aliment to a posthumous child, unprovided for, is found due by his brother, as representing his father ; but only till he has learnt a trade ; and on no account after majority.

The deceased A. Hastie, stabler in Edinburgh, having a son and a daughter when he died, disposed to them his whole means, whereof the daughter's part was but an ordinary portion, but the son's part was very considerable. After his death, his wife brought him forth a posthume son, who was destitute of all provision or aliment ; whereupon his wife and that posthume pursued his son, craving that a modification might be granted for the wife's expences in childbirth, and for aliment of the posthume son since his birth, and in time coming.—The defender alleged absolutor from any modification for the wife's expences, because there was no ground for it in law ; or for any further than her aliment [417] to the next term after the defunct's death, after which this posthume was born, especially seeing the defender's disposition was long before ; and albeit he be unwarrantably served heir, the tutor disclaims it, and will reduce it.—It was replied, That beside the ordinary allowance of relicts, the extraordinary expence of the birth of a posthume, was a debt for which the father was liable, whom the defender represents as lucrative successor, by the disposition posterior to the conception of this child, *nam in beneficiis qui in utero est pro jam nato habetur*.

The Lords sustained the libel, and modified in respect of the reply and disposition.

The defender further alleged the libel was noways relevant, as to any aliment for the posthume ; for though parents be obliged to aliment their children, yet there is neither law nor custom obliging a brother to aliment his brothers, especially where the brother doth not represent the father.—It was answered, The libel was not founded upon the brother's obligation, but upon the father's obligation, whom the brother represents by the foresaid disposition, which the Lords had in several cases allowed, especially in the case of the Children of Netherlie against their Brother, No. 50 ; and there can be no case more favourable than a posthume, whom the father did not neglect or pass by, he being gotten but shortly before his death.—The defender answered, That the father's obligation to aliment his children is personal, *et non transit ad heredes* ; and as to the practice, that it was collusion between the heir's tutor and the bairns.

The Lords found the defender, as representing his father by the disposition of his goods, liable to aliment this posthume child during his minority, at least so long of his minority as he was without calling or means to aliment himself ; but would not extend it after his majority.

Fol. Dic. v. 1, p. 32. Stair, v. 2, p. 1.

No. 57. [419] THOMSON v. WILKIE. July 23, 1678.

A sister succeeding to the means of her father and mother, found liable in expence of alimentering her furious brother ; but that only in so far as she was *lucrata*, by being freed from entertaining him in her own family.

Umquhile Walter Wilkie having several children, one called Thomas became furious before his father's death, and his father provided nothing to him, but made his relict his executrix and universal legatrix, who entertained the said Thomas during her life ; and after her decease, William Thomson having married Lucas Wilkie his sister, he entertained him 14 years, and now pursues Agnes Wilkie, who succeeded to the whole means of both father and mother, for the aliment of the furious person, in respect that it was a duty by the law of nature, both upon his father, and in case he had no means, upon his mother, to [420] constitute an aliment for him during his furorosity, according to their means and estate, which therefore must affect all representing them.—The defender answered, That the law and custom of Scotland hath only extended aliment of children against fathers personally, and never against mothers, nor against any representing either. 2do, This aliment being bestowed upon the furious person by his own sister, without any agreement, must be presumed to be of charity and natural affection, and introduces no obligation, especially having continued 14 years after the death of both parents ; and if it had been otherways intended, the pursuer ought to have required the defender to have accepted of the furious person in her family, and could not crave a modification to entertain him elsewhere.—The pursuer answered, That the Lords had made this natural obligation effectual, not only against fathers, but against mothers, where the father left no means, as was found in the case of the Children of E. Buchan *contra* the Countess of Buchan, No. 45 ; and also against the heirs, as was found in the case of the Children of Otter, No. 49, and Netherlie against the Heirs thereof, No. 50. And albeit the Lords has found that the entertainment of persons who can contract, is presumed gratuitous, unless there be an agreement, yet it is neither extended to pupils nor furious persons, who can make no act nor agreement for themselves.

The Lords sustained the process, and ordained a modification according to the means of the father and mother, whereunto the defender succeeds, and only in so far as she is *lucrata*, by being freed of entertaining the furious person in her own family.

Fol. Dic. v. 1, p. 32. *Stair*, v. 2, p. 639.

No. 58. DON of Attenburn v. DON. January 13, 1697.

Younger children allowed aliment from their brother ; the boys till 14, the girls till 12.

The younger children of Mr. Patrick Don of Attenburn, pursue their elder brother for an aliment, on this ground, That their father had left them nothing [421] by any bond of provision ; and the estate being opulent, about 9000 merks of yearly rent, it was just they should be alimentered ; and craved two periods to be fixed ; one to 14, and the other from that age to 21 ; for the first, 600 merks per annum, was craved to be modified for each of them ; and after 14, 800 merks.—The Lords remembered, that in the case of Jacobina Inglis, daughter to Crammond, in 1691,* the Lords would go no farther than her age of 12 ; therefore they allowed 600 merks yearly to each of them ; the boys till 14, and the girls till 12. *Fol. Dic.* v. 1, p. 32. *Fount.* v. 1, p. 754.

* General List of Names.

No. 61. [423] MAXWELL v. MAXWELL. February 23, 1711.

During the dependence of a reduction of a father's testament, betwixt a sister pursuer, and a brother defender, she, being married, found entitled to no *interim* aliment.

The deceased Sir William Maxwell of Monreith, by his testament, nominates Sir Alexander his son, to be his only executor and universal legatar, with the burden of 5000 merks to his daughter Elisabeth, and some other small legacies. But Sir Alexander finding his father's moveable debts exceed the inventory of the testament, he pursues an exoneration before the Commissaries to prove exhausted. In which process, the said Elisabeth, and Andrew Heron, younger of Bargally, her husband, compear, and repeat a reduction they have raised of that testament, as being elicited *in extremis*, when insensible, *et contra officium pietatis*, he having succeeded to an opulent land-estate, and ought not *vis et modis*, to intercept their natural legitim. But, during this dependence, being unable to subsist, the said Elisabeth, and her husband, and Agnes, another sister, raise a process of aliment against their elder brother, as a *debitum naturale*, seeing *frater dives fratres vel sorores inopes alere tenetur*. Yea some lawyers go farther, that if she be *dote destituta tunc eam dotare tenetur*.—Alleged, 1mo, Against Elisabeth, that being married, she must be alimented by her own husband, especially considering that she went away without her father's consent; and though her husband has little during his father's lifetime, yet law has prescribed an order of discussing, that his father should be, *primo loco*, conveyed *super jure naturæ*, to aliment him and his wife; and no law obliges a brother to aliment a sister, except so long as she remains a part of the family; but when she is emancipate, or passed into another family, his obligation ceases.—Answered, Not only the common law, but our municipal customs, have laid this burden on brothers, without respect to marriage or not, but merely if necessitous and poor; as was found 8th January 1663, Lady Otter, No. 49—29th June 1676, Rowe, Stair, v. 2, p. 434. (See PRESUMPTION.)—5th July 1676, Chiefly, No. 54—and 5th July 1677, the Children of Straiton of Lawriston, No. 55. And this case is more deplorable, that she has sundry young children; and her father had so far connived at her escape, that he left her 5000 merks. But Sir Alexander, her brother, offered to secure that to her children; debarring the father.—The Lords found the married sister could crave no aliment from her brother. Some thought, if she had been living separate from her husband, there might have been some more pretence. Then Agnes, the unmarried sister, craved an aliment to be modified to her.—Answered, 1mo, You are major and past twenty-one, and so can claim no aliment, but should, by some virtuous course, provide for yourself. 2do, You deserted my house, and suffered your brother-in-law to over-reach you, in disposing all you can claim for your portion to him. 3tio, I am willing to take you back and maintain you honourably, conform to your birth; and, in regard she surmises her return may be uneasy and uncomfortable to her, because of her disobligations, he is content she reside with any of her sisters or aunts, to whom he shall pay such a competent aliment as the Lords shall determine. Replied, She being now *sui juris*, cannot be confined to a particular place, but has the choice where she thinks fit to live.—The Lords thought the brother's offer reasonable, and therefore allowed her to chuse any of the friends named, for the place of her residence, in which case they would modify an yearly aliment to her, during the dependence of the process betwixt them: But if she refused, and would rather stay where she is, then they would assaillie her brother from any aliment.

Fol. Dic. v. 1, p. 32. Fount. v. 2, p. 641.

No. 63. [425] HELEN, ARCHIBALD, &C., DOUGLASSES v. Sir JOHN DOUGLASS of Killhead. February 8, 1739.

The brother, in a question with his mother, found primarily liable for the aliment of the younger children; the males till majority, the females till marriage.

Sir William Douglass having died without making any provision in favours of his younger children, they intended an action against Sir John, their elder brother, for

aliment, upon this ground, That he possessed an opulent fortune (about £500 a-year), descended to him from their common father. In support of this, it was observed for the pursuers, That the defender, as heir to his father in such an estate, is obliged to aliment them, in like manner as the father was, conform to 24th of January 1663, *Netherlie*, No. 50—8th of January 1663, *Lady Otter*, No. 49, which proceeded on this principle, That the obligation to aliment, which lay on the defunct, does descend against his heirs, and is competent to majors as well as minors, as the Court always found ; particularly, 25th July 1705, *Aiton*, No. 12 ; when it appeared such were not in a condition to aliment themselves, which is the case of all the pursuers in this process ; and therefore action ought to be sustained for aliment bygone, since the father's decease, and in time-coming, until they should be able to provide for themselves. Neither can it afford any objection, that the pursuers have been maintained part of the time since their father's decease by their friends, as the favour was not intended to be done to the defender ; consequently the benefit thereof ought not to accresce to him.

Pleaded for the defender : He did not controvert, but brothers, succeeding to the estate of a common father, are by law bound to aliment their younger brothers and sisters ; but then that obligation lasts only till majority. A father is bound not only to aliment his children, but to educate them to some calling, in order to put them in the way of maintaining themselves : If he does not do this, he will be bound for aliment, even after majority, because of his neglect ; but a brother is under no such obligation ; he is not bound to put his brothers and sisters to apprenticeships, or to give portions to his sisters ; and therefore, if, after majority, they are not infirm, their elder brother may be called cruel, if he leaves them to starve, but there is no law to compel him to aliment them further. 2do, Admitting he is liable for the pursuers' aliment till majority, unless he has no other defence, he further says, That persons liable in aliments, are to be taken in a certain order ; first, the father, *super jure naturæ* ; and, if he is indigent, the mother is bound to maintain the children, if she be in a condition ; which arises likewise from the law of nature ; and, by the civil law, grandfathers and grand-mothers ; beyond this, aliments are not due *super jure naturæ* : A brother is bound in conscience to maintain his brothers ; to which duty the law has added a positive command ; but the obligation does not arise from the same source, because a brother has no hand in bringing his brother into the world ; it arises singly from filial duty, by which a son, in reverence to his parents, ought not to suffer their children to starve ; a brother then being pursued in a process like this, has a [426] sort of *beneficium ordinis*, if not *discussionis*, that, if he can point out one liable in aliment by the law of nature, and able, he can only be liable *in suo ordine* : Now, *Lady Douglass*, their mother, is able, she having 2000 merks per annum of jointure off the defender, and £150 yearly more in property.

The Lords found the defender, *Sir John Douglass*, having succeeded to his father in a considerable estate, is primarily liable to aliment his younger brothers and sisters unprovided ; and found the males have no claim to be alimented by their brother after majority ; but that the females are entitled to be alimented till marriage ; and found, That, in so far as they have been alimented by their friends, they have no claim against their brother. *Fol. Dic. v. 3, p. 23. C. Home*, No. 114, p. 183.

No. 65. [427] *MARGARET ANDERSON and RACHEL GIBSON v. JAMES GIBSON and his Curators. January 25, 1754.*

A person succeeded to the estate of a distant relation. His mother and sister being poor, claim aliment. He admits the mother's claim. The sister, who was past 21, found not entitled.

James Gibson having succeeded as heir to his grand-uncle *John Jack*, *James Gibson's* mother, *Margaret Anderson*, and his sister *Rachel Gibson*, brought a process against him and his curators for an aliment.

The defender admitted, that an aliment was due to his mother ; but contended, That his sister, who was past 21 years of age, had no legal claim against him for an aliment.

Pleaded for Rachel Gibson : That by the civil law, persons who are able, are bound to aliment their brothers and sisters who are in want ; l. 1, § 2, ff. *De tutel. et ration. distra. l. 13, § ult. ff. De admin. tut. and Voet, ab tit. De agn. et alend. liberis* : And as this obligation is founded on the law of nature, and proceeds *ex æquitate et charitate sanguinis* betwixt brothers and sisters, it ought to take place with us ; and so it has frequently been decided, particularly 10th November 1671, *Hasty contra Hasty*, No. 53 ; and 23d July 1715, *Children of Knapperny v. their elder Brother*, No. 62.

[428] Answered for James Gibson and his curators : That although he would be very ready to relieve his sister when in need, yet he is under no legal obligation to aliment her. The texts cited from the civil law, only permit tutors and curators to make reasonable debursments out of the pupils or minors estates, for the education and maintenance of unprovided brothers and sisters, but by no means make it necessary for the minor or his curators to make such debursments. And all the decisions of this Court, whereby a brother has been found obliged to aliment his brothers and sisters were, upon this foundation, that he, as heir to his father, was liable to the same obligations to which his father was liable ; and therefore to aliment the children of his father. And even in such cases, the obligation reached no farther than to aliment them during their pupillarity, or at farthest minority. But, in the present case, the defender does not represent his father, but succeeded to his grand-uncle, who was under no obligation to aliment the pursuer Rachel Gibson, and she is past the years of minority.

“ The Lords found, That Rachel Gibson was not entitled to an aliment.”

Act. DAV. DALRYMPLE.—Alt. DAV. RAE.—Clerk, KIRKPATRICK.

Bruce.

Fol. Dic. v. 3, p. 23. Fac. Col. No. 97, p. 147.

No. 67. [429] *Mrs. MARGARET SETON, Relict of John Paterson, Younger of Eccles, and ELLIOT and KATHARINE PATERSONS, her Daughters v. Sir JOHN PATERSON of Eccles. June 25, 1761.*

Aliment due to a mother, *super jure naturæ* ; but sisters not entitled to an aliment, where the brother does not represent their father.

John Paterson, younger of Eccles, married Mrs. Margaret Seton, the pursuer, without the consent of his father Sir John.

During the son's life, Sir John allowed him an aliment of 1200 merks a-year ; but John the son having died in the 1742, Sir John withdrew the aliment altogether from the widow and seven children, whom his son had left behind. Some time thereafter, two of the sons having died, he took home the two remaining to his own family, and was prevailed on to settle a small annuity of 500 merks yearly, as an aliment for the widow, and Elliot, Katharine, and Margaret Patersons, her three daughters, to be restricted to 400 merks, in case of the death or marriage of any of the three young ladies : And in the event of the mother's marriage or death, he binds himself to pay to each of the three daughters, the sum of 100 merks yearly for their necessary support, &c., while unmarried.

Sir John Paterson, son to the pursuer Mrs. Margaret Seton, upon the death of old Sir John, his grandfather, took his sister Margaret entirely off her mother's hand, and augmented the yearly annuity to £40 Sterling.

The Lady, and her two daughters Elliot and Katharine, brought an action against Sir John Paterson, concluding that he should be decerned to make payment to his mother of an yearly aliment of 2000 merks, and 500 merks to each of his two sisters.

Pleaded upon the part of the mother, That the action was founded *super jure naturæ*, and upon that renunciatory obligation, to recompence the pursuer for the support and entertainment of the defender in his infancy, which can neither be renounced nor cancelled.

Pleaded for the two sisters, That if old Sir John their grandfather had been alive, he would certainly have been liable to aliment them ; and if that was so, so must

their brother who represents him. If they had obtained bonds of provi-[430]-sion, the grant whereof was not payable till their marriages; the Court, agreeable to many decisions, would have found them entitled to an aliment; and as the obligation is rather stronger where daughters are not provided at all in a portion, the same principle of equity ought to be extended to their case; 8th February 1739, Douglas, No. 63, the Court found the obligation to aliment sisters.

The defender, Sir John Paterson, did not seem to deny that a son was bound to aliment a mother who was altogether unprovided; but he pleaded, That the aliment which she already enjoyed, and which he offered to encrease, for behoof of herself and his sisters, to £50 Sterling, was sufficient to bar any further claim of aliment, *super jure naturæ*; because her claim had no other foundation, but the natural obligation of a child to aliment and maintain his parent, when destitute and unprovided; but the aliment she already enjoyed, with the addition offered, was sufficient to maintain herself and her two daughters decently, in a cheap part of the country.

With regard to the two young ladies' claim, the defender pleaded, That the law of this country had not extended the obligation to aliment *ex pietate*, to the case of brothers and sisters. Cases have indeed occurred, where younger children being left unprovided by their father, action has been sustained against the elder brother, who succeeded to the father's estate, for an aliment to his brothers and sisters. But, in these cases, the obligation was not founded *in pietate*, or upon the natural obligation upon one brother to aliment another, but upon the father's obligation, who was bound *ex jure naturæ*, to aliment his children, which the elder brother, as his representative, was bound to perform; but as the defender's father had no estate, the defender does not represent him, and therefore he cannot be liable in this claim of aliment to his sisters.

It was also argued, That the natural obligation upon parents to aliment their children, did not go beyond those of the first degree; was it to go farther, there would be no knowing where to stop.

The pursuer's progeny might multiply beyond number; and were they as many hundreds as they are now single persons, the claim would be the same. If Sir John the elder was bound to aliment his grandchildren, he was equally bound to aliment their children; and so, from one generation to another, to the end of the chapter; and if the defender, as representing him, was under the like obligation, he, nor any man living, could know what a load he might be subjected to.

The Lords found, "That the daughters were not entitled to an aliment, and therefore assoilzied the defender as to them; but found the mother entitled to an aliment *super jure naturæ*, and therefore ordained a condescendence of the defender's estate to be given in.

Act. D. DALRYMPLE.—Alt. LOCKHART.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 23. . Fac. Col. No. 44, p. 96.

No. 70. [434] NICOLAS THOMSON v. DAVID M'CULLOCH, and his Tutor *ad litem*.
March 6, 1778.

Additional aliment due to the widow, when her terce is inadequate.

Henry M'Culloch of Torhouskie, at his death, left an estate in land, yielding £240 Sterling free income, after deducting the interests of all debts. He left no personal effects, and was only infeft in such parts of the lands as yielded a terce to the widow of £40. No marriage contract had ever been executed betwixt him and his wife Nicolas Thomson, nor any settlement made on the younger children. An action of aliment was therefore brought, at the instance both of the widow and the younger children, against the eldest son David, to whom a tutor *ad litem* was appointed.

It was not disputed that the younger children were entitled to aliment from the heir and representative of the father; but, as to the aliment claimed by the widow, it was suggested, That having a legal provision of terce, she was entitled to nothing more.

Answered: Where there are no conventional provisions, the widow is entitled

to a maintenance out of her husband's estate, suitable to the circumstances of it. This is the necessary consequence of the obligation on the husband to provide for his wife; which, if he does not, the law will do for him. If her legal provisions of terce and *jus relictæ* are not sufficient, an addition to them must be made out of the estate.

The husbands' effects may be so circumstanced at the time of his death, that no part of them can be subjected to the terce, or *jus relictæ*, as in the case of his leaving an heritable estate in which he was not infeft, or bonds bearing interest: So that if the widow was restricted to these legal provisions for her maintenance, she might be totally unprovided, while her husband's heirs succeed to great riches.

The widow is in this case the better entitled to this claim, that the heir is her own son, bound to aliment her *jure naturæ*. Sir John Paterson of Eccles, 25th June 1751, No. 67.

Observed on the Bench: That where there are no conditional provisions, the widow is entitled to an aliment out of her husband's estate, suitable to its free income. When her legal provisions of terce and *jus relictæ*, are not adequate to this, she is entitled to an additional aliment out of it.

The Court "found the pursuer entitled to an additional aliment of £20 yearly, from the first term after the husband's death for nineteen years, or until the same is recalled or altered by authority of the Court." (See TERCE.)

Act. AL. GORDON *tertius*.—Alt. ILAY CAMPBELL.

Ogilvie.

Fol. Dic. v. 3, p. 24. Fac. Col. No. 19, p. 34.

No. 71. [435] Mrs. BARBARA LOWTHER v. MURDOCH M'LAINÉ. December 15, 1786.

Aliment found due by the husband's heir to a wife, who was not entitled to legal or conventional provisions.

Mr. M'Laine of Lochbuy died within a year after his marriage to Miss Lowther, there being no issue of the marriage. He had not received any portion with the lady; nor was any marriage-contract executed. Without claiming the terce, or the *jus relictæ*, she instituted an action of aliment against the heir of her husband, a distant collateral relation, to whom, by a family-settlement, he had devised his estate; though, being the daughter of a gentleman of some fortune, she could not be said to be in a state of indigence. The pursuer

Pleaded: Claims for aliment arise from the ties of nature; among which, as the relation of husband and wife is the earliest, so it is the strongest. If parents, *jure naturæ*, are bound to aliment their children, the obligation on husbands to aliment their wives is even superior. Other debts, and particularly alimentary obligations, are continued against heirs. This, then, the most just of all, ought not to cease; and no heir surely can be supposed more liable to the debt of an ancestor than the defender, so remote a relation, to whom an opulent estate has devolved; 10th November 1671, *Hastie contra Hastie*, No. 53; *Kilker. voc. Aliment*;—8th February 1739, *Douglases contra Lady Douglas*, No. 63;—13th December 1748, *Bisset contra Bisset*, Select Decis. No. 48;—11th February 1764, *Seatons contra Seaton*, Select Decis. No. 68;—8th March 1759, *Scott contra Sharp*, No. 73;—*Balfour's Practices*, p. 95.; * *Fount. v. 2*, p. 662, 19th July 1711, *Lady Kinfauns contra Husband*. See HUSBAND and WIFE.

By the Scottish practice, it is true, in cases like the present, no terce or *jus relictæ* is due. The pursuer, who claims neither, demands only a reasonable sum for her subsistence out of the estate of her husband, in consideration that those legal provisions have failed. If this is to be denied to her, it must be because the usage now mentioned ought to be extended, by analogy, to matters of a different kind from those to which it relates. But it is clear, that this consuetudinary rule ought not to be extended: for, in the first place, it is irrational and unjust; and secondly, it was

* See the cases here alluded to from Balfour, under HUSBAND and WIFE.

improperly introduced into the Scots law, in consequence of a misapprehension of that of the Romans.

Marriage being as complete the moment it is instituted as at any subsequent period, or after the birth of children, it is plainly absurd to conceive any reason for legal provisions to exist afterwards which had no place before. The idea is peculiar to Scotland; and even here there is no distinction rested on that foundation, except what respects the *terce* and *jus relictæ*. All the other legal rights belonging to a wife arise on the instant of marriage.

The error, however, was not original in the Scottish jurisprudence. In *Regiam* [436] *Majestatem*, lib. 2, cap. 16, 17, where the doctrine of *Terce* is fully treated, there is not the least intimation of such a rule. Nor are any traces of it to be discovered in the statutes of Alexander II. or of Robert III. respecting the same subject. The earliest appearance of the rule is towards the beginning of the sixteenth century, in the cases of *Windezettis contra Logan*, and *Gyle contra Cant*; the first relating to the return of the *tocher*, and the second to the wife's right in the moveables; Balfour's *Practica*, p. 95.* As to the *terce*, the question was not determined till anno 1600, in the case of Lord Gairlies *contra Lady Maxwell*, Haddington.† Craig, lib. 2, dieg. 22, § 23. But, as on the dissolution of marriage, the *dos* and *donationes propter nuptias*, were, by the Roman law, mutually restored; the same rule has been admitted into the Scottish customs, in regard to such marriages as dissolve within the first year, and without any child; Craig, lib. 2, dieg. 22, § 23. Among the Romans, however, there was no right of primogeniture, nor preference of males in succession; in consequence of which circumstances, the *dos* formed a just proportion of inheritance, and equal to that of any male. When restored, it was a fund for subsistence, and no aliment was wanting. The reverse is the situation of daughters under the Feudal institutions; their dowry is a trifle, insufficient for their support. Besides, the *dos*, or *donationes propter nuptias*, were to be restored equally after any period; and, it is obvious, that the Scottish distinction is inconsistent with the end or nature of the Roman restitution.

As a rule, originating in injustice and error, ought not to be extended to new cases, so this proper limitation has been constant in the practice of the Court. Thus, the rule was not applied to the case of a marriage dissolving within the year, a child having been born, though it likewise died during the same period; 20th July 1632, *Irvine contra Robertson*, Fol. Dict. of Decis. vol. 1, p. 415. (See HUSBAND and WIFE.) Nor to that of a father settling on his son, in contemplation of marriage, a sum which by the son was assigned to his wife, seeing the marriage did not subsist a year; *Kilkeran*, 7th November 1740, *Hood contra Jack*. (See HUSBAND and WIFE.) Nor to the interim aliment claimed by a widow for herself and her family, between the husband's death and the payment of her provision, the marriage having dissolved within the year, and the provision being secured by a special paction, which did not include any interim aliment; Clerk Home, p. 377, 19th February 1743, *Stewart contra Garden*. See CLAUSE.

Nay, the rule has been found not to extend to the special case in question. Thus, at a period when the law gave that liberty, a father having put his son in the fee of his estate, without reserving his wife's *terce*, and by the death of both father and son, the lands having fallen to the superior by ward and non-entry, [437] first the superior, and afterwards the heir succeeding, became bound to allow the widow a reasonable aliment; Balfour, p. 95, 21st July 1534, *Logan contra Campbell and Wallace*. (See HUSBAND and WIFE.) Again, in the case of Thomson *contra Macculloch*, Fac. Col. 6th March 1778, No. 70, the legal provisions of *terce* and *jus relictæ* not being adequate, the Court found an additional aliment due to a widow; and it would be absurd to suppose, that if those provisions had been more inadequate, or had not existed at all, the claim of aliment could have been justly denied.

Neither is it incongruous, when circumstances do not admit specific legal provisions, that the law should afford, in another shape, that aliment for which they were calculated. The legitim of children is a specific legal provision for their aliment; but, if it is precluded by the father's effects being converted into heritage, the heir is bound to furnish a competent maintenance to them.

Answered: Apart from the provisions contingent on the subsistence of marriage

* See HUSBAND and WIFE.

† See TERCE.

for year and day, or until the birth of a child, the law of Scotland recognises no claim for aliment at the suit of a wife, against the heirs, as such, of her husband. Nor is this inconsistent with the analogy of our law. However strong-founded the obligation is on parents to aliment their own children, an heir-male succeeding, in prejudice of the daughters of the ancestor, will not be liable to the claim for aliment which lay against their father: A brother succeeding indeed might; but the distinction evidently arises from his fraternal relation. Were not such limitation admitted, inextricable confusion and embarrassment would naturally attend every quick succession of heirs; the obligations to aliment incumbent on one descending to another, and accumulated with his devolving on the next, without any standard for settling the proportion of these multifarious claims. Besides, there is this peculiar to the relation of marriage, that the marriage being dissolved, the law deems the connection thence proceeding to be at an end. Thus, though a father was held to be liable for the aliment of his son's wife, during the lifetime of the son; yet, after his death, the claim was found not to lie; Fol. Dict. of Decis. vol. 3, *voc.* Aliment; 14th June 1765, *Adam contra* Sir Andrew Lawder. See *TAILZIE*.

To the argument founded on the case of *Stewart contra* Garden, the answer is, That the interim aliment was granted, not to the wife, but to the husband's family. As to that of *Logan contra* Campbell, the marriage had subsisted for the requisite time, and the legal provisions thence arising had been disappointed by fraud. At present they would be wholly restored; at that early period they were restored to a certain extent. The case of *Thomson contra* Macculloch was an amicable suit; and moreover, the aliment was claimed by a mother from her own son.

That, besides the above-mentioned specific provisions, the law admits no claim for aliment at the instance of wives against their husband's heirs, is evident from the explicit opinion of all the writers on our law. Thus Lord Stair, b. 1, tit. 4, [438] § 19; Bankton, b. 1, tit. 5, § 5, para. 117; and Erskine, b. 1, tit. 6, § 38, concur in declaring, that a marriage dissolving within the year, and without a living child, "all things return to the condition in which they were before"; by "all things" being evidently meant, all claim or interest in the respective estates of the married pair; as to the *dos* on the one hand, and on the other the *donationes propter nuptias*, the legal or conventional provisions by the husband to the wife. To suppose that a claim for aliment should still continue, is to figure a contradiction in the law; in rejecting, and at the same time allowing, a demand, the same in effect, and only differing in the shape in which it is preferred. Had such a right remained, it could not have failed to be recognised by the authors quoted above; nor to appear in those decisions which have proceeded on the principle upon which the legal provisions are withheld. In the above case of *Stewart contra* Garden, for example, why was not a permanent right of aliment insisted on by the widow? In that of *Somerville contra* Bell, 22d February 1751, Rem. Dec. v. 2, p. 257. (See *HUSBAND and WIFE*); where a settlement on a wife was annulled on the same ground, would not a claim for a competent aliment have been made, and reserved by the Court, if such an one had been known in law? Or in the similar case of *Cuming contra* Garden, 7th February 1781, Fac. Coll. No. 28, p. 50. (See *HUSBAND and WIFE*.)

It has been said, That the rule in question is in itself unjust, and that it was by mistake introduced into our law at a late period. But Craig assures us, that the return of the tocher "*omnium seculorum usu comprobatum*," lib. 2, dieg. 22, § 23. There seems nothing irrational in having admitted this return from the Roman law, under our limitation; and, being once admitted, that right which was the counter part of the tocher, the *quid pro quo*, came to be withheld of course. The case of *Gairlies*, it is to be remarked, related to a conventional provision, so is not to be regarded as the earliest respecting the legal terce. Nor is the distinction of year and day so singular as has been supposed. It is exemplified in the usages of several provinces, counties, or bailiages of France, as Anjou, Brittany, Maine, Touraine; *Nouveau Coutumier General*, p. 584. And were its foundation in justice ever so questionable, the province of a judge is to determine according to its foundation in law, and *ita lex scripta*.

The cause was heard in presence, and afterwards memorials were appointed.

A majority of the Court considered the claim of an indigent widow for aliment from the heir of her opulent husband as deeply founded in nature; and that the withholding of the legal provisions, by the operation of the rule of year and day,

made the exercise of that natural right necessary ; while others of the Judges argued, That this was granting in effect the very thing which the law had denied.

“The Lords repelled the defences, and found the pursuer intitled to a claim for aliment out of the estate of her deceased husband ; and remitted to the Lord [439] Ordinary on the bills, to hear parties procurators upon the quantum of the said aliment.”

To this judgment, on advising a reclaiming petition, with answers, the Court adhered.

Act. Dean of Faculty *et* CULLEN.—Alt. Lord Advocate, M'CLEOD BANNATYNE, *et* W. CAMPBELL.—Clerk, COLQUHOUN.

Stewart.

Fol. Dic. v. 3, p. 24. Fac. Col. No. 297, p. 456.

No. 72. MICHAEL, JOHN, HERRIES, MARGARET, ANNE, and ISOBEL MALCOLMS, Children of the deceased Michael Malcolm of Balbedie, by Anne Blackwood, his second Wife, and the said ANNE BLACKWOOD, as Protutor for them *v.* JAMES MALCOLM of Balbedie, only Son of the said Michael Malcolm, by his first Wife. January 16, 1756.

A son succeeding to his father, as heir of an entailed estate, found not obliged to aliment his brothers and sisters of a second marriage.

The defender succeeded to his father, as heir of entail to the estate of Balbedie ; the pursuers brought an action against him for aliment.

Pleaded for the defender : That he succeeded to the estate of Balbedie as heir of entail, and did not represent his father ; and therefore was not bound to aliment his father's children.

Answered for the pursuers : That the law of nature dictated, that children, whose tender age rendered them incapable of alimentering themselves, should be alimentered by others ; by their father, in the first place, if he be alive, and in a condition to do it ; by the public, if they have no relations able to aliment them : but where they have one so near as a brother, it is a duty incumbent on him to do it ; and were it not so, their condition would be worse than that of foundlings, the offspring perhaps of vice and infamy ; because the parish may justly refuse to aliment those whose brother is the man of the greatest property in it. By the Roman law, brothers, whether they succeeded to anything by their father or not, were bound to aliment indigent brothers and sisters, *L. 1, § 2, ff. De tut. et rat. distr.* And as the Roman law is of great authority with us, in all cases where our municipal customs do not differ from it ; so, in this case, when it is so strongly founded in nature and humanity, it ought to be our rule. And in fact, brothers have often been found liable to aliment their brothers and sisters ; and although the judgment has sometimes been put upon the footing of their representing their father, yet that could not be the only, nor indeed the proper, foundation for it ; for, although the alimentering of children, be an obligation binding upon the father, yet, if he has not provided for the discharge of it in his lifetime, it has received no civil form ; and being therefore merely natural, cannot, in strict law, be made effectual against his heir. Nor was it ever found [440] to be effectual against a man's heir, except in the case of a brother. Thus, although the Crown, taking by forfeiture, is *successor titulo lucrativo* to the forfeiting person, yet the Crown was never found to be obliged to aliment the children of the attained person ; and therefore it is rather the near relation which is betwixt brothers and sisters, than the representation of the father, that is the foundation for giving the aliment.

Replied for the defender : That by the law of nature, there lies an obligation on those who are able to give charity towards the alimentering of persons in indigent circumstances ; but by no civil sanction is this obligation enforced, nor its extent ascertained : And to load one person with the burden of the whole aliment, even of his nearest relation, were unreasonable, except in the case of parents and children.

A father is bound to aliment his children ; if he refuse, the laws of this country

will compel him ; and the obligation which the laws render effectual against the father in his lifetime, can also be made effectual against his representatives : this Court, therefore, has often found, that an elder brother was bound to aliment his father's younger children ; because he represented his father passive ; and the putting the judgment upon that medium, was in effect finding, that had he not represented his father, he would not have been liable in such aliment. The case of a forfeiture is singular ; and there the Crown is not bound to aliment the children of the attainted person ; because the forfeiture cuts off or corrupts the blood ; so that the children can claim and enjoy nothing by or through their father.

There is no arguing from the relation betwixt parents and children, to the relation betwixt brothers and sisters ; the relations being altogether of a different kind : And if a brother should be found liable to aliment his brothers and sisters, by a parity of reasoning, failing brothers, cousins would also be liable ; for their relations differ not in kind, but in degree.

“ The Lords found no aliment due.”

Act. WEDDERBURN.—Alt. HEW DALRYMPLE.

Bruce.

Fol. Dic. v. 3, p. 24. Fac. Col. No. 176, p. 263.

No. 73. MARY SCOT *v.* MARY SHARP and her HUSBAND. March 8, 1759.

A daughter who was executrix and universal legatar to her mother, found liable to aliment her sister-uterine, who was destitute of any fund of subsistence.

Mary Scot brought an action against Mary Sharp and James Lumisden of Ranniehill, her husband, for an aliment, founded upon the following grounds :

That she was the only daughter of Lady Mary Sharp, by her first husband Mr. Scot of Haychester : That Lady Mary was again married to Sir James Sharp, by whom she had a son, who predeceased her and the defender Mary Sharp : That [441] Lady Mary, after the death of her son, executed a will, by which she appointed Mary Sharp her sole executor and universal legatar ; and to that will she subjoined these words : “ I recommend Mary Scot to her charity.”

That Mary Sharp, upon Lady Mary's death, received considerable effects by virtue of this will : That Lady Mary, while she lived, was under a natural obligation to aliment the pursuer, her only surviving child of her first marriage, who had no other means of support : That she had accordingly, while she lived, allowed her an aliment of £20 Sterling a-year : That Mary Sharp, as sole executor of her mother, became subject, in her place, to the same obligation ; which was also strengthened by the condition annexed to the will, recommending Mary Scot to her charity.

It was answered, That Mary Sharp received very little benefit from her mother's succession ; for that the debts due by Lady Mary had exhausted almost the whole of her effects : That, at any rate, as the defender was not bound to aliment her sister upon the footing of relation, so she was not bound to aliment her as representing their common mother ; for that the obligation to aliment does not affect the disponees or legatees of a defunct : And the clause subjoined to the will was no more than a simple recommendation, which was not obligatory ; and if it was, could never import an obligation to pay an yearly allowance.

It appeared by a proof, That Mary Sharp had received, in consequence of her mother's will, after all deductions, above £230 Sterling clear, which she had possessed since the year 1754, when Lady Mary died.

“ The Lords found Mary Scot entitled to an aliment of £12 Sterling yearly, to commence from the date of the process.”

Act. NAIRN, WEDDERBURN, JOHNSTONE, FERGUSON.—Alt. DUNCAN, J. CRAIGIE, LOCKHART.—Clerk, KIRKPATRICK.

Johnstone.

Fol. Dic. v. 3, p. 24. Fac. Col. No. 183, p. 326.

No. 83. [449] CLELAND and GEDDES v. GEDDES. February 8, 1678.

Rules for the modification of the aliment, due *ex jure naturæ*.

A pursuit at a mother's instance against Kirkurd, for her daughter's aliment, and for making her own jointure six chalders yearly. Alleged to the first, He is content of a modification with respect to his debts: To the second, She possesses six chalders of Linlithgow measure already.—Replied, The lands lying in Tweeddale, she must have two pecks of each boll more conform to that measure, and the act 115th Ja. 6th, anno 1587, reducing all to the Linlithgow measure, contains an exception in favours of the masters of the ground, to whom their tenants are ordained to pay according to their old measure; and this being anent a ground duty, it falls under that exception.—The Lords found the foresaid clause behoved to be understood conform to the exception in the act of Parliament; and since the child had 10,000 merks provision, they modified 200 merks, being the third part of her annualrent, for her aliment, till she were seven years old; and half of her annualrent, viz. 300 merks, from that to ten; and two parts of her annualrent, viz. 400 from that till fifteen years of age, which was the term of payment of her provision. This is the common rule of modification in all [450] cases where respect is had always to the child's provision; and the Lords regarded not that she was heir of line. *Fol. Dic. v. 1, p. 33. Fountainhall, MS.*

No. 84. ELISABETH DALZIEL, and her Tutor *ad litem* v. ROBERT DALZIEL.
December 14, 1788.

In a question between these parties, it had been determined, that the defender, who had succeeded to his father in an opulent family-estate, was obliged to maintain the pursuer, his niece by an elder brother deceased.

The next question was, How long this alimony should continue; the defender contending, that it ought to cease as soon as the pursuer was able to earn her living, by her own industry.

The Lords, however, found, That, in the circumstances of this case, "the pursuer was entitled to £30 per annum during her life, or till her marriage."

Lord Reporter, MONBODDO.—Act. M. ROSS.—Alt. HONYMAN.—Clerk, HOME.

Craigie.

Fol. Dic. v. 3, p. 26. Fac. Col. No. 50, p. 89.

No. 2. [2] ISABELLA CLERK, and her Tutor *ad litem* v. Sir GEORGE CLERK, and his Tutor-at-law. February 19, 1799.

A sister found in strict law to have no claim for aliment against her eldest brother, although in possession of the family estate, where he did not represent his father, and represented his grandfather only as an heir of entail.

Sir George and Isabella Clerks were children of the late James Clerk, who predeceased his brother, Sir John Clerk of Pennycuik. On Sir John's death, Sir George succeeded to the estate, worth upwards of £2000 yearly. Sir George did not represent his father at all, and he represented his grandfather only as heir of entail; but he represented universally his great-grandfather, who held the estate of Pennycuik in fee-simple.

Miss Clerk being wholly unprovided for, and Sir George's tutor-at-law not thinking

himself entitled to afford her a suitable maintenance from his ward's estate, without the authority of the Court, an amicable suit was brought, concluding for an aliment of £60 yearly.

In defence, Sir John and his tutor

Pleaded : The pursuer's claim must rest on the defender's being bound to aliment her either *ex debito naturali*, or as representing some predecessor who, had he been alive, would have been under that obligation. But, whatever moral tie there may be on a brother to support his sister, the legal one extends only to her immediate parents ; 16th January 1756, *Malcolm v. Malcolm*, No. 72, p. 439. And as little can the pursuer be subjected as representing his predecessors, because the claim for aliment on that ground at the instance [3] of a sister, lies against her brother only as representing their father, and does not extend against a brother, who represents only his grandfather ; 25th June 1761, *Seton and Patersons v. Paterson*, No. 67, p. 429.

Answered : The Court have enforced the moral obligation to afford aliment in cases of a very similar nature ; 15th December 1786, *Lowther*, No. 71, p. 435. Besides, the eldest son possessing the family estate, has been found liable in aliment to his sister, where he represented their common grandfather ; 11th February 1764, *Younger Children of Seton v. the Heir*, No. 68, p. 431 ; 14th December 1788, *Dalziel v. Dalziel*, No. 84, p. 450 ; and there is no good reason why the representing a great-grandfather should not have the same effect. It may be said, that by ascending to remote ancestors, the obligation to aliment might be extended in favour of distant relations ; but, in all cases, the Court will pay regard to the relative situation of the parties, and will sustain the claim, on the footing of the defender's representing a common parent, when it is made at the instance of a sister, although they would repel it if made by a cousin.

The Court ordered memorials ; on advising which, several of the Judges were for supporting the claim. The rest so far agreed with them, as to be clearly of opinion, that every disbursement made by the defender's tutor in the maintenance and education of Miss Clerk in a style suitable to her rank, would be sustained in accounting with his pupil ; but they thought that there was no ground in law which entitled them to award the pursuer a specific aliment.

The Lords accordingly found. " That, in the circumstances of this case, the pursuer has no such claim of aliment against her brother, as can be enforced in a court of law ; and therefore assoilzied from the present action, and decerned ; without prejudice to any discretionary power which the tutor may be advised in such a case to exercise ; and reserving all questions of accounting between him and his pupil, when the term of his office expires."

Act. Ro. CRAIGIE.—Alt. H. ERSKINE.—Clerk, SINCLAIR.

R. D.

Fac. Col. No. 112, p. 255.

No. 3.

[4] TAIT v. WHITE. February 28, 1802.

Aliment due *ex debito naturali* to the grandchild, by a grandfather, when the father is unable to support it.

Mary Tait being deserted by her husband, who had left the country, presented a petition to the Sheriff of Selkirkshire, praying that William White, tenant in Caddenlee, her husband's father, should be ordained to aliment her and her infant child.

The Sheriff, at first (4th October 1797) dismissed the process ; but he afterward (21st March 1798) altered that interlocutor, and found the grandfather liable in the maintenance of the child, to which he adhered (23rd January 1799), by refusing a petition, " reserving to him liberty to apply to the Court, either in the event of the child's father returning to the country, or of the child being able to provide for its own maintenance."

Lord Bannatyne Ordinary (19th December 1800) refused a bill of advocacy of

this sentence ; to which Judgment the Court (4th July 1801), on advising a petition with answers, adhered.

The defender again reclaimed, and

Pleaded : The duty of providing for near relations being of the nature of charity, should be left to the consciences of those who feel called upon to exercise it. Cases, however, have occurred, where the Court, as a court of equity, have enforced this natural obligation. Were the defender a man of rank and fortune, to which the child was eventually to succeed, there might be room for the action upon the act 1491, c. 25, which requires, that a reasonable living be given to the sustentation of the heir, after the quantity of the heritage ; *Mirry v. Pollocks*, July 1731, No. 25, p. 397 ; *Lawder*, 1st March 1762, No. 26, p. 398. Farther than this, the duty of giving aliment has not been extended ; but in the present case, the child's father was a common labourer, and the defender himself is little better, with eight children of his own to maintain.

The question is properly a competition between the defender and the managers of the poor's funds of the parish. From them the child must be alimented ; and there seems no propriety in making the grandfather relieve them from this burden.

[5] The pursuer

Answered : The only object of the statute 1491, was to compel a liferenter to support the heir of the estate. This case is now entirely cut off by the act abolishing wardholdings ; but the spirit of it has been preserved, and the obligation of aliment has been much extended beyond the provisions in that enactment. The ties of relationship, and the natural duty of individuals, are equally strong in every class of society, and the natural obligation to aliment their children is equally general ; nor is this a hardship, while it is accurately proportioned to their respective rank and ability ; Dict. *voce* ALIMENT (due *ex debito naturali*) ; *Ersk. b. 1, tit. 6, § 56* ; *Blackst. Comm. b. 1, c. 16, p. 448*.

Before the case was advised, the father of the child had returned to this country, and was sisted in Court, but it was not thought that this could alter the judgment, as the grandfather had only been found liable *subsidiariè*, leaving to him to apply for relief, if the father could support the child.

It seemed the first time that this question had ever been tried in the case of a peasant, and the hardship of laying down a general rule in a case such as this, was strongly urged ; entailing upon a poor and industrious race of men, the burden of maintaining the numerous families of their children, at a time when their years and their labours merited a different reward. But the view taken by the majority of the Court was, that every man, according to his means, was bound to support his children, and their descendants, whenever it became necessary. The reason of its having been formerly confined to landed men, was, that formerly these were almost the only persons, possessed of wealth ; but now that other classes of the community share with them in the opulence of the country, this natural obligation must extend with the means of fulfilling it.

"The Lords (23d February 1802) adhere to their interlocutor reclaimed against, in so far as to find the petitioner liable to the pursuer in an aliment to his infant daughter, at the rate of £6 yearly from the time of her birth in March 1797, to the return of her father William White to this country in the month of December 1800."

Lord Ordinary, BANNATYNE.—For the Pursuer, BOSWELL.—Agent, W. RIDDELL, W.S.
—Alt. CATHCART.—Agent, D. MURRAY, W.S.—Clerk, PRINGLE.

F.

Fac. Col. No. 24, p. 47.

No. 5.

[7] *CHRYSTIE v. MACMILLAN.* July 6, 1802.

A father is not bound to maintain his son's wife, while his son is alive, and able to maintain her.

Grace Chrystie brought a declaratory action of marriage before the Commissaries of Edinburgh against Robert Macmillan younger of Barwhinnock, and obtained a

decree (9th January 1801) in absence of the defender. Afterward, as Macmillan had left Scotland, she raised a process of aliment in her own name, and in that of her child, against James Macmillan, her husband's father; and the Lords found her (6th July 1801) entitled to an aliment. In the meantime, however, Robert Macmillan returned to this country, and pursued a reduction of the Commissaries decree, which was conjoined with the process of aliment, on which a final judgment had not yet been awarded.

The whole cause was afterward stated to the Court in memorials; upon advising which, the Lords (23d February 1802) recalled their interlocutor in the process of aliment, so far as it related to the mother; and superseded consideration of the aliment of the child until the question of marriage was determined; and a condescendence was ordered, on the part of Robert Macmillan, of the facts and circumstances in support of the reduction.

This condescendence never was given in. Robert Macmillan again left Scotland, and the process of reduction was consequently abandoned. An additional petition was thereafter presented on the part of Chrystie, in the question of aliment, in which she

Pleaded: The process of reduction having been abandoned, the pursuer is to be held, by the decree of the Commissaries, as the daughter-in-law of the defender; and her husband having left her in a destitute situation, she is entitled to an aliment as a daughter of the family. Such obligations are reciprocal on parents and children; and as a father, in necessitous circumstances, might claim from his son an aliment out of the fortune brought by his wife, the son's wife may likewise claim a provision from the estate of the father. The defender, as a gentleman of landed property, is bound either to give an aliment to his son, or to put him in a situation to gain a maintenance suitable to his rank and station; and as his wife is entitled to a share of all the privileges competent to her husband, she has a right to a portion of that aliment; *Adam v. Lauder*, 1st March 1762, No. 26, p. 398.

Answered: The pursuer, if she has any claim for an aliment, can make it only as wife to Robert Macmillan; her claim, therefore, cannot be better founded than that of her husband himself. The obligation of aliment on the part of a father ceases, when his son has been put into a situation to support himself; *Puffendorf*, lib. 4, c. 11, § 4; *Blackstone*, v. 1, c. 16, p. 449; *Erskine*, b. 1, tit. 6, § 56; *Stair*, b. 1, tit. 5, § 12. Robert Macmillan is forisfamiliated, being established as a merchant in America, able to maintain himself, and all dependent on him. It is the duty of his wife, therefore, to follow his fortunes, and to live in his family. The law does not afford a married woman a temptation to neglect her duties, by allowing her to claim an aliment from the father of her husband, while she declines to accommodate to his situation. The case of *Lauder* probably was decided upon the act 1491, c. 25, respecting the maintenance of heirs; and the Court appears to have sustained the claim of aliment, on the footing, that the husband was the heir of an entailed estate. But the defender holds his lands in fee-simple. That decision, therefore, is not to be held as a precedent in this case.

The Lords assoilzied Macmillan from the claim of aliment at the instance of Chrystie; but sustained the claim for the aliment of the infant daughter to the period of her death, with the expense of her funeral. The Court, while it seemed in some degree to doubt the propriety of the decision in the case of *Lauder* altogether, thought it at any rate inapplicable to the present case.

Lord Ordinary, ARMADALE.—Act. TURNBULL, MURRAY.—Agent, J. JEFFREY.—
Alt. CAMPBELL, W. ERSKINE.—Agent, A. YOUNG, W.S.—Clerk, PRINGLE.

J.

Fac. Col. No. 52, p. 106.

No. 5. [464] Mr. JOHN COLVIL v. The Lord BALMERINO. July 6, 1665.

If there be a new intrant, the profits of the glebe fall no farther under the annat, than with regard to crop sown before the minister's death.

Mr. John Colvil, as executor, confirmed to umquhil Mr. John Colvil, minister at Kirknewton, pursues the Lord Balmerino for the stipend, the year 1663, and for the profit of the glebe. The defender alleged absolvitor; because payment is made *bona fide* to the intrant, before intenting of this cause.—It was answered, It could not be paid *bona fide*, because the minister died after January 1663: Which being so notour to my Lord Balmerino, to whom the most of the parish belongs; and he being so near it, he ought to have made payment to no other, of that year which belonged to the defunct minister, as his annat, extending to the whole years; *annus inchoatus habetur pro completo*, as to the annat; so that if the minister lived till the 1st of January, he has that whole year.—The defender answered, That an annat is only due to the wife and bairns of the defunct minister; and this minister had none. 2do, That the point is so dubious in law, he knew not that it would be his, unless he had lived till Whitsunday. 3tio, The benefit of the glebe must be the intrants, and falls not under the annat, as a part of the stipend, no more than the manse.

The Lords repelled the defence as to the stipend, and found it belonged to the executor, as nearest of kin; and that the defunct surviving the 1st of January, gave him that whole year; but found that the glebe did not fall under the annat, nor did belong to the defunct, but only the crop thereof, if it were sown by himself.

Fol. Dic. v. 1, p. 35. Stair, v. 1, p. 306.

No. 6. JAMES, JOHN, ROBERT, and JEAN M'DERMETS, Children of the deceased Mr. John M'Dermet, Minister at Air v. — MONTGOMERY, his Relict. July 14, 1747.

The relict has right to one half, the children to the other.

It being controverted between the relict and the children of Mr. John M'Dermet, late second minister at Air, whether the annat belonged to the relict and the children *per capita*, or if the children were only entitled to the one half equally among them, and the relict to the other half.

The Lords found the children were only entitled to the one half.

Fol. Dic. v. 3, p. 27. Kilkerran (ANNAT), p. 28.

No. 7. ELIZABETH SCRIMGEOUR v. MURRAY. June 24, 1663.

Annat divides between the wife and nearest in kin, where there are no children.

The said Elizabeth pursued the executors of her husband, and insisted upon several points; first, she craved the annat, as belonging wholly to her, seeing there [465] were no children, and annat being in favours of the wife and children, the nearest of kin could have no part thereof.—The defenders answered, That the annat was introduced the time of Popery, when the (clergy) had no wife nor bairns, and so did still most properly belong to the nearest of kin, who would get it, if there were neither wife nor bairns.

The Lords found the annat to divide betwixt the pursuer and the nearest of kin.

The pursuer insisted next, and alleged, That a bond bearing clauses of annual-

rent and obligation to infest, behoved either to give a right to the half of the stock, or else to a terce of the annualrents.

The Lords found the clauses of annualrent and destination, to exclude her from the stock as heritor; and the want of infestment to exclude her from the terce of annualrent.

The pursuer insisted in the next place, and produced a bond granted by her father to her husband; and here the longest liver of them two, and the heirs procreate betwixt them, without any addition or termination, failing these heirs, and without clauses of annualrents or infestment; and therefore she claimed the whole sum as being the longest liver.—It was answered, That this bond did not constitute in her only a liferent, according to the ordinary conception and interpretation of that clause, the longest liver of them two betwixt man and wife; but especially, heirs procreate betwixt them being mentioned, which behoved to be the man's heirs, who, if they had existed, would have had right as heirs to their father, not to their mother; and therefore the father behoved to be fiar, and the mother only liferenter.—It was further alleged, That beside the liferent, the pursuer behoved to have right to the half of the stock; because the sum being moveable, albeit the tenor of the bond made it payable to the relict for her liferent use, yet she behoved to employ it so, as the stock would remain; which stock would still be divisible betwixt the relict and the nearest of kin, as being moveable.

The Lords found, That the pursuer might take her choice of the liferent, or of the half of the sum, but would not allow her both. (See HERITABLE and MOVEABLE.)

Fol. Dic. v. 1, p. 36. Stair, v. 1, p. 194.

No. 8. SPENCE and CLERK v. CRAIG. January 22, 1679.

Found as above.

James Spence and John Clerk, as assignees by the legatars of Mr. John Louthian, having pursued Beatrix Craig, his relict, as executrix, and thereupon a count and reckoning being appointed, the relict having confirmed the annat of her husband, she alleged, That she had the sole right thereto, in respect there were no children, and the annat not being *in bonis defuncti*, nor due to the defunct for his service, but a privilege indulged by law in favours of his nearest relations, needs no confirmation, and if he have no bairns, all belongs to his wife, which [466] excludes his nearest of kin.—It was answered, That the annat being a favour to the successors of beneficed persons, though it need no confirmation, yet it must belong to the nearest of kin as well as to the wife, which is cleared by the late act of Parliament 1669, anent annats, declaring them to belong to executors without confirmation; therefore the executors can only be accountable to the wife for the half, when there are no children.

Which the Lords found relevant. *Fol. Dic. v. 1, p. 36. Stair, v. 2, p. 678.*

No. 11. [467] KATHARINE HUTCHISON, Relict of the deceased Mr. Mathew Wood, one of the Ministers of Edinburgh, and Others, his nearest in kin v. The MAGISTRATES and TOWN COUNCIL of EDINBURGH. June 9, 1747.

Annat takes place, although the stipend be not paid out of tithes. How computed.

Mr. Mathew Wood, one of the ministers of Edinburgh, having died between the terms of Michaelmas and Martinmas 1741, Katharine Hutchison his relict, and others his nearest in kin, pursued the Magistrates and Town Council of Edinburgh, for the half year's stipend due at Whitsunday 1742, as the annat.

Alleged for the defenders, Imo, That where stipends are not payable out of tithes, but as in the case of ministers within burgh, are made up by contribution, or out of the funds of the burgh, as the annuity and seat rents within the city of Edinburgh, no

annat is at all due. 2do, That by the several acts of the Town Council, settling the ministers' stipends at the rates therein-mentioned, the [468] same are declared to be in full of the annat. 3tio, Supposing the annat due, it is already paid, in so far as the executors have already got payment of the half year's stipend due at Martinmas 1741, which is half a year more than the defunct was entitled to by his incumbency, having died before Martinmas 1741, which is the term at which the half year's stipend is payable by the acts of council.

Answered for the pursuers, to the first, That they had no access to know what particular grants may have been made to the city for the support of their ministers, though they have been informed that the original fund for the stipends of the ministers of Edinburgh, was a grant of the spirituality belonging to the church of St. Giles, and that they are also possessed, for the like purpose, of grants of other tithes, which formerly belonged to the Archdeanry of East Lothian. But be that as it will, what they relied on was, that the law makes no distinction as to the annat between ministers in city or country, or out of what funds they are endowed. The act 1672, which is the latest statute that defines what the annat shall be, at the same time defines the persons to whose executors it is due, namely all clergymen having the cure of souls, stipendary ministers as well as bishops and dignified clergymen; and the very question that is again moved by this objection, was in point decided in the case, Sheils against the city of St. Andrews, 8th February 1709, when the Lords found, that the annat was due to the pursuer, as nearest of kin to Mr. Alexander Sheils, though his stipend was not payable out of teinds, but by contribution of the burgh; in respect the act 1672, subjects all persons to the payment of the annat, who are liable to pay stipend.

To the second, That not to mention that the act of the Town Council 1714, which is the last act settling the rate of the ministers' stipends to be 2500 merks, speaks nothing of the annat. It was not in the power of the town, by any quality, in any of their acts, to exempt the town from the annat, with which they are burdened by statute; and, *de facto*, the town have always been in use to pay it.

To the third, That this point is also settled by the aforesaid act of Parliament 1672. The annat was in use with us before the Reformation, as appears from the 5th act of the Parliament 1546; but the extent and boundaries of it were never clearly settled, till done by the foresaid statute in the year 1672: Before that time, the rule was, as Lord Stair observes, tit. TEINDS, § 34, *annus captus habetur pro completo*; and if the incumbent lived till the 1st of January, the annat was that whole year's rent of the benefice. But by the act 1672, as the persons to whose executors it is due are defined, so the extent of it is settled to be half a year's rent of the benefice; and it is declared, that if the incumbent survive Michaelmas, he shall have right to the whole year's stipend for his incumbency, and for his annat, shall have the half year's rent of the following year. And they are those terms which the statute has fixed that are observed, notwithstanding the stile of decrees of locality still continue to decern the money to be paid at Whitsunday and Martinmas, and the victual between Yule and Candlemas.

[469] On this debate the Lord Ordinary found, "That Mr. Wood having survived Michaelmas 1741, though he died before Martinmas, the term appointed by the acts of council for payment of the ministers' stipends, the pursuers were entitled to the half year's stipend payable at Whitsunday 1742, for the annat."

The defenders having reclaimed on the same grounds, the Lords had no regard to the first, in respect of the act 1672; nor to the second, in respect of the answer. But as to the third, some having thought it doubtful whether, although where stipends are payable out of teinds, Michaelmas be the last term, the fruits out of which they are payable being supposed then to be separated from the ground, the same should obtain where the stipends are not payable out of teinds. The petition was appointed to be seen and answered; but, upon advising petition and answers, the Lords "adhered."

For although it may be true, that the reason of fixing Michaelmas may have been, that by that time the corns are generally brought in, and the teinds out of which stipends are due, are, or may be then drawn, yet as the statute makes no distinction, it would be taking too much liberty with a statute, to restrain that general rule, to such cases only as may be supposed to have fallen within the reason of fixing on Martinmas for the last legal term.

Fol. Dic. v. 3, p. 37. Kilkerran (ANNAT), No. 1, p. 26.

No. 12. [470] *Bairns of the B. GALLOWAY v. COUPER.* February 28, 1628.

Whether the annat can be affected by the minister's debts or obligations.

In an action of tutor counts betwixt the Bairns of the Bishop of Galloway and Andrew Couper their tutor, an article of defalcation of the charge being given in by the tutor, whereby he craved allowance of a pension given to him by the Bishop, during his lifetime, to be allowed to him particularly of that year after the Bishop's decease, the annat whereof pertained to his relict and bairns, conform to the ordinance of the kirk, which provides the fruits of the benefice for the year, after the late incumbent's decease, to pertain to his wife and bairns, and therefore the tutor craved the pension of that year to be allowed to him ;—and the minors alleging, That the pension lasting only for the giver's lifetime, could not extend to that year :—The Lords allowed of the article of defalcation, and found, That the tutor ought to have that year's pension allowed to him, in his intromission with the minors' goods.

Clerk, HAY.

Fol. Dic. v. 1, p. 36. Durie, p. 351.

No. 45. [506] *DAVIDSON v. JACK.* February 22, 1634.

A tutor uplifted his pupil's money, and died soon after, before laying it out on interest. The heir, an infant at the time, found liable only from the time of intending action against him, which was not till after twenty-five years.

One Davidson conveyed one Jack in Dundee, as heir to his father, another Jack, who was one of the tutors to the said pursuer, to make payment of 600 pounds, intromitted with by the said tutor, with the annualrent ever since, conform to the said umquhile tutor's discharge, upon the receipt of the said sum from the pursuer's debtor, viz. By the space of 25 years bypast, since the date of [507] the discharge ; wherein the defender alleging, That he could not be conveyed in *solidum* for the whole, because the pursuer had two tutors given conjunctly, likeas the acquittances were subscribed by them both ; and therefore he alleged he could only be liable for his own part, and the other tutor should be subject in the other half, especially seeing he was the pursuer's own uncle.—The Lords found, That the pursuer might pursue any of the tutors as he pleased in *solidum* for the whole debt received ; for any of the tutor's omission would make the tutor liable for all, far more their intromission, without necessity of division : And in respect the defender, the time of his father (who was tutor), his intromission, was only a pupil of two years' old, and that his father died immediately thereafter, and that his father had not the exercise of the office of tutory, but one year only, and that he could not be acquainted that his father was tutor, nor what deed he had done as tutor, and that there was no pursuit moved against him all this time these 25 years bypast, but only within these two or three years last bypast ; therefore the Lords found, That he was not subject to the pursuer in any annualrent, for the sum received by his father as tutor, as said is, except only for the terms and space since he was cited in this action, viz. By the space of two or three years, but for no other term or year preceding ; and therefore assoilzied him from all preceding terms. And so this privilege of minority, or *privilegiatus*, was found considerable against another minor ; albeit this cause has no affinity with privileged causes, tending only (as is requisite in all law) that minor's money, received actually by their tutors, should not be kept from the minors idly ; and that the mischance of the tutor's death ought not to prejudice him of the ordinary benefit in law of tutor compts ;

but the cessation moved the Lords to assoilzie from the bygone annualrents. (See *Solidum et pro rata*.)

Act. —.—Alt. ROLLOCK.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 40. *Durie*, p. 705.

No. 49. [513] VALLANGE v. KINCAID and FORRESTER. July 21, 1630.

The Lords found a pro-tutor liable in the annualrents of money uplifted by him, as a tutor would have been.

A man having left his wife tutrix to his children, with others of his friends ; if she only have intrmission during her widowhood, and continue the same after she is married to another husband, although she lose her tutory by her marriage ; yet she will be liable to the children for payment of the annualrent [514] of the sum and duties uplifted by her, as well as if she had continued to be tutrix.

Spottiswood (TUTORS and CURATORS), p. 347.

No. 67. [526] Bailie SMITH's Children v. The Earl of WINTON. December 1, 1714.

The managers for a person of quality abroad, advanced money to a man to travel to him on business. The party found obliged to refund the money, but no interest on it.

The said James Smith having served the late Earl of Winton for many years in quality of factor, or chamberlain, the present Earl being beyond seas when his father and brother died, and not having even then returned, it was concerted at a meeting of some of his Lordship's friends, That Seton of Tough, and upon his declining the office, Sir Walter Seton, one of their number, should go abroad in quest of the Earl, in order to inform him of the state of his affairs, and to acquaint him that there was an absolute necessity of his Lordship's presence to manage his own business. At which sederunt they also resolved Sir Walter should have £100 Sterling for defraying the charge of his journey, out of the first and readiest of the rents of the Earl's estate. After James Smith's decease, his children, as having right by a general disposition, pursue the Earl for payment of the £100 Sterling, and annualrents thereof, advanced by the Bailie, in manner, and for the end foresaid.

Answered for the Earl, That Sir Walter had no mandate from his Lordship, nor was he under any character that could found such a repayment. 2do, A *negotiorum gestio* must be necessary and profitably done, otherwise the negotiator hath his labour for his pains ; and he that set him on work must pay his expences. And if a man undertake what is *insolitum*, or unusual, he runs the risk thereof himself if it miscarry ; negotiations of this nature requiring the most exact diligence that can be proposed : So that if Sir Walter had no other errand but to give an account how matters stood, this might have been done to as good purpose by a letter.

Replied for the defenders, That they did not contend there was any express mandate, but a *negotium utiliter gestum* for the Earl, and that not undertaken by Bailie Smith at random, but with concurrence of the friends of the family. And, therefore (in answer to the second) this advance of money was both necessary and profitable, as well in the effect as in the design ; the design having been to give his Lordship a particular account of his circumstances, and to solicit his home-coming ; and the effect (though it did not immediately follow) yet that the friends, by Sir Walter's journey, got knowledge where his Lordship was, so as to communicate with him by letters, and send him bills, which effectuated his return. And as to this *negotium*, its being *insolitum* ; answered, That when a person absent falls to a considerable heritage, and it not being known where he is, and he keeping no correspondence,

his affairs going to confusion, without orders that those interested should take rational methods to prevent those inconveniences which may turn to the ruin of the absent's affairs, is not at all *negotium insolitum*, though it may rarely fall out; but it is a necessary procedure when fallen out for the right administration; for *insolitum* is not what rarely falls out, but the undertaking of a new sort of business not in the way of usual administration.

The Lords found the Earl liable to refund the £100 Sterling advanced by Bailie Smith to Sir Walter Seton.

January 18, 1715. In this debate, as mentioned the 1st December 1714, the Lords having found the Earl liable to refund the £100 Sterling advanced by the Bailie to Sir Walter Seton, but having given no answer as to the annualrents thereof, though also libelled, the Children now apply for these also to be decerned for, and that,

[528] Because the money was advanced upon the Earl's account; wherefore it ought to be refunded *cum omni causa*; this being the natural effect of money expended in *negotii gestione*, that the advancer be fully reimbursed since 'tis *contra bonam fidem locupletari cum alterius jactura*.

Answered for the Earl, That *usuræ non debentur nisi ex pacto vel lege*.

Replied for the pursuers, That the rule admits of several exceptions, where annualrent is allowed for damage and interest. Thus, in the case of a cautioner's paying for a principal, where the principal stands bound for the interest, after the cautioner's making payment, though the original bond did not bear annualrent, as was found, 4th December 1629, Laird of Cockpool *contra* Johnston (Durie, p. 473, *voce* CAUTIONER), which is founded upon the general principle, That a *mandatorius* or *negotiorum gestor*, is to be refunded *cum omni causa*.

Duplied for the defender, That the decision adduced did not meet the present case, since there the annualrents are due *pacto* by the clause of relief, whereby the principal stands bound to relieve the cautioner of all cost, skaith, and damage, under which the annualrent of the annualrent, paid by him, is comprehended; since, for the most part, cautioners are obliged to borrow money upon annualrent, to pay for the relief of their cautionry.

The Lords assoilzied from the annualrents.

Act. FALCONER.—Alt. HORN.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 44. *Bruce*, p. 17 & 37.

No. 5. [586] JOHN, &c., WRIGHTS *v.* Ensign LUMSDEN. June 29, 1742.

A master can reclaim an apprentice if he enlists.

Ensign Lumsden having enlisted George Clark, John Wright claimed him as his apprentice, conform to indentures produced. The Justices of Peace declared Clark free from his Majesty's service, and that he belonged to John Wright his master: Whereupon Ensign Lumsden offered a bill of suspension, and pleaded, That there was no express statute prohibiting the enlisting of apprentices; that there was nothing in an indenture to give it a preference, in that particular, to every other contract. It is no more than a contract in writing; and yet it was never pretended, that any other contract, verbal or in writing, did afford the creditor in such contract a right to claim his party from his Majesty's service. It was never alleged, that an hired servant, if enlisted, could be claimed by his master; yet he is as much under contract as an apprentice; with this difference, that the term of his service is generally shorter. If one was bound, by charter-party, to perform a voyage, this would not give the merchant a right to claim such man from the service; for this good reason, That there is no exception or exemption of persons in the acts of mutiny and desertion. See act anno 12mo, *Annæ Reginæ*.

For the master it was urged, That the question is here about the power a person has of enlisting himself voluntarily ; the King's prerogative has no concern in that matter ; it must depend on the power one has over himself ; and none can be a volunteer, unless he is at his own disposal : and, therefore, to encourage such people to enter into the service, they are to receive £4 Sterling as a premium, or enlisting money, by acts made in Queen Anne's time. And by none of the recruiting acts made in that reign, were they in force, as they are not, could [587] George Clark be pressed into the service. It would seem absurd, therefore, that the will of him, who is not at his own disposal, but is a bound apprentice, should liberate him from his master's service.

The Lords refused the bill of suspension.

Fol. Dic. v. 2, p. 32. C. Home, No. 200, p. 333.

No. 8. [589] CHRISTIAN SHEPHARD, Relict of William Mowat *v.* ALEXANDER INNES. November 19, 1760.

No ground for reducing bills granted for an apprentice-fee, That the sum was not inserted in the indenture, nor the principal indenture stamped ; the master having subjoined the sum to an extract of the indenture, and got the extract stamped, on payment of the duty ; though this was done after the death of the apprentice. The whole apprentice-fee is exigible, although the apprentice should die before expiration of the indenture. Sufficient to support bills signed by initials, that the party acknowledges they were truly adhibited.

Christian Shephard, whose son, James Mowat, had, by indentures executed in May 1750, entered an apprentice to Alexander Innes, commissary-clerk and advocate in Aberdeen, for a term of three years, but deceased in October following, brought a reduction, in 1755, of three bills, of 100 merks each, accepted by her on the 2d August 1750, payable to Innes, as her son's apprentice-fee.

Innes produced an extract of the indenture, stamped, with a notandum subjoined, in these words : " Notwithstanding that there is no apprentice-fee contained in the foregoing indentures, there was 300 merks really and truly secured to me, the foregoing Alexander Innes." (Signed) " ALEXANDER INNES." As also a receipt wrote upon the back by the defender's brother, then clerk to the collector of the stamp-duties, of this tenor : " Stamp office, Edinburgh, 25th June 1755. Received 8s. 4d. for the duties of 6d. per pound, according to the statute."

The Lord Ordinary " repelled the first reason of reduction, That the bills libelled were not duly signed, in respect it was acknowledged, that the initials subjoined to the bills were truly adhibited by the pursuer : Repelled also the second and third reasons of reduction, That the sum given in name of apprentice-fee, was not filled up in the indenture, and that the indenture was not stamped in due time ; in respect of the several acts of Parliament indemnifying such omissions, and that the indenture was now stamped, and the sum given in name of apprentice-fee subjoined to the indenture : and also repelled the fourth and last reason of reduction, founded upon the death of the apprentice before the expiration of the indenture, in respect the non-performance of the contract was not occasioned by any fault on the part of the defender, the master ; and assolvied from the reduction, and decerned."

Pleaded in a reclaiming petition for Shephard, the pursuer, 1mo, The reason why a subscription by initials has been substained, is, that it is a party's ordinary subscription that makes a writ effectual. Accordingly, in the case Earl of Traquair *contra* Gibson, 9th February 1723 (*voce* Writ), the Lords would not sustain a subscription by initials, without a previous proof, that such was the party's [590] usual manner of subscribing. But, as that is not pretended in the present case, the objection resolves in this, That initial letters are not writing in the common acceptation of mankind, or in the sense and spirit of the act of Parliament, requiring the subscription of parties, or the attestation of notaries for them.

In the construction of this statute, the pursuer has no occasion to controvert,

that great latitude ought to be given, where the party is proved to have adhibited consent, upon receiving value at the time. It is not pretended that she is a party to the indenture, or that the bills are of the same date, or that they were granted in consequence of a stipulation or agreement then made for the apprentice-fee. They are not subscribed before the witnesses to the indenture, or indeed any other : and consequently, as it is the writing, and not the presumed consent, that must support the bills, it is either incumbent on the defender to prove, that these two letters, C. S. are the grantor's ordinary subscription, or otherwise they fall under the certification of the statute.

2do, The acts indemnifying omissions, have in view the case of the apprentice as well as that of the master ; and provide, That if the duties are paid within the time limited, it shall be available to give the apprentice the privilege or freedom of using his trade. It is therefore too late to stamp the indenture after the death of the apprentice, who is the person chiefly concerned to supply the original neglect.—And it would be a misconstruction of the statute, to allow the master, from this late act of his, five years after the death of the apprentice, and even posterior to his being cited in this reduction, to validate a null indenture.

But, *separatim*, Supposing it had been even then competent for the defender to supply the defect, yet he has not done it. The act of Queen Anne requires that the sheet of vellum or parchment upon which the indentures are wrote, shall be stamped. And the fact is, that the original, which lies as the warrant of the extract, still remains unstamped. The duties are payable for every piece of vellum or parchment on which shall be written any indenture, &c. ; and therefore, neither in the words, nor intendment of the statute, does the stamping an extract of the indenture answer the directions of the law. And the indemnity-act is strictly confined to the indentures or contracts, which, by the former acts of Queen Anne, require to be stamped, &c. ; that is, the principal indenture.—It was improper in the defender to add a syllable to the extract more than is in the principal writing ; and the consequence ought to be, totally to discredit the extract *in pœnam* of the defender, who has presumed to make that addition.

The subjoining to the indenture the sum given in name of prentice-fee, is another addition to the indenture, which the defender had no power to make. After writs are once signed, and mutually delivered, neither of the parties can lawfully add or alter one syllable in the writing. The notandum that is made to the extract, or to the defender's copy, was not done *unico contextu* with the indenture itself ; but an addition *ex post facto*, with a view to obviate this particular ground of reduction. Besides, the pursuer, in point of fact, cannot agree to the truth of the addition : For she denies, that there was any agreement, at the date of [591] the indenture, to give 300 merks as apprentice-fee. She was indeed foolishly induced to grant the bills some months before the boy's death ; but, as the boy was sickly during the most of the time he was in the defender's service, and did not even learn the rudiments of his profession, she did not expect the money was ever to be exacted.

"The Lords adhered to the Lord Ordinary's interlocutor, and refused the desire of the petition, in regard to that point, of the bills not being duly signed ; but with regard to all the other points, ordained the petition to be seen and answered."

Argued for the defender : The indenture in question was executed in a way which is very usual. The apprentice-fee is commonly paid down in ready money, and therefore no mention of it made in the indenture. In this case, the defender having no distrust of the pursuer, gave her credit for the money agreed on as the apprentice-fee, which was 300 merks, and did not even insist to have her security for some months thereafter, when she granted the bills in question. These bills were granted for a valuable and adequate consideration, viz. his undertaking to instruct and train up the pursuer's son in his profession. He had performed the most laborious part of this undertaking, during the space that the lad lived with him : And it was owing to no fault or deficiency on his part, that he did not proceed to accomplish the rest. Upon these considerations, the defender thought himself entitled to demand and receive payment of the whole apprentice-fee.

The omitting to fill up in the indenture the sum given in name of apprentice-fee, and the not stamping the indentures in due time, certainly fall under the several acts of indemnity, now that the indenture is stamped, and the sum given in name of apprentice-fee subjoined to the indenture. The several penalties enacted by the British statute

8vo *Annæ*, if the directions of that statute are not observed, are only intended to enforce obedience to the law, and payment of the public duties; and therefore many different laws have been made, to put it in the power of parties who are liable to suffer by these penalties, to rectify their original omission, and, by payment of the duties, to receive the benefit of their indentures. Thus, with respect to the apprentice, remedies are provided by the statutes, the 18th of the King, c. 22, § 24 and 25, and 20th of the King, c. 45. On the other hand, for encouragement to the master still to pay the duties, though originally not paid according to the directions of the law, there is every session of Parliament a clause in an act, indemnifying such offences against the law. Accordingly, by an act passed in the session of Parliament 1755, it is provided, that where persons have neglected, in their indentures, the directions of the law, yet, if they shall still pay in the rates and duties on or before the 1st day of August 1755, the same indentures shall be good, and available in law and equity, or may be given in evidence in any court whatever.—Upon the faith of, and in conformity to this statute, the defender did, upon the 25th June 1755, pay the rates and duties chargeable upon the apprentice-fee in question, of which he obtained [592] a receipt from the stamp office, of that date, and the proper stamp upon the back of the indenture. And, from this state of the laws, it will admit of no question, that the indentures produced are as good and valid, to all intents and purposes, as if the apprentice-fee had been originally inserted at length in them, the duties paid, and the stamp obtained in terms of the original act of Parliament, or as if no such act had ever been made.

The statute makes no distinction, but makes a just and general provision in favour of the master, that all indentures so stamped before the 1st August, shall be held as good as if they had been originally stamped.—The purpose of these stamps is the collection of his Majesty's revenue, which ought equally to be encouraged and protected, whether the apprentice be dead or alive.—The nullity introduced is no intrinsic original nullity in the contract or indenture; and therefore it may be supplied after the death of the apprentice.—It only takes place ay and until the duties be collected, which may be as well after as before the death of the apprentice.

The act 8vo *Annæ* does not speak of the vellum or parchment upon which indentures are wrote, but of the paper or parchment; and it is all one in the spirit and intendment of that statute, whether the original indenture, or an extract, which, in this country, is held equivalent, be stamped, as having paid the duty.

It is an agreed fact, that the onerous cause of these bills was for apprentice-fee; and as the indentures have become unquestionably as good as if originally stamped, by the express words of the statute, the pursuer has no ground to reduce these bills, upon pretence that the indentures are null.—The addition made to the extract can hurt no mortal, nor is there any ground for the alarm given by the pursuer, of the danger of allowing any addition to be made to extracts. Had the apprentice been alive, he would have profited by it, as well as the master, as the indentures were thereby rendered valid; and the only use and intention of the addition, was to certify to the stamp-master how much duty was to be paid.

Where the prestations undertaken by the master become impracticable, and the apprenticeship does only endure for a shorter space than the term of the indenture, without any fault or deficiency imputable to the master, there is no good reason why any part of the apprentice-fee should be abated.—All incumbent on the master, in return for the apprentice-fee, is, that he shall do his duty, while the apprentice remains with him. If he is cut off by the hand of God, the master suffers the loss as well as others, who have a concern with him.—If he should wilfully desert his service, the master does no more literally fulfil the terms of his engagement than in the former case: Yet it will not be pretended, that a parent, contracting an apprentice-fee with him, would, in this case, be entitled to refuse payment.—Upon the same principle it is, that if a master die in the middle of a term, the servant is entitled to his full wages; l. 38, ff. *Locat.*

“The Lords adhered to the Lord Ordinary's interlocutor.” (See WRIT.)

Act. AL. GORDON, jun.—Alt. Solicitor GARDEN.

Fol. Dic. v. 3, p. 32. *Fac. Col.* No. 267, p. 498.

No. 9. [593] JOHN GARDNER v. SMITH and WARDROBE. July 13, 1775.

Deemed sufficient implement of the obligation on the master to instruct his apprentice, while the master himself was casually absent, that the work was carried on by experienced journeymen.

In November 1771, an indenture was entered into between John Smith, for whom John Wardrobe was cautioner, on the one part, and John Gardner on the other part, whereby Smith became bound to Gardner as his apprentice in the art and trade of a wright, in Glasgow, for three years, and Gardner obliged himself to instruct him in that trade; but Smith having left his master about a year after the commencement of the apprenticeship, and the indenture containing a mutual penalty of five pounds; for that sum Gardner caused charge the apprentice and his cautioner.

Their objection to the validity of the indenture itself having been repelled, they set up another, in consequence of which the Lord Ordinary, before answer, allowed them a proof of the facts; and, upon considering the proof, pronounced an interlocutor, to which the Court adhered, on a reclaiming bill and answers:

"Repels the defence, That the charger having given up in a great measure his business of a wright, and betaken himself to the business of a smuggler, seldom attended his shop, and took no care to instruct his apprentice, in respect that it is proved, that although the charger, in consequence of his marriage with an illicit trader, did, for a time, engage in an illicit trade, yet the work in the shop was daily carried on by experienced journeymen; and that it is not proved that the apprentice was deprived of daily instruction by reason of the casual absence of his master."

Act. ILAY CAMPBELL.—Alt. PAT. MURRAY.—Clerk, TAIT.

Fol. Dic. v. 3, p. 33. *Wallace*, No. 179, p. 97.

No. 12. [597] EDINBURGH GLASSHOUSE COMPANY v. JOHN SHAW. December 22, 1789.

The indentures of an apprentice to one trading company, not assignable to another, tho' carrying on the same trade, and though by the articles of partnership a continual and indiscriminate change of individual members be admitted.

Shaw was bound as an apprentice to the late Alloa Glasshouse Company; by whose articles of copartnership, it was allowed to each partner to sell his share, and transfer his place in the company to any person whatever, so that no certain reliance could be had on the continuance of any individual member.

The indentures bore, on the one hand, that Shaw, during the term of his service, which was seven years, should work "in the Glasshouse at Alloa, or at any other glasshouse he might be ordered to by the said company, or their manager for the time;" and, on the other hand, that the company "should cause him to be instructed in the different branches of glass-making."

Within two years after the date of the indentures, the company resolving to give up business, conveyed to a trustee, for the purpose of its being sold, the whole of their stock, in which they comprehended "the services of the workmen and apprentices engaged to their works."

The effects were all purchased by the Edinburgh Glasshouse Company, in whose favour a disposition, specially mentioning the transfer of those services, was executed.

Shaw continued for several months to serve at the works under his new masters, but at length he withdrew from them, and engaged himself elsewhere. They still asserted their claim to his service; and the judge-ordinary having sustained that claim, granted warrant for his imprisonment, until he should find caution to return to the work that he had deserted. He then brought the question before the Court by suspension; and

The Lord Ordinary pronounced judgment as follows : “ Finds, That if the original partners had severally sold or transferred their shares to a new set of partners, the new company, or set of partners, would have been bound by the indentures, and intitled to the services thereby stipulated ; finds no relevant or sufficient ground to distinguish the case in question from the case supposed, all the partners having in this case concurred in transferring their right of partnership, particularly the indentures, to a new company or set of partners ; and also finds that they were entitled so to do by the true intent and meaning, and ex-[598]-press words of the indenture ; and therefore finds the letters orderly proceeded.”

In a reclaiming petition, Shaw pleaded : A *delectus personæ* is implied, whenever a free man engages his service. No master can assign over his servant or his workmen, without their consent ; nor are they required to justify their refusal by offering any reason for it. Could such an assignation be voluntarily made, the indenture of an apprentice might still more be adjudged for the debts of the master, might be arrested by his creditors, and might become the subject of competition in a multiplepoinding ; consequences too novel and alarming to liberty even to be mentioned. No apprentice's indenture ever passed to the master's heirs ; on the contrary, an action of repetition of the apprentice-fee arises on his death, though indeed it may be eluded by an offer to fulfil the obligations of the master. Fountainhall, 17th February 1711, Cutlar *contra* Littleton, No. 2, p. 583.

Nor in the case of an apprentice to a company is there any exclusion of the same *delectus*. Were a lease of lands granted to such a company, admitting a change of members, but exclusively of assignees, it would not give validity to a transference of the lease, that the assignees were not more different from the original company, than it would have become by the gradual change of members ; or that these individual assignees might have thus come to constitute the whole of the company. It is true, the members of the company were necessarily subject to change while it subsisted ; but the dissolution of a company is totally different from the change of members, the apprentice not being bound to the new company.

Answered : In general all rights are assignable, Stair, 3, 1, 15 ; but there is an exception in the case of *delectus personæ*. In contracts for performance of work or service, these having no connection with the person of the creditor, are plainly nothing else but obligations *ad factum præstandum*, which are just as assignable as any other debt or right. If a person contract with a labourer to do any work on his estate, it seems clear, that such a contract could be effectually assigned to a purchaser of the estate. Ordinary cases of apprenticeship indeed imply a *delectus personæ* ; but in the present instance there would have been absurdity in the idea, when applied to a company, the members of which were, by the constitution, changing from time to time ; so that after any given period, though the apprentice was to continue as much bound as ever, it could not be said that any one individual, the supposed object of his *delectus*, would remain. Nor, by the indentures, was he to expect any particular manager of the works to instruct him, as that officer was equally liable to be changed. The only *delectus* that the circumstances admitted of, was that of place ; but this is excluded in express terms.

The Court at first adhered to the Lord Ordinary's interlocutor ; but afterwards the idea prevailed, that indentures of apprentices were, in their nature, so far from being a subject of commerce, that the speciality of this case could not justify the transference. And, by a final judgment,

[599] The Lords “ altered that interlocutor, and suspended the letters *simpliciter*.” (See PERSONAL and TRANSMISSIBLE. See SOCIETY.)

Lord Ordinary, GARDENSTON.—For Edinburgh Glasshouse Company, Lord Advocate, G. FERGUSSON.—Alt. Dean of Faculty, M. ROSS.—Clerk, HOME.

Stewart.

Fol. Dic. v. 3, p. 32. Fac. Col. No. 100, p. 183.

No. 10. [617] DANIEL CUNNINGHAM of Cayen v. MARY GAINER, and SUSANNAH CUNNINGHAM, her Daughter. January 17, 1758.

A legacy of a right to lands is effectual against the testator's heir, who takes benefit from the testament in which the legacy is given.

By minute of sale, dated 13th June 1741, Thomas Forbes of Waterton, obliged himself to dispoise the lands of Holms of Dundonald to Robert Cunningham, Esq.; for which Mr. Cunningham thereby became bound to pay Waterton £1008, 14s. 2d. Sterling as the price. It was further declared, That the disposition to be granted, and the lands themselves, should be burdened with the said price until payment.

Mr. Cunningham soon after raised a suspension and reduction of the minute of sale *ex capite fraudis*. The reasons of reduction were, however, repelled by two consecutive interlocutors of the Lords, the last of which was pronounced 30th June 1743; but a question with respect to certain deductions from the price was still in dependence at Mr. Cunningham's death, November 1743.

By a deed, of date 17th July 1741, Robert Cunningham dispoised to Mary Gainer in liferent, and to her daughter Susannah in fee, his lands in Scotland, there particularly described, without mentioning the Holms of Dundonald.

On the 27th October 1743, Mr. Cunningham executed his last will and testament, by which he conveyed his estate in the island of St. Christopher's (there said to yield £2500 Sterling per annum) to certain trustees, for payment of his debts and legacies, and in further trust for Daniel Cunningham his son, to whom he also thereby bequeathed certain other plantations, said to yield £380 of yearly rent, and his whole other estates not dispoised by his will. Among other legacies given by this will, there was one in these words: "I give and bequeath unto my dear wife, Mary Gainer (which I have hitherto concealed), all my lands, plate, houses, furniture, linens, horse, mares, bulls, cows, sheep, and whatever I have or shall have, in Scotland, at the time of my decease, for and during her life, for her maintenance, and for the maintenance and education of my daughter Susannah Cunningham; and after the decease of my said wife, I give and bequeath all my lands, plate, &c., and whatever I have or shall have, in Scotland at the time of my decease, unto my daughter Susannah Cunningham, and the heirs of her body; and failing such heirs, I give my said lands and premisses to my son Daniel Cunningham, Esq., and his sons for ever."

Robert Cunningham died on the 13th November 1743, when the price of the Holms of Dundonald was not paid; Waterton thereupon adjudged these lands, and Mr. Cunningham's other land-estate in Scotland. Mary Gainer then brought [618] a suit in the High Court of Chancery against the trustees named in the will, and Daniel Cunningham, for performance of the trust, by relieving the Scots estate of the debts out of the produce of the St. Christopher's estate.—It was objected, That the testator was not in sound judgment when the will was made; but after a proof was taken, the Lord Chancellor pronounced his decree in July 1750, declaring, That the will ought to be established, and the trusts thereof performed; and, in particular, ordering, that the estate in Scotland should be relieved of all debts which did or might affect it."

In pursuance of this decree, the trustees paid the price due to Waterton, and took a disposition from him of the Holms of Dundonald, in favour of Daniel Cunningham, his heirs and assignees. Mary Gainer claimed these lands as legated to her, and the tenant called both parties in a multiplepinding for settling their right to the rents.

Objected by Daniel Cunningham, That, by the law of Scotland, neither lands, nor the right to lands, can be conveyed in a testamentary deed, by way of legacy.

Answered by Mary Gainer, That admitting such to be the general principle of our law; yet, as Mr. Cunningham's testament, by the law of England, was available to convey the St. Christopher's estate, for the uses and purposes therein expressed; and as Daniel Cunningham was, by the said will, constituted residuary legatee of that estate, from whence he reaped considerable benefit, he was thereby barred from challenging, and even bound to concur in making effectual the bequest, which, by the same will, was made of the Scots estate. So it has been decided in parallel cases; 2d December 1674, Cranston *contra* Brown (Stair, v. 2, p. 287, *voce Quod potuit, non fecit.*); and 19th July 1745, Paterson *contra* Spreul (Rem. Dec. v. 2, p. 114, *voce DEATHBED*).

Further objected for Daniel Cunningham.

1mo, That the lands of Holms of Dundonald do not fall under the words of the legacy to Mary Gainer and her daughter. They could not be comprehended under the description, my lands; for the personal obligation contained in the minute of sale, cannot be said to have transferred the property of these lands from Waterton to Robert Cunningham, being only a ground of action to compel Waterton to implement. Neither could these lands be comprehended under the general words, whatever I have or shall have, in Scotland, at the time of my decease; because these words are subjoined to the enumeration of *bona mobilia*, such as plate, furniture, &c., without any mention of debts or obligations; and it is not the practice to extend general words subjoined to particulars to other articles of a different species.

2do, Neither was it the testator's intention, that these lands should be comprehended under the legacy: For Robert Cunningham repudiated, and even challenged, by suspension and reduction, the minute of sale; and to his death would have nothing to do with the lands, nor accept of a disposition from Waterton. He was preparing to try every competent method for getting free of that contract, notwithstanding the interlocutors of this Court sustaining it, when he hap-[619]-pened to die. Hence it is plain, he could not mean to convey these lands under that legacy, when he never considered them as a part of his estate; of which the other deed he granted in his Lady's favour, upon the 17th July 1741, five weeks after the date of the minute, is further evidence; as every other bit of ground he had in Scotland, is thereby especially conveyed to her, but no mention made of the Holms of Dundonald.

And, 3tio, Supposing this legacy could comprehend these lands, yet it could only have the effect of conveying the contract of sale, with its inherent burdens; and, therefore, if Mary Gainer claimed the benefit of that contract, she would be liable to pay the price, which was owing at Robert Cunningham's death.

Answered for Mary Gainer: 1mo, The words, all my lands, comprehend every right to lands which Robert Cunningham had. In a deed *inter vivos*, the conveyance of all his lands, and whatever he had in Scotland, must have carried the personal obligation on Waterton to dispose these lands. And it can make no difference, in the present case, that the conveyance is in the form of a legacy. The general words are so broad, that they cannot be reasonably circumscribed to the *bona mobilia*. 2do, The testator's intention is sufficiently plain from his words; and therefore it is incompetent to bring in extraneous circumstances for explaining away the express words of a deed. Moreover, before this testament was executed, the contract of sale had been sustained in this Court by two interlocutors, unanimously pronounced; which could not be altered here; nor could Mr. Cunningham have any good cause to expect an alteration on an appeal. Besides, it must be presumed to have been his intention, that if the contract could not be set aside, the legatee should have the right of the lands. It does not appear that Mr. Cunningham intended to convey every estate he had in Scotland by the deed 1741, which contained only particular subjects; but as the Holms of Dundonald was the only subject in Scotland not thereby conveyed, the general legacy must have been intended purposely to carry it also. And, 3tio, Were this question with Waterton, he indeed would not be obliged to dispoise till the price were paid; but as the testament appointed the whole of the testator's debts to be paid out of the St. Christopher's estate, and the price undoubtedly was a debt due by him at his death, it must be paid out of that estate. But this question is only competent in the Court of Chancery, which has the sole jurisdiction over the St. Christopher's estate.

"The Lords found, That the right which the deceased Robert Cunningham had to the lands of the Holms of Dundonald, falls under the legacy left to the said Mary Gainer, the testator's widow, in the testament made by him in favour of the said Daniel Cunningham his son; and that, therefore, the said Daniel Cunningham cannot quarrel the said legacy; and preferred the said Mary Gainer to the rents of the said lands."

For Mr. Cunningham, A. LOCKHART, &c.—Alt. DAV. DALRYMPLE, GEO. BROWN, ARCH. HAMILTON.

No. 12. [620] The Viscount of ARBUTHNOT *v.* The Honourable JOHN, &c., ARBUTHNOTS, and their Tutor *ad litem*. July 4, 1792.

Whether one succeeding to a large personal estate, be obliged to fulfil his predecessor's will, so as to expose him to forfeiture of a valuable landed property ?

In 1733, John, Viscount of Arbuthnot, executed a deed of entail, in the form of a disposition, respecting the lands of Arbuthnot. Failing the heirs-male of his own body, his uncle, and nearest male relation, John Arbuthnot of Fordoun, and his heirs-male, were called to the succession.

[621] After these, were called the entailor's other heirs-male, and lastly his heirs-female ; the eldest always succeeding without division.

The deed contained the usual prohibitory, irritant, and resolute clauses ; and, in particular, it directed, under an irritancy, that the limitations, conditions, and provisions, should be inserted in all the subsequent investitures. But it had neither a procuratory of resignation, nor a precept of sasine. Being put into the hands of a friend of the family, it remained with him till 1757, when the entailor died.

Mr. Arbuthnot of Fordoun, the institute in the entail, having died some years before, the succession opened to his eldest son, the late Viscount of Arbuthnot, who, in 1759, neglecting the entail, made up titles, as heir to his cousin, under the standing investitures, which were subject to no limitation. Before his succession to the estate and honours of Arbuthnot, he had become bound, by his marriage-contract, to settle his paternal estate of Fordoun upon the heirs-male of the marriage.

In 1777 the late Viscount executed a new entail of all his lands, including those of Arbuthnot and Fordoun. The prohibitory, irritant, and resolute clauses were the same with those in the deed 1733 ; and the order of succession differed only in this, that upon the failure of heirs-male, his Lordship called " his own nearest heirs and assignees whatsoever " ; so that the eldest heirs-female, instead of having, in their order, a tailzied succession, had nothing but a *spes successionis* along with the other heirs portioners. The heirs of entail were also specially required, under an irritancy, to hold the estates under this entail, and no other title.

The entail 1777 was duly recorded. In 1789 the late Viscount died ; and his eldest son, the present Viscount, having expedite a general service under the entail 1733, brought an action for setting aside the subsequent one.

So far as it related to the lands of Arbuthnot, the action was founded on the prior entail ; which, though merely personal, and unaccompanied with procuratory and precept, was binding on the late Viscount, as representing the entailor. With regard to the lands of Fordoun, it was contended, that the late Viscount, by his marriage-contract, was barred from laying his eldest son, and the heir of the marriage, under any limitations.

The defenders, who were the present Viscount's children, insisted that the entail of 1733 was cut off by the negative prescription. That, however, was evidently founded on a mistake, as the prescription could not run till the entailor's death in 1757. They farther contended, that, notwithstanding the marriage-contract, their grandfather was at liberty to lay his eldest son, and the other heirs of the marriage, under any reasonable limitations ; and that the entail which he had executed, and which was merely intended to perpetuate the representation of his family, was of that sort.

Besides, and what seemed to supersede all farther argument, it was stated, that the pursuer had taken up his father's moveable succession to the amount of £30,000 ; so that he was barred from challenging the deeds in question.

[622] The Lords " Repelled the objection to the deed 1733 ; but found, that the pursuer, as representing his father, is barred from challenging the deed of entail executed by him."

In a reclaiming petition, the pursuer

Pleaded : Where a person executes a settlement, which cannot be immediately effectual, from his want of powers, the grantee, if not liable to the same inability, is in general bound to fulfil the testator's purpose, upon his availing himself of those parts of the settlement which are favourable to him. But where the settlement is not merely impracticable from a defect of power in the testator, but the heir is required to do an illegal act, or one which would expose him to a forfeiture, this, like a condition which

is naturally or morally impossible, ought to be disregarded, and the heir permitted to take under the will, without any obligation to perform what has been required from him. The present case is to be viewed nearly in the same light, as if the testator, along with his own lands, had entailed those which belonged to a third party, where the heir of entail, though obliged to fulfil the testator's injunctions as to the former, might warrantably omit taking any steps as to the latter ; Erskine, 3, 3, 85.

Answered : If the pursuer had made up his titles under the entail executed by his father, a very few years would have invalidated the former one ; and therefore, if he is under any embarrassment, it is one imputable to himself only. But the subsistence of that deed, though it may endanger the pursuer's right, does not preclude the other, which is effectual, till it is brought under challenge, and may, by the force of prescription, be rendered unchangeable. Besides, the pursuer must be barred from challenging the latter deed, so far as it lays him personally under farther limitations, the idea of setting aside a deed *in toto*, because in one respect it cannot be effectual, being inadmissible ; and, at any rate, if the pursuer were to be indulged in voiding the entail 1777, so far as it is inconsistent with the former one, he ought to be compelled, by employing the moveable funds which belonged to the late Viscount, in the purchase of lands, subject to the same restraints which are prescribed in the deed executed by him, to fulfil, so far as it is possible, his father's intentions.

After advising the reclaiming petition, with answers,

The Lords " Sustained the reasons of reduction of the disposition and deed of tailzie executed by the deceased John, late Viscount of Arbuthnot, *quoad* the estate of Arbuthnot ; but assoilzied as to the estate of Fordoun and others." (See *TAILZIE*.)

Ordinary, LORD ESKGROVE.—Act. Dean of Faculty, DICKSON.—Alt. WIGHT.—Clerk, GORDON.

Craigie.

Fac. Col. No. 220, p. 462.

No. 9. [626] WALTER GROSAT, Changer *v.* HENRY CUNNINGHAM, &c., Suspenders.
January 24, 1739.

Arbiters cannot decern for a penalty, other or greater, than is contained in the submission. The penalty will be restricted *quoad excessum*.

These parties entered into a submission, wherein they bound themselves to obtemper the decret, under the penalty of £20 Sterling ; and, by the decret-arbital following thereon, the suspenders were decerned to pay £200 Sterling, by equal portions, at Lammas and Martinmas then next, with £20 Sterling of penalty for each term's failzie ; and likewise it decerned for a penalty of £20 Sterling, to be paid by the party failing to observe, to the party performing, or willing to perform.

It was objected, in a suspension of the decret-arbital, That the arbiters had acted *ultra vires*, in decerning for £20 Sterling of penalty for each term's failzie.

Answered : Wherever a liquid sum is found due, or decerned for by arbiters, they can either make it payable by the decret-arbital at a certain term, or they can decern the party debtor to grant bond for it, payable at a certain term ; and, in this last case, they would decern the bond to be extended in common form, that is, with interest from the date, or term of payment, and a fifth part of the principal, as penalty : And the case is the same where they decern a sum to be paid by their decret-arbital ; the decret-arbital is, in that case, the bond, and the fifth part for penalty is, of course, a part of the bond. There is no absurdity at all in supposing two different penalties to be due, one by the bond, and one by the obligation to submit ; and both are incurred in case of disobedience, the penalty in this submission by disobedience, and the other by failure of payment.

The Lords restricted the penalty in the decret-arbital, to the penalty in the submission.*

C. Home, No. 117, p. 188.

* This case in *Fol. Dic.* v. 1, p. 49, is named *Boquhan v. Grossart*, and dated 24th February 1739.

No. 11. [627] *Earl of SELKIRK v. ROBERT NASMITH*. January 17, 1778.

A reference of the price, in a contract of sale, to arbiters, found to be binding on the heirs of the referrer.

Robert Nasmith, proprietor of the lands of Glenlee, agreed to dispose of these lands to the Earl of Selkirk.

The terms of the bargain were evinced by the missives of both parties. It was established, That they had agreed to refer the price to two arbiters, one to be chosen by each : That payments had been made by Lord Selkirk, to account of the price : That afterwards, the arbiters had been named and accepted. But, before the arbiters had fixed on the price, Nasmith died.

Lord Selkirk brought a declarator against Robert Nasmith, heir apparent of the defunct, for having it found that this was a concluded bargain. Robert Nasmith renounced to be heir. But James Nasmith having adjudged the lands, as creditor to the defunct, appeared as a party in the declarator ; and insisted that there was no concluded sale of the subject to Lord Selkirk ; and, therefore, that it was carried by his decret of adjudication. In the course of the process, a price for the subject was fixed on by the arbiters, in consequence of a remit from the Court. On the merits,

Pleaded for the adjudger : It is essential to the contract of sale, that the price be fixed ; without which, the contract, though parties are agreed in other respects, is not concluded ; § 1, *Inst. de Emp. Vend.* ; Bankton, v. 1, p. 408, § 3. In the bargain betwixt Lord Selkirk and Nasmith, for the sale of these lands, the price was not fixed by the parties : It was only referred to arbiters. Nasmith having died before the arbiters had fixed the price, the arbiters had no power to name any price thereafter, as submissions fall by the death of any of the referrers, unless heirs are specially mentioned ; l. 27, § 1, and l. 49, § 2, *de Rec. Arb.* ; Bankton, v. 1, p. 455 ; Erskine, p. 697. There was, therefore, no concluded sale.

Answered : While the price is only matter of communing betwixt the parties, the contract of sale is not concluded. But, when the parties are fixed by mutual agreement, it makes no difference whether they agree to specify a particular sum as the price, or name certain persons to specify the sum. After fixing on such persons, the parties can no more go back on the price, than if they had fixed on the price itself. Accordingly, in law, that price is said to be certain which is referred to certain persons ; § 1, *Inst. de Emp. Vend. l. ult. c. de Contrah. emp.*

[628] It is of no consequence, therefore, that the price was not named, in this case, by the arbiters, till after the death of one of the parties. The contract of sale was concluded by the nomination of these arbiters.

The authorities brought to shew, that submissions, are not binding on the heirs of the submitters, apply only to submissions, as separate deeds, unconnected with any other contract or transaction implying an obligation on heirs. But a reference, such as the present, is part of the contract of sale, and must go along with it. From the moment that contract is concluded, it is binding on the heirs of the contractors ; and the parties having in view a transaction that is to affect their heirs, cannot be supposed to intend that these heirs should not be equally obliged to submit to this reference of the price, as to every other part of the contract.

The Court were of opinion, That the reference was binding on the heir, and that he was obliged to admit the price fixed on by the arbiters after the death of the referrer ; therefore, found " That there was sufficient evidence of a completed bargain." (See SALE.)

Act. CROSBIE.—Alt. CRAIG.

Fol. Dic. v. 3, p. 36. *Fac. Col.* No. 4, p. 9.

No. 17. [634] KER of Cavers, and SCOT of Golden-berrie, Supplicants. January 6, 1670.

The Lords will give warrant to arbiters, authorising them to summon witnesses.

Ker of Cavers, and Scot of Golden-berrie, being arbitrators nominate by a submission, did, by bill, crave warrant from the Lords to authorise them, to summon witnesses to compear, and depone before them in the cause in which they were arbiters.

Which the Lords granted.

Fol. Dic. v. 1, p. 50. *Stair*, v. 1, p. 658.

No. 18. WILLIAM STEVENSON v. YOUNG of Winterfield. June 26, 1696.

A cause being in dependence before arbiters, the Lords granted diligence by horning, at the instance of one of the submitters, against third parties, to exhibit writs necessary.

William Stevenson, late bailie of Edinburgh, gives in a petition, representing he had a process depending against Young of Winterfield, which both parties had submitted; and for clearing the arbiters there were some papers in third parties hands, which were necessary for instructing his claim, and the passive titles; and therefore craved the Lords would grant a diligence by horning, to cause them exhibit those papers.—The Lords, considering that all methods should be used for facilitating the extinguishing and stopping of pleas, they granted the desire of the bill; especially seeing it is observed by Stair, that the Lords, on the 6th of January 1670, between Ker of Cavers and Golden-berrie (No. 17), granted letters to charge witnesses to compear, and depone before arbiters; and this seems to be a case equally favourable.

Fol. Dic. v. 1, p. 50. *Fountainhall*, v. 1, p. 723.

No. 19. GORDON of Troquin and NEILSON of Corsack, Petitioners. July 16, 1741.

Diligence to cite witnesses to appear before arbiters, limited to the shire.

The Lords never grant diligence to cite witnesses from a different shire, to appear before arbiters, but only to cite such to appear before them as live in the same shire; and as to such as live in any other shire to appear before any com-[635]-missioner to be named by the arbiters, and that within the shire in which the witnesses live; and in these terms granted diligence in this case.

Fol. Dic. v. 3, p. 35. *Kilkerran* (ARBITRATION), No. p. 34.

No. 56. [655] GORDON of Ardmelly v. ABERNETHY of Mayen. November 30, 1716.

A decree-arbitral pronounced by an oversman, found null, in respect it did not bear that the arbiters had varied, without which the oversman could not interpose.

Gordon of Ardmelly pursues a reduction of a decreet-arbitral, pronounced upon a submission betwixt him and Abernethy of Mayen, concerning contraverted marches; on this reason, That the submission was pronounced by the oversman alone, without the concurrence of any of the arbiters.

It was answered: The submission, according to common stile, did bear, that, in case of variance, the arbiters should chuse an oversman, whose decision alone is sufficient: And in this case there was a proration of the submission, to this effect,

that the parties and arbiter having met and examined witnesses, found it necessary to make choice of an oversman, whom they did thereby name; therefore the saids parties and arbiters did also thereby prorogate the submission to a further diet, betwixt and which time, the saids parties, arbiters and oversman were to meet at the same place, and fully to decide and determine all contraversies submitted.

By that prorogation, it was evident, that the arbiters had varied, whereby there was place for the decision of the oversman, whose sole determination was sufficient, in case of variance, and was also a full probation that the arbiters had not agreed.

It was replied: 1mo, The prorogation does not prove such a difference amongst the arbiters as could entitle the oversman to decide; because it bears, that the parties, arbiters and oversman, were to meet again, whereby the oversman could not interpose, unless there had been a variance posterior to the prorogation. 2do, Neither is the assertion of the oversman a sufficient document that the arbiters had varied; but that ought to have been instructed by the concurrence of the arbiters for one of the parties, in pronouncing and signing the decreet-arbitral. 3tio, In this case the decreet-arbitral does not so much as bear, that the arbiters had met and varied.

It was duplied: Decrees-arbitral being firmly established by law as unquarrelable, except upon bribery or falsehood; they are not easily to be overturned upon formalities, which cannot be expected where arbiters are not lawyers, as it generally happens; and there is no need of the concurring of the arbiter for one party, seeing the trust is lodged in the oversman; and it is easily presumed, that the arbiters for the party who acquiesces in the decreet would concur, if that [656] were necessary; and the omission of mentioning in the decreet, that the arbiters had varied, is no material circumstance; but in fortification thereof, it is offered to be proven, by the arbiters' oaths, that they did differ.

It was triplid: A decreet-arbitral being formal in itself, is a firm security, and therefore the more necessary that it be duly pronounced and extended; and it is too great a trust to lodge in the oversman, that his assertion alone should prove; and it is yet more, to presume a variance, when the decreet does not so much as affirm it; and if the decreet be not good and valid of itself *ab initio*, it cannot *ex post facto* be supplied.

"The Lords found the decreet-arbitral, not bearing the arbiters to have varied, null; and that the nullity could not be supplied by an after probation."

Fol. Dic. v. 1, p. 51. Dalrymple, No. 141, p. 225.

No. 59. [659] ANDREW GARDNER v. ROBERT EWING. January 19, 1773.

Found that the *res gesta*, in a submission, proved, by implication, that the arbiters had differed in opinion, which had occasioned them to chuse an oversman, so that there was no necessity for a special minute to that effect.

Ewing being charged with horning at the instance of Gardner, for payment of certain sums awarded by a decreet-arbitral, pronounced by an oversman, in consequence of a submission the parties had entered into, referring the matter in dispute, which was relative to their marches, to William Millar and Patrick Dun as arbiters, with power to chuse an oversman; he suspended, upon alleged informalities and irregularities in the decreet and previous procedure, which, he contended, did render the decreet-arbitral void and null; and, particularly, 1mo, That there was even no deed of acceptance, by the arbiters, of the submission; nor, 2do, Any minute of their having differed in opinion; and, 3tio, That even the decreet-arbitral itself did not bear that they had differed, and, on that account, had proceeded to name an oversman; which last objection had been found fatal to a decreet-arbitral; November 30, 1716, Gordon v. Abernethy, No. 56, p. 655.

The Lord Ordinary at first pronounced an interlocutor in general, repelling the reasons of suspension. And, by a subsequent interlocutor, adhered thereto, "in respect, that the decreet-arbitral charged on does bear, that the arbiters could not agree in the decision to be pronounced, and had chosen an oversman."

Ewing reclaimed upon his former grounds, referring to the authorities of Erskine,

b. 4, tit. 3, § 29; and of Bankton, tit. Arbitration; and the foresaid decision in the case of Gordon v. Abernethy; That there the objection to the decreet-arbitral was, that it did not appear from the decreet itself, that the arbiters had differed before chusing an oversman; to which it was answered (as in the present case), that the decision of the oversman did of itself afford complete evidence that the arbiters had differed: And, although this fact was farther offered to be instantly instructed by the oaths of the arbiters, yet the court were of opinion, that the assertion of the oversman was not a sufficient document that the arbiters had varied; and they therefore "found the decreet-arbitral, not bearing the arbiters to have varied, null, and that the nullity could not be supplied by an after probation."

Answered, The submission to Millar and Dun, with power to chuse an oversman, was signed by the parties on the 8th November 1771. On the 6th December, the arbiters, one of whom, Dun, had been brought from Paisley, met upon the ground; and, as they did not agree in opinion, it was necessary to chuse an oversman. This was a matter of some difficulty; but, having at length agreed on [660] James Gardner of Duncrean, they named him, by a minute of the following tenor: "Blairquhomrie, the 6th December 1771. James Gardner of Duncrean,—and also that William Millar and Patrick Dun, both arbiters, have elected and chosen the above man to be oversman in submission by Robert Ewing and Andrew Gardner to them as arbiters, as witness our hands. (Signed) Patrick Dun. William Millar."

This minute is perhaps not so distinct as it might have been, as it was wrote in the country, without the assistance of a man of business; but the Court cannot have any doubt of the meaning of it. The next step was the oversman's signing a minute accepting of the submission. This bears date the 10th December; and a third minute appears, of date the 31st of that month, signed by both the oversman and William Millar, one of the arbiters, appointing Alexander M'Culloch to be clerk.

Then follows the decreet-arbitral, dated the said 31st of December 1771, which begins in this manner: "I James Gardner of Duncrean, oversman appointed by William Millar of Culdervan, and Patrick Dun gardener in Paisley, arbiters mutually chosen by the parties designed in the foregoing submission, in virtue of the powers vested in them by the said submission, and conform to a minute subscribed by the said arbiters, of date the 6th December current, on a paper apart, naming me to be their oversman, in regard they could not precisely agree as to the decision to be pronounced with respect to the matters thereby submitted, to which mutual reference is hereby had, and I have taken upon me the determination of the matters submitted to the said arbiters, and to me as their oversman, in virtue of the said submission; and having, in conjunction and concert with the said William Miller, one of the said arbiters, made choice of and appointed Alexander M'Culloch, writer in Buchanan, to be my clerk, conform to another minute subscribed by the said William Miller and me, of this date, and as relative thereto, and I have heard and carefully considered the claims of parties anent the matters in dispute, and having God and a good conscience before my eyes, do hereby give forth," &c.

Here it is expressly set forth in the decreet-arbitral itself, that the arbiters had met, and had not agreed, and, therefore, that the oversman had been named by them, and had accepted, &c. The case, therefore, differs from that of Gordon *contra* Abernethy. The judgment, in that case, went expressly upon this ground, "that the decreet-arbitral did not bear the arbiters to have varied." Here the decreet-arbitral bears them to have varied, and therefore the contrary judgment falls to be pronounced.

Besides, upon looking into the decision, as collected by President Dalrymple, it appears to have been admitted on both sides, that the concurrence of the arbiter for one of the parties would have been sufficient evidence of a difference of opinion, and would have supported the decreet-arbitral. And, in a case noticed by Bankton, b. 1, tit. 23, § 9, June 1724, Rigg,* "the recital of the decree pronoun-[661]-ced by the oversman, with concurrence of one of the two arbiters, bearing, that the arbiters disagreed, was found a presumptive proof of it."

Now, here we have one of the arbiters concurring with the oversman, and even joining with him in the choice of a clerk; and we have the other arbiter concurring in the nomination of this oversman, and signing a minute to that purpose; which, in common sense, can import nothing else than that they differed in opinion, and therefore

* Examine General List of Names.

devolved their powers on the oversman, who accordingly pronounced his decision upon the express recital of a difference in opinion; for so the decret-arbitral bears; nor can the charger enter into the criticism, that the words, "not precisely agreeing," mean, "that they did not differ."

The minutes, and whole procedure, though briefly expressed, do clearly show, in the first place, That the two arbiters met, and, not agreeing in opinion, chose an oversman. 2dly, That this oversman accepted, and signed his acceptance. And, 3dly, That the oversman, along with one of the arbiters, appointed a clerk to the submission. And, lastly, That he pronounced a distinct and full decret-arbitral on the several matters in dispute; which decret-arbitral was favourable to the suspender, so far from containing the least matter of complaint at his instance.

The proceedings, in short, are sufficiently complete of themselves, and require no extrinsic evidence to support them. And, as to the observation, that the arbiters do not appear to have accepted, How can this possibly be maintained, when they acted under the submission, and even went the length of appointing an oversman? An acceptance of a submission does not require to be minuted in any precise form of words. It is enough if the proceedings show that the arbiters did accept and act.

Observed on the Bench, The decision quoted from Dalrymple is not a good one. Here, *res ipsa loquitur*, that the arbiters differed, from their naming an oversman.—Nor ought the circumstance of the minute naming the oversman, not being properly tested, create a difficulty, where a formal decret-arbitral followed in consequence thereof. Decreets-arbitral ought not to be got the better of upon critical forms, where they are substantially right; and there is full evidence here that the present was a very moderate one.

The Lords adhered; and, farther, decerned for the expence of the answers.

Act. ILAY CAMPBELL.—Alt. WALTER CAMPBELL.—Clerk, TAIT.

Fol. Dic. v. 3, p. 36. *Wallace*, No. 45, p. 119.

No. 68. [665] ANDREW WILLIAMSON v. ISABEL, &c., FRASERS. December 12, 1739.

A minor being capable, with consent of his curators, to enter into a submission, even he may not plead that facts were held to be true by the arbiters, although not so.

Some merchants in St. Andrews having freighted a ship to France, a submission was entered into, several years thereafter, by the Frasers, as having right to the freight, on the one part, and by the surviving partners, and by Andrew Turpie, as representing Andrew Smith deceased, and by Andrew Williamson a minor, with consent of his curators, as representing James Williamson's elder and younger deceased, likewise partners, on the other hand. Upon this submission a decret-arbitral followed, in which Andrew Williamson is decerned, not only for the shares of the two Williamsons, whom he really represented, but likewise he was found liable, conjunctly with one William Duncan, as representing the said Andrew Smith for his share, notwithstanding that Andrew Turpie above-mentioned was a party-submitter, as representing the said Andrew Smith.

Of this decret-arbitral Andrew Williamson brought a reduction, on the head of minority and lesion, upon the following grounds: 1mo, That it was competent to him, being a minor at the time of the compromission, to reduce the same, if it appeared, that, in consequence thereof, he was leased, as is plain from many authorities of the common law, and which, it is believed, is not taken away by the general words of the statute 1695. 2dly, By the tenor of the submission, the several partners, and the representatives of such as were dead, submit, as we or our predecessors being concerned, and partners in a voyage of the ship called the *James of St. Andrews*, whereby it appeared, no power was given to the arbiters to tie any of the submitters, unless that either he was concerned in the voyage himself, or as representative of a person so concerned. But it was impossible that Andrew Williamson could be tied by these words, to leave it to the discretion of the arbiters to make him represent

whom they pleased ; for it cannot be maintained they could decern against him for the whole freight, because he represented all the partners, which they might have done by the same parity of reason, that they make him represent one of the partners, whose true representative is a party submitter, and designs himself the representative of Andrew Smith, for whose share the pursuer is decerned. And, indeed, if he were to be tied down by a decret-arbitral of this nature, on a submission in the terms above-mentioned, there can be no greater instance of levity and rashness, than going into it is ; so that, whatever may be the rule in the general case, yet a minor, who enters into a submission, whereby he may be made liable for debts which otherwise he could never be made liable for, ought to be relieved. And therefore, the words, as we or our predecessors, must either be understood to signify the persons who really were their predecessors, and so the sentence is *ultra vires* ; or if it be contended, That these words must be taken in a larger sense, and that thereby the arbiters had power to determine who were their predecessors, such submission was so extravagant that there can be no difficulty to impute the going into it to the rashness of [666] a minor. 3tio, The arbiters having expressed a matter of fact, as the *ratio decidendi* against him, that being false, their decret fell to be reduced.

Answered, There could be no doubt but a minor, with consent of his curators, may effectually enter into a submission concerning any controversy, the same being a rational deed, in order to shun the expence of law-processes, otherwise minors would be in a worse case than majors, as being under an absolute necessity of spending their substance in law-suits, in place of having matters amicably determined by arbiters ; and, therefore, there can be no lesion in entering into a submission concerning an inveigled affair, such as this claim for the freight was, it having been the subject of several law-processes for a considerable time ; and, as the submission is binding, so, by our law, a decret-arbitral cannot be reduced on the pretence of iniquity. As to the allegiance, that the pursuer does not represent Andrew Smith, though he is expressly found by the arbiters, in conjunction with another, to represent him, it must appear exceeding improbable. The decret does not indeed bear the *ratio* of so deciding, neither is it usual, in decreets-arbitral to express the *ratio decidendi*, or the evidences that were brought before the arbiters of any fact. It is presumable, that it was either acknowledged or documented to them in what manner Duncan and the pursuer represented Smith, with relation to the matter submitted : But be that as it will, by our law, it is a *præsumptio juris et de jure*, that the decret is right, and it is not quarrelable upon the head of iniquity, or any other pretence, except falsehood, corruption, or bribery. As to the argument, That falsehood may be here alleged, because it is a false fact, or a finding that which was not true, it was a playing on words ; for it is plain, that falsehood, in the act 1695, means only, that the submission or decret are false or forged, but does not concern the finding or decerning that which is not true ; for that properly is iniquity, which is no relevant objection against a decret-arbitral. As to the other pretence, That the arbiters exceeded their powers in finding the pursuer represented Smith ; that must appear very frivolous, seeing it is admitted, the partners and the representatives of such as were dead, submitted what they should be liable for, in so far as they or their predecessors were concerned as partners in the said voyage, which behoved plainly to imply a power in the arbiters to determine how far they represented such as were dead, so as to be liable for their shares, otherwise the submission and decret-arbitral would have been to no purpose ; for the submission is expressly with power to determine all debates and controversies between the parties submitters, and what they should pay or implemment to others.

The Lords repelled the reasons of reduction.

No. 16. [687] *MUIRHEAD v. CORRIE*. February 17, 1735.

In a furthcoming of goods, it has the effect of a decree, that the judge has appointed the arrester to produce the goods, in order to be roupd.

In a process of furthcoming, the judge ordained the arrestee to produce the goods, in order to be roupd and sold, for payment of the pursuer's debt; this was found an effectual decret of furthcoming, so as to bar another creditor who offered to poind before any step was taken upon this ordinance, it being pleaded, That this was the regular method in furthcomings of goods, *Stair*, p. 375,* and equivalent to a simple decret of furthcoming where money is arrested, and a certain sum decerned to be made furthcoming.

Fol. Dic. v. 1, p. 54.

No. 20. [689] *Mr. ROBERT BLACKWOOD, Merchant in Edinburgh v. ADAM BROWN, Dean of Guild of Edinburgh*. January 6, 1702.

A bond of relief, obliging the granter to relieve his cautioner, and retire the creditor's bonds, betwixt and a certain day, being *ad factum prestandum* only, found no ground for arrestment, even after the day had elapsed.

Mr. Robert Blackwood being cautioner for John Watson in great sums of money, obtains a bond of relief, in these terms, obliging the said Watson to relieve the said Mr. Robert, and retire the creditor's bonds, betwixt and a certain day.

Mr. Robert Blackwood not being relieved, nor his bonds retired, arrests in the hands of Adam Brown, who, in the furthcoming, depones, That he was no ways debtor to Watson; but that, being creditor to him in great sums, Watson dispones certain of his effects for his security and payment.

Blackwood craved a re-examination, and that he might condescend upon these effects, and the debts due to him, and instruct the same, and not be his own judge, both in charge and discharge.

The defender alleged: He was neither bound to have deponed at all, nor is he now obliged to answer any further interrogatories; because the ground of the pursuer's arrestment is no bond for a liquid sum of money or debt, but a bond of relief, which is an obligation for a fact, viz. to relieve him, and retire his bonds; in which he followed the faith of his debtor, whom he ought to distress, but cannot thereupon crave his money to be made furthcoming; for the obligation to relieve, &c., does not afford him any title of intromission; and therefore no decret of forthcoming can follow. And further, it is a known and ordinary style in bonds of relief, that, for the cautioner's further security, the obligant is bound to pay the sums to his cautioner, that he may relieve himself; which ordinary caution being neglected, the pursuer must hold himself to his bond in the terms he has taken it.

[690] It was answered: That an obligation to relieve the pursuer, and retire his bonds, implies every thing that may make the relief effectual; and consequently, that his debtor's means may be affected, and made furthcoming. 2do, The defender did already acquiesce, in as far as he deponed in the furthcoming, and cannot now decline to clear his former oath. 3tio, In another process of forthcoming, on the same bond, against Margaret Seaton, the Lords did oblige her to depone in the furthcoming. 4to, The pursuer doth further liquidate his claim, by condescending and instructing the debts he has paid, in which he is a liquid creditor.

It was replied: The obligation of relief implies no more than the words do express, by which nothing was intended, but to oblige Watson personally. 2do, The defender might have declined to depone at first; and now he declines to lay his business open to the pursuer, who has no interest to require it. 3tio, Margaret Seaton had been

* Page 388, edition 1759.

holden as confest ; and in a suspension craved only to be reponed to her oath ; and, though she did offer the same grounds, yet she insisted only *ad hunc effectum*, to be reponed, in which she prevailed. 4to, It alters not the case, though the pursuer may have paid certain of the sums expressed in the bond of relief, and thereby is become a liquid creditor ; seeing his right to these bonds is not the foundation of the arrestment and forthcoming.

The Lords found, a bond to relieve the pursuer, and retire his bonds in the terms above expressed, was no ground for arrestment and forthcoming.

Fol. Dic. v. 1, p. 54. Dalrymple, No. 33, p. 41.

No. 21. KATHARINE ROSS, Relict of David Dickson, Supplicant *v.* WILLIAM RENTON, Factor to the Estate of Begbie. February 26, 1712.

A depending process of reduction (which does not conclude for payment of money), is not a proper ground of arrestment.

Upon a representation made by Katharine Ross, that William Renton had arrested all her effects, upon the dependence of a process of reduction raised by him against her :—The Lords found, That the depending reduction (which concludes not the payment of money, but the removing a right out of the way) is not the proper ground of arrestment : And therefore ordained the arrestment, used upon that depending process, to be loosed without caution or consignment.

Fol. Dic. v. 1, p. 54. Forbes, p. 594.

No. 40. [703] BAILLIE *v.* NASMITH and the Tenants of LETHAM. January 15, 1674.

Tenants were decreed to pay a sum to the heritor, to be employed in repairing a house liferented by a third party. Not arrestable, being destined for a certain purpose, in which a third party was concerned.

William Baillie of Torwoodhead, having arrested in the hands of the Tenants of Letham, any sums due by them to the Lord Forrester, for payment of a sum due by Forrester to him, pursues now the tenants for making forthcoming. Compearance is made for young Posso, donatar to his father's liferent, who hath right to the rents of Letham, as husband to the Lady Letham, the Lord Forrester's mother, and for him and the tenants. It was alleged, That the only sum due by the tenants of Letham to the Lord Forrester, was, by decret of Council produced, whereby the tenants were decerned with the Lady Letham and her husband, to repair the house of Letham, liferented by the Lady, betwixt and Lammas thereafter ; or otherwise, to pay to the Lord Forrester, as heritor thereof, 3200 merks, to be employed for reparation of the house ; which sum being, by the decret, destined for that particular use of reparation, was not arrestable, for the Lord Forrester's debt, or applicable to any other use ; especially seeing not only the Lord Forrester himself was interested, but the Lady liferenter, and her husband, who had the benefit of the house when repaired ; so that the tenants thought that they were in security to pay the sum to Forrester, even after the arrestment, and had paid a great part of it.

The Lords found, That this sum being decerned and destined for the particular use of reparation, which did not only concern the Lord Forrester, but others, that it was not arrestable for Forrester's debt. *Fol. Dic. v. 1, p. 56. Stair, v. 2, p. 253.*

No. 43. [707] ALEXANDER ALISON, Writer v. the DIRECTORS of the African and India Company. March 18, 1707.

A share of the African Company, which, while the Company subsisted, was by act of Parliament not arrestable, found arrestable, the company being dissolved.

Mr. James Erskine, Lord Grange, as probationer, reported Alexander Alison, writer, against the Directors of the African and India Company. Hary Crawford in Dundee having paid in £200 Sterling as an adventurer in that company, Alexander Alison, as creditor to him, arrests it in the directors, &c., their hands; and then pursues a furthcoming, and likewise repeats a declarator, that the money stands affected by his diligence, and must belong to him.—Alleged, 1mo, That the directors can never be personally liable, but only *ratione officii*. 2do, By the act of Parliament establishing the company (act 8th 1695), the capital stock is declared free of all confiscations, seizures, arrests, &c., except only as to the profits; and the patentees are empowered to prescribe rules for conveying and transmitting the shares of the proprietors; and they having ordained it to be by real diligence, and transfers, it cannot be reached by arrestment.—Answered, So long as the company stood, the stock could not be affected; but now *res devenit in alium casum*, this present Parliament has declared the said company dissolved and at an end, upon paying in the stock out of the equivalent, which was a *casus incogitatus* at the time of erecting the company; and therefore, on a supposition that it would be perpetual, the stock was declared not attachable; but now when every proprietor is to draw out his share, what more habile and proper diligence than an arrestment, which is a *nexus realis*, and so answers the terms of the act of Parliament; and *esto* it were heritable, yet even such debts, by the 51st act 1661, are affectable either by arrestment or adjudication, if infetment has not followed thereupon; and it were a most tedious and expensive way to put them to an adjudication; and lately, in the case of Alexander Stevenson, merchant in Paris, a share in the Newmills cloth-manufactory was found moveable and arrestable; and by a declarator, the arresster was surrogate in place of the proprietor: And Dirlerton, *voce* Arrestment of Conditional Debts, says, a creditor arresting a sum due upon a wadset before redemption (when it is certainly not arrestable), if afterwards there be a redemption it accresces and is preferable to a second arresster after redemption, though this last seems more formal, being then [708] made moveable; but *jus fuit fundatum*, and the superveniency accresces. So Stair, Instit. lib. 3, tit. 1, § 29, observes out of Hope, that an arrestment of the price of lands only verbally sold, from which there was *locus penitentie* (room to resile) was sustained, if a written agreement afterwards followed; and even so of arrestments *currente termino*.—The Lords found the company not personally liable, but that the arrestment affected the subject *tantum nexus realis*; and though they could decern in the furthcoming, yet they decerned in the declarator, that the share due to Crawford fell to Alison, his creditor, who had arrested it, and that the directors ought to transfer it over to him; and when the commissioners of the equivalent got the African money paid in to them, Alison had right to claim Crawford's share and proportion thereof.

Fol. Dic. v. 1, p. 55. Fount. v. 2, p. 361.

No. 45. [709] Captain JOHN BRODIE v. Mr. PATRICK CAMPBELL of Munzie. January 26, 1715.

The arrears of an officer's half-pay found to be arrestable; in the hands of the paymaster, who was held to be factor, not of the Colonel as an individual, but for the behoof of the officers.

Captain Brodie having commenced a process against Lieutenant-Colonel Hay, of the Earl of Tullibarden's regiment; during the dependency, arrests in Munzie (who had been paymaster to the regiment while it stood) his hands, some arrears

due to Hay; and after decret obtained against the Lieutenant-Colonel, having insisted in a forthcoming against Munzie: The question came to be discust, How far an arrestment in the hands of the paymaster could affect money belonging to the officers?

[710] It was expected for Munzie, That, by the Roman law, such an arrestment was so far from being supported, that, by Nov. 88, C. 1, the user thereof was punishable. And that pay cannot be arrested, appears further from L. 4, 6, *de execut. rei jud.* where it is said, That even *ob rem judicatam stipendia retineri non possunt*, except in *subsidium*; & *si aliis rationibus exequi nequeat*: And much less, where the arrestment is only on a dependence. Nay, according to L. 5, 6, *Qu. respig. oblig. poss. athletarum præmia pignori dari non possunt*; much less then can *stipendia militum*, which only in *subsidium etiam ob rem judicatam capiuntur*. And this is also supported by our acts of sederunt in annis 1613 and 1626, whereby pensions and fees of the king's public ministry and others, are declared not arrestable: Specially considering, their pay is to be looked upon as alimentary. 2do, By King William's regulations 1695, founded on an act of Parliament, 6to & 7mo *Gulielmi*, cap. 7, the pay of the army seems not arrestable, for there, § 9, it is statute, "That all agents, clerks, &c., for, or on the account of, any Colonel, or commanding Officer, &c., shall, before they receive any pay, give bond to his Majesty, with two sufficient securities: " The condition of which bond is, to answer the sums so by them to be received, &c. And, § 10, it is enacted, "That no Colonel, officer, or agent, shall, in accounts by them stated, be allowed any sums of money, upon pretence that they had been by them advanced or lent to any officer or soldier thereafter: " So that to imagine agents liable to arrestments, and at the same time obliged to fulfil the conditions of the bonds given, is to suppose manifest contradictions.

Replied for the pursuer, That the question is not here anent subsistence, which is indeed necessary for the public service, but anent arrears, which is a subject over and above what is necessary for subsisting in the service, and is arrestable; specially when the fund is still due after the regiment is broken, and the Lieutenant-Colonel out of the service; so that there is no occasion of detaining it on account of the necessity of the service. Which distinction is well established in parallel instances, by the Lord Stair's Institutions, lib. 3, tit. 1, § 37, where he says, "That it is a competent exception against arrestments, that the thing arrested is a proper aliment, and not exceeding the measure of aliments; and the fee of a servant was not found arrestable, in so far as it was necessary for the service he was in; but only for the surplus, more than was necessary for his aliment in such a service. July 9, 1668. Boag *contra* Davidson, preceptor of Heriot's Hospital." * And as to the act of Parliament, and regulations above-mentioned, though they can have no influence on this decision, being English acts before the union; yet even they seem more to favour the pursuer; for there it is expressly appointed, That the factors for regiments shall issue forth their payments to the officers, conform to their respective proportions, but no prohibition of legal diligence against arrears.

The Lords found the sums in question were arrestable.

[711] Another point having fallen to be determined, viz. Whether Munzie was factor for the Colonel only, or both for him and the officers? As to this, it was excepted for the defender, That he opposed his factory, in the terms whereof he is only liable, which is only from the Colonel, and to whom alone he is declared accountable; and, by the foressaid instructions by King William, the factor is only to issue out the money conform to his Majesty's directions; so that where no such directions were, it behoved to be by the Colonel, who had the only power to receive, and was accountable to his Majesty for the money of his regiment. And, though others officers also contributed for the agent's pay, yet such an office was absolutely necessary for management of the regiment's affairs.

Replied for the pursuer, That Munzie's discharge from the Lieutenant-Colonel was opposed, which bears *in terminis*, that he hath made full and complete payment of what arrears he had in his hands, notwithstanding of arrestments laid in his hands by the pursuers. 2do, Though, out of respect to Colonels, they have the nomination of the factor, yet still, by the nature of the trust, he was factor also for the regiment, and liable to count to every officer for his pay, as well as to the Colonel for his. 3tio,

* Stair, v. 1, p. 550, voce PERSONAL and TRANSMISSIBLE.

The defender owned this by clearing with the several officers, without noticing the Colonel, or receiving his warrant to pay any of them. 4to, There is a decision of the case *in terminis*, 20th February 1712,* James Napier *contra* George Grant, paymaster of Grant's regiment; where the whole above defences were proponed and repelled.

The Lords found, That the defender was factor for the behoof of the officers at the time of the arrestment, and therefore that their money was then arrestable in his hands.

Act. BOSWELL.—Alt. SE.—Clerk, MACKENZIE.

Bruce, Nos. 44, 45, p. 57.

No. 47. HALE, Minister of Linton *v.* His CREDITORS. February 12, 1736.

Minister's stipend arrestable.

Of this date, I find it marked in the diary, That, on report of Lord Coupar, the Lords found a minister's stipend arrestable. *C. Home*, No. 12, p. 33.

No. 49. [713] Creditors of BERNARD CLUNIES *v.* SINCLAIR and Her HUSBAND. January 19, 1739.

In what manner an arrestment affects the *jus mariti*.

The question occurred with the regard to a bond due to a married woman, the annualrents of which belonged to her husband, if an arrestment for his debt, laid on in the debtor's hands, did affect the *jus mariti*, or the annualrents only due at the date of the arrestment?—The Lords found that the arrestment carried no more than the annualrents that were fallen due, and the current term; and the reason given for it was, that arrestment can carry nothing but what is due to the common debtor, when it is laid on, not being of the nature of an inhibition to affect *adquirenda*; that the proper diligence in this case, is an adjudication against the husband, in whom the *jus mariti* subsists. *Fol. Dic.* v. 1, p. 55.

No. 52. [716] Competition ROBERT RAE, &c., with JOHN NEILSON, &c. November 19, 1742.

It is competent to affect the interest of a partner, in a copartnery, by arrestment.

Arrestment in the hands of the other partners will affect this interest, tho' the subjects of their copartnery should be, at the date of the arrestments, abroad; provided they be afterwards made good to the company.

Robert and James Robertsons entered into a company-trade with George Bogle, &c., merchants in Glasgow, for a particular negotiation, the import of which was, that they should send out certain cargoes of goods for building a ship in Boston in New-England, and the remainder upon merchandize to be loaded aboard that ship, and others which should be hired; with the proceeds whereof new adventures outward were to be carried on in a running trade, for the profit of the joint adventurers: All which was to be managed under the direction of certain supercargoes to be sent abroad to reside, and of others who were to accompany the goods. This joint trade continued for some years, when James Robertson having died, and Robert Robertson become

* Examine General List of Names.

bankrupt, some of their creditors arrested in the hands of George Bogle, &c. the other joint adventurers with the Robertsons, and likewise used arrestment at the market-cross of Edinburgh, pier and shore of Leith, in the hands of certain factors for the two Robertsons residing abroad, in whose custody they supposed their debtors' effects might be lodged.

In the course of the furthcoming, which was brought at the instance of the creditors who had used arrestment, Messrs. Bogle, &c. (who raised a multiplepinding), emitted a declaration, giving a detail of the joint adventures in trade, that they had with the two Robertsons; and declared, that at the time of the arrestments, they were not debtors to the Robertsons; on the contrary, they were debtors to the last adventure in £300 Sterling: That the declarants had disposed of the ship and cargo at the particular rates specified in their declaration; and that there were certain sums for which their factors abroad were accountable to the partners.

And this declaration was held as evidence, by all parties, of the interest which the Robertsons had in their adventure with Messrs. Bogle, &c.

The creditors of the Robertsons, who had neglected to use arrestment, objected to the furthcoming; 1mo, That the partners, in the present case, were not only not erected into a body-politic, or corporate, but that there was not even a contract of copartnership among them: So that it was new to consider this copart-[717]-nership as an *universitas*, as a right vested in the partners as a body corporate, and affectable by one diligence. 2do, It was objected, That, at the date of the arrestment, no part of Robert's share was in the hands of the partners, and that the stile of an arrestment directs the arrestee to detain in his hands such liquid sums of money as he owes to the arrester's debtor, and such goods belonging to the debtor as he has in his possession. Now, none of the partners were debtors to Robert in one shilling, at the date of the arrestment; consequently, there was nothing in their hands that could be attached or secured thereby. Nor could it alter the case, that they had several parcels of goods in foreign parts common with Robert, and several other goods on ship-board, also intended for foreign parts, in common with him; for this did not put Robert's goods in their possession or custody, nor indeed under their power. Neither can it make any alteration, that some of the goods *de facto* came home, which the partners sold for the common account; and that, if the goods that are still in foreign parts come safely home, and come into the partners hands, there will be a certain share thereof the property of Robert. For an arrestment does not reach *acquirenda*; it affects only the debts or goods of the debtor, due by, or in the hands of the arrestee, at the date of the arrestment. Lastly, Supposing there had been a proper copartnership in this case, which was dissolved by the death of James, and the bankruptcy of Robert *quoad* their interest, and that the copartnership subsisted in the remaining partners, subject to the balance of the stock belonging to James and Robert, after payment of the debts due by them severally to the copartnership, yet such interest is not affectable by arrestment; it is neither a liquid debt, nor moveable goods belonging to the debtor, but is a sort of *universitas*, consisting possibly of heritable debts due to the partners. And the claim of the Robertsons is a balance arising upon the whole, after payment of the company-debts; and therefore is the proper subject of an adjudication, but not of an arrestment, which affects only liquid debts, or *corpora mobilia*.

Answered for the creditors, pursuers of the furthcoming. That, if the effects of a copartner could not be attached by an arrestment in the hands of the managers of a copartnership (who had the power to sell and dispose of the goods, &c.) our law would be extremely deficient; but as any one partner may sue the rest to account, so every creditor of his may do the same for recovering the sums due to him.

Neither was there any necessity for a charter to create a body-politic, or a contract in writing; consent is sufficient for this purpose, and the actings of the several partners is sufficient evidence of that consent. What was advanced by each partner became common stock; debts contracted for carrying on the company concerns bound the whole; books were kept: And if these circumstances do not infer a co-partnership, so as the managing partners should be accountable to the other partners (or their creditors doing diligence) for the profits, the pursuers do not know what will.

[718] As to the second objection, it was answered, That the surviving partner, having the power and command over the subject of the co-partnership, wherever the same might be lodged for the time, the case was the same as if the whole had been in their custody, and so subjected to the arrestment. In the same manner, the custody of

the supercargoes abroad, or in their ships at sea, who were accountable to the surviving partners, or their constituents, must be deemed in law the custody of the constituents themselves; as much as goods consigned to a merchant in Edinburgh, though the goods ly at Leith, in cellars and warehouses, of which his servants have the keys, will be constructed in the custody of the merchant himself; and an arrestment in the merchant's hands for the debt of the consigner will reach such goods. See a late case betwixt Sir Hary Innes and the Creditors of Gordon, No. 51, p. 715.

And, with respect to the last objection, it was answered, That the surviving partners have declared, that the subject of the co-partnery consisted in moveables; and although, in some respect, the co-partnery may go under the name of an *universitas*, while it subsists, yet when it is at an end, and that there is a necessity for the division of the subject of the co-partnery, as in the present case, so as that the company debts must be paid off, and each partner have his share in the free profit, it remains no more an *universitas*; but the case falls to be considered, as if there was an actual division, and each partner's share was ascertained, which is the purpose of the present action. See 18th March 1707, Alison, No. 43, p. 707. The only habile diligence therefore in this case is arrestment, and not an adjudication.

The Lords found it was competent for the creditors of Robert and James Robertsons, the two bankrupt partners, to affect the debtors interest in the co-partnery by arrestment, and that the arrestments used in the hands of George Bogle, &c., the remaining partners, did habily affect the same, notwithstanding the subjects of their co-partnery were, at the date of the arrestments, in the hands of the company's supercargoes at sea, or of their factors abroad; and found the same liable to be made furthcoming by the said partners to the creditors arresters, so far as the same have been made good to the company by the said supercargoes or factors. *C. Home*, No. 209, p. 347.

No. 55. [723] NEILSON and MURDOCH v. COLQUHOUN and RAE. January 22, 1745.

One partner of a company named another his executor, and died. Arrestments in the hands of their partners in trade, found to affect the shares both of the deceased and of the executor. See No. 52, p. 716.

James Robertson, merchant in Glasgow, named his uncle, Robert Robertson, merchant there, his executor; and, of the same date, specially disposed to him his whole subjects, for the behoof of his children.

It appearing, on James's death, that he was broke, Robert being in the same circumstances, gave up the whole effects to the creditors, who chose John Neilson, merchant, and Robert Murdoch, writer in Glasgow, their trustees, and he having died, the said trustees confirmed his effects, and also those of James, notwithstanding his disposition to his uncle was special, the same being in trust for his children.

On the same day of the surrendry made by Robert, Agnes Colquhoun and John Rae of Little Govan, creditors of both the Robertsons, arrested in the hands of their partners in trade; whereupon it came to be a question, How far arrestments laid on for debts as Roberts, and of effects as belonging to him, could affect James's interest in the copartnery.

The Lord Ordinary, 18th December 1744, "having considered the disposition by James to Robert, and accepted of by Robert, whereby, for the reasons therein mentioned, he specially conveyed to Robert, every subject belonging to him, and particularly his share of stock with the said Robert, in company with George Bogle and John Jamieson, partners in the West-India and Virginia trade; and that for the behoof of the said James's creditors, and of his children, as to the residue: Found, That Robert and James Robertsons, being jointly and severally bound in the debts pursued for, the arrestments proceeding thereon, in the hands of Bogle and Jamieson, the other partners, albeit after the death of James, did no less affect the interest of James than that of Robert in the copartnery; and therefore preferred the arresters."

The Lords refused two reclaiming bills successively, and adhered.

Petitioner, H. HOME.—Clerk, JUSTICE.

D. Falconer, v. 1, p. 49.

No. 58. [729] SIMON HOLIDAY v. HUGH M'KAILE, Writer in Edinburgh, and one of the Principal Keepers of the Parliament-House. February 23, 1773.

The rents of booths, or shops, in the outer parliament-house, part of the dues of one of the principal keepers of the parliament-house, found to be arrestable.

Holiday, creditor to M'Kaile in the sum of £300 Sterling, by bill accepted along with his son, laid arrestments in the hands of the possessors of some booths, or shops, in the outer parliament-house, and insisted in a furthcoming.

Pleaded by M'Kaile, Salaries of offices and fees of servants are not affectable by arrestment, except in so far as they exceed the bounds of a reasonable aliment, to be estimated by the nature of the office in the one case, and the condition of the service in the other.

The right the defender has to these rents arises from his office of one of the keepers of the parliament-house, the emoluments of which are inconsiderable; the fixed salary, by the stated particulars thereof, amounting to little more than £20 Sterling yearly to each of the joint keepers, which is made up in part by rents of the booths, or shops, in the outer parliament-house, the half whereof comes to £9 Sterling: Besides which fixed income, there are several small fees annexed to the office.

It will not be said that twenty pounds Sterling yearly exceeds the bounds of a reasonable aliment for a man who bears a considerable office about the Court. It is clear, therefore, that the emoluments of this office, without distinction, whether they arise from the rents of shops, or from any of the other articles stated, are strictly alimentary, leaving no surplus, such as can be attached by the diligence of creditors.

Farther, it cannot be denied that this aliment is lawfully constituted. The defender was admitted to his office by the Court, upon a leet presented by the Magistrates of Edinburgh; and his admission is inserted in the books of sederunt. In every particular, therefore, do the rents in question fall under the description given by lawyers of an alimentary fund that may not be arrested.

In the beginning of this century, a question occurred, whether the fees of a commissioner in Parliament could be arrested? It was argued for the creditors, that, although pensions granted by the King, the salaries of his Ministers of State, and servants, could not be arrested, yet that was only in consequence of the act of sederunt, June 11, 1613; and that the fees of Commissioners in Parliament are not mentioned in the act; nevertheless, the Lords found the arrestments unwarrantable, and ordained them to be loosed, without caution or consignment; Forbes,* March 18, 1707, Molison supplicant. In the present instance, if the pursuer is at liberty to arrest the rents of the shops, which are one half of the salary, he must be at equal liberty to arrest the whole from year to year. If he be allowed to arrest one half of the salary, the defender will not be in a condition to attend the service of the Court in a suitable manner; if he arrests the whole, he cannot attend it all.

[730] Answered, The general rule in law is, that every man's effects, of whatever kind, are subject to pay his debts. The only exemption of funds not specially declared, and bearing, *in gremio* of the right, to be alimentary, is that mentioned in the act of sederunt 1613, recited by Spotiswood, *voce* Pension, and what is contained in the act of sederunt, February 27, 1662, reciting one in 1626.

In the present case, there is no declaration whatever that the perquisites of this office, which does not yield less, *communibus annis*, than £50 Sterling, shall be held alimentary; far less, that the shop-rents, amounting to but £9 out of £50, shall be deemed such. And, in their own nature, it is impossible they can be viewed as alimentary, from this simple consideration, that they are not paid per advance. The state of this process demonstrates, that they are not absolutely necessary for the defender's support; and, as the other perquisites are more than sufficient to maintain him, compared with what ought to be held alimentary in a question with a creditor, there is not the smallest ground for finding, that the rents in question are not attached by the pursuer's arrestments.

It may be proper that the Court should have an officer of this kind; but it is of much more consequence to show, that no office whatever can be a shelter to injustice.

* Page 155, *voce* PERSONAL and TRANSMISSIBLE.

If Mr. M'Kaile should not be in capacity to attend, the office will still subsist, though the Court may have another incumbent. His being an officer of Court, therefore, can make no alteration in the present question.

It was indeed found, that the fees paid by a borough to a commissioner in Parliament were not arrestable; but that proceeded chiefly on this consideration, that the commissioner was entitled to the privileges of Parliament; and the fees being paid only during his attendance in Parliament, he was to be held as attending in consideration of them; and, therefore, could not be deprived of them.

In fine, the pursuer knows of no privilege indulged in this respect to any officer whatever. The Court have solemnly decided in the case of an officer in the army, that the arrears, which are in effect part of the pay, are arrestable, January 26, 1715, Brodie *contra* Campbell, No. 45, p. 709; and in the case of Hale, minister of Linton, *contra* his Creditors, February 12, 1736, found a minister's stipend arrestable, No. 47, p. 711.

The Lords repelled the objections to the arrestments.

Act. ALEX. MURRAY.—Alt. GEO. FERGUSON.—Clerk, TAIT.

Wallace, No. 61, p. 150.

No. 59. HUMPHRY-BLAND GARDINER *v.* GEORGE SPALDING. November 30, 1779.

Arrestment, not a habile mode of affecting the reversion of an estate sold judicially.

Mr. Gardiner was a personal creditor of Spalding of Ashintilly, whose estate was sold by judicial sale; and it being, after payment of the heritable debts, sufficient to yield a reversion, Mr. Gardiner used arrestment in the hands of the purchaser. To this arrestment it was objected, That the only competent mode of affecting the reversion of the price was by adjudication; and

The Lords found, "That an arrestment is not a habile way of attaching or affecting the reversion of a bankrupt estate, sold under the authority of this Court, in the hands of the purchasers thereof."

Lord Ordinary; WESTHALL.—Act. G. FERGUSSON.—Alt. NAIRN.

Stewart.

Fol. Dic. v. 3, p. 40. *Fac. Col.* No. 92, p. 177.

No. 66. [736] HUNTER *v.* LEES. January 19, 1733.

A person let a part of his cellar. He had tobacco in his own distinct part of it. The tenant sometimes kept the key: Found, that an arrestment of the tobacco in the hands of the tenant, while he had the key, was inept.

A merchant, proprietor of a cellar in which he had hogsheads of tobacco, let out the half of the cellar to a neighbouring merchant; and they had a common key, which sometimes the one and sometimes the other kept, as their purposes required. At a time when the key happened to be in the tenant's possession, an arrestment was laid in his hands by a creditor of the proprietor of the cellar, who had his own tobacco in that half of the cellar which was not set. In a competition betwixt the arrester and a voluntary assignee, whose right was posterior to the arrestment, the Lords found the arrestment an inept diligence, because the arrestee was not custodiary of the tobacco, or in any proper sense a possessor, so as to be liable to any action for delivery or making forthcoming.

Fol. Dic. v. 1, p. 56.

No. 74. [742] JOHN CAMPBELL *v.* JOSEPH FAIKNEY. December 12, 1752.

Arrestment used in the hands of the trustees of the debtor to the common debtor, upon which decree of furthcoming was taken against the constituent, found not good.

Joseph Austin of Kilspindy granted a promissory note, dated at London, for £50, payable to David Graham, merchant in London. Austin, having put his estate into the hands of trustees, went abroad. John Campbell, cashier of the Royal Bank of Scotland, raised a process against David Graham for payment of certain debts; and upon the dependance arrested, not in the hands of Austin, the debtor of Graham, but in those of Austin's trustees. Thereafter Campbell having obtained a decret of constitution against Graham his debtor, raised a furthcoming against Austin's trustees, and also against Austin himself, who, by this time, had returned to Scotland; but he took the decret of furthcoming against Austin only, not against the trustees.

The promissory note in question had been indorsed by a blank indorsation to Andrew Pringle, merehant in London; but whether before or after the arrestment, did not appear. Andrew Pringle sold the note, as it stood, without indorsing his own name upon it, to Joseph Faikney, merchant in London: this was after the date of the arrestment. In a multiplepinding, at the instance of Austin, Faikney, the indorsee, objected to Campbell's arrestment, that it was null and void, because used not in the hands of Austin, the debtor to Graham, but in the hands of Austin's trustees; for that such an arrestment was no better than if used [743] in the hands of Austin's factor: the trustees might be debtors to Austin, but were not so to Graham.

2do, The decret of furthcoming was informal, in so far as it was obtained, not against the trustees in whose hands the arrestment was laid, but against Austin, in whose hands no arrestment was laid.

Answered for the arrester, That the trustees and Austin were *eadem persona*; and the trustees being debtors to Austin, must be considered as debtors to Graham: This will also account for the taking the decret against Austin himself, who acknowledged his having granted the note.

There were also other points argued; particularly this, viz. Whether the promissory note in question, because granted in England, where promissory notes have the like privileges as bills of exchange, should therefore be considered as if it had been a bill? Many of the judges gave their opinion in the affirmative; but it being moved by one of the judges, to put the question only upon the objection to the arrestment,

The Lords sustained the objection to John Campbell's arrestment, and therefore preferred Joseph Faikney the indorsee.

For the arrester, JA. FERGUSON.—For the indorsee, H. HOME.—Clerk, GIBSON.

Wal. Stewart.

Fac. Col. No. 44, p. 64.

No. 77. [745] ANDREW STALKER, Merchant in Glasgow *v.* ANDREW AITON, Merchant there. February 9, 1759.

Arrestment in the hands of a person to whom goods are consigned being used before the goods come to his possession, not competent. Goods put into the hands of a trustee, to be sold and applied for behoof of creditors, being sold; arrestment in the trustee's hands, cannot prevent him from making the intended division of the price.

In February 1754, John Trotter having carried to Jamaica a cargo of goods, insured them in Stalker's office. The price of insurance amounted to £57, 12s. Sterling, for which he granted bills on London. The bills were protested for not acceptance.

In July thereafter, Trotter sent a cargo of sugars from Jamaica to Leith, consigned to Aiton at Glasgow, and to Mitchell at Leith. He inclosed the invoices and

bills of lading in a letter to Aiton ; and desired him, " when he received the proceeds of the cargo, to discharge certain bills and accounts due by him in Scotland, as far as the proceeds would go." And to the letter he subjoined a list of the creditors to whom these bills and accounts were due, in which Mr. Stalker is set down as one. Mr. Aiton was likewise desired to insure the cargo ; which he did in his own name.

Before the arrival of the sugars, Mr. Stalker, in October 1754, arrested them in the hands of Aiton, as the effects of Trotter, his debtor.

After the arrival of the sugars at Leith, Mr. Aiton, in February 1755, made out an account of the proceeds of the cargo, and allotted to each of the creditors a certain share thereof, corresponding to their debts ; by which the whole was exhausted, and there remained due to the creditors considerable sums.

All the creditors agreed to accept of this dividend except Stalker ; and Aiton granted an obligation to the other creditors to pay them their shares of it.

[746] Before Aiton had paid the other creditors, Stalker executed another arrestment in his hands ; and on both arrestments raised a process of furthcoming.

Pleaded for Aiton, the arrestee, That the first arrestment was inept and ineffectual, as it was laid on in his hands before he was in possession of any of the common debtor's effects.

That the second arrestment was likewise ineffectual, as it was not executed till after Mr. Aiton became bound to pay the dividends agreed upon to the other creditors out of the proceeds of the cargo. They had thereby acquired such a right to the proceeds of this cargo, that it could not be affected by Stalker's after arrestment.

Pleaded for Stalker, the arrester, That, at the date of the first arrestment, the arrestee, Mr. Aiton, was in the legal and civil possession of the cargo. It was consigned to him ; he had insured it in his own name ; he could have sold it before it arrived, and vested the property of the goods, or of the sum insured, in the purchaser, although he had not then obtained the natural possession of them : these effects therefore being in his possession, were subjected to diligence by arrestment in his hands, and were properly arrested. Thus it was decided, 19th November 1742, in the case *Rae contra Nielson*, No. 52, p. 716, that an arrestment laid on in the hands of one copartner, by the creditor of another copartner, was effectual to attach the copartnery goods, although the arrestee was not in the natural possession of them. And in the case, 13th February 1740, *Sir Harry Innes contra the Creditors of Ludovick Gordon*, No. 51, p. 715, the Lords preferred an arrestment laid on in the hands of an indorsee to a bill in trust for the common debtor, to a posterior one laid on in the same hands after the bill was paid, and the money thereby in the indorsee's possession.

2dly, That the arrestee's becoming bound to pay the dividends to the creditors, did not transfer the property of the subjects ; they continued *in bonis* of the common debtor Trotter, subject to be attached by legal diligence. By the commission and consignment, Aiton was desired to pay the proceeds of the cargo to the creditors, only so soon as they were put into his hands. He was not desired, by anticipation, to interpose his own obligation ; by so doing he acted beyond his commission ; and such actings cannot have any effect ; they cannot obstruct or defeat the operation of the second arrestment laid on in the arrestee's hands, while he was in the natural possession of the common debtor's effects, the price of the cargo.

Answered, That the first decision did not apply to the present case. Every copartner is considered as proprietor, and in possession of the whole company-goods, wherever they are situated ; arrestment therefore is properly executed against any of the partners, and will affect the goods of the copartnery ; but goods consigned to a trustee or factor, as in the present case, are not considered to be in his hands until he is in the natural possession of them, and till then they are not arrestable in his hands.

[747] Neither does the second decision apply to the present case. For though bills or goods consigned for the behoof of the common debtor may be subjected to the arrestment of his creditors, yet, when they are consigned for payment of certain creditors, the property is so much transferred to those creditors, that the goods are not liable to diligence by arrestment at the instance of other creditors. This was so determined in a case, December 1726, *Jamieson contra Leckie*, No. 46, p. 711.

" The Lord Kames Ordinary found, That, in October 1754, the date of the pursuer's first arrestment, Andrew Aiton had no such possession of the goods as to make the arrestment in his hands a habile diligence for affecting the same : And with respect to the second arrestment, laid on in Mr. Aiton's hands after he became bound to the

creditors to divide the proceeds of the cargo amongst them, found, That Mr. Aiton was not interpellated, by the said arrestment, from making payment to the creditors in pursuance of his obligation. And the Lords, on advising a reclaiming petition and answers, adhered to the interlocutor of the Lord Ordinary.

Fol. Dic. v. 3, p. 41. Fac. Col. No. 166, p. 295.

No. 84. [759] JOHN GRIERSON *v.* JOHN RAMSAY. February 25, 1780.

Arrestment, the habile diligence for affecting the price of heritable subjects in the hands of a trustee for creditors.

John Dickson, for behoof of his creditors, conveyed his heritable estate to a trustee ; and in a deed of accession to this conveyance all his creditors concurred. But the trust-right did not specify the debts, nor was the trustee infett.

One of these creditors was Ebenezer Hepburn ; to whom, again, Grierson was a creditor.

After the trust conveyance, but before the trustee had proceeded to sell those subjects, Grierson laid an arrestment in his hands ; and, when the sale was over, insisted in a process of furthcoming. In this action he was opposed by Ramsay, in the character of trustee for the creditors of Hepburn, who had likewise become bankrupt ; Ramsay objecting that the arrestment was inept, first, because it had not been used in the hands of the common debtor himself, but only of his trustee ; and, 2dly, because no moveable effects remained at the time in the trustee's possession ; and though he was vested in the heritable subjects, yet that these could not be attached by that personal diligence.

The Court had no difficulty in repelling the first objection ; but, with respect to the second, they ordered a hearing in presence on this point, " How far an arrestment in the hands of a trustee, to whom an heritable estate is disposed for payment of creditors, is a habile mode of diligence to affect the proportion of the price of said estate corresponding to the debts due to any of the creditors, though the estate was not sold at the time of the arrestment."

Pleaded for Ramsay against the arresting creditor, No heritable subject is arrestable. Prior to the statute 1661, cap. 32, which declared bonds bearing annualrent moveable, except *quoad fiscum et relictam*, such bonds could not be arrested ; Durie, July 29, 1634, *Laird of Lugton contra Creditors of Dishington*.* And afterwards a particular enactment by the same statute, cap. 51, was necessary to render personal obligations in heritable bonds, even those on which infettment had not followed, subject to arrestment. Now, in the present case, there exists in the trustee a complete heritable right, though personally vested ; and if a special statute was requisite in the above-mentioned instances, it would certainly be much more necessary to render an heritable right like this a subject of arrestment ; for otherwise every personal right to lands would be arrestable, whereas adjudication is undoubtedly the only mode of attaching such subjects.

Answered, The thing arrested is the interest of Hepburn, a creditor under this trust-right ; and all the argument on the other side of the question proceeds on the erroneous supposition of that interest being a share *pro indiviso* in the heritable subjects conveyed. On the contrary, the whole interest of the creditors by the trust-deed resolves into a claim of accounting against the trustee. The case is similar to that of the creditors of a particular partner in a company, who may attach by arrestment their debtor's share in the company-stock, although it be composed of heritable subjects.

Observed on the Bench, Were the idea of a *pro indiviso* interest accruing to creditors in the whole estates conveyed to trustees to prevail, it would render the execution of trust-rights inextricable. The effect of the trust-deed now in question was not to give such an interest, but merely to found against the trustee a personal

* No. 35, p. 699.

action arising to the creditors from their *jus crediti* in the estate of their debtor, in order to make him account to them for his intromissions. This *jus crediti* could not be affected by adjudication ; and therefore is the subject of arrestment ; for by one or other of these diligences, a creditor is entitled to attach every estate belonging to his debtor. Accordingly, where the estate of a company is vested in a trustee, arrestment will carry to a creditor a share in that estate, whether heritable or moveable, indiscriminately.

The Lords repelled the objections to John Grierson's arrestment, and sustained the same as sufficient to affect the dividend of the proceeds of the heritable subjects which belonged to Dickson ; and which proceeds are now in the hands of [761] Robert Maxwell, the trustee, effeiring to the debt due by Dickson to Ebenezer Hepburn."

Lord Ordinary, GARDENSTON.—For Ramsay, CROSBIE, CORBET.—For Grierson, ILAY CAMPBELL, ALEX. FERGUSSON.

Stewart.

Fol. Dic. v. 3, p. 41. Fac. Col. No. 108, p. 203.

No. 85. ROBERT DAVIDSON v. DANIEL MURRAY. December 11, 1784.

Not competent to attach by arrestment, household furniture in the occupation of a third party.

Duncan Macfarlane sublet a house, of which he was the tenant, to Peter Wilkie, for a definite period ; and, alongst with the house, he let the greatest part of the furniture, which was his own property. On Macfarlane's removal, accordingly, Wilkie entered into the sole and exclusive possession of the house and of the furniture.

Davidson, a creditor of Macfarlane's, arrested the furniture as in Wilkie's possession ; and a sequestration of Macfarlane's effects was likewise awarded ; but this happened more than thirty days posterior to the arrestment. A competition, however, ensued between Davidson and Murray, factor under the sequestration, which depended on this point, Whether or not the above arrestment was a habile and effectual diligence.

The Lord Ordinary found, That arrestment in this case was an improper and inept diligence ; and therefore preferred the factor.

In a reclaiming petition it was pleaded, All moveable effects of a debtor must be subject to the diligence either of arrestment or of poinding. The operation of the last is an immediate and complete transference of property ; and, by consequence, the proprietor's right of possession is here presupposed. The forms, too, by which this diligence is executed, indicate the same idea ; there being essential to these, the assuming of possession, and the carrying of the goods to the market-cross. For to deprive, either during a longer or a shorter period, of a possession which he holds by legal right, any one man for the debt of another, whether the proprietor or not, would be a violation of justice. As this arrestee, then, had such a title to the exclusive possession of the subjects in question, it follows, that here poinding could not take place.—Arrestment, on the other hand, is undoubtedly the proper diligence to attach moveable effects, whether fungibles, as money, or *ipsa corpora*, while in the possession of third parties. It has indeed been questioned, whether they could be arrested in the hands of a mere depositary, since he might not be deemed to hold the proper possession ; but, even in that case, this diligence was found competent ; 10th December 1760, Creditors of Appin, No. 79, p. 749. An incongruity has been figured to arise in the arrestment of household-furniture, from the embarrassment to which the temporary occupier of a room in another person's house might be thus exposed ; and it has been likewise said, that, [762] on the same principle, a traveller might be made the arrestee of his post-chaise. But it was not perceived, that, in those instances, the possession, not transferred to the temporary occupier, would still be held by him in the right of the owner.

The Court were of opinion, That poinding was the only proper diligence in this case, though it could not have its full effect before the right of possession expired ;

but that the temporary infringement of that right, being essential to the form of execution, was to be submitted to.

The Lords therefore refused the petition without answers.

Lord Ordinary, GARDENSTON.—For Petitioner, W. STEWART.—Alt. A. BURNET.

Stewart.

Fol. Dic. v. 3, p. 42. Fac. Col. No. 182, p. 286.

No. 92. [767] JOHN CORSE, Writer v. GEORGE MASTERTON, Portioner of Bothkenner.
January 31, 1705.

An arrestment was laid upon a wife's annuity, payable out of land, for a debt due by the husband, who had right to the annuity *jure mariti*. The arrestment found to affect even the current term's rent, although, it being uncertain whether the wife would live till the term, *dies nec cessit nec venit*.

The deceased George Masterton infefts Margaret Dalrymple, his spouse, in the liferent of some houses. After his death she marries one Muirhead; and he being debtor to Corse in a sum of money, Corse arrests the rents in the tenants' hands, as falling under his debtor's *jus mariti*. George Masterton, the first debtor's heir, and the fiar of the lands, compares, and alleges, Corse's arrestment is null, because the subject arrested was no debt, and had no being at the date of the arrestment, because the existence of the debt depended on the two joint lives of the husband and the wife; and if any of the two had died before the term, there was nothing due, and so the arrestment fell to the ground; and what makes it due, is the liferentrix outliving the term, and till then no arrestment could affect it; for, before that, it was a *non ens*, and the arrestment had no foundation [768] till they had outlived the term.—Answered, This is a notion never before advanced; for though the arrestment would eventually be ineffectual if either the wife or husband had died before the term, yet being laid on *currente termino*, and they outliving it, it is certainly a valid diligence; and has been so decided in a competition betwixt an arrester and an assignee; 27th July 1673, Creditors of Scot competing, No. 39, p. 702; and Stair, lib. 3, tit. 1, § 29, allows arrestments of debts before the term of payment; and arrestments on conditional debts are valid, as Dirleton observes, *voce Jus mariti*, and cites *l. 18, D. de reg. jur.*, and the case is clear *in annuis legatis*, § 3, *Institut. de verb. obligat. l. 16, § 1, D. eod. tit.*—Replied, There is a great difference betwixt this case and arrestments on debts whereof the term of payment is not come; for there *dies cessit licet non venit*; but here it cannot be so much as said that *dies cessit*; for *non subest debitum omnino* till the term come; and they might as well arrest for all subsequent terms that the liferentrix shall happen to live, as for that current one. The Lords thought the casting of such arrestments might lay a foundation to defraud the creditors of liferenters; for, if their rents could not be arrested till the term were past, then by compounding and giving down a little they might uplift it summarily, and so prevent all diligence of creditors; and therefore the Lords sustained Corse's arrestment as valid to affect that current term, and repelled the allegation of nullity against it.

Fol. Dic. v. 1, p. 57. Fount. v. 2, p. 263.

No. 94. [769] ADAM LIVINGSTON, and Others v. GEORGE FARQUHAR KINLOCH.
March 10, 1795.

When the rent of the current year is payable at Whitsunday and Martinmas, an arrestment before Whitsunday will only attach the rent payable at that term.

The rents of the estate of Craigforth (the tenants of which, in general, enter into possession at Martinmas, and pay their rents at Whitsunday and Martinmas, by

equal portions) having been arrested by different creditors of the landlord, the tenants raised a process of multiplepoinding, in which the rents payable at Martinmas 1792 were claimed by Colonel Livingston, and others, upon an arrestment executed on the 12th of November 1791; and, by Mr. Farquhar Kinloch, upon an arrestment executed on the 18th June 1792.

The Lord Ordinary, "in respect it is admitted that the rents of the estate of Craigforth are payable at two terms in the year, Whitsunday and Martinmas, in equal portions, found, that the arrestments laid on in the hands of the tenants, on the 12th November 1791, attached only the current rent that became payable at Whitsunday 1792, and that the arrestments on the 18th June 1792, attached the rents that became payable at the term of Martinmas following."

In a petition for Colonel Livingston against this interlocutor, it was stated, That not only arrears due by a tenant, but current rents may be attached by arrestment. That by current rents, are meant those *quorum dies cessit, sed nondum venit*. Ersk. b. 3, t. 6, § 9; and that although rents may be made exigible by termly payments, the obligation to pay a year's rent is an *unum quid*, which cannot be divided, and is wholly incurred by possession for the smallest part of the year; and that, consequently, the rents claimed were current on the 12th November 1791; on which account, accordingly, the landlord might then have sequestered the stock of the tenant for payment of them.

[770] The Lords, unanimously, refused the petition without answers.

Lord Ordinary, ANKERVILLE.—For the Petitioner, D. CATHCART.—Clerk, MENZIES.

Douglas.

Fol. Dic. v. 3, p. 44. *Fac. Col.* No. 167, p. 394.

No. 101. [775] Earl of ABERDEEN v. The other Creditors of SCOT of Blair.
December 22, 1738.

Arrestment found not to fall by the death of the person in whose hands it is laid.

The Earl being creditor to Scot of Blair, used arrestment in the hands of William Blair his son, and thereupon brought a furthcoming against him, in which some procedure was had; thereafter, William died, who being succeeded by Hamilton Blair his brother, the Earl insisted in a transference against him; in which compearance was made for the creditors of Mr. Scot, who produced an arrestment used for them, in the hands of Hamilton Blair, after he succeeded to his brother; and objected, That the Earl's arrestment perished by the death of William; so that no decret of furthcoming could now follow thereon.

Answered for the Earl: There is no other legal method known by which a moveable debt can be taken in execution of a decret, or applied in payment of a creditor, but by an arrestment and process of furthcoming founded thereon; and, if an arrestment did import no more but a personal prohibition upon the debtor, it is not easily conceived how the personal prohibition, while it is not contemned, should establish a right in the arrester. It is certain, an inhibition, which is but a personal prohibition, gives no action to the inhibitor, while it is not counteracted; consequently, an arrestment is not a simple prohibition upon the party, in whose hands it is used, to pay; but it must further give some right to the arrester, which is the foundation of a furthcoming. With respect to the particular effects whereof, it was observed, That, as an arrestment of a debt (which is the subject of the present question), gives the arrester an action for payment; so it is equally certain, that a creditor cannot attain that end, without the intervention thereof: Hence it would seem to follow, That the arrestment is not a simple prohibition, which may be the foundation of a reduction, if it is contemned, but that it gives a right, since there is no instance in law where a petitory action is competent, but where there is a right upon which it is founded. 2do, It is equally established, an arrestment gives a preferable right upon the debt arrested by its priority, which is inconsistent with the supposition that it is only a personal

prohibition, and establishes no right in the arrester : A personal prohibition, while it is submitted to, can be no stronger than another personal prohibition made by the same authority at any after period ; e.g. An inhibition used to-day, and one used ten years hence, if the debtor in the meantime neither sells his lands nor incumbers them, will have the same effect against an alienation made after both. This demonstrates that an arrestment, which, from the moment it is laid on, gives an action, and a preference, is not a simple personal prohibition, but establishes a right in the arrester. But, 3tio, What puts the point beyond doubt, is, That, suppose a debt be assigned, and the assignation not intimated, a creditor of the cedent's arresting, will be preferred to the assignee, afterwards intimating his assignation. Now, if the arrestment was but a prohibition, What colour could be assigned for this preference ? 4to, It is upon the same principles, That, if the debtor, for payment of whose debt the arrestment was used, happen to die, and another creditor of his should confirm the debt as [776] executor-creditor, whereby, if the arrestment were not in the case, he would denude the *hereditas jacens*, and establish the right in his person as effectually as if the debt had been assigned, and intimated in the defunct's lifetime ; yet the arrester is preferable, which it is impossible can be supported, if an arrestment were but a personal prohibition ; for the confirmation is no contempt, 'tis no deed, neither of the principal debtor, nor of him in whose hands the arrestment was laid ; 'tis but a step of diligence allowed by the law to the co-creditor ; but, when an arrestment is considered as giving right and a preference, it follows, that the after-diligence of the executor-creditor cannot exclude it. And, if this is the case, That an arrestment creates a right in the arrester, 'tis not easy to be conceived upon what principles this right, and the action thence arising, should become void by the death of the defender. 'Tis an established rule, That penal actions do not transmit, unless after litiscontestatio ; but 'tis equally established, That an action *rei persecutoria*, is as competent against the heir as against his predecessor, and an action of furthcoming is in no sense penal.

Replied for the creditors of Mr. Scot, The doctrine, that an arrestment falls by the death of the person in whose hands it is used, is a point clearly established by all our lawyers ; particularly Lord Stair, lib. 3, tit. 1, lays it down as a principle, " That arrestment being a personal prohibition, used against him in whose hands the arrestment was made, if he die, it is not extended to his successors ; but they may dispose of the goods or sums arrested, unless it be renewed in their hands in the same manner as an inhibition, which is also a legal prohibition extending to heritable rights, as arrestment doth to moveables ; but, though the debtor, whose goods or sums were arrested, die, the arrestment ceaseth not, &c." Where the learned author justly distinguishes betwixt the death of the common debtor, and the death of the person in whose hands the arrestment was used, the arrestment does not perish by the death of the one, because it is not directed against him, but against the other, who is inhibited to pay what is in his hands, until the arrester be satisfied ; and so far it agrees with an inhibition, that it is a personal prohibition, but it differs in this, that the effect thereof does not cease by the death of the common debtor ; a distinction which seems to have been established the 20th of Jan. 1681, Riddell, No. 113, p. 783. Both of them are only personal diligences, but neither gives properly a right to the subjects belonging to the common debtors. Heritages are only carried by adjudication, and inhibition is calculated solely for preventing alienation : in the same manner, arrestment is allowed to prevent the common debtor from running off with his effects, before they can be decreed to belong to his creditors ; so that the furthcoming is nothing else but an adjudication *in mobilibus*, and the arrestment, the interim remedy, answering the end in moveables, that an inhibition does in heritage ; nor is there any reason for giving it a stronger effect than what is allowed to the other. This doctrine is likewise laid down by several other lawyers, and not a little confirmed from this consideration, That it does not appear ever the point was so much as debated. As to the argument urged for the Earl, That an arrestment must be something [777] else than a personal prohibition ; it was answered, A second arrester is preferable to the first, if he obtain the first decret of furthcoming, which is incompatible with the Earl's plea ; and, if an arrestment give any right, such as a decret of adjudication or furthcoming, there is no reason why it should prescribe sooner than forty years : neither is it inconsistent with the notion of an arrestment's being only a personal prohibition, that they are preferred according to their dates ; for, suppose one is laid on to-day, and another

half a year after, and both arresters are insisting for a decret of furthcoming, is it not agreeable that, in *pari casu*, he who used the first diligence should be preferred ? And there is this good ground for preferring the first arrester, That it was his diligence which preserved the subject *in medio*, otherwise the common debtor might have got payment from his debtor during the half year that intervened betwixt the date of the first and second arrestment : it is likewise consistent with this doctrine, that arrestments are preferred conform to their dates in a competition with assignees, according to the dates of the intimations of their assignation ; for an assignation to a personal debt being only a personal right, the cedent's debtor is not obliged to know of any private assignation the cedent has made, until it be intimated to him ; and therefore, until then, he may *bona fide* pay the old creditor, who, till the intimation, is considered as the proper creditor. An arrestment has the same effect, namely, to put the common debtor's debtor in *mala fide* to pay him ; but then, that an arrester is preferred to a prior assignee, who only intimates his assignation after the arrestment, seems to have been wisely introduced by our law, to prevent the hazard that there was of antedating such latent deeds. And, lastly, As to the observation, That an arrestment is preferred to an executor-creditor confirming the debt, it was answered, The present question is only, whether it perishes by the death of him in whose hands it was laid on, seeing it is admitted the common debtor's death does not alter the case ? for, as he is only called for his interest, the calling his successor is sufficient ; and, as the inchoat diligence against the person, in whose hands the arrestment is used, may be thus carried on ; the arrester will be preferred to the other creditors of the common debtor, who shall confirm the subject ; because that is only a new step of diligence for affecting their debtor's means ; and, as his death does not alter the arrester's diligence, the executor-creditors can be in no better case after their debtor's decease, than they would have been in by using a second arrestment, in order to affect their debtor's means, in case he had been alive ; for the sums arrested are indeed in *bonis defuncti*, but affected by a prior arrestment that is not altered by the common debtor's death ; whereas, from its nature as a personal prohibition, it perishes with the person in whose hands the arrestment was used, he alone being personally inhibited thereby.

The Lords found, That the arrestment does not die with the person in whose hands it was used, but may be made effectual against his heir by a furthcoming, the subject being *in medio*.
C. Home, No. 110, p. 176.

No. 147. [802] MARGARET WHITE, Petitioner. July 22, 1741.

Suspension having been obtained of a decret-arbitral, after arrestments had been used thereupon, and the suspender applying for letters of loosing the arrestments, the Lords were of opinion, that wherever a decret is suspended, arrestments on it are looseable, though laid on before the suspension ; and therefore granted warrant for letters of loosing, but upon new caution.

Fol. Dic. v. 3, p. 44. Kilkerran (ARRESTMENT), No. 9, p. 40.

No. 149. [803] JOHN MACARTHUR v. DAVID BRUCE. July 22, 1760.

Arrestment of goods contained in lockfast trunks and packages, being loosed, upon caution, and the goods afterwards given up by the arrestee to the common debtor, without any inventory or appreciation, the cautioner, in the loosing, found liable to the arrester to the extent of the debt upon which the arrestment was used.

John Macarthur, as executor nominated by Ludovick Grant, brought a process, in his own name, and in that of Elisabeth Leslie, a creditor of the said Ludovick Grant, in a bond of £150, against Barbara and Grizel Grants, his sisters ; alleging,

That, upon their brother's death, they had clandestinely intromitted with and carried off sundry moveable effects belonging to him ; and therefore concluding against them, as vicious intromitters, to restore the said effects, or to make payment of £150 Sterling as the value of the goods.

In this process compareance was only made for Barbara ; and she having acknowledged her intromission with certain particulars of furniture, and other effects, of which a condescendence was given in to process, but the values of which were not ascertained, she was decerned, by decret of the Court of Session, to return the said goods to the pursuer.—It was further alleged, That about the time of her brother's death, she intromitted with £22 Sterling of cash, which was then lying by him. To this she made no answer, but withdrew her compareance ; upon which she was also decerned to make payment to the pursuer of the said £22. Mrs. Grizel, the other sister, was decerned in absence, as a vicious intromitter with her brother's effects, to restore the money, goods, gear, and effects, intromitted with by her ; or otherwise to make payment to the pursuer of £150 Sterling, with interest and penalty, in terms of the libel.

[804] During the dependence of that process, the pursuer having learned that the sisters had conveyed certain trunks and packages, containing effects belonging to their deceased brother, to the warehouse of Robert Grant, merchant in Leith, he immediately arrested the same in the hands of Robert Grant. Upon which, the two sisters having applied for a loosing of the arrestment, David Bruce, writer in Edinburgh, became cautioner in common form, " That the goods and effects arrested in the hands of Robert Grant, at the instance of John Macarthur, should be made furthcoming to the said John Macarthur, in case, at discussing the process raised at his instance against Mrs. Barbara and Gribel Grants, it should be found, that they ought to restore the goods, gear, and effects, or make payment of the sums of money therein libelled." And the arrestment being accordingly loosed, the chests, &c., were given up by Robert Grant to the two sisters, without looking into them, or having any knowledge of the contents.

Macarthur thereupon commenced a process against Bruce, the cautioner, subsuming on the above facts ; and concluding against him for restitution of the several goods which Barbara Grant had been ordained to restore, and the £22 Sterling in which she had been found liable ; and likewise to restore the money, goods, and effects, which had been intromitted with by Grizel ; or to make payment of the sum of £150 Sterling, with annualrents, &c., in terms of the decret against her.

The Lord Ordinary " found the cautioner David Bruce liable in payment of the sum of £150 Sterling to the pursuer." But the cause having been afterwards reported, Mr. Bruce insisted in the following defences :

1mo, The defender can be no further liable than to make the arrested goods furthcoming, or pay their values as they shall be ascertained by the pursuer. The effect of an arrestment of goods is only to attach them in the hands of the person in whose possession they happen to be, and thereby to subject him to the obligation of making these goods furthcoming, or so much thereof as shall be equal to the debt upon which the arrestment is used. The arrestee can never be made further liable, unless he has been guilty of unwarrantable breach of arrestment ; and when a person becomes cautioner in a loosing, the nature of such obligation is, that he becomes bound in the same manner, and to the same extent, that the arrestee would have been if the arrestment had not been loosed. The pursuer, therefore, in this action, concludes improperly. The defender has no concern with the extent of the sums decerned for against Barbara and Grizel Grants ; he is only obliged to make the goods furthcoming which were arrested in Robert Grant's hands, or to account for the values thereof, in the same way as Robert Grant himself would have been, had the arrestment not been loosed. The sole effect of the defender's becoming cautioner was, to substitute him in Robert Grant's place ; and it is incumbent upon the pursuer to ascertain what was the value or extent of the goods arrested. To that extent only the defender is liable, by the nature of the transaction, as well as the express words of the bond of cautionry above recited. Agreeable to this doctrine, the Lords have decided, that [805] the cautioner, in a loosing of arrestment, can be decerned to pay no more than what appears, from the oath of the arrestee, to have been then owing by him ; Durie, 21st June 1626, and 2d February 1627, Lord Balmerino *contra* Laird of Lochinvar, No. 126, p. 788.

It is true, that in this case the goods arrested were contained in lock-fast trunks; and Robert Grant, who has been examined upon oath, says, he is ignorant of the value of the goods. But this circumstance ought not in reason to make any difference: the defender knew nothing about the goods being contained in any locked repositories; he did not think it incumbent on him to take any inventory of these goods; and as he was certainly guilty of no unlawful act, in becoming cautioner in common form in the loosing of an arrestment, it would be very hard to subject him to the pursuer's whole debt, however considerable, and however far exceeding the value of the goods, merely from this reason, that they were given up without any inventory being made of them.—Suppose the pursuer had used an arrestment in the hands of a debtor to Barbara or Grizel Grant, whose debts could be no otherwise instructed but by the debtor's oath; that the defender had become cautioner in common form for loosing the arrestment; and that, in the meantime, the arrestee had died, so that the mean of proof for establishing his debt was lost: it could not in such case have been maintained, that it was the defender's duty, when he became cautioner in the loosing, to have inquired, and informed himself, what was the precise extent of the debt arrested, or that he would have been subjected in payment of the whole debt upon which the arrestment was used. Besides, in the present case, it cannot be said, that the proof of the value of the goods arrested has become impracticable; the value and extent of them may still be proved by the oaths of Barbara and Grizel Grants, to whom they were delivered up; and, while that mean of proof remains, it would be hard to subject the defender in payment of the whole debt said to be due to the pursuer.

2do, The defender cannot be made liable in £150 upon the decret, as obtained either against Mrs. Barbara Grant or against Mrs. Grizel. For, with regard to Mrs. Barbara, she is not found liable in £150, but only to restore certain particulars of furniture contained in an inventory or condescence, and to make payment of £22 Sterling of cash said to have been intromitted with by her; which last part of the interlocutor was in absence, and without proof. And, with regard to Grizel, though she is indeed found liable in £150 Sterling, as the value of the goods supposed to have been carried off by her; yet as the decret, *quoad* her, was entirely in absence, so it is still competent to her to reduce that decret, unless proper evidence be brought of her intromission, and if so it is equally competent to the defender to reduce that decret; or, even without the form of a reduction, to object to it in this process, as obtained against her without evidence.

Answered for the pursuer, There is no occasion to dispute the general principle assumed by the defender, that an arrestment can carry no more than what is in the arrestee's hands at the time of laying it on; and that, if there is no other mean of proof to ascertain the value or amount of the subject arrested, recourse [806] must be had to the arrestee's oath. But the present case is somewhat particular. It is a fact admitted on all hands, that the subjects arrested were trunks full of goods, the contents unknown; and as, by loosing the arrestment, whereby the sisters were allowed to possess themselves of the goods, it is now rendered impracticable to prove the extent or value of them, the law must presume, that they were in value equal to the sums for which the arrestment was used. The matter is not otherwise extricable. And if the defender's plea were to be listened to, all such arrestments might be evacuated, and rendered of no effect. The pursuer can have no decret against the arrestee, as the loosing the arrestment warranted him as effectually to deliver up the goods, as if no arrestment had ever been used; so that any difficulty which now occurs in ascertaining the value of the goods, arises from the defender's neglect, in allowing the sisters to possess themselves of these effects without inventory or appretiation. The pursuer cannot agree to hold the oaths of the sisters as a proper mean of proof, for ascertaining the quantum and value of these goods. This would be a most dangerous precedent, as they are plainly interested to conceal and depretiate the goods. The law will presume, that the defender knew the goods arrested to be at least of equal value with the sums for which the arrestment was used, otherwise he would not have allowed them to be given up, without using some precaution for ascertaining their value: he knew that the purpose of loosing the arrestment, was to put the sisters in possession of the goods; and if he did not previously know their value, it was his duty to have inventoried and appretiated them.

With regard to the other defence, founded on the objections to the decret against the two sisters; in the first place, It is clearly proved, by the depositions of a variety

of witnesses examined in that process, and by Mrs. Barbara's own confession, that she had a considerable intromission with her brother's effects; and she was accordingly ordained to restore them. Those goods which she acknowledged to have been in her possession, were, to appearance, of considerable value; but it has now become impossible to ascertain the precise worth of them, because they have been carried away and disposed of by the sisters, which they had access to do by the defender's loosing the arrestment: And therefore, as it has become impossible, either for Mrs. Barbara or the defender, to restore the identical goods, or values of them, he must be liable in the alternative which the pursuer concluded for in that process, of £150 Sterling, as the supposed value of the goods abstracted. 2dly, With regard to Grizel, though it is true, that the decret *quoad* her was in absence, yet this does not alter the case; for the two sisters, by joining in an application to have the arrestment loosed, did acknowledge their joint interest in the goods arrested; and the consequence of the loosing was, that they possessed themselves of and carried away these goods, without inspection or inventory; and as the defender, by interposing his cautionary security, without any notice or intimation to the pursuer, and without any precaution taken for ascertaining the particulars or values, suffered the goods themselves to be withdrawn, the presumption of law is, that these goods were acknowledged to be of superior value to [807] the sums libelled; and consequently, as the defender has rendered it impracticable to say, what was the value or extent of the goods themselves, he must be liable in their presumed value of £150. The defender cannot be in a better case than Grizel herself, were she insisting in a reduction of that decret; and as by taking the goods out of the arrestee's hands, and disposing of them, it has been rendered impracticable to prove the precise value of them, it would be impossible for her to prevail in such reduction; and therefore the defender, who gave her an opportunity of so doing, must be liable in terms of the decree that stands against her.

"The Lords adhered to the Lord Ordinary's interlocutor; but remitted to his Lordship to hear parties procurators upon any objections that might be to the decret against Grizel Grant."

N.B. The cause having come back to the Lord Ordinary, the above objection was again stated by the defender to the decret against Grizel Grant; to which the pursuer having made answer as above, the Lord Ordinary, upon the 21st February 1761, "repelled the objections, and allowed the decret formerly pronounced to be extracted."—And the Lords, upon advising a reclaiming petition and answers, upon the 8th July 1762, adhered.

Act. MACQUEEN & LOCKHART.—Alt. DA. GRÆME.—Clerk, KIRKPATRICK.

Fol. Dic. v. 3, p. 44. *Fac. Col.* No. 239, p. 435.

No. 160. [813] LORD PITMEDDEN *v.* PATERSONS. July 17, 1678.

Found in conformity with *Charters v. Neilson*, No. 157, p. 811.

Pitmedden having arrested in the hands of merchants in Aberdeen, the price of some bear sold to them by Cromarty, Masters William and Robert Patersons having arrested the same also; the merchants gave in a bill of suspension of double pointing, and both parties having compeared, the Lords appointed the cause to be discussed upon the bill, and did prefer Pitmedden, though the last arrester, to the Patersons, because they arrested before the term of payment of their bonds for which they arrested, and Pitmedden's term was past, albeit several decisions were adduced, sustaining arrestments laid on before the term, to take effect after the term; so that such executions were not null, otherwise inhibition would be also null on the same ground, in respect that the Lords did not find the first arrestment null, but that the same might be sustained where the [814] debtor was *lapsus* or *vergens ad inopiam*; otherwise such arrestments passing of course *periculo petentis*, are not warrantable to stop the debtor's

disposal of his moveables and sums before the term of payment; for inhibition reacheth not these; but the posterior arrestment was preferred by the Lords, as the more formal and legal diligence, as was lately done in the case of *Charles Charters v. Cornelius Neilson*, No. 157, p. 811; but the Lords ordained Pitmedden to assign his security to the Patersons. (See *LEGAL DILIGENCE*.)

Fol. Dic. v. 1, p. 60. *Stair*, v. 2, p. 636.

No. 177. [824] *JAMES LISTER v. JOHN RAMSAY*. July 25, 1787.

A prior arrester, who entered his claim before a decree of furthcoming was extracted, preferred to a posterior arrester, who brought the process, although the former, after arresting, had not proceeded in his diligence for three years.

James Lister, being creditor to Lilius Dewar, used arrestment in the hands of one of her debtors in 1785. He immediately after brought an action of furthcoming, which was conjoined with an action of multiplepoinding raised by the arrestee; and he obtained a decret of preference.

Before this decret was extracted, a claim was entered for John Ramsay, in virtue of an arrestment which had been used by him three years before. But the Lord Ordinary, "on account of the *mora* on the part of the claimant, of new decerned in the preference."

In support of this judgment, which was afterwards brought under review of the Court, James Lister

[825] Pleaded: Anciently the only effect of arrestment was to prevent voluntary payments to the debtor himself. In a competition of creditors, it was not the person whose arrestment was first executed, but he who first obtained a decret of furthcoming, to whom the preference was given: And hence it sometimes happened, that a prior arrester, who had brought his action in the Court of Session, was postponed to one, who, having commenced the same action in an inferior court, had, from the shortness of the *inducia* there allowed, been able more speedily to complete his diligence. In modern times, it is true, this strictness has been considerably relaxed; but still any unreasonable delay will be fatal to the preference otherwise given to priority in date. A second arrester, therefore, who, without loss of time, has brought his action, and who has obtained a decret, ought certainly to be preferred to one, who for years has neglected to follow out his diligence in a proper manner. *Spottiswood, Harcarse, voce Arrestment*; *Stair*, b. 4, tit. 35, § 6; *Bankton*, b. 3, tit. 1, § 43; *Erskine*, b. 3, tit. 6, § 18.

Answered: Since the enactment of 1669, limiting the duration of arrestments to five years, it does not appear that any other restraint ought to be imposed on the users of this mode of diligence. At any rate, the preference here awarded seems unsupported by any precedent. Whatever may have been the effect of arrestment in the most ancient periods of our law, it has now, for a long while, been considered, not only to prohibit payments to the debtor, but also to create a certain *lien* or *nexus* in favour of the arrester, which nothing but an extracted decret of preference obtained by another creditor can effectually disappoint. In the present case, as an action of multiplepoinding had been commenced, to which the first arrester was a party, an extracted decret in that process would also have been necessary, to put the arrestee in safety to pay to any other person.

"The Lords altered the interlocutor of the Lord Ordinary, and found the first arrester to be preferable."

Lord Ordinary, ALVA.—For John Ramsay, M'CORMICK.—For James Lister, PATISON.—Clerk, ORME.

Craigie.

Fol. Dic. v. 3, p. 46. *Fac. Col.* No. 343, p. 531.

No. 4. [8] WILLIAM LAIDLAW v. JOHN WYLDE. June 9, 1801.

The exemption of members of the College of Justice from inferior judicatories, must be pleaded in the inferior court. Professors' salaries are arrestable, *salvo beneficio competentie*.

William Laidlaw obtained decree before the Sheriff of Edinburgh against Mr. John Wylde, advocate, Professor of Civil Law in the University of Edinburgh, for payment of a bill accepted by Mr. Wylde, to which the pursuer had right by indorsation. No objection was there stated to the jurisdiction of the Sheriff. Upon this decree, the pursuer arrested Mr. Wylde's salary in the hands of the Magistrates of Edinburgh.

Mr. Laidlaw raised a forthcoming, and afterward (other creditors having appeared) a multiplepointing, in name of the Magistrates, both in the Court of Session.

The Lord Ordinary having preferred the pursuer in terms of his libel; in a petition for Mr. Wylde, who enjoyed a pension from the Crown, it was, *inter alia*,

Pleaded: 1mo, The decree of the Sheriff was null, as pronounced against a member of the College of Justice, who was not subject to his jurisdiction; Bankt. b. 4, tit. 7, § 11; Dict. *voce* COLLEGE OF JUSTICE.

2do, Professors' salaries being alimentary, and given to enable them to maintain a suitable station in life, are not arrestable.

Answered: 1st, The privilege of members of the College of Justice is not effectual, unless pleaded in the inferior court.

2do, If Mr. Wylde had been pursuer of a *cessio bonorum*, he would have been obliged to give up a reasonable proportion of his income to his creditors, and, having a pension from the Crown, he would not have been allowed likewise to retain his salary. The present case must be decided on the same principle. There is nothing in the nature of a Professor's salary which excludes arrestment, though, where he has no other income, he may plead *beneficium competentie*, 5th March 1768, Grierson, No. 102, p. 11784; 19th May 1791, Mackenzie, No. 90, p. 10413; 23d February 1773, Holiday v. Macphail, No. 58, p. 729; Spottiswood, *voce* PENSION, Act. Sed. 11th June 1613.

The Court being unanimously of opinion, that the respondent was right on both grounds, adhered to the Lord Ordinary's interlocutor, and (26th June) refused a petition without answers.

Lord Ordinary, HERMAND.—Act. MAXWELL MORISON.—Alt. FRASER TYTLER.—Clerk, MENZIES.

D. D.

Fac. Col. No. 135, p. 531.

No. 19. [831] MUIR v. CALDER. December 8, 1635.

The assignee can be in no better situation than the cedent would have been.

Umquhil Henry Hunter was addebted to Thomas Barber in 300 merks: This Henry having left behind him only one daughter, that lived not long after, his means fell to two sisters, Janet and Bessie Hunters. John Muir, who married Janet, paid the sum to Thomas Barber, and took assignation of it in the Laird of [832] Annistoun's name. John Muir of Annistoun, the assigney's son, sought to have this bond transferred against Richard Calder, grandchild to Bessie Hunter, the other sister, and who had served himself heir to the said Henry Hunter his grandmother's brother. Alleged, No transferring; because offers to prove, that the said bond was paid by John Muir, husband to Janet; which John was debtor of the said sum, in so far as he having married the said Henry's sister, and apparent heir portioner, did intromit

with his goods and heirship, and disposed certain of his lands and heritages, the price whereof, with the goods intronitted with by him, will be more than the bond libelled. Replied, That this ought to be repelled; because, any payment made by John Muir was not to the effect Henry his heir should be liberate, but rather to burden him; for he, seeing that he was such a party as might be burdened with the payment of the said bond, made payment of it, and took assignation in Annistoun's name, that he might lay it on upon the heir again, which was very lawful for him to do; so that it was not *solutio*, but rather *nomini emptio*: And as to his intromission, it was with his own goods belonging to him *jure mariti*; and although they came to him by his wife, yet he was not bound for that to undergo all her debts; and that although, perhaps, if he had been convened for it in his own time, he would have been found liable to it; yet, now he being dead, his interest ceasing (seeing he was only conveyable *pro interesse et non principaliter*), the allegiance must be repelled specially in consideration of the assigney, who being a singular successor, cannot be obliged to pay this, whatever might have been said against the cedent. Duplied, The assigney can be in no better case than the cedent; and if the cedent's own name had been in the assignation, no question but it had been unprofitable to him, even so must it be where he borrowed another's. And it is most reasonable, that, this bond being paid out of the debtor's own gear, his heir should not be burdened with it again; and that the pursuer's cedent having reaped the benefit, should be liable to the burdens, *quia quem sequuntur commoda eundem sequi debent et incommoda*. The Lords found the allegiance relevant.

Spottiswood (ASSIGNATION), p. 22.

No. 29. [839] CHANNELL v. SETON. February 16, 1693.

The registration of a bond by an assignee after the cedent's death is informal.

The debate between Anne Channell, relict of Mr. Alexander Seton minister at Lithgow, against Sir Walter Seton, was advised; and the Lords found the registration of the bond by an assignee after the cedent's death was informal, though the debtor was alive; because the registration was a decret of consent, which required *actor et reus*, and here the actor was dead, and so there could be no decret at his instance; and it was not sufficient, that it was not done by an assignee who had not intimate his assignation in the cedent's life; for though it be payable to the creditor, and his assignee, so it is likewise to his heirs and executors, and yet, they could not summarily registrate, so that the mandate died here, both *morte mandantis et mandatarii*; though it was argued, that the procurator was the *mandatarius* here and not the creditor. (The Lords had found the contrary between Reid and Mr. James Deas, advocate.* But there he had paid annual rents to the assignee.) But, not to cast the assignee too far back, they sustained this charge as a libel; and ordained the defender to answer thereto, but so as to get terms to prove, and not to be put to verify instantly as in a suspension: And for proving, that there could not be summar execution by registration, where either the granter or receiver was dead, the following decisions were cited out of Durie, p. 102, 27th January 1624, Inglis, *voce* PROCESS; and 30th of July 1625, Lady Stonyhill, Durie, p. 185, *voce* TUTOR and PUPIL; 16th March 1627, Bruce, Durie, p. 291, *voce* SUMMAR DILIGENCE; 1st December 1630, Chappeltown, Durie, p. 544, *voce* SUMMAR DILIGENCE; 19th March 1631, Crighton, Durie, p. 584, *voce* SUMMAR DILIGENCE; 15th January 1635, Shank, Durie, p. 742, *voce* SUMMAR DILIGENCE; 12th February 1635, Brown, Durie, p. 754, *voce* SUMMAR DILIGENCE.

Some proposed, that it would be a great ease to the lieges, and dispatch of justice, to make some regulation for the future, that execution may summarily pass at the assignee's instance, though the creditor be dead, especially now since the act of Parliament 1690, not requiring confirmation of special assignations.

Fol. Dic. v. 1, p. 62. Fountainhall, v. 1, p. 561.

* Fount. v. 1, p. 536, *voce* SUMMAR PROCESS.

No. 35. [842] Earl of ARGYLE v. Lord M'DONALD. December 14, 1676.

A disposition of the superiority to the vassal himself, implies an assignation, and needs no intimation.

The Earl of Argyle having purchased the superiority of Knodyeer from Lochnell, he pursues a reduction of M'Donald's right, who holds the same of Lochnell, and now of Argyle ; and M'Donald having alleged, that Argyle was obliged to relieve Lochnell of the disposition of that superiority, that he had formerly made to M'Donald ; the allegiance was found relevant ; and M'Donald's oath of calumny being craved thereupon, he failed to compare, and thereupon decreet of reduction was pronounced and extracted. M'Donald does now pursue reduction of that decreet, and offers to give his oath of calumny, and thereupon craves to be reponed to his defence, and so have a term assigned, and an incident for obtaining the writ out of Lochnell's hand. The pursuer answered, That he was willing to repon the defender to his oath of calumny, and to his defence, if instantly verified : Otherwise he adhered to his decreet, which being *in foro* upon certification, it was as strong as if a term had been assigned to prove, and M'Donald had succumbed, though there were but neglect : But here was contumacy, that being present in town, he did not depone, and hath not any excuse, the decreet being in the midst of the Session.

The Lords reponed M'Donald to his oath of calumny, but refused to give a new term to prove, or any diligence, the intimacy betwixt M'Donald and Lochnell being notour : But if M'Donald should depone that he was not master of the bond at present ;—The Lords superseded the extract till the first day of February, that if any such bond were produced betwixt and then, it might be received.

M'Donald further alleged, That his feu could not be reduced for not payment of the feu-duty, because he produces a right to the superiority from Lochnell, the common author ; which comprehending a disposition of all right, is equivalent to a discharge, or to an assignation to the feu-duties, which being granted to the debtor himself, needs no intimation ; so that albeit the pursuer being first infert, hath right to the superiority ; yet the defender's disposition of the superiority secures him as to the bygones before the pursuer's infertment. It was answered, That the right of superiority carrieth therewith, without any special right, all the casualties of superiority, though fallen before the right ; and therefore neither feu-duties, nor other casualties, fall to executors, but to the heir, unless they [843] be separate actually by a decreet, innovating their nature, and turning them into a liquid debt.

The Lords found, That albeit the superiority carries the right of all casualties, which are not separate before the disposition of the superiority ; yet the same may be separate, not only by a decreet, but by an assignation intimate ; and found the disposition of the superiority to the vassal himself to imply an assignation, which needed no intimation. (See IMPLIED ASSIGNATION.)

Fol. Dic. v. 1, p. 63. *Stair*, v. 2, p. 478.

No. 42. [845] M'LURG *contra* BLACKWOOD. February 24, 1680.

Assignation intimated, though not delivered, is effectual.

In a competition betwixt M'Lurg, assignee by Boyd of Pinkell, and Blackwood, his creditor arrester ; it was alleged for the assignee, That his assignation and intimation were before the arrestment.—It was answered for the arrester, That the assignation was never the assignee's delivered evident, but was retained in Pinkell, the common

debtor, his hand ; and that the intimation was null, being made by a person who was no notary, but known to be flagitious.—It was replied, That intimation supplies delivery, after which the assignee hath interest to force the cedent to exhibit and deliver ; and though he should cancel the assignation, the assignee may prove the tenor of it, using the intimation as an adminicle, as was found in the case of Dick of Grange and Sir Laurance Oliphant ; * yea in the case of Mr. John Bain v. Campbell,† it was found, That a debtor taking a bond in name of his creditor, though not delivered, that creditor had right to found upon it, and to force the debtor to deliver. And as to the notary's not being authorised, it was offered to be proven he was holden and repute notary, which is all the leiges can know ; and though he were flagitious, the intimation may be redargued by the witnesses insert.

The Lords found the assignation being intimate before the arrestment, though not delivered, was preferable, and that the notary's being holden and repute such was sufficient.
Stair, v. 2, p. 762.

No. 47.

[848] HUME v. HUME. July 21, 1632.

Intimation at the market-cross of the head burgh, or even at the dwelling-house, if not personally, does not put the party in *mala fide* to pay.

The deceased Samuel Hume being decerned by a decreet-arbitral, to pay to his mother yearly, a yearly duty of victual, whereto she having made one her assignee ; which assignation being intimate at the market-cross of the head burgh of the sheriffdom, where the party dwelt, and within the which the lands lay, for which the victual should be paid : The assignee desiring this decreet-arbitral, the same being registrate, to be transferred in him active, and in the heir of Samuel Hume, party obliged to pay the said victual, passive, who compeared, and alleged, That the mother to whom the said victual was payable, had discharged to the said Samuel that decreet, and granted her satisfied of that clause concerning the payment of the victual, and had exonerated him thereof ; and which, albeit it was confest to be done after the assignation and intimation thereof, yet the said Samuel might lawfully do it, notwithstanding thereof, seeing the said intimation was never lawfully made to him ; and the assignation and intimation preceding, made at the market-cross, could not put him *in mala fide*, to pay his own just creditrix, and to take exoneration from her. This allegiance was found relevant, notwithstanding of the preceding assignation and intimation, which the debtor was not holden to know, not being made to himself : For, if the intimation had been made at the debtor's dwelling-house, it might have remained as obscure to him and unknown, as the intimation made at the market-cross ; therefore it would be considered, if such intimations at parties dwelling-houses, be sufficient against them, or else they must be made personally to them. (See *Bona Fide* payment.)

Act. MOWAT & HEPBURN.—Alt. CRAIG.—Clerk, GIBSON.

Durie, p. 649.

No. 52. [850] Messrs. NEWTON and COMPANY v. Messrs. COLLOGAN and COMPANY, and Others. November 23, 1785.

Holograph acknowledgement of intimation, by the debtor, though unattested, supplies the want of a notorial instrument.

Samuel Bean assigned to Messrs. Collogan and Company, and to other persons, a bond which had been granted to him. Instead of a notorial instrument, certifying

* Dirleton, p. 215, *voce* IMPLIED OBLIGATION.

† See General List of Names.

intimation of these assignments, there appeared on the back of them a holograph writing to that effect, subscribed by the debtor. In a competition of Bean's creditors, Newton and Company objected to this evidence of intimation, and

Pleaded, This writing, though holograph, not being attested by witnesses, cannot prove its own date ; and therefore is to be understood as if it really bore no date. As such, then, it must be ineffectual. Otherwise, indeed, debtors might easily antedate intimations, for the purpose of unduly preferring favourite creditors. Equipollents, if admitted, ought to be such as to guard against such frauds.

Answered, To receive such proof of intimation, is the universal usage ; and, in particular, it is daily exemplified by the transactions of the public banks. The decisions of the Court seem likewise to give countenance to it. See No. 64, p. 860 ; Fountainhall, vol. 2, p. 397 ; *Charteris v. Sinclair*, *voce* COMPETITION, Turnbull *contra* Stewart, No. 74, p. 868.

The cause was reported by the Lord Ordinary, when a great majority of the Court were influenced by the consideration of the common usage ; though some of the Judges observed, That such a practice was so erroneous that it ought not to be regarded.

The Lords found, that the intimation was sufficiently ascertained.

Reporter, LORD MONBODDO.—For Newton and Company, ROLLAND.—Alt. ELPHINSTON, G. FERGUSON.—Clerk, HOME.

Stewart.

Fol. Dic. v. 3, p. 46. Fac. Col. No. 238, p. 368.

No. 4. [877] JOHN M'GILCHRIST v. THOMAS ARTHUR. January 16, 1794.

When a person grants a draught on his banker, payable to the bearer, or his order, on demand, he cannot, in a question with an onerous holder of it, plead compensation upon a debt due to him by the person to whom the draught was originally delivered.

James Fife granted to Archibald Macausland the following order :

“ Port-Glasgow, 23d February 1793.

“ Pay the bearer on demand, or his order, One hundred pounds Sterling, and debit my account with the branch of the Bank of Scotland, Greenock.

“ To Messrs. Wilson and Arthur their agents.”

This order, Fife afterwards alleged, was granted without value, and on promise of repayment on or before the 26th February 1793.

Macausland stopt payment on the 5th March following. On the 12th of that month, Fife received a charge of horning upon this draught, at the instance of John Macgilchrist, who had got it as a payment from Macausland on the 24th of February, but had not presented it at the Bank till the 5th of March, when Fife having by that time withdrawn his money out of their hands, payment was refused, and a protest immediately taken.

Fife raised a suspension of this charge, which, upon his bankruptcy, was conducted by Thomas Arthur, the trustee for his creditors. The competency of a summary charge upon such a note having been disputed, the Lord Ordinary turned the charge into a libel, and found the defender liable in the sum contained in the draught, with interest.

In a reclaiming petition, Arthur contended, That if Macausland had immediately, upon receiving the draught, carried it to the Bank, as he ought to have [878] done, and got payment of it, Fife would have made the promise of re-payment on the 26th February effectual, as Macausland continued solvent till the 5th of March ; and that as

Macausland himself could not, so no person in his right could now demand payment of it; and farther

Pleaded: Draughts like the present are very frequently granted by creditors on their debtors, whether bankers or individuals; and when paid by the drawee, they operate as a discharge in his favour, upon whatever terms the bearer may have got possession of them. But they have not the same privilege of negociation with bills or promissory notes. When transferred to a third party, all objections competent against the cedent may also be proponed against the assignee, as in the case of a bond or other personal security; Erskine, b. 3, tit. 5, § 6, 10; Bacon's New Abridgment, v. 3, pp. 603, 609. Indeed, there being no fixed rules for their negociation, as there are with regard to bills, great hardship would arise from giving them the same privileges.

They were evidently considered by the Legislature as having effect only in favour of the first holder, and not transferable like bills, otherwise it would not have exempted from the stamp-duties, orders on bankers, drawn by persons residing within a certain distance of the banking house, while it expressly declared all orders not payable to the bearer, liable to these duties; 23d Geo. III. c. 49, § 4; 24th Geo. III. ses. 1, c. 7, § 3. Indeed, on the contrary supposition, the tax might be evaded in all bills payable on demand.

Besides, bills payable to the bearer are null, as falling under the statute 1696, c. 25; 8th January 1730, Walkinshaw's Executors, *voce* BLANK WRIT.

Observed on the Bench: The draught in question is transferable like a bill of exchange. It is equally free from compensation with a bank-note. It falls under the class of "notes of trading companies," which are exempted from the enactments of the act 1696. Besides, the drawer having issued his order in these terms, is barred, *personali exceptione*, from objecting to the negociability of it, and the trustee for his creditors cannot be in a better situation.

The Lords unanimously "refused the petition," without answers. (See COMPENSATION.)

Lord Ordinary, JUSTICE-CLERK.—For the Petitioner, JOHN CLERK.—Clerk, SINCLAIR.

D. Douglas.

Fac. Col. No. 89, p. 200.

No. 3. [881] Laird of BIRKINBOG v. JOHN GRAHAME of Craigie. July 20, 1671.

A disposition granted by a notour bankrupt was not reduced upon the act 1621, at the instance of the other creditors, who had done no diligence; the disposition being in satisfaction of a bargain of victual, sold and delivered to the bankrupt about a month before the disposition.

In a competition among the creditors of umquhile Sir Robert Douglas of Tilliquihilly, a disposition granted by Sir Robert to Grahame of Craigie, was called for to be reduced upon this reason, that it was granted by Sir Robert when he was a notorious and known bankrupt, and fled, and was latent; so that by the act of Parliament 1621, he could not prefer one creditor to another, being in that condition, for that act annuls all dispositions made by bankrupts, without a just and necessary cause; and there was no necessity nor justice for the bankrupt to prefer one creditor to another.—It was answered, That unless there had been legal diligence at the pursuer's instance, or that the defender's disposition had been without a cause onerous, there is no ground for that act to hinder any debtor, though bankrupt, to prefer one creditor to another; for if he had had the money, he might have paid any he pleased; and the cause is both just and necessary, because he might have been compelled by law to have done the same, and there was nothing to hinder the creditor; but, that as he might have first appraised, so he might have taken the first disposition from his debtor. 2do, The

pursuer's debt was for a bargain of victual sold and delivered to the common debtor, but a month before the disposition in question, when he was alleged to be bankrupt.

The Lords found the last allegiance relevant, and assoilzied from the reduction, but did not decide upon the former allegiance.

Fol. Dic. v. 1, p. 66. *Stair*, v. 1, p. 762.

No. 5. [882] FRAZER v. MACKIE. February 1, 1681.

Found, that a party holding an assignation bearing to be for causes onerous, was bound to explain the cause particularly, that it might be known whether it was adequate.

William Fyfe having given an assignation to a sum of 5000 merks, due to him by Inchbrakie, first to George Mackie, and thereafter to Frazer of Balbedie ; it was alleged for Frazer, that albeit Mackie's assignation was prior, yet it was without a cause onerous by a bankrupt, in defraud of him and others the bankrupt's creditors, for whose use he had obtained assignation ; which being found relevant, Mackie deponed that the assignation was for causes onerous ; but refused to depone what the cause was, or whether it was equivalent ; and alleged that his assignation does bear causes onerous as well as Frazer's ; and it being referred to his oath, that it was without a cause onerous ; and not in these terms, "that it was without an equivalent cause onerous," he was obliged to depone no further than to deny the allegiance referred to his oath.—It was answered, That the reason of preference for Frazer being, that the cedent was bankrupt, and had no other means but this sum assigned to him, whereby he became wholly insolvent, and therefore could not without a cause onerous, and legal diligence, assign the bond to Mackie, therefore he ought to depone what was the cause of the disposition particularly, that the Lords may determine, whether it was equivalent, or whether the assignation was fraudulent.—It was replied, That this was no way competent to Frazer, till he had first instructed his posterior assignation to be for debts prior to Mackie's assignation, otherwise if Mackie's assignation were in whole or in part gratuitous, it is not fraudulent, but preferable to any posterior assignation.

The Lords found, That if Frazer instructed the cause of his assignation to be the common author's debts, anterior to Mackie's assignation, that Mackie should [883] depone particularly what was the cause of his assignation, that the Lords might determine whether the cause was adequate. *Stair*, v. 2, p. 848.

No. 11. [886] BROWN and Others v. MURRAY. July 6, 1754.

A sale by a bankrupt, for a full price, so far reduced as to bring in the creditors all *pari passu*.

John Gillespie, possessed of a grass farm and a large stocking of sheep, &c., fell into labouring circumstances. He had been taken with caption, and let go upon payment. And apprehending a discovery of his circumstances, which would bring all his creditors upon him, he assigned his tack, and sold his stocking to John Murray his son-in-law, at a price which was agreed on all hands to be equal. Whether he had any view in this transaction to benefit his favourite creditors, who lived all in the neighbourhood, or whether he meant only to prevent [887] his effects from being carried off by poindings at an under value, is not certain ; but this is certain, that the favourite creditors, most of them the bankrupt's near relations, got the start by arresting in the hands of the purchaser. "This produced a reduction of the bargain at the instance of the other creditors ; and the bargain was accordingly reduced, not as to the purchaser, but only as to the creditors, to the effect of ranking them all *pari passu* upon the price."

This interlocutor was carried, not upon any just principle, which seems not easy to be found, but upon a natural impulse to redress a wrong, which deserved redress had there been law for it. The difficulty is, that there is no foundation, either in common or statute law, to reduce a sale made by a bankrupt for a full price. Neither did the Court take upon them to reduce the sale. On the contrary, they held the purchaser bound, and ranked the creditors upon the price. So far I could have gone, as to find that the bankrupt's relations and neighbours could take no benefit from their arrestments against the more distant creditors, when the preference of the former was probably one of the bankrupt's motives for making the bargain. But unluckily it came out in the course of the process, that nine arrestments were laid on by creditors who were not parties to the process, and who had no such connection with the bankrupt, as to admit of a supposition that he had any view to prefer them. This was a pinching circumstance, because the pursuers had not arrested, nor done any sort of diligence against the bankrupt; and the Court could find no other means to come at what was reckoned material justice, but to pronounce the above interlocutor.

Sel. Dec. No. 65, p. 85.

No. 12.

BLAIKIE *v.* ROBERTSON. March 9, 1781.

A sale contrived to elude the statutes, by means of instant payment to interposed persons, in order to favour particular creditors, reduced.

It has been found, that a voluntary disposition for a price instantly paid, and not for anterior debts, fell not under the statutes 1621 and 1696: In like manner, that voluntary securities, granted for money instantly received, were not affected by these statutes; Erskine, large Instit. b. 4, tit. 1, § 43. In this case, it appeared from a proof, that the sums for which an heritable security was granted by the bankrupt, had been advanced by a favourite creditor, through an interposed person, in order to prefer that creditor, by making payment to him of the money so advanced: The transaction being thus evidently calculated to elude the statutes,

The Lords "reduced the security."

Ordinary, LORD BROXFIELD.—Act. ILAY CAMPBELL, CRAIG.—Alt. M'LAUBIN, ABERCROMBIE.

Craigie.

Fol. Dic. v. 3, p. 48. *Fac. Col.* No. 51, p. 90.

No. 14.

[889] KINLOCH *v.* BLAIR. January 18, 1678.

An uncle took a disposition from his nephew of his whole estate, in satisfaction of anterior debts. By this the nephew became utterly insolvent. The transaction was reduced as fraudulent, to the effect of bringing in the other creditors for their proportion.

Kinloch of Gourdie pursues reduction of all rights granted to Mr. George Blair by James Strachan of Kirkcoun of Lethindie, on this reason, that Mr. George being uncle to the common debtor's heir, a minor, had acted for him, and retarded the pursuer's diligence, and after the pursuer had obtained decret *cognitionis causa*, Mr. George bought in rights from other creditors, and took a disposition from the common debtor of this land, which was his whole estate, and being superior to him, granted to him a precept of *clare constat*, and accepted from him a resignation *ad remanentiam*, though he knew that he had no other estate; and albeit it was notour to him that he was bankrupt, his debt far exceeding his estate. The defender answered, That the reason is not relevant, seeing he, as assignee, was creditor, and was prior in diligence, and therefore might lawfully take satisfaction from his debtor by a disposition for causes onerous, against which there was no ground from the act of Parliament 1621, which excludes no preference, but that which is

in prejudice of creditors, having done diligence lawfully, affecting the debtor's estate, as by horning, inhibition, arrestment, or apprising; and though it has been found, that, after denunciation of lands to be appraised, or execution of an inhibition against the party inhibit personally, that dispositions in favours of other creditors, by the common debtor, granted before the appraising, or publication at the cross where the lands lie, might reduce the intervening dispositions as fraudulent by gratification; yet it was never found that the beginning of a pursuit, or obtaining a personal decret, could impede another creditor to take a disposition for his satisfaction, seeing the pursuer had an ordinary and obvious remeed by an inhibition. 2do, Diligence operates nothing, when it is not punctually insisted in: but here four months intervened betwixt the decret *cognitionis causa*, and the adjudication.

The Lords found not that member relevant upon anticipation, the diligence being but personal; but found the other members relevant, as grounds of fraud, though not founded upon the act of Parliament; especially, the taking a disposition of the whole estate, from a person notourly insolvent, not being by an unconcerned person, by way of commerce, buying the land, but by a creditor obtaining preference; but declared the reduction to be only to this effect, that both parties might come in proportionally effeiring to their sums, as if both had obtained decreets within year and day.

Fol. Dic. v. 1, p. 67. Stair, v. 2, p. 595.

No. 20. [893] CRAMOND v. BRUCE and HENRY. February 25, 1737.

One creditor arrested in the hands of another who had obtained a disposition *omnium bonorum*. They were ranked *pari passu* on the fund.

A debtor, against whom no diligence was done, having granted a disposition *omnium bonorum*, to one of his creditors in security and payment, and another creditor having arrested in the disponsee's hands, and in a furthcoming insisted that the disposition was null, and that he was preferable by virtue of his diligence; the Lords reduced *ad hunc effectum*, to bring him in *pari passu*; and repelled the *jus retentionis* pleaded for the disponsee; for, if the disposition was unlawful, the disponsee could have no just title to retain possession.

Fol. Dic. v. 1, p. 67.

No. 27. [899] HUME v. SMITH. July 5, 1673.

A wife's sister is considered to be a confident person.

Margaret Hume pursues a reduction of a disposition granted by Robert Sinclair, of certain tenements to Katharine Smith, his wife's sister, as being betwixt conjunct and confident persons, without an onerous cause in prejudice of her, who is Sinclair's creditor; for albeit the disposition bore sums of money, yet the narrative did not prove betwixt conjunct persons, unless it were otherwise instructed.—It was answered for the defender, That law hath never interpret a wife's sister to be a confident person, meant by the act of Parliament, which hath been extended to father and son, and brother and brother, but never to a wife's sister.—It was replied, That it was extended to a good-brother in the case of Birnie *contra* —.

The Lords, before answer, ordained the defender to condescend upon the onerous cause of the disposition, and to adduce such evidences therefor as she could: And she adduced one witness, who deponed that he was witness to a bond of 350 merks, due by Sinclair to Smith, and that he heard Sinclair acknowledge that he was due to her 700 merks.

The Lords found this a sufficient adminicle to astruct the cause onerous of the disposition *pro tanto*, the defender giving her oath upon the verity thereof, and declared the lands redeemable from her thereupon.

Stair, v. 2, p. 204.

No. 29. [900] Creditors of TARPERSIE v. the Laird of KINFARNS. December 18, 1673.

A disposition, by a person who had been denounced and in the sanctuary, of his estate to his uncle, reduced, to the effect, that the creditors should be ranked proportionally on the price.

The Laird of Tarpersie having disposed his estate to Kinfauns his mother's brother, some of his creditors coming short of payment, pursue a reduction of the disposition upon the act of Parliament against bankrupts, as being done by a bankrupt to his uncle, a confident and conjunct person, without an onerous, at least without a necessary cause, whereby the bankrupt and his uncle did prefer such creditors as they pleased, and excluded the rest. The defender alleged, That, by the act of Parliament, a bankrupt was not hindered to pay his lawful creditors by himself, or any confident interposed person; for, by the express words of the act, all payment made to the bankrupt's creditors by the interposed person is allowed; and is only liable for the remainder; and albeit creditors who have done diligence, cannot be postponed by voluntar dispositions after their diligence, yet these creditors had done no diligence before the disposition, or before the defender's undertaking of the other creditor's debt, which he offers to depone were undertaken by him at the time of the disposition. 2dly, The law doth not determine what a bankrupt is; and albeit there were several hornings against Tarpersie, that will not conclude him bankrupt, or else all dispositions, though for most onerous causes, may be reduced, most of the disponers being at the horn for the time; and all the hornings that were then due are now paid. It was answered for the pursuers, That their reason of reduction is most relevant, for there are two members in the act of Parliament, one is in favours of creditors that had done diligence, but the other is by the first part of the act in favours of all anterior creditors, whether doing diligence or not, that bankrupts could not, even for an onerous cause, prefer one creditor to another, but either dispose for all their uses proportionally, or leave them to their legal diligence; and therefore the act bears, not only that the dispositions of bankrupts must not only be for an onerous cause, but for a necessary cause, and there is no necessity for a bankrupt to prefer one creditor to another: And that Tarpersie was bankrupt, it is most evidently evinced, on these grounds, that he was many times denounced, and at the horn, and that he was fugitive in the Abbey, where his disposition is dated, that his debts exceeded his estate, and that his uncle accepted of a disposition of all his estate.

The Lords found that the qualifications were sufficient to instruct, that the disponent was a notour bankrupt, and that the disposition by him to his uncle could not prefer one anterior creditor, though he had done no diligence, to another, and therefore reduced the disposition *ad hunc effectum*, that their creditors might have access to the estate, not to affect it simply for their whole sums, but to put them in that case as if the disposition had been for payment of the price proportionally to all the creditors, conform to their sums and diligences. *Stair, v. 2, p. 243.*

No. 33. [903] SCRYMZEOR of Kirkton v. LYON of Bridgeton. July 20, 1694.

A disposition by a person insolvent, but against whom no diligence had been done, in favour of near relations, reduced.

Scrymzeor of Kirkton *contra* Lyon of Bridgeton, for reduction of a disposition made by James Lyon, when he was *in meditatione fugæ*, to Morison his nephew, for implement to his wife of her matrimonial provision in the first place, and for payment of a tocher due by him to his son-in-law with his daughter in the second, and to Morison himself in the third place, and to his creditors *ultimo loco*.—Alleged, It was not reducible, seeing he was not then under legal diligence at his creditor's instance, neither had he fled, but retired some days after; so this cause neither quadrated with Lanton's and Sir Thomas Moncrieff's (p. 884), nor with Clackmannan's Creditors'

debate with Miln of Carridden. And as to his preferring his wife and daughters, this was no partial gratification nor preference, he not being then a legal bankrupt, and they being creditors by anterior obligations.—The Lords resolved to hear this cause in presence.

January 28, 1696.

Halcraft reported Scrymgeour of Kirkton *contra* Lyon of Bridgeton, and others, mentioned 20th July 1694, for reducing a disposition granted by James Lyon, [904] merchant in Dundee, in favours of his nephew, son-in-law, and other relations, as in fraud of his lawful creditors. Alleged, He was not notoriously bankrupt nor insolvent at the time of his granting this disposition, seeing he had neither retired, nor were there diligences by horning, &c., against him; and so he fell under none of the heads of the act of Parliament 1621, for though it was to conjunct persons, yet they offered to prove the antecedent onerous causes by their contracts of marriage, &c., and he did not gratify and prefer one creditor to the prejudice of another's diligence, for there was no diligence then against him. Answered, That excellent statute obviated the frauds then discovered; but the *actio Pauliana, et de dolo malo* in the common law were much larger; and this was as plain and palpable a fraud as any; the man was *obscured*, and resolving to fly immediately, prefers all his nearer relations, and ranks his true and onerous creditors in the last place; but if the order in which he places them stand, all is exhausted, *usque ad peram* before the creditors get a sixpence; and so here is fraud both in *consilio et eventu*; and the Lords have oft proceeded on the grounds of the common law, as in the famous case of Street and Jackson v. Mason (*infra h. t.*), and Reid v. Daldilling, 4th December 1673, Stair, v. 2, p. 234, *voce* FRAUD—The Lords found the disposition fraudulent, and reduced it. There was a separate allegiance, that one of them ranked in the disposition was no conjunct person but a stranger, and so *utile per inutile non vitiatur*; the disposition must subsist *quoad* his sum. This was not decided.

Fol. Dic. v. 1, p. 67. Fountainhall, v. 1, p. 635 & 705.

No. 34. BLACKWOOD of Pittreavie v. The other Creditors of Sir GEORGE HAMILTON.
January 18, 1749.

The narrative of a deed *inter conjunctas* requires no astruction, after a long lapse of time.

In the reduction at Mr. Blackwood's instance of the decree of ranking of the creditors of Sir George Hamilton, the grounds whereof, *vide* 4th January 1749, *voce* Process; it was *inter alia* found, "That a bond of relief *inter conjunctas* not having been objected to till after forty-five years from the date, the user of it was not, after so long time, bound to bring any other astruction of the onerous cause than the narrative of the deed."

The like is observed by Fountainhall to have been found, 23d December 1692, Spence v. the Creditors of Dick (*infra h. t.*), where it was above forty years, and that not upon the score of prescription, there being some traces of interruption, but, because after so long time the objection was incompetent; and the like where it was fifty-eight years, 2d February 1711, Guthrie v. Gordon, Forbes, p. 492 (*infra h. t.*).

Fol. Dic. v. 3, p. 49. Kilkerran (BANKRUPT), No. 10, p. 56.

No. 35. [905] ELLIOT v. ELLIOT. November 10, 1749.

The singular successor of a conjunct person found not to be bound to prove the onerous cause of his disposition after forty years.

Henry Elliot, in Flat, had right, by progress, to a bond granted by James Scot of Bristo in 1684, on which his author had, after James Scot's death, which happened

in 1692, obtained decree of constitution against James and William Scots his sons, and thereon led an adjudication in 1745 against Bristo's heirs, of the lands of Chisholm and Wandburn, and lands of Ancrum.

In the action of mails and duties pursued on this adjudication, compearance was made for Sir James Stewart of Goodtrees, who produced a disposition from James Scot of Bristo, in 1692, of the lands of Chisholm and Wandburn, and lands of Ancrum, to William Scot his second son, with a conveyance from him to the late Sir James Stewart, of the lands of Chisholm and Wandburn, in 1697; and for William Elliot of Kirklands, who produced a conveyance, from the said William Scot, of the lands of Ancrum, to Thomas Porteous in 1695, from whose heirs he derived right.

Of these dispositions from Bristo, to William Scot his second son, the pursuer repeated a reduction on the act 1621; against which the defence for both was [906] prescription, but, with this difference, that Sir James Stewart could only plead the negative prescription, whereas William Elliot of Kirklands also pleaded the positive prescription, in virtue of an infeftment taken by Thomas Porteous his author, in the year 1696, upon a charter passed in 1695.

To these defences the pursuer replied upon his minority: And, so far as concerned the negative prescription pleaded for Sir James Stewart, the reply was admitted to be good; and condescendences were appointed by the Ordinary to be given in, of Bristo's debts and effects in 1692, when he granted the disposition of Chisholm and Wandburn to William Scot, his second son.

The Ordinary "sustained the defence upon the positive prescription proponed for the said William Elliot, as to the lands of Ancrum possessed by him, his predecessors and authors, upwards of forty years, upon the charter and sasine in favour of Thomas Porteous *in anno* 1696, and found that the interruption of the negative prescription running against the bond of relief, does not interrupt the positive prescription as to the foresaid lands of Ancrum; and assoilzied the said William Elliot of Kirklands from the reduction."

Against this interlocutor assoilzieing Kirklands, the pursuer reclaimed; and the point deserved well to be considered. Where there is a competing heritable right belonging to a minor, that his minority will avail to save his right against the positive prescription by another possessor, was not doubted; but, if a personal action, being saved by minority from the negative prescription, *v. g.* a reduction on death-bed, or on the act 1621, as in this case, should interrupt the positive prescription, it would much impair the security from the records. On the other hand, as the records neither are, nor can be a security in all cases, whereof several instances may be given; so also, when an action upon any debt or obligation is kept alive from the negative prescription, why should not that preserve every action, of whatever nature, competent for the party to have raised upon that title?

This point appeared to the Lords to be so doubtful, that, on advising petition and answers, they appointed it to be heard in presence; and accordingly it was heard, but not determined.

For, upon the hearing, another point occurred, upon which the Lords took up the case, *viz.* That it was now upwards of forty years from the date of the disposition by Bristo to William Scot, his second son; and the Lords found, "That, after so long time, parties could not be obliged to bring an astruction of the onerous cause of it," agreeable to what had been frequently found in other cases. *Vide supra*, January 18, 1749, Blackwood of Pittreavie *v.* the Creditors of Sir George Hamilton, No. 34, p. 904. And, upon this ground, Sir James Stewart became also safe as to the lands of Chisholm and Wandburn.

No. 37. [907] GEORGE BEAN, Deputy Sheriff-Clerk of Aberdeen v. RACHEL STRACHAN, Daughter of William Strachan senior, Merchant in Aberdeen. August 1, 1760.

A person insolvent discounted bills, and paid a debt to his sister with the cash. She was ignorant of his insolvency, and did not know how he came by the money. Although he was rendered bankrupt within 60 days, the payment found good.

William Strachan junior, merchant in Aberdeen, being debtor to his sister Rachel Strachan in a bond for £240,* and finding his affairs in a desperate situ-[908]-ation, he, in the beginning of September 1754, was advised by a friend, whom he consulted on the occasion, to raise money by discounting bills which he then had, and to apply the proceeds for payment of his sister's bond, which had been granted for her proportion of her father's effects.

Accordingly, by the assistance of his ordinary agent, who did not know his real situation, he got bills discounted to the amount of £272 Sterling; and with that money he paid his sister the principal and interest due on the above bond, and on a separate note, amounting together to £260 Sterling: But it did not appear, that he then explained to her the state of his affairs, or that she knew in what manner he had raised the money.

This happened on the 2d of September, and immediately thereafter William Strachan absconded. On the 14th of that month he was apprehended on a warrant of the Sheriff, at the application of his creditors; and horning and caption were, within the sixty days, raised against him. On the 16th of September he granted a disposition *omnium bonorum* to trustees for behoof of his creditors; to which almost all of them acceded (particularly George Bean, a creditor in about £50), and received a dividend far short of paying their debts.

George Bean afterwards used arrestment in the hands of sundry persons, particularly of Rachel Strachan; against whom he insisted in a furthcoming, upon this ground, That she had improperly received payment of her bond from her brother when bankrupt. Upon a proof, the facts appeared as already stated.

Pleaded for the pursuer, Rachel Strachan lived in family with her brother, before and at the time of his bankruptcy, so could not be supposed altogether ignorant of his affairs; and the method taken for giving her an unjust preference, by getting bills discounted, and then paying over to her the money, when he well knew he was utterly insolvent, and within sixty days of his notour bankruptcy, was a fraudulent device, which must be presumed to have been contrived between them for eluding the effect of the act 1696. Therefore such transaction between conjunct and confident persons is challengeable or reducible at common law, and as falling within the spirit and intentment of both the acts 1621 and 1696.

Answered for the defender, That her ignorance of her brother's situation is as clearly proved as a negative can be; and it is also proved, that she had no concern in the discounting the bills. The payment made to her is therefore not challengeable at common law, as the *actio Pauliana* was only competent against creditors who were *participes fraudis* with the bankrupt; and did not debar lawful creditors from taking payment, even when they knew their debtor to be *lapsus*; l. 6, § 6, 8, et l. 10, § 16, ff. *Quæ in fraud. cred.*

It is lawful for every creditor to take his payment when he can get it, and the fraud of his debtor cannot hurt him. Again, the first alternative of the act 1621 only relates to gratuitous alienations; and the second to voluntary payments, or conveyances made after diligence is done against the debtor. This case falls within neither of them, as the defender was an onerous creditor, and no diligence had been done against the debtor at the time. Besides, by the payments men-[909]-tioned in the act, it is thought, are to be understood, conveyances of *nomina*, or other subjects *in solutum*; and not those made in ready money. Nor does the act 1696 extend to this case; for although the word deeds in it has been found to extend to the delivery of goods, which is a species of alienation; yet payment in cash being a natural extinction of the debt, cannot be recalled. Nor can the debt be revived by the debtor's afterwards

* See Executors of M'Commie v. Strachans, 29th July 1760, Fac. Col. p. 440. *Voce* LEGACY in this Dictionary.

becoming a notour bankrupt ; 26th January 1751, Forbes *contra* Brebner, *infra h. t.* The annulling such payments would be in effect destructive of all commerce.

"The Lords found, The payment made to Rachel Strachan, the defender, does not fall within the act 1696 ; and therefore assoilzie the defender, and decern ; but find no expences due."

Act. BURNET.—Alt. RAE, FERGUSON.

D. Rae.

Fol. Dic. v. 3, p. 48. Fac. Col. No. 243, p. 444.

No. 40. [911] Lord LOURIE v. Earl of DUNDEE. February 6, 1663.

A gratuitous disposition, reserving the granter's liferent, and a faculty to sell a part of the estate for payment of debt, was reduced ; to the effect, that the creditor might proceed in diligence against the lands, as if the disposition had not been granted ; and without regard to the faculty to sell.

The Lord Lourie pursues a reduction of a disposition, made by Carnegie of Craig to the Earl of Dundee, as being posterior to the pursuer's debts, and in prejudice thereof, upon the act of Parliament 1621, against bankrupts ; and, for instructing of the reason, repeats the disposition itself, being betwixt confident persons, cousins-german, and without cause onerous, in so far as it bears reservation of the disponent's and his Lady's liferent ; and provision to be null, if Craig have heirs of his body, in whose favours Dundee is to denude himself, upon payment of his expence.—The defender alleged, That the libel is not relevant. 1mo, Because Craig is no bankrupt, nor any diligence done against him, before the disposition. 2do, He is not insolvent by the disposition, because there is reserved to him a power to sell as much of the land as is worth £80,000 for debt, and so is not *in fraudem creditorum* ; but the pursuer ought to pursue for that provision, either by apprising or personal action.

The Lords found the reason relevant and proven by the tenor of the disposition ; and therefore reduced, to the effect, that the pursuer might affect the said lands with all legal diligence for his debt, as if the disposition had not been granted ; for they thought, seeing by this disposition there remains no estate sufficient, *ad paratam executionem*, that there was no reason to put the pursuer to insist in that clause, to restrict himself thereby to a part of the land, but that he ought to have preference for his debt, upon his diligence, affecting the whole land.

Fol. Dic. v. 1, p. 68. Stair, v. 1, p. 175.

No. 45. [915] Laird GARTHLAND v. Sir JAMES KER. March 6, 1632.

Found in conformity with the above.

The Lord Jedburgh having bound himself to dispoise an annual rent out of his land of to the Laird of Garthland's son, oye to the Lord Jedburgh, redeemable upon twelve thousand merks, and accordingly having infeft him, and there being then a back-tack set to the Lord Jedburgh of the lands, for the yearly [916] duty of twelve hundred and thirty merks ; upon this right Garthland having intended action of declarator, as is mentioned betwixt these parties, Feb. 26, 1631 (Durie, p. 575, *voce* LEGAL DILIGENCE), Sir James Ker comparing, alleged this right was a right made by a conjunct person, viz. the goodsir to the oye, without a cause onerous, but only for love and favour, which ought not to be found good and lawful against him, who was a lawful creditor to the Master of Jedburgh, to whom the granter of this infetment is father and retoured heir ; and who is obliged expressly to pay all his son's debts, for which this expient is bound, conform to a contract betwixt them ; and for relief whereof he is infeft before the pursuer's infetment, albeit after the bond granted to the pursuer ; and so that his right being for causes onerous, and

the pursuer's *ex titulo lucrativo*, he ought to be preferred, specially seeing the same is made to his own oye, whose mother is one of his appearand heirs, he having no other bairns but her and her sisters ; and so being that person who has acquired that right, *post contractum debitum*, and which therefore will make her liable to the creditor if the goodsir were dead, so it ought now to have no force against the creditor's right ; moreover, he alleged that this was an usuary right, and fell under the act of Parliament 1597 ; which prohibits to take more than ten for each hundred ; for there is a back-tack set for 1230 merks, which is thirty merks more than the ordinary annual-rent of 12,000 merks. These allegiances were both repelled, and the pursuer's infetment sustained, albeit it had been a mere donation, depending upon a bond prior to the excipients infetment, seeing it was never alleged, that the granter of the infetment, the time of the making thereof, or since, was become bankrupt, and not *solvendo* ; neither had the excipient done diligence against him, to discuss him for his debt ; and so not being bankrupt, but being able to pay all his debts in lands and goods, he might lawfully *ex causa simplicis donationis* effectually grant this infetment, albeit he was then debtor to his creditors ; and the act of Parliament 1597, anent usury, was not found to militate in this case, which was not of borrowing and lending of money, wherein the act prohibits to take more than ten for the hundred, and extends no ways to this case controverted, or the like, which concerns a free donation, where the parties may contract to make the lands redeemable, which is gifted, upon more or less sums, as they agree together, than as effeirs to the duty of the land, contained in the back-tack ; and the overplus also being but thirty merks, and so being of so mean a quantity, could not make the whole infetment null. See POINDING. See USURY.

Fol. Dic. v. 1, p. 68. Durie, p. 626.

No. 46. [917] CLERK v. STEWART and WATSON. June 30, 1675.

In support of a gratuitous alienation, made by a debtor, who, at the time of reduction, was bankrupt ; it was found relevant, that, when he made the alienation, he had a sufficient visible estate to pay the pursuer and all his other creditors.

A husband, by his contract of marriage, having got the right of the fee of a tenement of land settled upon him ; his wife having resigned the same for infetment to him and her, and the heirs of the marriage, which failing, his heirs : He and his wife did thereafter enter in a contract with another sister of his wife's, who had right to the equal half of the said tenement, as heir portioner with her sister ; by which contract there was a mutual tailzie with consent of the husband ; and the right of fee, that, by the former contract, was settled upon her husband, as said is, was disposed to the wife ; in so far as both the sisters, with consent of their husbands, were obliged to resign their respective parts, in favours of their husbands and themselves in liferent, and the heirs of the marriage in fee ; which failing, in favours of the wife's heirs : Which contract was questioned by a reduction at the instance of a creditor of the husband's ; upon that reason, that the said right of fee, granted by the said contract betwixt the husband and the wife, and her sister, was in defraud of the husband's creditors, and null by the act of Parliament 1621 ; in so far as the husband had a fee of the said tenement, by the contract of marriage betwixt him and his wife ; which might have been affected with execution at the instance of his creditors ; and the said fee was given, by the said late contract, to the wife, so that the husband had only a liferent.

In this process, it was alleged, 1st, That the act of Parliament did militate only in the case of dyvors, and dispositions granted by them. And, 2dly, That the said act of Parliament doth only rescind alienations that are made without true, just, and necessary causes ; and that the said contract betwixt the husband and his wife, and her sister, was made for a true and just cause ; and the fee of the said tenement, which the debtor had, was given away in respect of the obligations of the said contract in favours of the husband, the pursuer's debtor, which was as equal, as to advantages, for the pursuer's debtor, as they were for the other party ; seeing both the sisters, their parts of the tenement, were provided in the same manner to the respective

wives and their husbands, and the heirs of the marriage, which failing, the wife's heirs; and that the pursuer's debtor was a person opulent for the time, according to his quality; and had sufficiency of estate and moveables otherways, that might have satisfied the pursuer's debt the time of the said last contract, and thereafter; so that the said contract being valid *ab initio*, it could not be taken away upon pretence, that thereafter the husband became insolvent; seeing it cannot be said, that the husband did intend to defraud his creditor, or that there were any fraud upon his part.

It was replied, That though the case of bankrupts, and their fraudulent practices, mentioned in the said act, being so frequent, did give occasion and also rise to the same; yet it appears evidently by the said act, that it was intended that debtors should not be in a capacity to give away any part of their estate, in prejudice of their creditors, to any person: In so far as the dispositive words of the act are in [918] these terms, that in all causes at the instance of a true creditor, the Lords will decern all alienations and rights made by the debtor, to any conjunct person, without true, just, and necessary causes, and without a just price really paid, the same being done after contracting of lawful debts from true creditors, to be null without further declarator; and the said act does not bear, that all rights made by bankrupts should be null, it being hard to give a character and definition of a bankrupt; so that diverse questions may arise anent the notion of bankrupt; and what debtors should be esteemed bankrupt; and therefore for cutting off the same, the act is conceived in the terms foresaid, and annuls dispositions made by debtors without an onerous cause: And the Lords, by the statute ratified by the said act, do declare, that they intend to follow and practise the laws civil and canon made against fraudulent alienations in prejudice of creditors: And, by the civil law, all rights and deeds made and done in prejudice of creditors without an onerous cause, are null, and may be rescinded *actione Pauliana*: And the law doth presume, *præsumptione juris*, that they are fraudulent, being prejudicial to creditors *ex eventu & re*; who are not obliged to say, that they are fraudulent *consilio*, which is *in animo* and hardly can be proven.

As to that point, viz. That the said contract was upon valuable considerations, it is replied, That the taking of the fee from the husband, and giving the same to the wife, it is a donation as to the wife in prejudice of the creditor; so that there is no onerous cause as to the husband.

The Lords, upon debate at the bar and among themselves, did find, that debtors might dispose of a part of their estate by way of gift, and without an onerous cause, if they retain as much and more than would satisfy their creditors; and therefore they found the defence relevant, that the debtor had as much estate, besides the fee of the said tenement, as would satisfy the pursuers debt.

Some of the Lords were of the opinion, That the case, being of so great consequence as to the preparative, it was fit to be thought upon; and urged these reasons, 1st, That the words and letter of the law appear to be clear, against deeds done by debtors without an onerous cause. 2dly, Though our law were not clear, yet in cases of that nature, when we have not a municipal law, nor custom to the contrary, we ought to follow, though not the authority, yet the equity of the civil law, which is received everywhere, where there is no custom to the contrary: Specially, seeing it is declared by the said statute mentioned in the act of Parliament 1621, That the Lords are to follow the civil and canon law made against deeds and alienations in prejudice of creditors. 3dly, It is hard to put creditors to dispute the condition of their debtors, the time of making donations; and whether they had effects and sufficiency of estate to satisfy their debt, notwithstanding the said deeds; which may be unknown to the creditors; it being sufficient to say, that the deed was without an onerous cause, and that the debtor became insolvent. 4thly, If a debtor should become insolvent *ex post facto*, though the time of the donation, the residue of his estate might have satisfied the [919] debt, it is more just and reasonable that a donator, who has a lucrative title, should rather suffer *ex eventu* than a creditor. ——— did argue to the contrary.

Act. FALCONER.—Alt. STEUART.—Clerk, MONRO.—PRÆSENTIA.

No. 47. [920] M'KELL v. JAMIESON and WILSON. November 10, 1680.

A gratuitous alienation was sustained, and found not reducible by onerous creditors, if the donee had then a visible estate sufficient for all his debts, whether by infertments, moveables, or bonds, tho' *ex eventu* he might prove insolvent.

M'Kell pursues a declarator of expiring of an apprising of a tenement in Leith, deduced against Edward Jamieson. Compearance is made for Jean Wilson and Lodovick Callender, her husband, who repeat by way of defence, a reduction of the right of this tenement, before Jamieson's right against Kier his author, to whom it was disposed by Houston, upon this reason, that Kier was Houston's oye by his daughter Magdalen, and he having only four daughters who are all *forisfamiliatæ*, and provided, he disposed this tenement to his oye, without an equivalent cause onerous, after contracting of 1000 merks due to Wilson; and though Jamieson did acquire right from Kier, and M'Kell from Jamieson, yet the matter became litigious before their rights.—It was answered for M'Kell, That the reason was not relevant, unless Houston, when he disposed, had been bankrupt, at least had become insolvent by the disposition. But it is offered to be proven, that the disposition was burdened with 3000 merks, to be disposed of at the disposer's pleasure, and with his own liferent, for which he got 2000 merks; so that he had then a visible estate remaining, sufficient for this and all his other debts, and had bonds and moveables, which by his testament came to £200 Sterling, and therefore was in full capacity to gift to his oye, or any other person; so that no creditor of his, after not insisting upon diligence for so long a time, can quarrel his disposition as fraudulent; or otherwise all gratuitous dispositions, by the most solvent persons, would become ineffectual, and the power of disposal would be bound up, as if they were inhibit, and therefore the Lords did lately find, That bonds of provision to the daughters of Mouswell (*infra h. l.*) were [921] not reducible by anterior creditors because their father had a sufficient fortune for these portions, and all his debts.—It was replied, That bairns provisions were *debitum naturale*; but this was an oye whose mother was provided; and that bonds or debts were no visible estate; and it were more just that the acquirers by gratuitous dispositions should be put to seek the disposers upon their warrandice, than that creditors should be frustrate.

The Lords found the defence against the reduction relevant, That Houston, the first disposer, had a visible estate, sufficient for all his debts the time he disposed, whether by infertments, moveables, or bonds.

Fol. Dic. v. 1, p. 68. Stair, v. 2, p. 795.

No. 50. DEAS v. FULLERTON. December 7, 1710.

A gratuitous assignation to a conjunct person, a few days before the granter's death, was reduced at the instance of a creditor of the defunct, though proof was offered that he was solvent at the time.

The deceased Captain Fullerton having some arrears owing him in the commissions of the equivalent's hands, and being debtor to Mr. James Deas, writer, in £30 Sterling, he confirms himself executor-creditor to him for affecting that sum; and pursuing for payment, they suspend on double poinding, that they are likewise distressed by John Fullerton of Auchinhall, claiming right to the same debt by virtue of an assignation he had thereto from the Captain, and duly [922] intimated. Whereupon a competition arising, it was contended for Deas (who repeated a reduction of the said assignation) that he behoved to be preferred, because the assignation was a gratuitous deed betwixt near relations, after the contracting of his debt, and was condemned by its own narrative expressly bearing for love and favour, which can never be otherwise considered, than as a mere donation and a testamentary legacy, being only a few days before his death, and can never compete with a lawful creditor

confirming the subject.—Answered, The act of Parliament 1621 annuls only deeds done without a just, true, and necessary cause ; whereas here it bore not only for love and favour, but also for other causes and considerations moving him, which words must import something ; and in fortification thereof, he offered to prove onerous causes for supporting the said assignation ; and that this has been sustained, appears from Sir George M'Kenzie's observations on that act, where he cites January 1669, Lady Brae *contra* Chisholm,* and the case of Napier *contra* Ardmoir,† whence he infers, that *verba narrativa probant tantum præsumptive contra proferentem*, and may be further astrusted and adminiculated ; and for his relation, the cedent was only his cousin-german, and there is no decision finding that remote degree of blood to fall under the act of Parliament.—Replied, No law ever allowed a man to impugn the verity of his own writ, and to adduce an extrinsic probation to canvel the faith of its own narrative ; for that were *probatio contraria scripto* ; and who would either give or receive a deed, bearing expressly love and favour, if there were truly any onerous cause at bottom to support it ; and as to the decisions, where they related to onerous causes in the general, there the Lords permitted them to condescend particularly what they were ; but here there is neither shadow nor pretence, to compete with an anterior lawful creditor, who has duly affected the subject.—The Lords preferred the executor-creditor, and reduced the assignation not simply, but in so far as prejudged him.—Then he insisted on a second ground of preference, that his cedent had, at the time of his making that assignation, estate either heritable or moveable, more than sufficient to pay all his debts ; and therefore his assignation, though gratuitous, can never be quarrelled, unless you prove the granter was insolvent at the time of his making thereof ; for no law hinders a man to gratify his friends and relations, if he have a clear visible accessible estate to pay all his creditors ; and it were a great embargo on the freedom of property, if a small debt hindered a man of an opulent fortune to grant voluntary rights, where there is no diligence to interrupt him ; and the creditor *sibi imputet*, if he has been *in mora* to affect his estate, and by negligence has suffered his circumstances to turn worse ; for *sibi debuit vigilare* ; and thus the Lords found, 30th June 1675, Clerk *contra* Stewart, No. 46, p. 917 ; 11th December 1679, the Creditors of Douglas of Mousewell *contra* the Children (*infra h. t.*) ; 22d July 1680, Grant ; † and 10th November 1680, Mitchel *contra* Jamieson and Wilkie.†—Answered, That Mr. Deas has discussed the Captain's sister, his heir of line, and could recover nothing ; and Auchinhall the competitor is his heir-male, and has right to any estate the defunct [923] left ; and it is more just he should be at the trouble and expence of seeking out his hidden desperate debts, than to put creditors to expiscations of searching out his effects *per omnes regni angulos* ; and if it be a visible accessible estate, he is willing, on payment, to assign him to his debt, for his readier affecting thereof ; and he knows better where to find it than Mr. Deas, a stranger, can. And the cases cited were where the parties were in possession, or had uplifted the subject in controversy ; but here the arrears are still extant unluphted, and in the equivalent's hand ; and the debate is *in acquirendo*, where the executor-creditor is undoubtedly preferable to a gratuitous assignee, it being more reasonable he should want his legacy, than Mr. Deas lose his just debt.—The Lords likewise repelled this second ground and preferred the executor-creditor. See PROOF.

Fol. Dic. v. 1, p. 68. *Fountainhall*, v. 2, p. 604.

No. 52.

[924] M'KENZIE v. FLETCHER. January 15, 1712.

A disposition to a sister and her husband, found not reducible on the act 1621, if the granter had at the time an estate equal to payment of his debts. There was here a *mora* on the part of the pursuer of the reduction.

James Fletcher of Cranston grants bond for £100 Scots to Sir George Lockhart, in 1678. The very next day he gives his sister, Alison Fletcher, a bond for 8000 merks ;

* Stair, v. 1, p. 591, *voce* HUSBAND & WIFE.

† Examine General List of Names.

and, in 1681, he disposes the lands of Gilkerston to the said Alison, and John Grahame her husband. On Sir George Lockhart's bond he is denounced and registrate in 1689 ; and the said bond, by progress, comes in the [925] person of my Lord Prestonhall, who leads an adjudication for it in 1699 : And pursuing for mails and duties, Jean Fletcher and Captain Hary Straiton, her husband, as come in her sister Alison's right, crave preference as first infest, which necessitated Prestonhall to raise a reduction of James Fletcher's right to his sister and brother-in-law, upon both the branches of the act of Parliament 1621, as being an anterior creditor, and the deed being *inter conjunctas personas* and gratuitous : Next it impinges on the second clause of that act, declaring all dispositions null, granted by debtors, after they are denounced and registrate to the horn, in so far as concerns the creditor-user of that diligence ; but so it is James Fletcher was at the horn before he gave that disposition to his sister and her husband. Alleged for Jean, 1mo, It is not yet clearly decided, if a brother-in-law be a conjunct person in the eye, sense, and construction of that act. 2do, This deed is not wholly gratuitous, for it is in satisfaction of a bond of provision given her by Sir John her father. 3tio, That act annuls only rights made by dyvours and bankrupts ; so that if the man had a clear visible accessible estate at the time, sufficient for paying all his debts, the right cannot be quarrelled, though by a supervenient insolvency he come to be *obærat*. How many does every age produce, who, by mismanagement and prodigality, from opulent estates, fall into the very gulph of poverty ; and yet will any man say, that when he bruiks a flourishing estate of £1000 Sterling per annum, that he cannot provide his children, or give a gratuity to his friends and relations, because *ex post facto*, he dies a beggar ? What embarrassment would this lay on all commerce and bargaining ; if eventual insolvency, occurring many years after, were sufficient to annul these deeds ? And by the *actio Pauliana* he only is repute insolvent, who, at the time of the deed, or by the granting it, is incapable to pay his debt ; as Justinian determines, § 3, *inst. quib. ex caus. manumittere non licet*. Now Mr. Fletcher, at the making this disposition, had the lands of New Cranston, with a jointure of 1200 merks yearly, and a post in the army, which were funds more than sufficient to pay all his debts. And Prestonhall may *sibi imputare* that *non sibi vigilavit*, in affecting these funds till his debtor began to sink : And this is no new doctrine ; for the Lords on the 30th June 1675, Clark *contra* Stewart, p. 917, found it relevant to assoilzie from the act of Parliament, that he had a sufficient unincumbered estate at the time : And the like, the Creditors and Children of Mousewell competing (*infra h. t.*) ; and 6th March 1632, Garthland *contra* Ker, No. 45, p. 915. See also 8th February 1681, Neilson *contra* Ross (*infra h. t.*) ; and in Langton and Cockburn's case, No. 9, p. 884, it is required they be altogether insolvent, at least *difficilis conventionis*, and the estate so overburdened, that it cannot extricate itself without a sale.—Answered, Where a debtor's estate is reduced to that condition that it cannot satisfy all ; it is more reasonable that the bankrupt debtor's relations should be at the loss, than extraneous onerous creditors put to expatiate their debtor's concealed means ; and though decisions have varied on this head, yet they have, in many cases, reduced these voluntary deeds, without regarding the debtor's sol-^[925]veny at the time, if *ex post facto*, he turn insolvent. See the 25th January 1681, Bathgate and Bouden (*infra h. t.*). And 10th February 1665, Lady Greenhead *contra* the Lord Lowrie (*infra h. t.*). And Sir John Nisbet (Dirleton), relating the decisions of Clark (p. 917) and Mousewell (*infra h. t.*), cited by the other side, adduces irrefragable arguments to convell them with great penetration and closeness. And where there appears such variety of opinions among the Lords, though the plurality makes a *res judicata*, yet it affords ground to examine the reasons on both sides, when they come to be cited as precedents and practices, especially when the point is only carried by a vote or two, and on the absence of some of that first sederunt, the Lords come to alter ; therefore some have proposed this expedient, that these dubious cases should be reviewed, either by a full bench, or else by the same who sat in the first interlocutor, which would prevent the frequent alterations that daily occur ; but this is scarce practicable, seeing some are detained, at the second review, from the house, by sickness ; others are in the outer-bench, side-bar, or on the bills. See Dirleton's reasonings, at p. 140 and 207. Sir George Mackenzie does also concur with him, in his observations on the said act 1621, and thinks sufficiency of estate, at the time, not relevant, if eventual insolvency supervene, and that it is better that conjunct persons suffer, than strangers who lent their money *bona fide* on the view of a clear estate.—The Lords thought there was no doubt but a brother-in-law was a conjunct person in the

sense of our law ; but yet, by plurality, having balanced the inconveniences on all sides, they found, if James Fletcher had a visible unincumbered estate, at the time of his disposing to his sister and her husband, more than would have paid all his debts, the said disposition could not be annulled on the act 1621, especially considering that Prestonhall was *in mora*, not having adjudged the lands for seventeen years after the said disposition ; and it seemed to have some resemblance of an onerous cause, like a tocher given *ad sustinenda onera matrimonii*.

Fol. Dic. v. 1, p. 69. Fountainhall, v. 2, p. 703.

No. 53. [928] The Executors Creditors of JANET MELDRUM v. KATHARINE KINNIER.
December 11, 1717.

Found in conformity with Borthwick v. Goldilands, No. 44, p. 914, and Garthland v. Ker, No. 45, p. 915.

John Cunningham of Enterkin, being debtor to Janet Meldrum in £1000 Scots, she, some time before her death, gave him up his bond ; which was immediately renewed in name of her daughter Katharine Kinnier. Her creditors, after her death, getting notice of this transaction, raised a reduction against the daughter, upon the act of Parliament 1621 ; with a conclusion of declarator, That the money was the mother's, and that she could not take the bond in her daughter's name, in defraud of the pursuers, her lawful creditors.

The daughter's defence was, That this transaction was forbid by no law, the mother being solvent at the time of granting the bond ; and though *ex eventu* her debtors became insolvent, it is sufficient to exclude a reduction upon the act 1621, that the mother had sufficient effects to pay all her debt, over and above the money for which the bond was granted to her daughter.

Answered for the creditors :—That however this defence might be pleaded against a prior gratuitous creditor, it were apparently unjust to sustain such deeds in prejudice of prior onerous debts : Onerous creditors ought not to be put to dispute what their debtor's condition was the time he made the alienation, it being sufficient for them to say in competition with posterior gratuitous creditors, That the debtor is insolvent ; since, upon the eventual bankruptcy of the debtor, the donor ought rather to suffer than the onerous creditor, according to the principle *Potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro adquirendo*. And the reasoning is the stronger in this case, in which the creditors are more defrauded, than if the mother had only granted a bond of provision to her daughter ; for, at any rate, they would have come in [929] *pari passu* with such a bond : Whereas if the defender be assoilzied, they shall thereby be entirely cut out of the most valuable share of their debtor's means.

Replied for the defender Katharine Kinnier :—She is much better founded in her present situation, than if she had only a bond of provision from her mother. When one accepts a personal bond, he agrees to trust his debtor, and to run the hazard of his insolvency : Personal creditors therefore are in this view all embarked as on one bottom ; if their debtor's funds prove shortcoming, the loss falls upon them ; first indeed upon the gratuitous creditor : For if there is not sufficient for all, it is but equitable that the onerous creditors draw first ; according to the maxim, That in competitions, *Potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro adquirendo* ; or, which comes to the same, *Nemo debet locupletari aliena jactura*. And in this case the maxim is directly applicable : For whatever is given to the gratuitous creditor, who is *certans de lucro adquirendo*, is virtually taken from the onerous creditor, who is *certans de damno evitando*. But where one entirely solvent, and thereby at an absolute liberty of alienation, gives away any of his effects, still leaving sufficient for all his creditors ; if such an alienation, whether gratuitous or onerous, cannot be secured against posterior deeds of the alienator ; it will follow, there is no such thing as an absolute power of disposal of any thing in the world. Here the maxim does in no shape apply ; for the creditors suffer nothing

by the alienation : If they continued to trust their debtor afterwards, *sibi imputent* ; at the time of the alienation there was a sufficient fund for all ; at that time they might have disengaged themselves from their debtor, by doing diligence for payment ; and if they chose to give longer trust, the hazard of that ought not to lie upon a third party, who is not in a competition with them about their debtor's effects, and who is no way connected with them or the debtor, except that he now stands possessed of some effects which were legally given him by the debtor, while he had the absolute disposal thereof.

"The Lords sustained the defence, That the mother had effects, either *in specie* or obligations by responsal persons, the time of granting the bond, sufficient to satisfy the debts then resting." *Fol. Dic.* v. 1, p. 68. *Rem. Dec.* v. 1, No. 9, p. 17.

No. 71. [949] Sir ARCHIBALD GRANT v. ROBERT GRANT of Lurg, &c. November 10, 1748.

A person who dreaded that the consequences of an unfortunate transaction would render him insolvent, made out heritable securities in favour of certain of his creditors without their knowledge. Found ineffectual.

Robert Grant having, in the year 1731, made a purchase of the estate of Tillifour, borrowed several sums from Grant of Lurg, and others, which he applied for payment of the price. Robert Grant had been employed by Sir Archibald Grant, as his factor upon the estate of Monymusk ; this factory was, anno 1739, converted to a tack of the whole estate ; and it was part of this bargain, that Robert should undertake the arrears due by the tenants, for which he granted to Sir Archibald an obligation for £800 Sterling. This was an unlucky transaction for Robert Grant by which he lost considerably. Finding Sir Archibald's claim swelling every year, and being apprehensive about his other creditors who had lent their money to discharge the price of his estate, he came to a resolution to secure them in all events upon his estate of Tillifour. This resolution he executed the 15th February 1733, classing these creditors in three several bonds, upon which he proceeded to give sasine the same day : and it came out, upon proof, that the creditors knew nothing of these securities granted to them till afterward, and that it was Robert Grant's intention to secure them in a preference before Sir Archibald. This fact furnished Sir Archibald an objection, which he proposed, in a ranking and sale of Robert Grant's estate, viz. that these infestments of annualrent were null and void upon several grounds. 1mo, As being granted against the original law of justice. 2do, Against the authority of the civil law, and the *actio Pauliana*. 3tio, Against our statute 1621. And, lastly, Also against the statute 1696.

In answer to these grounds, it was premised, that there is nothing in our statutes nor practice to favour an objection against these heritable bonds, granted in security of just and onerous debts. The statute 1696 is quite out of the case. Far from being a notour bankrupt within sixty days of these bonds, Robert Grant continued in credit for a long time thereafter ; and Sir Archibald himself, who makes the objection, took an heritable bond from him, 28th October 1734, more than a year and a half after these bonds. As for the statute 1621, it is a direct authority against the objector, because it is understood by that statute, and is established law, that bare insolvency deprives not any man of the administration of his own affairs, nor prevents him from paying or securing his creditors in what order he pleases. The only exception is, that after diligence by one creditor, the insolvent person cannot prefer any other ; such preference being understood purposely done to disappoint the effect of the diligence.

If then there be any wrong to be the foundation of a reduction, it must lie upon the general head of fraud, to furnish a challenge at common law. And to make out this fraud, the following proposition must be maintained, That, after a man knows himself to be insolvent, it is wrong in him to do any deed to prefer one creditor before another ; which, in other words, is maintaining that an insol-[950]-vent person,

knowing himself to be such, is barred by the common law from the management of his own affairs, from making payment to any one creditor, and from granting any one creditor a security. This doctrine has no foundation in the common law; because insolvency does not deprive a man of his property, nor of the administration of his property, of which payment or granting security are rational and ordinary acts. Nay, our statutes suppose a contrary doctrine; the act 1621, goes no further than to cut down a security granted to a creditor, in prejudice of a more timeous diligence used by another creditor; and it does not even cut down payment made after diligence; and the act 1696 supposes, when no diligence is done, as in the present case, that all acts of administration, such as sale, payment, security, &c., are good in law, unless executed within threescore days of notour bankruptcy.

Supposing there were any dubiety as to these points, other difficulties remain to be surmounted before the objection can be supported. In the first place, how does it appear that Robert Grant knew himself to be insolvent? The contrary appears from the deposition of the notary, the man he trusted, and to whom he would communicate his sentiments without disguise; he depones upon the conversation he had with Robert Grant, who told him, "that he was resolved to give these securities to his other creditors, because there was a fund in the hands of the tenants of Monymusk sufficient to pay Sir Archibald:" and if this was his opinion, it can not be said that his granting a security to his other creditors was in him a wrong or immoral act.

But supposing, for argument's sake, that Robert Grant knew himself to be insolvent, it will not follow that he did wrong in preferring his other creditors before Sir Archibald; for he owed them this preference in common justice, as the very estate upon which he gave them preference, was purchased with their money. On the other hand, it was a hard bargain which Robert Grant had unluckily engaged himself in with Sir Archibald; and if he was conscious, which for ought appears is the case, that he faithfully applied to Sir Archibald's behoof whatever he drew out of his estate, it would have been unjust to have preferred Sir Archibald upon the land-estate, or to have brought him in *pari passu* with these creditors; so that Robert Grant did the honest and fair thing, when he secured these creditors upon his land-estate, which was purchased with their money, and who trusted their money with him upon the faith of that estate.

But, in the third place, supposing Robert Grant to have acted wrongously, why is this wrong to be turned against the creditors who had no accession to it? It is not alleged that they knew of Robert Grant's insolvency; it appears by letters in process, that some of the creditors, Grant of Lurg in particular, were demanding their money; and there is a letter by Robert Grant to Lurg, 1st September 1732, in answer to one craving payment, wherein he promises payment of half of Lurg's sum at Martinmas, and the other half at Whitsunday; adding, "but if you are positive shall get the whole." Lurg therefore, when he got the real security delivered to him, considered this as no more than a piece of justice done him by [951] his debtor; that, since he had failed in his promise of payment, he had done what was the next best, viz. to give him a security.

What remains only to be obviated is, the authority of the Roman law, which the objector in vain calls to his aid. It is very true, that, by the *actio Pauliana*, securities given by a bankrupt to one or other of his creditors preferring them before the rest, are rescinded; and the authority cited proves this and no more: but then it is as true, that the *actio Pauliana* did not arise till the debtor's effects were sequestrated, a *curator bonis* named, and the creditors put in possession. The *actio Pauliana* was given by the prætor; and the prætor's edict, which is contained in the first law, *Quæ in fraud. creditor.* expressly mentions the creditors to be in possession. Justinian describing the *actio Pauliana* in his Institutes, lib. 4, tit. 6, § 6, makes it an express condition of giving the action, that the bankrupt's effects be in possession of the creditors. And accordingly the established definition or description of this action given by all commentators is, "*Actio in factum competens creditoribus in possessionem missis, vel curatori bonorum adversus possessores fraudis conscios, ad res in fraudem creditorum alienatas cum omni causa restituendas.*"

"Found the heritable bonds of corroboration were fraudulent, devised and made with intent to prefer the creditors therein named before Sir Archibald Grant; and therefore reduced the heritable bonds so far as to subsist only and be ranked *pari passu* with Sir Archibald."

In this case a distinction ought to be made betwixt ordinary acts of management, levying rents, uplifting and paying debts, granting securities, &c., done in the prosecution of a man's affairs; and extraordinary acts, such as granting a preference to one set of creditors before another, when a man has no other prospect but bankruptcy. Insolvency merely is no objection to the first; because such acts are done with a view to carry on affairs, and in the hopes of better fortune; and therefore are not only innocent but commendable. The second, though not properly a fraud, is a moral wrong; because, in effect, it is bestowing upon one creditor what ought to be given to all: and such moral wrong cannot be supported by a court of justice: it must be reduced, and no person allowed to take benefit by it. *Rem. Dec. v. 2, p. 167.*

* * Lord Kilkerran mentions the same case thus :

Grant of Tillifour being debtor to Sir Archibald Grant in a large sum, formed a scheme for disappointing him of his debt. He was in debt above what he was worth, and, without the privity of his other creditors, he executed three several heritable bonds, in each of which he comprehended a variety of creditors, containing precepts of sasine in general for infetting them, which bonds were all written at the same time, the hand employed fitting up the whole night, and [952] being enjoined secrecy; and next day the infettments were taken without the privity of the creditors.

Of these bonds, Mr. William Grant, as trustee for Sir Archibald his brother, pursued reduction upon the head of actual fraud; and prevailed.

The only question was, How the creditors, who might acquire, though *ignorantes*, could be affected by the fraud of their debtor, to which they were not accessory; but, to this the answer was, That, by their accepting of the deeds, they became *particeps fraudis*.

On this occasion, there was some reasoning among the Lords upon the construction of the act 1621; wherein they agreed, that the words necessary causes in the act 1621 are in practice thus understood, That there be a previous obligation to grant the deed: That though the words true, just, and necessary causes would appear as they stand to be conjunctive, they have always been considered as disjunctive; so that if either the deed be granted in consequence of a previous obligation, or, though there be no such previous obligation, if the deed be granted for a true and just cause, it is not reducible. *Fol. Dic. v. 3, p. 49. Kilkerran (BANKRUPT), No. 9, p. 55.*

No. 72. [953] WALKER v. POLWARTH. June 19, 1635.

A bond granted after marriage, for a suitable liferent to a wife, by her husband, insolvent at the time, was sustained in competition with creditors, whose bonds were anterior. The wife was allowed to rank proportionally, although there was neither contract of marriage nor tocher given. Her claim arose *de jure naturæ*.

Umquhile Patrick Walker being married upon one Polwarth's wife, betwixt whom there were bairns procreate, he gives a bond *stante matrimonio* to Henry Polwarth, brother to his wife, and to her behoof, for payment of 2000 merks, she not being provided to any liferent or conjunct-fee, or any other benefit or means of maintenance by her husband; at the time of giving of the which bond, the defunct was debtor to sundry creditors, by sundry bonds, preceding this bond given to his wife, in more sums of money than all his goods or means extended to; thereafter, after his decease, the relict and the creditors contesting in a double pouding, raised by the executors of the defunct, which of them should be answered of the defunct's goods, which were not sufficient to pay the half of his debts:—The creditors alleged, That the bond given to the wife could give her no right to any of the said goods, seeing the same were given to her long after these bonds, at which time he could do no deed to their prejudice, he being then in effect a bankrupt, seeing then he had not so much gear as might pay his debts, whereby he could not give to his wife anything, but *deductis debitis, et post solutum æs alienum*; and so this being *donatio inter virum et uxorem*, and for no lawful onerous cause, it cannot be respected against them; and where the relict opposed

that it was given for her maintenance and living, she having no other thing whereupon to live, and receiving no other provision, and that it is in effect *donatio propter nuptias*; they answered, That it is not *donatio propter nuptias*, because there is no contract of marriage can be shown betwixt them; likeas she gave no tocher nor other benefit to her husband, and so of law and reason can seek no recompence of his goods; for *dos et donatio propter nuptias in jure paribus passibus ambulant, et æqualiter regulantur*: Notwithstanding whereof this allegiance proponed for the creditors was repelled, and the relict was found ought to have her proportion with the rest of the creditors, according to the free goods in [954] the testament, and according to the quantity of their debts; albeit there was neither contract of marriage nor tocher given; and albeit the creditors' bonds were anterior to the relict's; seeing she had a debt owing to her, *de jure naturæ*, for her maintenance and living, which in its own proportion is as favourable as the creditors' debts.

Act. HAMILTON.—Alt. —.

Fol. Dic. v. 1, p. 70. Durie, p. 767.

No. 74. [956] GEORGE LOCKHART of Carnwath v. EUPHAN DUNDAS and Mr. JOHN DUNDAS of Philpston, her Husband. January 14, 1714.

A wife assigned the price of lands to her husband by contract of marriage, as tocher. He contracted for suitable provisions to her and her children. The assignment found not reducible upon the act 1621, at the instance of an anterior creditor.

George Lockhart of Carnwath, in January 1693, obtained a decreet against Katharine Swynton, daughter and heir of George Swynton of Chesters, and David Dundas of Philpston, her husband, for his interest, for payment of £1000 principal, annualrent and penalty, contained in a bond granted in anno 1680, by the Lord Mersington as principal, and the said George Swynton, his brother, as cautioner, to Sir George Lockhart, President of the Session, the pursuer's father. The lands of Chester, then affected with a liferent annuity of 600 merks, in favours of Euphan Brown, Katharine Swynton's mother, being sold to a third party for 12,000 merks, there was a contract of marriage perfected, 20th December 1693, betwixt the said David Dundas and Katharine Swynton, whereby the husband got the 12,000 merks, the land's price, in name of tocher, to be applied for payment of his debts; in recompence whereof, he secured his wife in a liferent annuity of 8 chalders of victual, out of his own estate of Philpston, and Euphan Brown his mother-in-law, another annuity of 600 merks, in lieu of the equivalent renounced by her out of the lands of Chester, and disposed his estate with these burdens to the heirs male of the marriage, and provided the daughters to £1000 Sterling; which contract expressly referred to marriage articles formerly communioned upon. No diligence having been done upon the decreet against David Dundas, as husband to Katharine Swynton, *stante matrimonio*; Carnwath pursued Euphan Dundas his heir, and Mr. John Dundas her husband, for payment of the sums decerned, upon these grounds; Imo, That David Dundas [957] was *lucratus* by the marriage with Katharine Swynton. 2do, Seeing Katharine, as heir to her father, was liable before the marriage for the debt claimed by the pursuer, she could not *stante matrimonio* dispone, or her husband, a conjunct person, accept of a right to the price of her lands, in prejudice of an anterior lawful creditor; therefore the pursuer repeated a reduction of the said fraudulent deed, upon the act 18th, Parliament 23d, James VI. (1621).

Fol. Dic. v. 1, p. 71. Forbes, MS. p. 16.

No. 76. [958] Sir RODERICK M'KENZIE of Scatwell v. CHRISTIAN MONRO.
February 17, 1738.

A wife being disappointed by the diligence of creditors, of her jointure, for which her husband had been only personally bound, is found entitled to the benefit of an infertment, given to her by her husband during the marriage, bearing to be, "over and above any former provision," which would have been gratuitous, had the jointure been made effectual.

In a marriage contract, the husband, by a personal obligation, provided his wife to a jointure of £180 Scots yearly, and also to the sum of £1000 Scots, failing children of the marriage; during the marriage he infert his wife in a tenement of £10 Sterling of yearly rent, bearing to be, "over and above any former provision made in favours of his spouse." The husband having died insolvent, his creditors raised a reduction of this infertment, upon the first head of the act 1621, as being gratuitous: The relict acknowledged she could not hold both the personal provision and the infertment; but observed, That the case would be hard if the creditors, who had cut her out of her personal provision, by preventing her in diligence, should be allowed to turn these provisions against her, in order also to cut her out of her liferent infertment; and therefore answered, That as a reasonable provision granted *stante matrimonio*, to a wife not otherwise provided, would be effectual though the husband were insolvent at the time; so the present infertment, though designed as a gratuity, turning out to be no other than a reasonable provision, is not reducible; gratuitous it cannot be said to be, with regard to the relict, who throws up every other claim against the husband and his creditors.—The Lords found the wife's infertment is not reducible upon the act 1621.
Fol. Dic. v. 1, p. 70.

No. 90. [974] Creditors of CULT v. The YOUNGER CHILDREN. August 5, 1783.

In cases regarding bonds of provision to children, the solvency of the granter when these became effectual against him, must be proved by the children, unless the other creditors have been *in mora*.

In 1775, Mr. Wardrobe died possessed of the estate of Cult, and some moveable funds. In 1777, his creditors, and among these his younger children, upon their bonds of provision, adjudged; and in the end of the year 1782, the lands were sold judicially.

In the ranking, the Lord Ordinary found, "That as the creditors of the father were guilty of no culpable neglect, and as there is now a confessed bankruptcy, the children are not entitled to compete on their bonds with the creditors of the father."

Against this interlocutor the younger children reclaimed, and pleaded, The object of the statute 1621 was not to render every gratuitous right dependent on the future circumstances of the donor, but to restrain fraudulent alienations, by persons in a state of insolvency, in favour of their confidants and relations. The validity therefore of rights with regard to this statute must be regulated by the situation of the granter when these became effectual against him. In the case of provisions to children, which are subject to revocation, the father's death is the period to be attended to; and no subsequent alteration, whether proceeding from the conduct of the other creditors, or any other contingency, ought to impair settlements, which, though not viewed as onerous in a question with the granter's creditors, are in every other respect of the most favourable and rational nature, Erskine, b. 4, tit. 1, § 34; January 6, 1677, Children of Mousewell *contra* his Creditors, No. 80, p. 961; December 11, 1679, *inter eosdem*, No. 60, p. 934; February 7, 1679, Hamilton *contra* Hay, No. 81, p. 968; January 12, 1697, Kinfauns *contra* Carnegie, No. 85, p. 970.

Answered, The Lord Ordinary's interlocutor, when duly compared with the circumstances occurring in this case, does not in the least impinge on the principle, that provisions to children in a question of this sort depend on the solvency of the granter

at the period when these became the foundation of a proper action against him. Here the younger children are unable to point out any diminution of their father's funds, from misconduct on the part of the heir, or any other extraneous accident. Their competitors have used every dispatch in discussing the estate of their debtor which the nature of their diligence could admit. No reason therefore can be offered for supposing that the funds would have been more productive at the common debtor's death than at the moment of this ranking.

Observed on the Bench, In the circumstances of this case the justice of the Lord Ordinary's decision cannot be disputed. Yet as the words are capable of the interpretation given to them by the petitioners, it may be proper, for preventing any misapprehension from the precedent, to vary the terms in which it is conceived.

The interlocutor pronounced by the Court was in these words: "Find, That the creditors were guilty of no culpable neglect, in not doing diligence sooner [975] for their debts: Also find, That there is now confessedly an insufficiency of funds belonging to the late William Wardrobe, for payment of his debts; and that the younger children of the said William Wardrobe have not produced sufficient evidence to show that their father's estate in Scotland, at the time of his death, was sufficient to answer the debts he then owed, and their provisions; and therefore find, that the said younger children are not entitled to compete with these creditors of their father."

Lord Ordinary, BRAXFIELD.—For the Creditors, HONYMAN.—For the Younger Children, HENRY ERSKINE, DICKSON.—Clerk, COLQUHOUN.

Craigie.

Fol. Dic. v. 3, p. 49. Fac. Col. No. 117, p. 182.

No. 91. MR. JOHN WATT *v.* CAMPBELL of Kilpont. February 8, 1671.

A father, at the time solvent, gave his son on his marriage £40,000 Scots. On the father's eventual bankruptcy, action sustained at the instance of a creditor against the son; the gratuity, although it did not render the father bankrupt, being considered to be exorbitant.

Sir Archibald Campbell being debtor to Adam Watt in a sum of money, he did thereafter contract his son Mr. Archibald in marriage with Thomas Moodie's daughter, and by the contract Thomas Moodie acknowledges the receipt of forty thousand pounds from Sir Archibald, and is obliged for twenty thousand merks of tocher, all to be employed for Mr. Archibald in fee; but Thomas Moodie's daughter dying, and leaving no children behind her, Thomas Moodie did restore the sums, and there is a discharge granted by Sir Archibald and his spouse, and Mr. Archibald, bearing them to have received the sums, and to have discharged the same; whereupon Mr. John Watt, as heir to Adam, pursues Mr. Archibald to [976] pay him the sum due to his father, upon this ground, that he having received forty thousand pounds of his father's means, after contracting of the debt, ought to make so much of it forthcoming as will pay the pursuer; which action was founded upon the act of Parliament 1621, whereby all deeds done by debtors in prejudice of their creditors, without a cause onerous, are declared null; and all parties that by virtue thereof intromit, are declared liable to restore to the creditors. It was answered for the defender, 1st, That the libel was not relevant, there being no part of the act of Parliament 1621 that incapacitates debtors to gift or dispoise sums of money, or moveables, especially if the dispoiser at that time be not insolvent, but have a sufficient estate for satisfying his debt; and it is offered to be proven, that Sir Archibald had, at the time of this contract, a sufficient estate for all his debt, in the hands of the Earl of Argyle and Glenorchie; and albeit, by the supervening forefaulture, Argyle's debt be insufficient, it was a good debt the time of the contract, so that there can be no ground to make a child liable to restore a portion given by a father who was solvent. 2dly, Albeit the defender could be liable, if it were clear that he had the sum foresaid by his father yet remaining to the fore, yet if it had been lost or spent before the intent-

ing of this cause, he or any subsequent estate acquired *aliunde* is not liable, *ita est* any thing he has is a wadset of forty thousand merks on Kilpont, and the two tochers he had, viz. twenty thousand merks from Thomas Moodie, and ten thousand merks of legacy, and twelve thousand merks of tocher with Sir William Gray's daughter, was sufficient to acquire the right of Kilpont, without any thing from his father. 3dly, The discharge produced cannot instruct that Mr. Archibald received the money, because it bears indefinitely that payment was made to Sir Archibald and his spouse, and to Mr. Archibald, and all of them do discharge. The pursuer answered, That the libel was very relevant, for whatsoever might be alleged of bairns portions by a solvent father, yet this being so considerable a fortune provided to the only son, and apparent heir, if it did not make him liable to satisfy the father's debt *pro tanto*, it were a patent way to defraud all creditors and elude the act of Parliament, for the father might sell his estate, and provide the moneys in this manner; and as to the discharge, albeit it be indefinite, yet it must be presumed that Mr. Archibald received the sums, because they belong to him in fee by the contract of marriage.

The Lords found the libel relevant, and that the discharge produced did presume that Mr. Archibald the fiar did receive the money, but seeing the probation was not express, but presumptive, they allowed Mr. Archibald to condescend upon what evidences he could give, that the money or surety thereof was delivered to his father.

Fol. Dic. v. 1, p. 73. *Stair*, v. 1, p. 717.

No. 93. [977] *WOOD v. REID*. November 23, 1680.

A father, while in prison, and reputed bankrupt, made an assignation to his son-in-law in lieu of tocher; although onerous, the daughter not being otherwise provided for, found reducible; and that a son-in-law, contracting with a father in such circumstances, must run the hazard of the father's debts.

James Wood as creditor to umquhile Andrew Balfour, pursues reduction of an assignation procured by Balfour, of a sum belonging to Andrew in favours of Mr. Patrick Reid, who married his daughter, as being betwixt conjunct persons, without a cause onerous. The defender having condescended upon several causes onerous; and amongst the rest, that he having married Balfour's daughter, the only child of his marriage, in favours of whom 25,000 merks were provided by her mother's contract; this assignation was all the provision he had, and therefore is in place of a contract of marriage, which being *ad sustinenda onera matrimonii* is an onerous and most favourable contract. It was answered, That though it had been a formal contract, yet being granted by Andrew Balfour, who was in prison for debt, and commonly repute bankrupt, it could not prejudice lawful creditors; but Reid having married the woman, her father being in that condition, is not as if her father had been in entire reputation, but it must be understood that he married her *cum periculo* of her father's debts.

Which the Lords found relevant. *Fol. Dic.* v. 1, p. 73. *Stair*, v. 2, p. 804.

No. 98. [984] *Creditors of Sir DAVID THOIRS v. Lady MIDDLETON*. November 18, 1729.

A provision by a person insolvent, to his nephew's wife in her contract of marriage, held to be onerous and not reducible.

A person insolvent became bound in his nephew's contract of marriage, among other provisions, to pay the wife an yearly annuity of 2000 merks, to commence after the husband's decease, in security of which he infeft her in certain lands. The granter's creditors raised a reduction of this alienation, upon the act 1621, alleging it to be *ultra vires* for the granter, to make voluntary alienations of his effects, in

prejudice of his prior lawful creditors.—The Lords refused to sustain the reduction, the said liferent provision being onerous as to the wife, in so far as upon the faith thereof, she had entered into the marriage contract. *Fol. Dic. v. 1, p. 72.*

No. 101. [987] JANET DUNCAN v. JOHN SLOSS. February 8, 1785.

A provision to a wife, by antenuptial contract, ineffectual so far as exorbitant.

By an antenuptial contract of marriage, John Sloss settled a large jointure on Janet Duncan his second wife ; for payment of which, after his death, she sued his heir, a child of the first marriage, on whose provisions it encroached.

Pleaded for the defender : The jointure in question is exorbitant, being greatly disproportionate to the means of the granter ; and therefore, *quoad* the excess beyond its rational or just amount, it is to be postponed to the claims, as well of his children by the prior marriage, as of his other creditors ; Gosford ; Stair ; 19th January 1676, Stansfield *contra* Brown, No. 73, p. 954 ; Kilkerran, *voce* BANKRUPT, 26th July 1744, Creditors of Sir James Campbell, No. 103, p. 988, *Fac. Col. p. 225*, 12th July 1758, Noble *contra* Dewar, *voce* TAILZIE ; Erskine, p. 564. Fountainhall, 23d March 1683, Gartshore *contra* Brand, No. 102, *infra*.

Answered : The authorities quoted relate to postnuptial contracts alone ; for it has not yet been found, that provisions to wives, contracted for by antenuptial deeds, are not onerous debts in the fullest sense.

The cause was reported by the Lord Ordinary ; when

The Court restricted the jointure in question to a rational extent, in the same manner as if it had been granted in a postnuptial contract.

Lord Reporter, GARDENSTON.—Act. W. CRAIG.—Alt. M. ROSS.—Clerk, HOME.

Stewart.

Fol. Dic. v. 3, p. 50. Fac. Col. No. 197, p. 310.

No. 103. [988] The LADY of Sir JAMES CAMPBELL of Auchinbreck, and his CREDITORS, Competing. July 26, 1744.

A postnuptial provision to a wife, held to be onerous, in so far as suitable and moderate.

After Sir James Campbell had contracted debts above the value of his estate, he, in April 1736, married a young woman, who had for some time been in his family as governess to his children, without any contract of marriage ; but in October 1736, he granted her a liferent bond of annuity for £100 Sterling, besides a house with some conveniences, containing precept of sasine, whereon she was infeft. Of this bond, his creditors having raised reduction on the act 1621, the Lords “ Restricted the lady’s liferent bond of provision and infeftment to £50 Sterling yearly, in full of all she could claim by the said bond.”

Some of the Lords were of opinion, That where a woman marries without a contract, upon the faith of the legal provision, any postnuptial provision is a gratuitous deed, and as such, reducible at the instance of prior creditors ; and that, were it otherways, there would be nothing to hinder any man who had married without a contract, after he knew himself insolvent, to settle a provision on his wife preferable to all his personal creditors.

But the opinion which prevailed was, that marriage itself is an onerous cause, which yet will not be sufficient to sustain the provision any further than what may be a moderate subsistence ; for so far only the husband is under obligation. [989] And as to the case supposed of a husband’s settling a provision upon his wife, after he knew himself become insolvent, even in that case, it was thought the provision might be sustained to the extent of a subsistence.

But be that as it will, the present case was thought different, as in the supposed

case there is more an appearance of fraud than in the present case, where there was no change of the husband's circumstances between the marriage and the time of granting the provision ; and, as it was not controverted, but that at the marriage he might have granted a provision, it was thought to be straining too hard to say, he could give none thereafter, although no change had happened in his circumstances.

Fol. Dic. v. 3, p. 50. Kilkerran (BANKRUPT), No. 4, p. 51.

No. 104. [990] *Executors Creditors of Mr. HUGH MURRAY-KYNNYMOUND v. AGNES MURRAY-KYNNYMOUND.* June 18, 1746.

A person enjoying an entailed estate, gives, in a postnuptial contract, to his only daughter, who was also heiress of the entail, a provision of £2000. The provision reducible on the act 1621, if the granter was insolvent at the date of the contract.

By a postnuptial contract of marriage, entered into between Mr. Hugh Murray-Kynnymound, advocate, and Isabella Somerville, daughter to Hugh Somerville, writer to the signet, narrating that the terms thereof had been agreed on before the marriage, and that Mr. Somerville had already paid to Mr. Murray £1000 Sterling, in part of portion with his lady : Mr. Somerville further obliged himself, and granted bond for another £1000 payable at his decease, and to pay to the children of the marriage, other than the heir, or the heir, if a single child, in fee, and to his daughter in liferent, £1000 at the childrens' ages of 21, or marriage ; and it was further provided, that Mrs. Murray should succeed equally to his effects with his other daughter, unless he should otherwise dispose, after his said other daughter had first drawn £1000 out of them, to preserve the equality, as there had been but £2000 given with her at her marriage. On the other hand, Mr. Murray secured his lady in a jointure of £200 Sterling, disposed to her his whole household furniture, redeemable by the children of the marriage for 2000, and by any other heir for 4000 merks Scots ; settled his estate of Whitsomhill on the heir-male ; and failing heirs-male of any other, on the heirs-female of this marriage, and obliged himself to do no deed whereby the heirs of the marriage might be disappointed of any succession competent to them to the tailied estate of Melgum and Kynnymound, which last article was not agreed on before the marriage, as the succession to that estate had not then fallen to him ; and it was provided, that it should not be in Mrs. Murray's power to renounce her jointure, without the consent of certain trustees named.

Mr. Murray had granted a security for the first £1000 paid to him, before executing the contract, and there was produced in process a memorandum under his hand, entitled, Articles of contract of marriage betwixt Mr. Hugh Dalrymple, advocate (which name he bore before his succession to the entailed estate), and Mrs. Isabella Somerville, his wife ; containing all the terms in the contract, except that concerning the succession to the estate of Melgum and Kynnymound ; and that the estate of Whitsomhill is not in any event agreed to be settled on female.

The clause on which the present question depended, contained an obligation on Mr. Murray, in case there were no sons, to pay to one daughter of the marriage £2000 ; if there were two, to pay them £2500 ; and to three or more, £3000 Sterling.

The estate of Whitsomhill was sold, and Mr. Murray dying insolvent, as his creditors alleged, a reduction was by them raised against Agnes Murray, the only child of the marriage of this provision, as fraudulent, excessive, and gratuitous, in prejudice of creditors.

Pleaded for the creditors, Mr. Murray was insolvent at the time of contracting the marriage ; he died so, and what debts he had contracted after it, were to satisfy prior engagements. This appears to have been in view at making the contract, in which is the unusual clause of putting it out of the lady's power to renounce her jointure, which could only proceed from Mr. Somerville's knowledge of Mr. Murray's circumstances, and hence his apprehension that his daughter would be in danger of being pressed to renounce. This is a key to the whole transaction, and shews a formed scheme to secure a provision to the children out of the fund of creditors ; for

no other interpretation can be put upon granting this sum to a child who was to be both heir and executor.

Supposing the case to be without fraud on the part of Mr. Somerville, the provision falls to be reduced as exorbitant. When a man is to marry his daughter, he may be allowed to make the best bargain for her that he can, but after marriage the provisions fail to be considered as voluntary ; and in Mr. Murray's circumstances, in which no credit can be given to the narrative of the contract, that it was preconcerted, the jointure itself was rather too large ; but Miss Murray was to succeed to the estate of Melgum and Kynnymound, and to her grandfather's £1000, which made the provision unnecessary and gratuitous ; for though the portion might be considered as a sufficient onerous cause to support the lady's jointure, yet it cannot support this provision to a child expecting besides such a succession : And even eventual bankruptcy will set aside deeds absolutely gratuitous.

[992] By the tailzie it was in Mr. Murray's power to burden the estate with provisions to younger children, to the extent of three years' rent, in which case, it is apprehended, he could not have laid them on his own proper effects to the prejudice of his creditors ; and neither can he be allowed to do it in favours of this child, who gets both the three years' rent and the remainder of the estate.

With regard to such of the creditors as became so after the contract, their money was applied to the payment of prior creditors ; and the Lords have found debts contracted by an heir of entail, and so applied, a burden on the tailzied estate, 29th January 1731, *Gordon v. Sutherland of Kinminity*, see *TAILZIE*. 2dly, They are in the same case with that of the decision, 2d July 1673, *Street v. Jackson and Mason*, *Stair*, v. 2, p. 197, *voce FRAUD* ; where an infetment granted to a son was reduced on debts after contracted.

Pleaded for Miss Murray, The deed was neither gratuitous, nor was the granter then in a state of insolvency. It was not gratuitous, considering the portion given ; and here the tailzied estate falls not to be considered, being already secured to the child without any deed of Mr. Murray ; so that all that is provided in her favours is her mother's portion. And this cuts down all allegations of designing fraud, when the bargain was reasonable and equal ; and Mr. Somerville had no reason to suspect his son-in-law's credit, who was in possession of a proper estate, besides his liferent of the tailzied estate and profits of business. Neither can any inference be drawn from the clause, putting it out of the lady's power to renounce, which he was used to insert in contracts of his drawing, and actually did it in his other daughter's contract.

2dly, As the creditors are presently endeavouring to charge several of the debts claimed by them on the tailzied estate, it will depend on their success in that question, whether Mr. Murray's effects be insolvent at this hour ; so that the reduction ought at least to be superceded till the event of that cause.

Observed on the bench, That Miss Murray might have been excluded from the succession of the tailzied estate, by the existence of a son of a subsequent marriage, in which case nothing was settled on the issue of this marriage but the provision.

"The Lords, 18th June 1745, found, That the provision of £2000 Sterling, contracted by Mr. Hugh Murray, in his contract of marriage with Mrs. Isabella Somerville, to the only daughter of the marriage, was not reducible on the act of Parliament 1621, although the said Mr. Hugh Murray had been insolvent at the time of the said contract."

On the reclaiming bill and answers, in which the Lords were chiefly moved with this circumstance, that the £2000 to an heir-female was beyond what was provided to the heir-male, in case any had existed ; and therefore, if the provisions in his favours were adequate, this to a daughter could not be looked upon but as gratuitous.

"They found, 25th July 1745, that the provision was reducible on the act of Parliament 1621, in case it should appear that Mr. Hugh Murray was insolvent at the date of the contract."

[993] Pleaded in a bill for Miss Murray, That the creditors had at first endeavoured to cut her out of this provision, by putting an interpretation upon the clause, as if it had only been intended to take effect, in the event of her being excluded from the succession by an heir-male of another marriage ; but, by an interlocutor of the Ordinary, adhered to, it was found that she was creditor upon the executry and moveables for the sum ; and therefore it being fixed, that this was provided in her favours, if it be not an irrational provision, it must be made good to her, notwithstanding it be a

further provision than what is made upon an heir-male. Mr. Murray was infert in an estate above £300 per annum, a terce whereof he might have settled upon his lady, though he had received nothing with her ; so that the only question is, Whether what he received be not sufficient to support the provisions made on her and her child, over £100 of jointure. But without being so nice, it is apprehended £2000 of portion was an adequate consideration for £200 jointure to his lady, and £2000 to be paid to the child, in the event of her attaining majority or marriage ; for as the present argument proceeds on the supposition of Mr. Murray's bankruptcy, the stipulated succession to the estate of Whitsomhill must go for nothing ; and the tailzied estate was settled on the petitioner prior to the contract, without any deed of Mr. Murray's : So that her grandfather might have, without regard to that, retained his money, which he might have disposed of to her mother and her, or insisted on these terms : Not to mention the £1000 bound to Mr. Murray's children of the marriage, which may very well be reckoned an additional inducement of the provision made by him in their favours.

Answered, That by the memorandum in Mr. Murray's handwriting, the estate was not in any event to be contracted to heirs-female, wherefore the provision to daughters was only intended to take place, in case of their not succeeding to his estate ; and this the respondent imagined to have been the intention, though it was not so expressed in the contract. The petitioner had argued wrong in alleging, that no part of the provisions made upon the daughter could be brought *in computo*, besides this £2000 ; for the hope of the succession, though not settled by a deed of Mr. Murray's, was a cause for granting the portion, and he also obliged himself to do no deed by which that hope might be frustrated ; and the respondents apprehended they could point out a method by which that might have been done. The settlement of the estate of Whitsomhill fell also to be considered ; for though the argument went on the supposition of Mr. Murray's bankruptcy, yet the petitioner would not say, that Mr. Somerville was in the knowledge thereof when he made the stipulation, or if he were, it would be a sufficient cause of reduction.

The Lords adhered. See PROVISION to HEIRS and CHILDREN.

Reporter, ARNISTON.—Act. R. CRAIGIE & H. HOME.—Alt. A. MACDOUALL & BROWN.—Clerk, KIRKPATRICK.

Fol. Dic. v. 3, p. 50. *D. Falconer*, No. 117, v. 1, p. 142.

No. 105. [996] Creditors of JAMES STRACHAN *v.* LUDOVIC STRACHAN. July 1, 1754.

Provisions to children, in a postnuptial contract, being made payable after the death of the father and mother, were found to confer no *jus crediti*, and creditors were preferred.

James Strachan of Dalhackie became bound, in a postnuptial contract of marriage to pay certain sums of money to the children, born or to be born of that marriage ; the term of payment was declared to be at the first term after the decease of himself and of his wife.

In a competition between Ludovic Strachan, the only child of the marriage, and the creditors of James Strachan, it was objected for the creditors, That, with regard to the obligations in the contract aforesaid, Ludovic Strachan was to be considered as an heir of provision only ; and therefore could not compete with the onerous creditors of his father.

Pleaded for Ludovic Strachan : It is the duty of a father to provide for his children ; such provisions are onerous, and constitute them creditors to their father : as he who is solvent may become bound to strangers, so also may he to his own children ; as he may make the existence and extent of his obligation to strangers depend on some uncertain event, so also may he in his provisions to his own family. Thus it was decided, 24th January 1724, in the case, Margaret Lyon *v.* the Creditors of Easter Ogle (see p. 233). In that case, provisions were made in favour of daughters

to be born, and declared payable on the first of these three events, the day of their marriage, the attaining the age of eighteen, or the first term after the death of the father. And it was found, That a daughter, having right to such provision, might compete with the onerous creditors of the father.

Pleaded for the creditors of James Strachan : Contracts of marriage ought, in reason, to constitute the children heirs of provision only ; they may, nevertheless, be so framed as to render the children creditors. In this case, however, the children are only made heirs of provision ; for that here a sum of money is made payable after the death of the father ; and which proves, That, during his life, there was no *jus crediti* constituted in favour of the children. Were this provision a *jus crediti*, this pendent obligation would exclude creditors from the date of the contract, which is absurd. Provisions made payable to children whenever they shall attain a certain age, produce action for payment from that time ; the children are therefore creditors in such provisions : for, had these provisions ever been a right of succession, they could not have altered their nature, and become a debt from the term of payment.

The case of Margaret Lyon *v.* the creditors of Easter Ogle is not in point : there the obligation was to pay at a term which might have happened before the [997] death of the father ; it was therefore found to be a *jus crediti*, not a destination to heirs : but the contrary would have been found, had the obligation been to pay at a certain term after the death of the father.

“ The Lords preferred the creditors.”

For the Creditors, SIR JOHN STEWART.—Alt. J. GRANT.—Reporter, MURKLE.—
Clerk, JUSTICE.

Dalrymple.

Fac. Col. No. 109, p. 160.

No. 108. [1000] JAMES CAMPBELL and Others *v.* JANET SOMERVILL. February 14, 1778.

A postnuptial grant of the liferent of a house, by a husband, *obæratu*s, to his wife, found good against creditors, to the effect of securing her antenuptial provisions, in so far as the funds might be otherwise insufficient. If the funds should turn out sufficient for payment of the debts, the liferent was to remain as a separate provision.

Robert Jaffray, in his contract of marriage with Janet Somervill, became bound to provide her in an annuity of £25 Sterling, in case of her surviving. Soon after his marriage, upon a narrative of “ love and regard,” he executed a liferent-conveyance of a house in favour of his wife. Robert Jaffray died, in a few months after executing this deed, in Jamaica, leaving his affairs much involved. His effects in Scotland not being sufficient to pay his creditors, they brought a reduction of the foresaid disposition of the liferent of the house to the widow, upon the act 1621.

Pleaded for the pursuer :—Jaffray died insolvent, and was in the same situation at the time of granting this deed. Where a wife is otherwise unprovided, a postnuptial settlement in her favour will be good to the extent of a rational provision, even when the husband is *obæratu*s at the time of granting it. But it will not be supported by the Court, if immoderate, against onerous creditors ; Kilkerran, No. 4, *voce* BANKRUPT, No. 103, p. 988 ; *Fac. Col. p. 225, Noble v. Dewar*, 12th July 1758, *voce* TAILZIE ; Erskine, b. 4, tit. 1, § 33.—In the present case the wife was provided in the contract of marriage. This ascertained what the parties considered to be reasonable in their circumstances. Every addition thereto, by a postnuptial deed, after the husband is *obæratu*s, must be held as immoderate ; *Fac. Col. No. 18, p. 32, February 7, 1761, Bruce v. Glen, voce* PROVISIONS to HEIRS and CHILDREN.

Answered for the defender :—There is no certain evidence of the husband’s insolvency at the time of granting the deed. But, although he had been insolvent, this deed was granted for a just cause, and, therefore, is not reducible. It is only an addition to the defender’s jointure, of a small house at £4 rent, in which to live with her family. This case, therefore, differs from those founded on by the creditors ; in all of which the provisions were immoderate. The only question, with respect to such provisions is, Whether they are exorbitant or not ? and it makes no difference,

if they are moderate, whether they are additions to a former scanty provision by the marriage-contract, or granted when there has been no former provisions.

The Court found, "That Janet Somervill's liferent-right to this tenement, is to remain in security to her of the annuity in her contract of marriage ; but reserved to her, in case of her husband's debts being paid by the proceeds of his effects at Jamaica, or elsewhere, to claim the liferent-right as a separate provision."

Act. MATTHEW ROSS.—Alt. AD. ROLLAND.

Fol. Dic. v. 3, p. 51. *Fac. Col.* No. 16, p. 29.

No. 109. [1001] The Creditors of WALTER FERGUSSON v. Mrs. CATHARINE SWINTON. February 2, 1796.

An annuity granted by a husband to his wife after insolvency, and by a post-nuptial contract of marriage, reduced in so far as it exceeded a reasonable provision.

In 1782, Walter Fergusson, writer in Edinburgh, married Mrs. Catharine Swinton, a lady of a respectable family, by whom he got a fortune of about £1600 Sterling, besides a yearly revenue of £84, 12s. 6d., arising from property not falling under the *jus mariti*.

No contract was entered into at the time of the marriage, but by a postnuptial one in 1789, Walter Fergusson, after he had become insolvent, settled a jointure of £160 upon his wife, together with £150 to purchase furniture. On this contract she was infeft in certain subjects belonging to him, a few days after its date.

A ranking and sale of Walter Fergusson's heritable property was afterwards brought, in which Mrs. Fergusson having produced this contract and infeftment as her interest, the other creditors

Objected : The provision to Mrs. Fergusson cannot be considered as onerous, because her husband received and spent her fortune before the date of the contract, which he had come under no previous obligation to execute. It therefore falls under the act 1621, as a gratuitous deed, executed by him after insolvency ; and there are no grounds for supporting it to the extent of an aliment, as Mrs. Fergusson will have, after her husband's death, £84, 12s. 6d. yearly, arising from property not falling under the *jus mariti*.

Answered : Settlements made by a husband on a wife, even after insolvency, are reducible only in so far as they are exorbitant ; 11th January 1738, Robertson, No. 75, p. 957 ; 19th June 1635, Walker, No. 72, p. 953 ; 19th January 1676, Brown, No. 73, p. 954 ; 17th February 1738, M'Kenzie, No. 76, p. 958 ; 26th July 1744, Campbell, No. 103, p. 988. But the provision in question, considering Mrs. Fergusson's station in life, and the fortune brought by her, is moderate and reasonable.

The Lord Ordinary took the cause to report.

The Court were unanimous in thinking, that the contract should neither be supported nor set aside *in toto*. Some of the Judges thought that Mrs. Fergusson should be allowed 10 per cent. yearly of the fortune brought by her. The prevailing opinion, however, was that, in cases of this sort, the extent of the widow's provision ought not to depend so much upon what her husband received by her, as upon the rank and situation of the parties.

The Lords, "in respect both parties are agreed that Mrs. Fergusson has the property of a house in Tiviot Row, and the fee of two sums of £700 and £282, 9s. Sterling, due by bonds bearing interest, restrict her provisions, granted by Mr. Fergusson out of his estate, to an annuity of £80 Sterling, in the event of her surviving her husband ; and in so far repel the objections made to [1002] said provisions, and to the heritable security granted for the same, in virtue of the postnuptial contract."

Lord Ordinary, MONBODDO.—For the Creditors, MACONCHIE, RAE.—Alt. HONYMAN, CATHCART, ARCH. CAMPBELL, junior.—Clerk, COLQUHOUN.

R. Davidson.

Fac. Col. No. 198, p. 476.

No. 110. The Creditors of JOHN POLLOCK v. JAMES POLLOCK, his Son.
January 21, 1669.

Debts constituted by witnesses, as bargains, furnishings, &c., found effectual, from the time of contracting, not from the time of decree only, to frustrate posterior gratuitous deeds of a bankrupt.

The creditors of John Pollock having adjudged his tenement for their debt, and James Pollock having gotten a bond of 5000 merks from his father, payable after his father's death, which was granted after he was married, he did also apprise thereupon, within year and day of the adjudication. The adjudgers raise a reduction of this bond, and the apprising following thereupon, upon these reasons; first, Because the bond was granted for love and favour, and albeit it bear borrowed money, yet the said James has acknowledged by his oath, that it was for love and favour; and so, being granted betwixt most conjunct persons, after the contracting of their debts, it is null by the act of Parliament 1621.—The defender alleged, That the reason was not relevant as to such debts as were not constituted by writ, anterior to the defender's bond; and as to any constituted by probation of witnesses, for proving bargains, merchant accounts, and furnishings, wherein the probation and decreet are both after the bond, they cannot be said to be anterior debts, because they are not constituted till sentence; and albeit the sentence bear the debt to have been contracted before this bond, yet that cannot make them anterior debts; because writ cannot be taken away by witnesses, proving an anterior debt, which would be as effectual against the writ, as if the payment thereof had been proven by witnesses; and the time of bargaining or furnishing, being a point in the memory, and not falling under the sense, nobody would be secure who had writ, but that bargains and furniture might be proven anterior thereto.—The pursuer answered, That his reason was most relevant and the constitution of the debt is not by the decreet or probation, but by the bargain, and receipt of the goods or furniture, after which, no posterior deed of the debtor can prejudice the creditors furnishers; and albeit in many cases witnesses prove not, and witnesses are not admitted to prove, where writ may, and uses to be interposed, yet where the probation is competent, the debt is as well proven [1003] thereby, for the time of contracting, as it is by writ; neither doth that ground, that writ cannot be taken away by witnesses, anyway hinder; for the meaning hereof is only, that the payment or discharge of that writ, must be proven by writ; and it were a far greater inconvenience, if, after bargain and furniture, any writ granted by the debtor, though without an onerous case, should prejudice these creditors.

The Lords sustained the reason, and repelled the defence, and found debts constituted by witnesses to be effectual, from the time of contracting, and not from the time of probation or sentence, to take away any posterior deed of the debtor, done without a cause onerous.

The pursuer insisted in a second reason of reduction, That albeit these debts were posterior to this bond, yet the same ought to be reduced, as being a fraudulent conveyance betwixt the father and the son, kept up and latent in some of their hands, without anything following thereupon to make it known and public; so that the creditors having *bona fide* contracted with the father, having a visible estate, were deceived and defrauded by this latent bond, if it were preferred to them. 2do, This bond bears only to be payable after the father's death, and so is but *donatio mortis causa*, and but a legacy; or if it be *inter vivos*, it is much more fraudulent and latent. 3tio, Bonds of provision, for love and favour granted to children, are accounted but as their *legitim*, still revokable by the father, and all debts contracted by him are preferable to them.—The defender answered, That there was neither law, reason, nor custom to evacuate or exclude bonds of provision, granted by parents *ex pietate paterna*, to their children, upon account of their father's posterior debt, especially if the bonds were delivered; for there is no ground for any such thing by the act of Parliament 1621, which relates only to deeds done after the debt contracted; neither is there any sufficient ground of fraud, that the bonds were not made public or known, there being no obligation upon parties to publish the same, and creditors have less means to know the debts of other anterior creditors, than of children having a just ground to suspect that they may be provided, and to inquire after the same; neither doth the

delay of the term of payment import either fraud, or that the bonds were *donationes mortis causa*.

The Lords would not sustain the reasons of reduction upon the act of Parliament 1621, or upon the general ground, that posterior debts were preferable to all bonds of provision, but ordained the pursuer to condescend upon the particular ground of fraud in the case in question. See FRAUD. *Fol. Dic.* v. 1, p. 74. *Stair*, v. 1, p. 587.

No. 111. STREET v. MASSON and Lord TORPHICHEN. July 27, 1669.

A bond was granted for goods furnished. The bond was dated posterior to a gratuitous deed, and the furnishings had been discharged upon receipt of the bond; yet the time of furnishing was allowed to be proven by witness, and so far as prior to the gratuitous deed, frustrated it.

James Masson being debtor to the Lord Torphichen, does infeft his son, an infant, in his lands, publicly holden of the superior; and being a merchant, there was [1004] a correspondence betwixt him and Mr. Street, and other London merchants, whereupon he gave them bond, mentioning to be for former accounts and provisions betwixt them, and thereupon followed an infeftment of annualrent. The Lord Torphichen obtains decreet of reduction of the infeftment granted to the son, as being posterior to his debt, and granted by a father in defraud thereof. The London merchants raise also a declarator, that the infeftment granted by Masson to his son (then an infant) ought to be affected with their debt, in the same condition as it were yet standing in the father's person, or otherwise ought to be declared void as a fraudulent deed by the father, in favours of his son, the father being then in tract of correspondence and traffic with these merchants, who *bona fide* continued the same, seeing the father continued in possession of the lands, and built thereupon, and gave an infeftment of annualrent to the merchants, after the infeftment granted to his son; and likewise raised a poinding of the ground upon his infeftment of annualrent, whereupon he now insists.—It was alleged for the son and Lord Torphichen, That the son's right being public, and registrated in the public registers, prior to the pursuer's annualrent for the bonds whereupon the same proceeds, it doth fully exclude them from poinding of that ground.—The merchants repeat their declarator by way of reply:—To which it was answered, That whatsoever may be said of latent and clandestine rights betwixt fathers and children, and other confident persons; yet there is no law hindering a father to give a public infeftment to his son, unless it be in prejudice of the creditors, to whom he was due sums at that time; which being a valid public right, no deed or pretence of fraud of the father thereafter can prejudice the son in his right; who being an infant, was not capable to be partaker of fraud; neither can fraud be presumed as to creditors, who are but to contract thereafter; nor can a public right registrate, and a public sasine, which all the world may, and all concerned ought to know, be esteemed a contrivance or fraudulent right; and as to any commerce betwixt these merchants and the father, which began before the son's right, no respect can be had thereto, because the pursuer's bonds are lately, for a sum of money, and must import that the former debts by traffic were past from or discharged, and, if need be, offered to prove that they were actually discharged. 2do, The making up a debt to be prior, to take away the son's infeftment, can only be probable by writ or oath of party, and not by witnesses who cannot prove above £100. 3tio, Though the cause of the bond were proven to be a correspondence and traffic begun before the son's infeftment, it is noways relevant against any provisions gotten after the infeftment; for such can have effect but from their own date, and the effect is cut off as to what is posterior to this public infeftment, seeing the merchants did either follow Masson's faith upon their hazards, or else they should have had a procurator here, and taken advice how they might have been secured of Masson's estate by the law of Scotland, who would have taken notice by the registers, that Masson was denuded by a public infeftment, which nothing he could do thereafter could prejudice, and would have certified the merchantsthereof; and their failing therein is on [1005] their own peril; and albeit their payment, and acting *bona fide* is sometimes good, though made to those who had not a

valid, but a colourable right, by those who knew not a better right; and might have been compelled to pay upon the colourable right; yet other deeds, though *bona fide* done, are upon the peril of the actor.—To which it was answered, That by the common law and custom of this nation, all fraudulent deeds are reducible; and there can be no deed more fraudulent than this of a father to his own infant son, for whom he is legal administrator, and must accept the right he gives himself, and so colludes with himself to make a snare to intrap merchants and strangers, in the midst of a course of trade with them; which is a common ground of law, whether the debt be prior or posterior to the son's infetment; and albeit the merchants bond be posterior, yet seeing it bears to be for ware, witnesses, according to the ordinary custom, are receiveable for astructing the writ, to prove what the ware was, and when received; which will not be prejudged, though there had been a discharge of the ware granted the time of the bond, unless there had been a real and true payment of the money; for there being nothing then paid, this bond ceases not to have a true anterior cause, as if it had been granted on deathbed upon a discharge then given, it would be valid, as being upon an anterior cause before the sickness; neither is there any difference to be made of the parts of the traffic after the son's infetment; but seeing the correspondence began before, and is once continued as a constant correspondence and traffic, it must all be drawn back to its beginning, as if the merchants on both sides had contracted when they began their correspondence, that they should faithfully pay what either of them received from other, till the correspondence was given up.

The Lords found that this bond, although posterior to the son's infetment, not bearing borrowed money, but merchant ware, that the quantity and times of furnishing thereof might be proven by witnesses; and albeit there had been a discharge of the ware, yet so much thereof as was furnished before the son's infetment would affect the same: But found, That the son's infetment being public and registrate, no posterior deed of the father's, by continuing traffic or correspondence, nor no pretence of fraud of his, could annul or burden the said infetment for any debt contracted posterior thereto.

Fol. Dic. v. 1, p. 74. Stair, v. 1, p. 645.

No. 112.

CATHCART v. GLASS. November 28, 1679.

A gratuitous disposition reduced at the instance of a prior onerous creditor, by an implied warrandice, though the decree establishing the debt, upon incurring the warrandice, was not obtained, till after the disposition.

George Cathcart pursues reduction of a disposition made by Glass to his good-brother, who married his sister, as being fraudulent betwixt conjunct persons, in prejudice of the pursuer, a lawful creditor, in this manner, viz. Glass, though but a shoemaker, took up a trade of buying seeds in Holland, and sold them to gardners in Scotland, a parcel whereof he sold to the pursuer, which being corrupt and insufficient, the pursuer obtained decreet against him for repetition of [1006] the price.—It was answered, That there was no debt constituted against Glass before the disposition, but by a process long after the same.—It was replied, That the process did not constitute, but declare the debt; but the debt was constitute before the bargain for the seeds, which did imply warrandice against latent insufficiency: And suppose the bargain had been after the disposition, yet it being betwixt two good-brothers, without a cause onerous, it must be presumed to have been a contrivance *animo fraudandi*, to let Glass go on to trade and to deceive him; and in case he should be questioned, his good-brother should enjoy his tenement, as was found in the case *Street contra Jackson* and *Masson*, *Stair, v. 2, p. 197, voce FRAUD*, where a disposition by a father to the son was reduced upon debts contracted thereafter; and the like, *Reid of Balloch mills contra Reid of Daldilling*, *Stair, v. 2, p. 144 and 234, voce FRAUD*.

The Lords found the reasons of reduction relevant, that the bargain for the seeds was before the disposition, or though posterior, that the disposition was made upon the fraudulent design alleged; but found it not inferred, because it was granted to a conjunct person, unless he were partaker of the fraud; therefore found the contriv-

ance only proven by writ or his oath ; but if other pregnant circumstances in fact were adduced to infer the contrivance, the Lords would consider the same.

Fol. Dic. v. 1, p. 74. Stair, v. 2, p. 710.

No. 113. JAMES MAN, Merchant in Dundee v. ANDREW WALLS, and Others, his Creditors. July 25, 1702.

In a declarator of bankruptcy, the Lords would not sustain the presumption, that a bill had been accepted the same day it was dated. The acceptance being posterior to a disposition by the bankrupt to other creditors, it was found that the party claiming on the bill had no title to challenge the disposition, unless he could show evidence otherwise, of a debt owing to him, prior to the disposition.

The said Andrew Walls being debtor to sundry persons, he, on the 14th of February 1700, grants a disposition of the whole ware of his shop, and plenishing of his house, and other moveable debts, in favour of some particular creditors therein named ; and the very same day there is a bill drawn on him, payable to James Man, another creditor, but not contained in the disposition foresaid, which is accepted by the said Andrew Walls, but without any date ; but it is protested on the 15th of February for non-payment. After this, Walls leaves the town of Dundee for some weeks, and then returns, and is imprisoned by some of his creditors. This being the case, James Man raises a declarator of bankrupt against the said A. Walls on the 5th act of Parliament 1696, and thereon concludes reduction of the said disposition made by him in favour of some particular creditors to the prejudice of the rest ; and he founded on this new act, in regard the act of Parliament 1621, against fraudulent alienations of bankrupts, will not comprehend this case, the disposition not being to conjunct persons, nor did it want onerous causes ; nor was it in defraud of any diligence done by James Man, anterior to the disposition quarrelled ; but he contended it fell precisely within the terms of the said last act 1696, because it was in prejudice of him, a creditor ; and after he was under horning and caption at another creditor's instance, though not at his, and that he was then insolvent, and fled, and absconded. Alleged for the creditors in [1007] the disposition, 1mo, You, James Man, have no title nor interest to pursue this declarator, because none can pursue a reduction of a disposition made for onerous causes, but he who is a creditor at the time of the said disposition ; but *ita est*, you was none, for your bill is only dated the same day of the disposition, and bears an acceptance without any date ; and being a mandate, it constitutes no debt till acceptance, which can only be known by the protest, which is on the 15th of February, a day posterior to the disposition. Answered, 1mo, Posterior creditors have been allowed to reduce anterior fraudulent dispositions, as was decided in 1673, in the famous case of *Street v. Jackson and Masson* : * but, 2do, The acceptance wanting date, must be presumed to have been the very same day of the bill, seeing they both dwelt in one town, and it might have been easily presented and accepted within an hour after its subscribing.—The Lords did not sustain the presumption, that the acceptance was of the same day's date with the bill, unless it was otherwise proven ; and found he was not creditor to Walls till acceptance, and which being posterior to the disposition, he had no interest to quarrel the same, which could only be done by anterior creditors, unless he could astruct and fortify his bill by some grounds of debt owing by Walls to him prior to the same. 2do, Alleged for the defenders, That the horning and caption produced being only on general letters for the excise of brandy, is not equivalent to the diligence required by the 5th act 1696, which should be for some obligation of debt, or on a decret ; whereas general letters are prohibit by the 13th act of Parliament 1690, and go of course for any branch of his Majesty's revenue against the best merchants in the kingdom, and can be no qualification of bankruptcy. Answered, 1mo, The act of Parliament speaks of a horning and caption, without making any distinction ; *et ubi lex non distinguit, non est nostrum distinguere*. 2do, It is not horning and caption alone that infers the conclusion of bankruptcy, but it must be

* *Stair, v. 2, p. 197, voce FRAUD.*

conjoined with insolvency at the time ; and some of the alternatives of the said act, as his retiring to the Abbey, flying, absconding, deforcing, &c. The Lords repelled the defence, and found the horning sufficient. 3tio, Alleged, The withdrawing proven was not in the terms of the act of Parliament, but only he went to the country to get in some debts owing him. But the Lords having advised the probation, found it was to evite imprisonment and other diligences that he retired, and so reduced the disposition, James Man the pursuer proving he was a creditor anterior to his bill. The Lords were the more circumspect in deciding this case, because it was amongst the first pursuits that have been founded on that late act of Parliament, and it was fit to clear the same for the future.

November 7.—In the action mentioned, 25th July 1702, Man *contra* Andrew Walls and his creditors, the Lords having there found that he could not quarrel the disposition, because his bill whereby he was creditor, and his protest, were posterior thereto, unless he could astruct the onerous causes of his bill to be some debt anterior to the disposition ; John Man, for proving thereof, adduced sundry [1008] witnesses to astruct that he had delivered to Walls several quantities and parcels of merchant goods some time before the date of the bill, and which were the cause thereof : Against whom it was objected, That no witnesses could be received in this case, but he behaved to prove the onerous antecedent cause of his bill *scripto*, especially seeing the interlocutor in the act did not determine the *modus probandi*, and that he seemed to have elected that manner of probation by writ himself, in so far as he had cited sundry persons to depone on the having of Andrew Walls's count-books, whereby it would appear he was creditor *ab ante* to the disposition. Answered, The act was indeed indefinite, without determining the manner of probation, but that made for him ; seeing where the *modus* is not specified, law always understands to be *prout de jure* ; and his calling for the count-books was no passing from his probation by witnesses, seeing he may use both. Replied, If you have declared your manner of probation at the time of making of the act, and offered to prove an anterior ground of debt by witnesses, then I would have elided it by this answer, offering to prove that the said debt was satisfied by Walls *aliunde*, and so could not be the onerous cause of the bill of exchange, from which I am now precluded. The Lords considered, that in adminiculations and astructions of this nature, they did not require a full and positive probation ; and that where a bond is quarrelled, as granted on deathbed, or as being holograph, and so presumed to be *in lecto*, as not proving its own date, they used to sustain a reply, offering either to prove an antecedent ground of debt prior to the sickness, or that the writ was seen and read by severals before contracting the sickness whereof he died, and that both these are in use to be proven by witnesses : Therefore the Lords repelled the objection, and allowed the witnesses to be received ; but would not permit him both to prove by them, and likewise to call for writs, unless it were *quoad* distinct articles ; and therefore ordained him to elect any of the two he pleased, but not to make use of both *quoad* the same points. (See PROOF. See DEATHBED.)

December 2, 1704.—In the action mentioned 7th November 1702, pursued by John Man *v.* Reid, Maxwell, and the other creditors of Andrew Walls, the disposition being reduced as granted within sixty days of his flying, this new point was started, that the disposition was only reduced in so far as it was a partial gratification and preference of one creditor to another, but could not hinder the receivers of the disposition to come in *pari passu* with the other creditors-arresters ; for if we had not relied on the faith of the said right, we would have done diligence as soon as you ; but we supposed our disposition to be good, and therefore neglected any farther security : Neither could we arrest in our own hands the goods disposed to us in property ; and the Lords in many parallel cases have found where parties have been put *in tuto* by a right, then looked upon as valid, if *ex post facto* it come to be annulled, it has been sustained so far *ad hunc effectum* as to bring them in equally with the other creditors who did diligence ; as on the 25th of July 1672, Gray *contra* Gray,* a husband of an heiress having [1009] a disposition from her father, and that being reduced, yet the Lords sustained it to give him the liferent and courtesy, though his wife was never infert,

* Stair, v. 2, p. 109, *voce* DEATHBED.

because it was presumed, that if he had not got that disposition, he would have infest his wife, as heir, and so have got the courtesy. 2do, In the case of Kinloch *contra* Blair, No. 14, p. 889, a disposition reduced by an adjudger, yet was so far sustained as to bring in the receiver of it (though he had not adjudged) *pari passu* with the adjudger, on this plain presumption of law, that if I had not got the said disposition, I would certainly have adjudged within year and day of you. 3tio, They cited Balmerino's case, 18th February 1662,* who being the Earl of Somerset's trustee, and pursued by Bedford, he was allowed retention of what debts were contracted afterwards, even against a singular successor. Answered, The act of parliament 1696, defining notour bankrupts, declares such dispositions made within 60 days of their breaking to be simply void and null in themselves, *et quod ipso jure nullum est, nullos sortitur effectus*; and if the receivers of such dispositions were so far countenanced and supported as to bring them in *pari passu* with the other creditors, every bankrupt would be courted by some of his creditors to grant such dispositions, knowing that, at the worst, they would come in equally with other creditors neglected by the bankrupt, but who had prevented them in affecting the subject by doing legal diligence. And, as to the decisions cited, they were stretches of the Lords *officium nobile*, in supplying their omissions, which are not to be drawn in example.—The Lords found the disposition simply null, and that it could not even subsist to bring them in *pari passu*; and so preferred the arresters. In this process it was farther urged for these creditors who had carried on this reduction on the head of bankruptcy, that they having removed this middle impediment of the disposition out of the way, they ought to have the expences wared out in this process, over and above their debts, as is done in rankings, and the sale of bankrupt's lands; this being as profitable to the creditors behoof as these common actions are. It was not determined at this time, but was afterwards refused in this process.

Fol. Dic. v. 1, p. 74. *Fountainhall*, v. 2, p. 156, 158, 244.

No. 114. Doctor HAY v. MARJORY JAMISON. February 6, 1672.

A reduction of a gratuitous right, upon the act 1621, is sustained against a singular successor in the right, where it bears in itself to be gratuitous. In that case the singular successor, although paying a price, cannot pretend to acquire *bona fide*.

Doctor Hay pursues a reduction of a tack for two nineteen years granted by Patrick —, his debtor to Kinnaird his spouse, of the land of Attroch, for 20 pounds yearly, and payment of the teind; the narrative of the tack bears, that he had given a promise before, to grant the same, whereby the benefit of the [1010] tack was six chalders of victual yearly to her. The reason of reduction was upon the act of Parliament 1621. It was alleged for Marjory Jamison who now has right, That the said act of Parliament declares singular successors, acquiring *bona fide*, for onerous causes, and so not being partakers of the fraud, to be excepted from the act, and the right of this tack has come through several singular successors to this defender for onerous causes. The defender answered, That the exception of the act of Parliament hath no place where the first right doth not at least bear an onerous adequate cause; for if it be for love and favour, or without any cause, as this tack is, no singular successor can pretend to acquire it *bona fide*, or to be ignorant that the right they acquire is without a cause onerous.

Which the Lords found relevant, and reduced the tack.

Fol. Dic. v. 1, p. 74. *Stair*, v. 2, p. 63.

* Earl of Bedford v. Lord Balmerino, *Stair*, v. 1, p. 101, *voce* MUTUAL CONTRACT.

No. 116. [1011] Earl of GLENCAIRN v. BIRSBANE. January 16, 1677.

A conveyance for an adequate price, is not reducible by the creditors of the granter.

In the reduction at the instance of the Earl of Glencairn v. John Birsbaue, of his right of the lands of Freeland, and declarator, that a reversion in favours of the heir of the disponer's own body, to take effect after the disponer's death, was fraudulent, purchased by the disponer's means, and therefore should be holden to be as taken to the disponer himself, and that it might be affected by the pursuer as his creditor :—The defender alleged, that this disposition was for an adequate price, and therefore there was no prejudice to the disponer's creditors ; and as to the reversion, it was a personal favour to the disponer's heirs-male of his own body only, and did not make the right as a wadset, but it remained a true sale ; neither doth any gratuitous right, procured to a son, become affected by the father's creditors, unless the father had exhausted his estate, which the creditors might have affected by purchasing thereof :—Which defence the Lords found relevant.—It was now further alleged, That the price was not adequate, because the pursuer offered to give 2000 merks more, and to find out a tenant that would take a nineteen years' tack for 500 merks yearly, the land never having been set, but still in mainsing, which, at twenty years' purchase, will be 10,000 merks, whereas the price is but 8000 merks ; and where debtors have not an estate sufficient for their debt, the greatest price that can be obtained should be sustained, though it be above the ordinary price.—It was answered, That the price of affection or emulation is no just ground to reduce a disposition, otherwise no man would buy from persons that are in great debt ; but a competent price hath ever been sustained, and the procuring of a tenant to take above the true value, whose hazard may be secured is not sufficient.

The Lords adhered to their former interlocutor ; but seeing the land was not set but in mainsing, they would prefer neither party in the probation of the ren-[1012]-tal, or price, but allowed either party to adduce witnesses what the land was worth, and might pay as at a constant rent, and what it was worth in buying and selling in that place of the country. *Stair, v. 2, p. 494.*

No. 117. GORDON v. FERGUSON. December 23, 1679.

A conveyance from a conjunct person to a singular successor, who could not plead *bona fides*, sustained only to the extent of the sums actually paid.

Gordon of Troquhen pursues a reduction of an infeftment granted by Cannon of Blackmark to Cannon of Marrogat, his brother, bearing, for undertaking all his debts, and for love and favour ; and of a disposition granted by Marrogat to Ferguson of Keiroch ; the reason of reduction was upon the act of Parliament 1621. The defender alleged absolvitor, because he was no conjunct person, nor partaker of the fraud betwixt the two brothers, but paid a competent price ; and by the foresaid act, third parties not partaking in the fraud are secure.—The pursuer answered, That Ferguson was necessarily partaker of the fraud, it being in the body of his author's right, that albeit it bore for undertaking the disponer's debt, yet there was only £600 mentioned in a blank, which is scored, and which could not be an adequate price.—The Lords found, That Ferguson could not be free of the participation of the fraud in his author's right.—It was further alleged by Ferguson, That the sum expressed in Blackmark's disposition to his brother, was due to him, and therefore he might lawfully take a disposition from Blackmark, or from Marrogat his brother, which behoved to be effectual, as to his own sum, which was Blackmark's anterior debt.

The Lords sustained the disposition, in so far as concerned Ferguson's own sum due by Blackmark, but declared the right might be affected by the pursuer *quoad reliquum*, that he might redeem upon payment of Ferguson's sum, unless it were proven that Blackmark was a notour bankrupt, when he disposed to his brother ; and so could not dispoise to one creditor in prejudice of another. *Stair, v. 2, p. 726.*

No. 121. [1020] Mr. DAVID GUTHRIE and ALEXANDER WILLIAMSON v. Mr. WILLIAM GORDON, Advocate. February 2, 1711.

A disposition to a conjunct person, bearing to be for security of a sum owing to him, by the granter, solvent at the time, not having been quarrelled for 58 years ; found that a singular successor to the receiver of the disposition was not, in competition with anterior creditors of the granter, obliged to prove the onerous cause otherwise than by the narrative.

In the process at the instance of Mr. David Guthrie and Alexander Williamson, who stand infet in annualrents out of the teinds of Balcomy, against Sir William Hope the purchaser, for payment of the price : Mr. William Gordon craved to be preferred upon a disposition of these teinds granted by Sir James Lermonth in anno 1654 to Sir William Gordon of Lesmore his son-in-law, bearing for security of 4000 merks owing by Sir James to Sir William ; and also upon two expired apprisings of these teinds in the same year 1654 ; to which disposition and apprisings Mr. William Gordon hath right by progress. Mr. David Guthrie and Alexander Williamson alleged, by way of reduction upon the act of Parliament 1621, That the disposition, being *inter conjunctas personas*, could not prejudice them anterior onerous creditors, unless the onerous cause thereof were instructed *aliunde* than by writ itself. 2dly, Albeit that were instructed, the pursuers offer to prove that Mr. William Gordon and his authors were more than satisfied of the 4000 merks, by their intromission with the teinds.

Answered for Mr. William Gordon. *Esto* the disposition had been gratuitous, it cannot be quarrelled, because Sir James Lermonth was solvent in the 1654 [1021] when he disposed, and had an estate sufficient to pay the 4000 merks and all his anterior debts ; nay, his affairs turned not in disorder till after his death, when he could not be said to defraud his creditors, Stair, *Instit.* lib. 1, tit. 9, p. 82 (84). And the disposition not being called in question for fifty-eight years, the narrative of it must be sustained to instruct its onerous cause, which, after so long a time, cannot be otherways proved. 2dly, *Non relevat*, that Mr. William Gordon intromitted with as much of the teinds as would pay the debt : Because he had a right to two expired apprisings before any intromission, to which he ascribed his possession as the most profitable titles, and so is not countable for his intromissions.

Replied for the pursuers, They need not say that Sir James Lermonth at the date of the disposition to his son-in-law was bankrupt ; but it is insufficient to annul that right, that the granter's estate was then incumbered by many infetments of annualrent and apprisings, whereby *in eventu* he became insolvent, February 6, 1663, Lourie *contra* Dundee, No. 40, p. 911 ; February 10, 1665, Craig *contra* Lourie, No. 56, p. 931 ; Dirleton, Decis. June 30, 1665, Clerk *contra* Stuart, No. 46, p. 917 ; Stair, *Instit.* p. 82 (84), and Mackenzie upon the act 1621. For when an estate is incumbered with debts and diligences, it is more reasonable that a conjunct and confident person should want a donation, than an anterior creditor be frustrated of his just debt. Upon which account, the Lords are in use to rank children for their bonds of provision *ultimo loco*, though equal in diligence with other creditors, February 10, 1688, The Creditors of William Robertson, No. 83, p. 969 ; the case of the Creditors of Cardon, anno 1700, *voce* PROVISION TO HEIRS and CHILDREN ; and the late Competition of the Creditors and Children of George Marshall, *voce* ADJUDICATION, p. 47. Albeit infetments granted to children *foris-familiae*, when the granter's credit was entire and unquestionable, have been sometimes sustained according to their dates. 2dly, Mr. William Gordon and his author having once entered to possess the teinds by virtue of the disposition a redeemable right, they could not invert the cause of their possession, and liberate themselves from counting by purchasing expired apprisings. Besides, the apprisings founded on cannot defend him from counting, because they were reduced or opened in the ranking of the creditors of Balcomy.

Duplied for Mr. William Gordon, Albeit his apprisings were opened and turned to securities for the true debt, because of some nice informality ; yet any prior intromission thereby was *bona fide*, and the sentences reducing or opening had no retrospect to make the intromitter liable for bygones, July 19, 1664, Douglas and Sinclair of Longformacus *contra* Laird of Wedderburn, Stair, v. 1, p. 217, *voce* BONA FIDE CON-

SUMPTION ; February 17, 1624, Thomson *contra* Law, Durie, p. 111, *voce* BONA FIDE CONSUMPTION ; January 18, 1677, Dick of Grange *contra* Oliphant, Stair, v. 2, p. 496, *voce* PRESUMPTION. For voluntary rights, as well as apprisings, may chance to be reduced upon nullities or prior diligences : And if apprisers be holden to count for fruits *bona fide* uplifted and spent, purchasers by consent would run the same fate, which would mightily unsettle all manner of property.

[1022] The Lords found, That Sir James Lermouth having been solvent in the 1654, the time of granting the disposition, and the same never having been quarrelled for so many years ; Mr. William Gordon cannot now be obliged to prove the onerous cause thereof. And found, That Mr. William Gordon instructing that he had the rights of apprising (then unquarrelled) in his person, the time of his entering to possession of the teinds, as well as the voluntary right by disposition ; he can ascribe his intromissions wholly to the apprising *medio tempore* till the same were found to be only a security for the sums therein contained ; and preferred Mr. William Gordon's disposition to the infetment of annualrent. See INDEFINITE INTROMISSION.

Fol. Dic. v. 1, p. 75. *Forbes*, p. 492.

No. 123.

ALLAN v. THOMSON. January 9, 1730.

Unless there be evidence of *mala fides* in the singular successor ; his right is secure, although his immediate author's right may have been challengeable as *inter conjunctos*.

William Sangster having disposed a tenement in Aberdeen, narrating an onerous cause, to Charles Sangster, who happened to be his brother, Charles disposed the same over again to his daughter and her husband, in their contract of marriage, but without making mention that the subject was derived to him from his brother William. A great number of years thereafter, action of reduction upon the act 1621 was intended of these dispositions, by a prior creditor of William Sangster's libelling, that the disposition from William to Charles being betwixt conjunct and confident persons must be presumed gratuitous ; and that therefore Charles' daughter and her husband who knew of the said conjunction, though, in the eye of law onerous purchasers, can be in no better case than their author. The defence was, that it was extremely likely, the daughter and her husband knew of the relation betwixt William and Charles Sangster's, but at the same time there was no sort of evidence of their knowledge that Charles's right was derived from his brother William, without which they were in *optima fide* to purchase ; and unless this knowledge be proved they can never be brought in as *participes fraudis*. The Lords, in respect there was no evidence that the defender was in the knowledge that Charles Sangster's right flowed from William Sangster his brother ; therefore they assolizied from the reduction.

Fol. Dic. v. 1, p. 75.

No. 126. [1027] The Creditors of THOMAS DUNBAR v. Sir JAMES GRANT. June 18, 1793.

A bond of corroboration falls under the second clause of the act 1621.

Thomas Dunbar of Westfield having become insolvent, a variety of adjudications were led against his estate, of which that obtained by Mr. Cuming of Altyre on the 29th November 1788 was the first effectual, and in February 1789 a summons of ranking and sale was executed against him.

On the 2d May 1789, Mr. Dunbar granted to Sir James Grant a bond of corroboration, accumulating into one sum, bearing interest from Whitsunday 1788, the principal and interest due at that term on the following claims, viz. A bill payable in 1781, upon which no diligence had followed ; a bond, in which Sir James was cautioner for

Mr. Dunbar ; a bond and a bill, in which Sir James, though in reality only cautioner for him, was *ex facie*, joint obligant. The three last had been paid by a trustee for Sir James, who afterwards assigned the securities to him.

Upon the bond of corroboration Sir James adjudged on the 4th August 1789.

And on his producing this interest in the ranking, the common agent, besides stating a variety of objections to the original grounds of debt, on which no judgment was given, contended, that the bond of corroboration was reducible on the act 1621, as being prejudicial to the prior diligence of other creditors.

Sir James Grant, on the other hand, pleaded, The act 1621 was intended solely to repress the fraudulent transactions of bankrupts. It states, in its preamble, the mischiefs arising from their gratuitous deeds in favour of conjunct and confident persons in defraud of lawful creditors. It declares liable to reduction, 1mo, All alienations of that description. 2do, Any voluntary payment or right made "by a dyvour, or an interposed partaker of his fraud," to one creditor in defraud of the prior diligence of another, at the instance of the party injured, and it punishes with infamy all parties concerned in such transactions.

The statute must therefore have had in view deeds of a very different complexion from the bond now in question, which can be considered in no other light than as a renewal of the voucher for a just debt, and which, so far from being fraudulent, it was the duty of the debtor to grant. Its sole object was to save the expence of a decree of constitution, which, with an adjudication follow-[1028]-ing thereon, might undoubtedly have been obtained within year and day of the first effectual, as all objections would have been reserved *contra executionem*. The advantage gained by the accumulation of the debts was insignificant, and if at all worthy of notice, could not be the ground of a total reduction.

Besides, the sole effect of the bond was to enable Sir James to rank *pari passu* with other creditors, an object which is so much a favourite of the law, that in order to accomplish it, the Court are accustomed to dispense with the usual forms of judicial procedure.

As the statute contains no accurate definition of a bankrupt, while its certification is at the same time very severe, it ought to be strictly interpreted. No instance can be found where an objection similar to the present has been sustained. And even upon the 1696, the enactments of which are much more definite and precise, no deed equally harmless has been reduced ; 7th January 1762, Cowan v. Mansfield's Trustees, *infra h. t.* ; Fountainhall, 15th July 1697, Creditors of Hunter, No. 124, p. 1024 ; 19th November 1783, Spottiswood v. Robertson Barclay, *infra h. t.* ; 31st July 1724, Creditors of Watson v. Cramond, *infra h. t.* ; February 1728, Creditors of Graitney, *infra h. t.*

Answered, The act 1621 contains two distinct enactments, which have always received the most liberal interpretation.

By the first, every gratuitous act of the bankrupt which tends to diminish the value of his property, is reducible at the instance of prior creditors, Erskine, b. 4, tit. 1, § 29.

By the second, he is in like manner prevented from making a voluntary payment even to an onerous creditor, in prejudice of the prior diligence of another. Under the former, even family provisions, otherwise unexceptionable, are comprehended ; under the latter, not only payments in cash, or by bond, bill, or indorsation in security ; Bankt. b. 1, tit. 13, § 28, but even necessary acts, such as the fulfilling a minute of sale, provided they have been done without the compulsion of legal diligence ; Bankt. b. 1, tit. 10, § 104.

The bond now in question not only enabled the creditor to come in *pari passu* with other creditors, which he could not otherwise have done, but confirmed and accumulated exceptionable grounds of debt. A bond much less hurtful was reduced ; 19th January 1788, Scott v. Bruce.* Upon the same principle, the Court found, that a person bankrupt in terms of the act 1696, could not grant a bond of corroboration ; 1st March 1791, Creditors of Mackellar v. Macmath, *infra h. t.* ; and it has been frequently found, that such bonds are struck at by a prior inhibition ; 29th January 1696, Wilson and Logan v. Penman, Fount. v. 1, p. 706, *voce*

* Not collected. See Appendix.

INHIBITION; 19th June 1782, *Watson v. Marshall*, Fac. Col. No. 45, p. 72, *vide* INHIBITION.

No argument can be drawn from the certification of the statute, as deeds are frequently reduced on both clauses of it, granted by persons ignorant of their own insolvency, and where consequently that certification cannot apply.

Some of the Judges were a good deal moved by the hardship to the creditor, who had time in this case to have led an adjudication independent of the bond, [1029] and by its object having been not to give him a preference to other creditors, but to bring him in *pari passu* with them. A great majority of the Court, however, were of opinion, that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.

It was farther observed, that the case of *Spottiswood v. Robertson Barclay* having been settled by compromise, could be of no weight in point of precedent.

The Lord Ordinary sustained the objection; a reclaiming petition was refused, without answers; and upon advising a second, with answers, the Lords "adhered."

Lord Ordinary, ANKERVILLE.—For Sir James Grant, JAMES GRANT, MACONOCHE.
For the Creditors, HONYMAN.—Clerk, GORDON.

D. Douglas.

Fol. Dic. v. 3, p. 52. *Fac. Col.* No. 61, p. 133.

No. 127. VIETCH v. PALLAT. November 11, 1675.

A bankrupt having granted assignation to one of his creditors, in prejudice of another, who had done more timeous diligence by horning, &c.; the prior creditor having affected the subject assigned, by taking a gift of escheat, was found to have action of repetition against the assignee who had received payment.

In anno 1648, James Sanderson, merchant in Edinburgh, being debtor to James Nairn, and David Rodger being cautioner for Sanderson, was distrest, and paid the debt, and obtained assignation from Nairn, and as assignee raised horning, and charged and denounced Sanderson; and in anno 1652 took a gift of Sanderson's escheat, and obtained general declarator thereupon; and in anno 1649, James Sanderson became debtor to Robert Brown for some wines sent to him from Bourdeaux, to the sum of 3000 pounds, whereupon he did also charge and denounce Sanderson anno 1649; and in the same year Sanderson obtained decreet against Sir Robert Stuart for 2000 pounds Sterling. In anno 1655, Sanderson grants assignation to Robert Brown to 700 pounds Sterling, as a part of the 2000 pounds Sterling, and thereafter Sanderson having obtained three bonds from Sir Robert Stuart in anno 1662, containing 800 pounds Sterling, Sanderson grants a new assignation to Robert Brown of the third part of the said sum of 800 pounds Sterling, which assignation relates the former assignation to 700 Sterling as a part of the 2000 pounds Sterling, and both assignations are granted in satisfaction to Robert Brown of the said sum of 3000 pounds. In anno 1666, Sir George Maxwell of Pollock interposeth for Sir Robert Stuart, and gives his bond to Robert Brown for 100 pounds Sterling, on condition that the bond and assignation granted by Sanderson to Brown should be delivered up, which accordingly [1030] was done: And Sir George Maxwell being pursued upon his bond by the executors of Brown, compearance was made for Peter Pallat, merchant in Bourdeaux, as donatar to the escheat of Robert Brown; compearance was made also for William Veitch, merchant in Edinburgh, as having assignation to 600 pounds of the sums due by James Sanderson to James Nairn satisfied by David Rodger, Sanderson's cautioner, and having assignation to the horning at the instance of Rodger against Sanderson, and to the gift of his escheat, and also as having obtained a new gift of Sanderson's escheat in anno 1672, upon which last gift Veitch first insisted, and after full debate it was found, upon the day of 1673, that Robert Brown being a lawful creditor to Sanderson, rebel, and having obtained assignation from him for payment of his

debt before Veitch's gift and declarator in anno 1672, and having thereupon obtained payment in so far as Sir Robert Stuart's bond, to which Brown was assigned, was delivered up to Sir George Maxwell, and thereby that debt extinct, and Sir George gave a new bond to Brown, which was found equivalent to payment, that therefore the donatar of Sanderson's escheat could never make Brown or any representing him repeat that sum; whereupon Veitch insists upon this new ground, viz. that albeit payment obtained by Brown would secure him against Veitch as donatar, yet by the last clause of the act of Parliament 1621, it is expressly statute, that no bankrupt can by any voluntary deed prefer any creditor, although he had done diligence, to another creditor that hath done a prior diligence in prejudice of that prior diligence. *Ita est*, David Rodger author to Veitch had done diligence by horning in anno 1648 against Sanderson, and had obtained gift of his escheat in anno 1652, whereas James Brown, though he had used horning in anno 1649 against Sanderson, yet he proceeded in no further diligence by pointing, arrestment, or gift of escheat, but took a voluntary assignation from Sanderson to Sir Robert Stuart's bonds, and therefore Sanderson being bankrupt and insolvent, he could not prefer Brown's posterior horning to Rodger's prior horning by a voluntary assignation, but the said assignation is null, and by the express words of the act of Parliament, "the posterior creditor preferred by the voluntary deed of the bankrupt, is declared liable to repeat," and therefore though Brown had gotten real payment, he was obliged to repeat, much more when Sir George Maxwell's bond is granted for the same sum, and is yet resting. It was answered for Pallat, 1st, That he opposed the former interlocutor, whereby Brown was preferred to Veitch the donatar, as having gotten payment by the rebels assignation. 2dly, By the act of Parliament 1621, "Bankrupts cannot prefer posterior diligences to prior affecting the rebel's estate." *Ita est*, That horning can affect no estate, and assignation was granted to Brown before the gift of escheat to Rodger in anno 1652, and so was before that diligence by the gift, which only could affect the sum in question. 3dly, Gifts of escheat are not only excluded by payment made to lawful creditors, but likewise by assignations granted by the rebel for a debt due by him before rebellion; if the assignation was granted before declarator; but Brown's assignation was granted before either gift or declarator: And there is this singularity in Brown's case, [1031] that his debt being for wines sent to Sanderson from France, if payment of such wines were not secure, but liable to repetition, it would mar commerce; yea if a lawful creditor should get payment in specie, or money from his debtor, though a rebel, it would be of dangerous consequence, if any other who have used horning should take a gift of the rebel's escheat, and thereupon recover. It was replied for Veitch, That he ought to be preferred, as having right from the creditor who did first diligence, and that he is not now insisting as donatar only, for then he might be excluded by payment of the rebel's creditor; but now he insists as a creditor, having done diligence by the horning and gift, which affects the sum in question, and makes Brown the other creditor liable to repetition of what he recovered by the rebels preference by his voluntary assignation; for albeit Brown having used a posterior horning, if he had first completed his diligence by pointing, arrestment, or gift, he would have excluded the prior diligence, but not having proceeded upon a diligence, but upon a voluntary assignation, the same is null, and he is liable to repetition by the express words of the statute, neither is there any exception relating to strangers or to commerce; neither did the first creditor Rodger fail in diligence, because his horning being in 1648, shortly thereafter the judicatures ceased by the incoming of the English, who set up new judicatures in anno 1652, and that same year Rodger took a gift of Sanderson's escheat, and declared the same shortly thereafter.

The Lords found, that Veitch as having right from Rodger, who used horning in anno 1648 against Sanderson the common debtor, and took gift of his escheat in anno 1652, and declared the same could not be prejudged by the rebels voluntary assignation, but that the same was null; and though payment had been obtained on that assignation, it was liable to repetition, in respect there was sufficient evidence and probation adduced that Sanderson was bankrupt and insolvent. In this there was nothing to hinder commerce by buying from bankrupts or rebels goods for present money delivered to them, or by any permutation without fraud, in which case the bankrupt did not become debtor, nor the seller creditor; but if he sold upon trust, and became creditor; a merchant, whether a foreigner or country-man, behaved to run the hazard of his debtor's condition and estate, who could not prefer him,

becoming once creditor, to the more timeous diligence of other creditors, the debtor being bankrupt, and not able to pay them all.

Fol. Dic. v. 1, p. 77. Stair, v. 2, p. 366.

No. 129. [1037] ALEXANDER TWEEDIE v. JOHN DIN, and Others. June 7, 1715.

Denunciation with insolvency not sufficient foundation to reduce posterior payments made by the common debtor, unless at the same time he had been commonly reputed bankrupt, or the receiver were *particeps fraudis*.

Alexander Tweedie having sold a stock of sheep to John Din, for which he got his bond; he registrate him at the horn, and a few months thereafter, endeavouring to poid, he found the sheep disposed upon to some neighbours; and having arrested in their hands, and pursuing a furthcoming, they deponed, they had got the goods, but that they had bought them, for payment of debts due to them by the common debtor, or wherein they were cautioners for him: But for these their debts, no diligence save registrations of their bonds was used, and the common debtor still continued to trade in buying and selling sheep, &c.

Tweedie now insisting upon the latter clause of the act of Parliament 1621, and alleging, That he was in the precise words thereof; because he had used diligence to affect his debtor's goods, by a registrate horning against a bankrupt and dyvour; and that the other creditors had obtained payment (by the partial favour of the debtor) though posterior to him in diligence; and therefore he had good action to recover what was thus voluntarily paid.

And the co-creditors defenders, having alleged, 1mo, That there was a difference betwixt bankrupt and insolvent, and that the law was only to be understood of the first; and here the common debtor was not bankrupt. 2do, Betwixt creditors partakers of the fraud, and those who are not. 3tio, Betwixt those who had got payment, and such who only were competing for preference, on a subject yet outstanding.

Answered for the pursuer, 1mo, That there is a difference betwixt bankrupt by the act 1696, so to operate the effect of that law, and bankrupt by the act 1621, to afford the benefit of that act: That less is requisite to make one bankrupt by the latter than the former; because the effect of the act 1621, is nothing so general as of the act 1696. So that with respect to the benefit of the act 1621, it was sufficient that a horning was registrate against the common debtor. And this was so found 11th December 1691, the Creditors of Langtoun competing, *voce COMPE-[1038]-TITION*, observed by the Lord Stair, Inst. tit. Reparation, § 15. For there, though single insolvency was not sustained, yet joined with legal diligences, beginning to be raised and execute, was found sufficient. As to the second point, answered, That it makes no difference as to this clause of the act, whether the receiver was *particeps fraudis* or not; for the former clause of the act does indeed make that distinction and repeats it twice: But the latter clause hath no such quality burdening the prejudged creditor with proving the participation; but all that therein is required, is a prior diligence, and a partial preference; so that the clause being here omitted, it is *de industria* done; and therefore the addition of it, is against the mind of the law. As to the third, answered, That there is no such distinction to be made, as is plain from the law, for the preference and repetition are joined in one clause, without any difference made; and therefore as the co-creditor would be preferred, so also has he action for repetition; as was found 12th February 1675, Veitch *contra* Ker, *infra h. t.*

Replied for the defenders, That the import of the act 1621, is very plain, especially if traced up to the common law, from whence (as appears by the express words of the act) it is derived, where there is a manifest distinction made betwixt lucrative deeds in prejudice of creditors, and onerous: In the first, *non est quærendum an scient eo cui donatum, gestum sit, sed hoc tantum an fraudulentur creditores*. L. 6, § 11, *D. quas in fraud. cred.* But where the right is onerous, such as where a true creditor receives his payment, *non sufficit si simpliciter sciat illum creditores habere, sed si particeps*

fraudis sit, L. 10, § 2, *D. eod.* And consequentially our act of Parliament is divided in two branches, the one with respect to lucrative conveyances, such as the law presumes all those in favours of conjunct and confident persons; and such again as are onerous; and there the act denotes the person, whose deeds are to be reduced by the name of dyvour or interposed persons partakers of the fraud; which necessarily implies, that there ought such circumstances of bankruptcy to appear, as might interpell the party who is onerously contracting, from dealing with the dyvour. As to the decision in the case of Langtoun's Creditors, 1mo, The rights there reduced were rights in security granted after diligence. 2do, There was such a crowd of diligence against the common debtor, that it amounted to a notoriety of his bad circumstances. 3tio, These diligences were so far prosecute, that *ex continenti*, the common debtor retired to the abbey: All which make that case widely differ from the present. And the decision, Veitch *contra* Ker proceeds exactly upon the same principle. All which is distinctly cleared by a late decision, Lady Riccarton *contra* Thomas Gibson, No. 128, p. 1035; the words of the interlocutor are, "The Lords found, That in case of a master's obtaining a disposition from his tenant, though in a competition another creditor doing diligence might be preferred, yet the master having obtained payment *bona fide* by virtue of the disposition, is not liable to repeat what he received." As to the act 1696, it is obvious from the tract of our decisions, that before that act, the difference betwixt a debtor insolvent (but still keeping his trade and credit) and a bankrupt debtor, was well established; and that act [1039] did not so much introduce the qualifications making notour bankrupt, as the privilege of reducing deeds done 60 days before the period of bankrupt. Lastly, if it were otherways, there would be a door opened to unspeakable confusion, and a stop put to all commerce, since thus no man could be sure of what he may call justly his own.

The Lords found insolvency of the common debtor, with horning and denunciation against him, not relevant *per se*, to give the pursuer the benefit of the last clause of the act of Parliament 1621, anent bankrupts, without participation of the fraud, by the creditors receiving payment by goods from the common debtor.

Act. BOSWELL.—Alt. GRAHAM.—Clerk, SIR JAMES JUSTICE.

Fol. Dic. v. 1, p. 77. *Bruce*, No. 92, p. 109.

No. 130. [1041] GEORGE GORDON, Writer in Edinburgh *v.* JOHN BOGLE, Writer to the Signet. February 19, 1724.

A debtor apprehended by caption, delivered to his creditor goods out of his shop, in payment. The creditor found not liable to repeat to other creditors, on either of the bankrupt statutes.

James Tweedie, merchant in Edinburgh, being debtor to William Brook and Company, merchants in London, and likewise to Samuel Dawson and Jeremiah Lupton, diligence by horning and caption was used against him by Mr. Gordon, [1042] factor for Brook and Company, and also by Mr. Bogle, trustee for Dawson and Lupton: Mr. Bogle, in prosecution of his diligence, being determined to point the debtor's goods, was prevented by his delivering him such quantities as was thought would answer the sums charged for, which he gave to John Robertson, merchant in Edinburgh, to be kept for the use of his constituents till they should be disposed of: Mr. Gordon coming in a few days thereafter to Tweedie's shop in order to point, found nothing therein for his purpose, but, understanding what had been done, he arrested in Mr. Bogle's hands, upon which Mr. Bogle caused point the goods in the possession of the said John Robertson.

In an action of furthcoming at Mr. Gordon's instance, he insisted, That Mr. Bogle should be liable to him in payment of the sums due to Brook and Company, or the value of the goods abstracted, upon the acts of Parliament 1621 and 1696, since his pointing and payment was disappointed by a voluntary deed of the common debtor; for though Mr. Bogle might have had a legal way of affecting the goods, yet he having

neglected that, and contented himself with a voluntary conveyance, the law must take place, and the pursuer's legal diligence be preferred.

It was answered for Bogle, That the payment made by the debtor was not voluntary, since it was to secure himself from a caption and the bad consequences of a formal poinding ; nor was it fraudulent because made to a creditor equally preferable by his diligence at the time of the delivery of the goods ; and therefore in no sense could it fall under either of the statutes.

The Lords found that Tweedie, the common debtor, being apprehended by a caption at Mr. Bogle's instance, might lawfully pay Mr. Bogle, by delivering him goods to the value of his debt ; and that Mr. Bogle was not liable to repete, on the acts of Parliament 1621 or 1696.

[This interlocutor was reclaimed against, chiefly upon this ground, That it did not appear that ever Mr. Bogle's caption was put in execution :—The Lords appointed the petition to be answered ; but parties agreed.]

Reporter, LORD DUN.—Act. JO. HORN.—Alt. DUN. FORBES.—Clerk, MACKENZIE.

Fol. Dic. v. 3, p. 52. Edgar, p. 36.

No. 131. GEORGE FORBES *v.* WILLIAM BREBNER. January 26, 1751.

Payments in money by a debtor to some of his creditors, found not reducible upon the act 1621.

George Forbes, merchant in Aberdeen, used diligence by horning against George Elmsly, merchant there, his debtor, who, after being denounced, made payment to William Brebner, merchant there, and others, his creditors, of certain sums he owed them : And thereupon George Forbes incarcerate him ; and having arrested in the hands of these creditors, as debtors to Elmsly ; and they having deponed they were not his debtors, but, on the contrary, had received [1043] payment of what Elmsly owed them ; he insisted for furthcoming of the sums paid, alleging the payment was reducible, as being partially made, in defraud of him a creditor who had used diligence.

The Lord Ordinary, 15th instant, assoilzied the defenders.

Pleaded in a reclaiming bill ; by the act 1621, if a dyvour shall make any voluntary payment, in defraud of the more timely diligence of another creditor, the creditor having used the first lawful diligence, shall have good action to recover what was voluntarily paid in defraud of his diligence : The Lords have sustained repetition of goods delivered by a bankrupt, in defraud of his creditor's diligence, 27th January 1715, Forbes of Ballogie *v.* the Creditors of Forbes, *infra h. t.* ; 19th July 1728, Taylor *v.* Smith, *infra h. t.* A bankrupt can sell his estate ; and if he can pay away the money among his favourite creditors, it will render of little use the statutes for preventing partial preferences.

The Lords refused the bill.

Pet. H. HOME.

Fol. Dic. v. 3, p. 52. D. Falconer, v. 2, No. 186, p. 225.

No. 136. [1046] ALEXANDER MILN of Carridden *v.* Sir WILLIAM NICOLSON'S CREDITORS. November 19, 1697.

Actual insolvency allowed to be proven, though the debtor was not at the time of alienation publicly known to be bankrupt.

Alexander Miln of Carridden pursues a reduction against some of Sir William Nicolson's creditors on the act of Parliament 1621 ; that either their debts were con-

tracted, or else they had taken bonds of corroboration in security of their prior debts, after he had charged the common debtor with horning in 1685.—Answered, He was not in the terms of the act of Parliament, unless, 1mo, He say, that Sir William was dyvour or bankrupt. 2do, That his diligence was compleated by denunciation before granting their rights.—Replied, He needs not allege notour bankrupt. It is sufficient if he prove Sir William was then *obcratus* and insolvent. And for the second, the act makes the using of a horning sufficient diligence ; so where one has charged, it cannot, in propriety of speech, [1047] be denied, but he has used horning.—Duplied, If he had immediately prosecute the charge, there might be some pretence to found this reduction ; but he was so far *in mora* that the denunciation and registration was ten or eleven months posterior to the charge, and their rights intervened,—Triplied, Any time within the year was sufficient, no law requiring a denunciation sooner ; and, by many decisions, rights after a charge of horning (though prior to the denunciation) have been reduced as in defraud, 12th February 1675, Vietch *contra* the Executors of Ker and Pallat, No. 127, p. 1029 ; 18th July 1677, Murray of Keillor *v.* Drummond, No. 139, p. 1048 ; January 1681, Bathgate *contra* Bowdoun, No. 140, p. 1049 ; and in the case of Cockburn's creditors (*infra*, *h. t.*)—The Lords considered, That a charge of horning was a foundation either for affecting the personal or heritable estate of the debtor ; and that a charge of horning satisfied the terms of the act of Parliament ; therefore they sustained Carridden's reduction, he proving Sir William's insolvency at that time, though his condition was not then so propoaled as to make him holden and repute a notour bankrupt, the standard being but lately fixed by the act of Parliament containing a notour bankrupt's marks and definition.

Fol. Dic. v. 1, p. 77. *Fountainhall*, v. 1, p. 796.

No. 145. [1053] LAURENCE GELLATY *v.* STEWART. February 3, 1688.

A person arrested the goods of a bankrupt, who voluntarily gave an order to receive them, so that there was no decree of furthcoming. A reduction at the instance of a creditor who had previously charged with horning and denounced, is dismissed : A circumstantial case.

One Stewart having arrested some goods belonging to Bennet his debtor, a bankrupt, after the said bankrupt had been charged, and denounced by Laurence Gellaty, and having raised a summons of furthcoming, he received the goods by virtue of a warrant, by way of disposition from the common debtor ; Gellaty raised reduction of the said disposition on the act 1621, as being a gratification in prejudice of his more timely diligence.

Answered : The arrester being stopped in his furthcoming, which was a habile diligence, by the debtor's voluntary delivery, that must be considered equivalent to a decreet of furthcoming, otherwise no man could safely stop his diligence upon receiving payment, or delivery of goods.

Replied : By the act of Parliament, the defenders who used posterior diligence must refund the payment by partial favour, to the pursuer who used the first diligence.

Duplied : That part of the act is to be understood of posterior inhabile diligence, whereas the defender used the most proper diligence by arrestment ; and had he proceeded to obtain a decreet of furthcoming, he would have been preferred to the pursuer upon the head of diligence ; and the voluntary delivery, which prevented the decreet, is equivalent thereto.

The Lords, in this circumstantiate case, assoilzied from the reduction, and preferred the arrester. But if the charger had proceeded to poind the goods, which would have been also habile diligence, and was stopped by the disposition and delivery sooner than the other's decreet of furthcoming could have been recovered, the Lords would have considered it. This decision seems irregular, horning being as proper and habile a diligence as arrestment.

Harcarse (ALIENATION), No. 153, p. 33.

No. 162.

[1078] YOUNG v. KIRK. November 1688.

One having charged his debtor without denouncing for four months after, and taken a disposition after the charge ; before which disposition, but after the charge, another creditor having charged and denounced, and quarrelled the disposition ;

The Lords reduced the disposition as a voluntary gratification, the first charger having been negligent in delaying so long to denounce.

Fol. Dic. v. 1, p. 80. Harcarse (ALIENATION), No. 156, p. 35.

No. 164. [1079] Mr. DAVID DRUMMOND, Treasurer to the Royal Bank v. ALEXANDER KENNEDY of Glenour, and JOHN REID, Taylor in the Canongate. July 9, 1709.

A person insolvent, after he was charged with horning, granted a voluntary assignation in security of a debt contracted before the charge. Reduction upon the act 1621, at the instance of the user of the horning, dismissed, because he had been *in mora* ; not having denounced for five months after the charge.

In an action, at the instance of the treasurer of the bank, upon the act of Parliament 1621, for reducing a voluntary assignation, granted by Alexander Paxton, stabler, when insolvent, in favours of Glenour and Reid, within ten days after he was charged with horning by the pursuer, for security of a debt contracted before the charge :

Alleged for the defenders :—The pursuer having charged the common debtor with horning on the 2d February, ten days before the assignation to the defenders, and intimated the 23d, and used no further diligence for a matter of five or six months after the charge ; he was *in mora*, and his inchoate diligence, by a simple charge, so neglected to be consummated by denunciation, or poiding, &c., to [1080] affect the common debtor's lands and goods, can be no ground to reduce the right made to the defenders.

• Answered for the pursuer :—The act of Parliament 1621 requires only to found reduction thereon, that a bankrupt make a voluntary right in defraud of the lawful and more timely diligence of another creditor having served inhibition, or used horning, &c. And the pursuer hath used horning by giving a charge, which is using thereof in a proper sense ; denunciation being only the effect of disobedience to the charge. Law requires not consummated and complete diligence actually affecting the subject, which *per se*, would be a title to reduce after voluntary deeds, without the benefit of the statute 1621 ; but such as may thereafter affect, and be completed, Bathgate *contra* Bowdoun, No. 140, p. 1049 ; and December 11, 1691, The Creditors of Langtoun, *voce* COMPETITION, where the execution of a charge of horning against a debtor was found relevant in the terms of the act 1621 to reduce posterior voluntary rights.

Replied for the defender :—By inchoate diligence in the statute 1621, is meant where the creditor is *in cursu diligentia*, and goes on without delay to complete it in due time, Stair, *Instit.* lib. 1, tit. 9, page 83 (85), lib. 4, tit. 35, § 17, Hamilton *contra* M'Culloch, Spottiswood, p. 43 (*voce* BONA et MALA FIDES). And can the pursuer be understood to have been *in cursu diligentia*, who forbore to denounce for six months after the charge ? Again, by horning we understand denunciation, or such a diligence as can affect the dyvour's lands or goods, 11th November 1675, Veitch *contra* Pallet, No. 127, p. 1029 ; 18th July 1677, Murray *contra* Drummond, No. 139, p. 1048 ; which a simple charge can never do.

Duplied for the pursuer : Seeing the statute prescribes no definite time for completing diligence, in order to found reduction thereon ; it sufficeth to prosecute the same within the year, which law and custom allows for denouncing upon a charge of horning. 2do, The defender cannot obtrude *mora* to the pursuer, seeing the assignation made to him within ten days of the charge, would have been unquestionably reducible, had denunciation followed a few days after the assignation, as in Major Bateman and Provost Drummond's case, p. 1076, and p. 1067 : And the pursuer's

delaying to denounce could not validate the null assignation ; for that, *quod ab initio vitiosum est, tractu temporis convalescere non potest*. Besides, it is the interest of a trading place, that creditors be not forced immediately to the utmost step of rigorous diligence ; but left to use their discretion in allowing some reasonable time to the person charged, to recover and extricate himself before the fatal completing of diligence against him. The practiques cited by the defender, are not to the purpose ; for in that betwixt Veitch and Pallet, denunciation had been used before the date of the voluntary right : And a simple charge would not have been good in competition with a voluntary right, granted a year after the charge, upon which no subsequent denunciation could have followed effectually. When it is said in Murray and Drummond's case, that horning has a general effect both as to lands and moveables ; that is not so to be understood, as if denunciation anterior to the voluntary right were necessary ; but only that a charge of horning [1081] may lawfully affect these when completed by denunciation. What is cited out of Spottiswood, is as little to the purpose ; for there the acquirer of the voluntary right had not taken the same in security or payment of bygone debt, but for a price paid long after the reducer's apprising.

The Lords repelled the reason of reduction upon the act of Parliament 1621 ; in respect that, albeit the pursuer had used horning by a charge before the assignation, yet he had not connected and completed his diligence by denunciation for five months thereafter, No. 149, p. 1057.

Fol. Dic. v. 1, p. 80. Forbes, p. 334.

No. 173. [1092] Creditors of AGNES HAMILTON, Relict of Campbell of Rachan v. The Representatives of JAMES HENRY. February 9, 1743.

Found, that a minute of sale, executed by a person, who had, six months before, been in jail, but then liberated, and the debt paid and discharged, did not fall under the act 1696.

The said James Henry entered into a minute of sale with the said Agnes Hamilton and two others, whereby they disposed to him a house in Edinburgh ; and one of the articles was, That Henry should be allowed to retain as much of the price as should pay him two debts due by one of the disponers. Agnes Hamilton's creditors brought a reduction of the minute, upon the act 1696, alleging, That she was bankrupt at the date thereof ; and, for verifying their allegiance, condescended on this fact, *scil.* that she had been incarcerated about six months before the minute of sale, in the tolbooth of Edinburgh, in virtue of a caption, at the instance of John Miln.

Answered : That the debt due by Agnes to John Miln was paid and discharged, and she liberated six months before the deed under challenge was granted : This being the case, she cannot be reputed a notour bankrupt, unless she shall be held to be such upon one of the three joint grounds, which the law requires, [1093] without the concurrence of either of the other two. The statute supposes, That, at the time of granting the deed, the granter is a dyvour, or bankrupt, in terms of the description therein laid down. This must be admitted with respect to one of the requisites in the act, *viz.* insolvency ; that must come down to the date of the deed under challenge, as it would be absurd to suppose, that a reduction could proceed on this statute, of a deed granted by a person solvent ; or that an anterior insolvency, which may have happened twenty or thirty years before, should have any influence to set aside a deed granted by a man who is at the time in good circumstances.

In the second place, There was no partial preference granted by Agnes to her anterior creditors, which can fall under the law, the debts for which retention of the price is allowed being due not by her, but by one of the other disponers.

Replied for Agnes Hamilton's Creditors : That the payment of the debt in the caption cannot influence the case, if the bankrupt was once imprisoned thereon, or eluded the diligence by any other of the qualifications in the statute ; for sure the payment of the debt cannot hinder the fact to be true, that she was imprisoned thereon, or fell under any other of the qualifications respecting the diligence. And it is a mistake to suppose, That the remedy introduced by the statute was only intended

for the behoof of the party at whose suit the diligence proceeds ; as every creditor whatever may take the benefit thereof, in order to reduce the deeds granted there after ; and if the defender's gloss on the act were to hold, it might be cancelled, as the party who gets a voluntary right from a bankrupt would have no more to do, in order to secure that right, but to take off the creditor who used such diligence, by payment of his debt, perhaps a mere trifle, a few days before taking the deed. With respect to the second point, it was answered, That it would be absurd, if a deed in satisfaction or security of any debt of the bankrupt's should be voided, and yet a gratuitous deed in favours of the creditor of another should subsist : Besides, when the bankrupt alienates any of his effects to a creditor of his own, that debt is thereby satisfied, and his remaining effects left open to the rest of his creditors ; whereas, when he does the like to a creditor of another, it is downright profusion, and his own creditors altogether thereby prejudged.

The Lords found the act of Parliament did not take place.

C. Home, No. 227, p. 370.

No. 187. [1113] JAMES SPEDDING v. Messrs. HODGSON and DONALDSON.
August 9, 1785.

In this case, likewise, the execution of search sustained as evidence. There is a *præsumptio juris* of absconding, if a person notoriously insolvent be absent from his house ; but this presumption may be elided by contrary proof.

A messenger having gone to the house of Thomas Bushby, in order to execute a caption against him, and having searched for him there, without being able to find him, reported this proceeding in his execution.

In a competition of Bushby's creditors, it was afterwards debated, Whether the above circumstances, joined to his insolvency, were sufficient to bring him under the description of the statute of 1696.

Observed on the Bench : The absence of a debtor from his dwelling-house at a time when he is notoriously insolvent, will create a *præsumptio juris* of absconding. Not being, however, a *præsumptio juris et de jure*, it may be elided by a contrary proof.

The Lords found, "That Thomas Bushby, by the execution of search produced, fell under the description of the statute 1696."

Lord Ordinary, ALVA.—Act. ELPHINSTON.—Alt. G. FERGUSSON.—Clerk, HOME.

Stewart.

Fac. Col. No. 229, p. 356.

No. 189. JAMES RICHMOND and Others v. Trustees of CHARLES DALRYMPLE.
January 14, 1789.

Other proof of a bankrupt's imprisonment in terms of the statute, besides a messenger's execution, is admissible. To establish the bankruptcy in this case, parole proof was brought that the bankrupt had been repeatedly apprehended by messengers within the 60 days, but not imprisoned or detained in custody ; circumstances held not to be sufficient to constitute bankruptcy in terms of the act.

An assignation by a debtor, in favour of the Trustees of Dalrymple, one of his creditors, was brought under reduction by Richmond and others of his creditors, as having been executed within 60 days of his bankruptcy, contrary to the statute of 1696, cap. 5.

[1114] To establish the debtor's bankruptcy in terms of the statute, the pursuers adduced a parole-proof, of his having been repeatedly apprehended by messengers during the 60 days, but without being imprisoned or detained in their custody.

The defenders pleaded : The execution of a caption is an *actus legitimus* ; of which no other evidence can be admitted than a regular and formal document ; Dirleton,

No. 102, p. 40, Duke and Duchess of Monmouth *contra* Scott, *voce* PROOF; Forbes, MS., 25th June 1714, Hasswell *contra* Magistrates of Jedburgh, *voce* PRISONER; Fountainhall, v. 1, p. 356, Glendining *contra* Glendining, *voce* MUTUAL CONTRACT. On this principle, and not on the ground stated in the Faculty Collection, was determined the case of Maxwell *contra* Gibb, No. 188, p. 1113.

Answered: Where certain forms are prescribed for giving validity to any legal deed; as the instrument of a notary in sasines, and perhaps too in the consignment of redemption-money, or as the execution of a messenger in poindings; these being requisite steps of procedure, are indeed indispensable. But the statute of 1696 has not required, as a solemnity or necessary form, the execution of a messenger. The facts therefore on which that enactment proceeds, may be proved *prout de jure*; nor do any of the cases quoted by the defenders exceed the bounds of the above admission. Their ill-founded idea of the decision, Maxwell *contra* Gibb, is acknowledged to be contradicted by the report of the case.

The Court expressed an unanimous opinion, That there was no ground for supposing the execution of a messenger to be essential to the proof of the facts respecting a bankrupt's imprisonment, which might be equally well established by parole-testimony. But as in this case that evidence was deemed inconclusive, the circumstances proved not amounting to imprisonment, in the sense of the statute, more than in the case of Maxwell and Gibb.

The Lords adhered to the Lord Ordinary's interlocutor, assoilzieing the defenders.

Lord Ordinary, STONEFIELD.—Act. TAIT.—Alt. HAY.—Clerk, SINCLAIR.

Stewart.

Fol. Dic. v. 3, p. 53. Fac. Col. No. 54, p. 95.

No. 190. The Creditors of NEIL MACKELLAR v. DONALD MACMATH. March 1, 1791.

After a legal bankruptcy, incapacity continues, till solvency proved. In this case, a debtor who had been indisputably bankrupt in 1771, was, in 1776, for some hours in custody of a messenger; but paid the debt, and was not imprisoned. A bond of corroboration granted after this, was reduced.

So early as the year 1771 Mackellar was in embarrassed circumstances, and a great variety of diligences, by horning, inhibition, and caption, was issued against him in the subsequent years.

In the year 1776 he was in the custody of a messenger for some hours, after which he paid the sums due to the creditor at whose instance the caption had been obtained, amounting to £150; but he never was put in prison, nor was any written execution of his having been apprehended made out by the messenger.

[1115] Mackellar was indebted to the father of Donald Macmath to a considerable amount, partly by bills, partly by open accounts, and partly by bonds. All these grounds of debt having, in 1780, devolved to Donald Macmath, in virtue of a general conveyance executed by his father, Mackellar granted to him a bond of corroboration, wherein the whole sums due, including the arrears of interest, were thrown together, and a corresponding penalty stipulated.

In virtue of this bond of corroboration, and without obtaining confirmation as a general disponent, Donald Macmath proceeded, along with the other creditors, to lead an adjudication against the lands belonging to Mackellar.

The lands being sold judicially, a competition of the creditors ensued; and an objection, founded on the statute 1696, c. 5, was stated to the claim entered for Donald Macmath. In support of this objection it was

Pleaded: Before the date of the bond of corroboration the granter had become legally bankrupt in virtue of the statute 1696. His debts far exceeded his effects. Several years before, in virtue of horning and caption, he had been seized and detained in the custody of a messenger, until he could raise the sums necessary for obtaining his enlargement. Thus the granting of the bond itself, with every thing following upon it, became ineffectual and void.

It is of no importance that in this case the debtor was never put in prison. When it appears that the apprehending was used only for the purpose of obtaining a partial payment, without any intention to imprison, it has been doubted how far the statutory requisites can be considered as having been fulfilled, Maxwell *contra* Gibb, No. 188, p. 1113; but where the debtor was not set at liberty until the whole debt was paid, his detention, whether in a private house or elsewhere, has been justly held sufficient; Fraser *contra* Monro, No. 183, p. 1109.

It is of as little importance that the apprehending of the debtor has not been vouched, in this case, by the official report of a messenger. Where the sums due are immediately recovered, no such report being necessary for the user of the diligence, it is generally omitted. What the law regards is the debtor's submitting to the disgrace attending the final execution of the caption; and this may be proved as any other fact, by such evidence as affords conviction to the judge.

It is equally unimportant, that after being thus made legally bankrupt, the debtor continued in the administration of his affairs, and that he was still intrusted with the management, at the time when the bond of corroboration was granted. The words of the law are general, avoiding all transactions at or after bankruptcy; and it would be attended with the most mischievous consequences if a different rule were to prevail. The longer a person continues in a state of insolvency, the danger of fraudulent preferences is the greater. It is only when he has fully paid the debts due by him, that he becomes a new man, and entitled to the full exercise of all his rights as a proprietor.

The only question therefore is, whether the granting of a bond of corroboration is to be considered as prohibited by the statute? But this can be attended with little doubt. It is not enough for excluding the operation of the law, that [1116] no wrong was meant. With regard to actual frauds there was no occasion for the interposition of the legislature: It was to prevent undue preferences where the deeds were *ex facie* liable to no objection, but where the situation of the debtor exposed him to many temptations, that the general rule was laid down in 1696, and the hands of the debtor, after public bankruptcy, and for sixty days preceding, tied up from deeds of every kind, whereby the situation of one creditor may be rendered more advantageous than that of his competitors.

The words of the statute, which being for the prevention of fraud, ought to be liberally construed, are, that "all and whatsoever voluntary dispositions, assignments, or other deeds, which shall be found to be made or granted, directly or indirectly, by the foresaid dyvor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days, if before, in favour of his creditors, either for his satisfaction, or farther security in preference to other creditors, shall be void and null." A bond of corroboration evidently falls under this enactment. It is a deed voluntarily granted; it is granted to one creditor in preference to others, who being in the same situation, have been allowed to follow the ordinary course of law in obtaining a confirmation; and it is done in favour of one of the creditors, the sums due to him being thereby enlarged by the accumulation of the interests, and a heavy penalty.

But, beside the advantages thus immediately resulting to the favourite creditor, from a transaction of this kind, there are others more indirect, which it was the purpose of the legislature to restrain. In making up titles by confirmation, there is a danger of omitting some of the requisite forms, which would be fatal to the diligence founded on it. The confirmation itself is a species of diligence, by which other creditors might have been prompted to take those measures which were necessary for their obtaining a rateable distribution; an opportunity is also given to attach the estate of the debtor with more dispatch. But this is not all: In this way debts may be saved from prescription—objections in point of form may be removed—and thus not only the equality of distribution among the creditors may be affected, but the funds which are to be the subject of it, may be wholly taken away.

Though, at an early period, our Courts seem to have erroneously considered this enactment to be of a correctory nature, no determination can be mentioned as a precedent for the present case. In that of Watson *contra* Cramond (*infra h. t.*), where, within the sixty days, the debtor had granted a procuratory or warrant for serving himself heir to his ancestor, the deed had no relation to any particular debt. The case of the Creditors of Gratney, No. 195, p. 1127, was decided on the same principle. In that of Cowan *v.* Mansfield (*infra h. t.*), where, within the sixty

days, a debtor, in lieu of certain bills, had granted a new one including interest and exchange, unless the mercantile nature of the transaction shall be thought to have authorised a distinction, the determination must be considered as contrary to the true meaning of the law. That case, however, appears to be so far different from the present one, that the debt [1117] was not, by the new bill, enlarged beyond what it would have been, if the creditor had instituted an action, and arrested upon the dependence of it.

In the later decisions, the views of our Courts have been more just and enlarged. In *Watson v. Marshall*, Fac. Col. No. 45, p. 72, *voce* INHIBITION, it was found, that a bond of corroboration was struck at by an inhibition, though the debt due to the inhibiting creditor was posterior to that corroborated; and in a still more recent case, where a bill of exchange had been granted to a creditor for the purpose of warranting a sequestration, the voucher was set aside, although the intention of it was not, as in the present case, to create a preference, but to remove it; 19th January 1788, *Scott contra Bruce*.* In those cases, as well as in *Robertson Barclay v. Lennox (infra h. t.)*, a general rule was laid down, which ought never to be departed from, that after public bankruptcy, the law alone ought to regulate the distribution of the debtor's effects.

Answered: The enactment of 1696, intended for the advancement of commerce, must not be so construed, that it shall have a tendency to destroy all confidence between man and man. This, however, would be the case, if, after the execution of diligence by horning and caption, the deeds of a person, continuing for years in the full administration of his affairs, were to be set aside. One so situated, cannot be considered as a bankrupt to whom the statutory regulations are applicable; and unless fraud be proved, his actings must be valid.

The consequences of a contrary doctrine would be still more dangerous, if the mere apprehending of the debtor, and that verified only by parole testimony, were to be considered as equal to imprisonment. By rendering this necessary to every act of bankruptcy, the legislature had in view to give public notice of the debtor's situation; nor could it be intended, that the efficacy of deeds of the greatest importance should depend on the mere assertion of an inferior officer of the law, without those means of detecting his falsehood, which the production of a written execution must afford. Indeed it may be doubted, whether, in such a case as this, where the debt was immediately paid, even actual imprisonment, authenticated in the most regular manner, could be regarded.

But although it should be held that the debtor, in this case, had been rendered bankrupt in the manner required by the statute, that would not be sufficient for undoing what has been here done. A debtor may act unjustly to his creditors by embezzlements, under the colour of onerous bargains; or by voluntary alienations to one class of creditors, in defraud of diligence already commenced by others not so much favoured. Proceedings of this kind by a person whose debts exceed his funds, though he is not notoriously insolvent, have been restrained by the statute of 1621. After public bankruptcy, it has been thought necessary to impose some farther restrictions, so as to prevent "all voluntary, dispositions, assignments, and other deeds, either for satisfaction, or farther security of the favoured creditor," &c.; but, as the purpose of the law does not seem to be frustrated by the granting of a bond of corroboration, so the words of the statute do not seem to reach such a case.

[1118] The granting of a bond of corroboration is neither a disposition nor an assignation; and although it is a deed, it is of a different nature from those which are particularly mentioned in the statute. It is not given in satisfaction to the creditor, nor for his farther security, as he must still pursue the same measures for attaching the debtor's estate as formerly. It is nothing more than an act of accommodation to save the expence of confirming. From proceedings like these, the legislature could not intend to withdraw its sanction. Indeed, when the retrospective effect of the statute is taken into view, all transactions of the nature of those prohibited being set aside, if completed within sixty days of the public bankruptcy, it would be palpably unjust, if, in consequence of an act of this kind, a creditor should be deprived of the sums justly due to him.

Those are merely imaginary evils which have been stated as resulting from giving effect to deeds of this nature. If, after granting a bond of corroboration to one creditor,

* Not collected. See APPENDIX.

the same accommodation should be refused to another, the proceeding would be set aside on the head of actual fraud. If an attempt were made in that manner to revive debts long before done away by prescription, it would doubtless be disappointed. Even so far as the bond here granted may be thought to enlarge the debt by an accumulation of the interests, or by the addition of a penalty, this may be rectified without avoiding the document, so far as it only acknowledges a just debt.

If, after the leading of several adjudications, it were necessary, for enabling another creditor to come in *pari passu*, that a bond of corroboration should be granted to him, this surely could not be thought fraudulent. Though the words of the enactment had been so broad as to comprehend such a proceeding, a court of law would not, in opposition to its true meaning, give effect to them. The case of a bond of corroboration granted after inhibition differs widely from the present one. Even the granting of an heritable security, for money actually advanced, is struck at by an inhibition, though such a transaction is not prohibited by the statute of 1696.

The Court were unanimously of opinion, that, in this case, the circumstances necessary for inferring public bankruptcy were sufficiently established, imprisonment not being absolutely necessary, while the act of apprehending the debtor might be ascertained by the method here practised.

The Court were also unanimously of opinion, That the payment of the debt, in virtue of which ultimate diligence had been used, was not sufficient to take off the effects of public bankruptcy, and that this could only be done by showing that the debtor had afterwards been in a situation to pay all his debts due at the time.

As to the legality of the bond of corroboration, a great difference of opinion prevailed. So far as the debt was thereby enlarged, and a penalty superadded, it was agreed, that no effect ought to be given to it in a question with the creditors. Still, however, as the bond was good against the debtor himself, these circumstances were thought by many of the Judges to afford no ground for setting [1119] aside the adjudication *in toto*, it being considered as unreasonable, where nothing fraudulent or collusive could be stated, to annul a deed which, without any apparent injury to the other creditors, tended to save unnecessary expence to the party obtaining it.

On the other hand, it was observed, that by requiring a proof of actual fraud, in order to set aside deeds of this kind, the purpose of the enactment in 1696 would be in a great measure frustrated; and that while by the establishment of such a general rule as was contended for by the objecting creditors, many improper proceedings would be prevented, no injustice could arise from it, every person being equally put on his guard.

After advising informations, the Court "sustained the objection."

A reclaiming petition was preferred, which was followed with answers.

Counsel were afterwards heard.

And the Court, by a very narrow majority, adhered to the judgment formerly pronounced.

Reporter, LORD ANKERVILLE.—Act. ABERCROMBIE, HONYMAN.—Alt. SOLICITOR-GENERAL, ROSS.—Clerk, HOME.

Craigie.

Fol. Dic. v. 3, p. 54. Fac. Col. No. 170, p. 345.

No. 193. [1124] *FORBES of Ballogie v. the Debtors of FORBES of Craigie.*
January 27, 1715.

Delivery of goods and merchandice by bankrupts, in satisfaction of anterior debts, found to be challengeable upon the act of Parliament 1696.

In the furthcoming at Ballogie's instance, against the Debtors of Forbes of Craigie, the pursuer extracted several accompts from the common debtor's compt-book, and referred the accompts to the defender's oaths, who deponed and acknowledged the articles and prices in the accout; but added this quality, that the said articles were received and given them in payment and satisfaction of debts due by the common debtor to the defenders.

[1125] At advising, the quality relating to the terms and condition of the bargain, was found to be intrinsic; but the pursuer having repeated a declarator of bankrupt upon the 5th act, Parliament 1696, "The Lords sustained the declarator."

The defenders reclaimed by a bill, representing, that the said act 1696 did indeed annul voluntary dispositions, assignations, and other deeds made and granted by bankrupts at or after their becoming bankrupt, or 60 days before, in favour of creditors, either for satisfaction or security in preference to other creditors; but that act did not concern the defender's case, who had received goods or merchandice *de manu in manum* in the way of commerce; and that the word deed, in the act of Parliament, was only to be understood of writings, in the common meaning and acceptation of the word; otherwise the words of the act of Parliament would not be congruous, which bears dispositions, assignations, or other deeds made and granted, which words, deeds made and granted, can only be interpreted writings.

It was answered: Clauses in an act of Parliament are to be interpreted according to the reason and meaning thereof, and not captiously by the words. The reason is, that frauds are still frequent, notwithstanding of former laws against fraudulent alienations; and therefore there is by that law very great extension made; and former laws, especially the act of Parliament 1621, expressed all alienations against the same to be null; and albeit deeds be frequently understood of writs, yet alienation of moveables and merchandice, by delivering *de manu in manum*, are also deeds of the bankrupt, and falling under the reason of the law; for in this case the common debtor *in meditatione fugæ* disposes of merchandice to a great value, for satisfying such creditors as he favoured, to the manifest defraud of others; and in the preceding act, regulating deeds on deathbed, there is no question that alienation of heirship, as jewels, or other valuable moveables on deathbed, are regulated by that act, though no writ be interposed.

"The Lords adhered to their former interlocutor."

Fol. Dic. v. 1, p. 83. Dalrymple, No. 132, p. 184.

No. 194. BRUGH of Tinmouth v. ALEXANDER GRAY. January 1, 1717.

A voluntary disposition for a price paid, and not for anterior debts, falls under neither of the acts of Parliament 1621 or 1696.

Sir David Thoires having disposed some lands in Leith in trust to Sir Robert Forbes; and he, with consent of Sir David, having sold to Alexander Gray part of the said lands, Mr. Brugh, one of Sir David's creditors, denounces and registers him at the horn; and after his decease in the Abbey, constitutes the debt against his heirs, and thereupon leads adjudication of the said lands, and of Sir Robert's back-bond, and charges the superior: But, coming to insist for mails and duties, Gray compares, and craves preference upon his said disposition, which was granted, after Brugh's diligence by horning; but, prior to his adjudication; the question was, Whether a voluntary disposition for a price paid, and not an anterior debt, fell under the acts 1621 and 1696?

[1126] It was alleged for David Brugh, 1mo, As to the act 1621, that that law, in the latter clause thereof founded on, seemed to have a particular regard to the diligence of creditors, deeming all alienations made in prejudice thereof fraudulent, without distinction; and therefore reducible only to the extent of the debts, for which the creditor's prior diligence was deduced; and that there was a great difference betwixt that clause and the former one of the same; for by the former, deeds are only to be reduced, where the fraud of the receiver concurs; whereas, in the latter, all deeds, without distinction, are declared reducible upon the single ground of their being prejudicial to prior lawful diligence.

2do, Though the first clause of that law provides in favour of *bona fide* purchasers from the interposed person, yet, in the latter clause, no such provision is repeated; and therefore conveyances made by dyvors in prejudice of creditors, are affectable with the dyvor's debts, though passing *bona fide* through many hands; which is the

opinion of Sir George Mackenzie in his treatise on the said clause : But this clause, says he, annuls not these deeds upon any personal account, but because they are contrary to diligence done by a lawful creditor ; besides, that if a purchaser *bona fide* from a co-creditor, preferred contrary to the meaning of the act, should be burdened with the prior diligence of another creditor ; it were ridiculous to suppose, that a purchaser from the dyvor himself, should not be liable to the prior diligence of a creditor, merely because that purchaser was not a creditor.

3tio, Though it is true that the law, in this clause, had more particularly in its view, alienations made in favours of co-creditors, as being the most common case ; yet it has left the dispositive words general and comprehensive touching " all rights made to any person," which are the very words made use of ; and the fraud would be much greater if the dyvor were allowed to sell lands in prejudice of creditors diligence, than if he were allowed only to prefer one creditor to another ; since, in the last case, the extinguishing one creditor's debt would leave the remaining subject affectable by others.

Answered for Gray, 1mo, That the act 1621 plainly concerned either gratuitous deeds in favour of conjunct persons, or rights granted in security or payment of prior creditors, in prejudice of the inchoate diligence of competing co-creditors ; but there is nothing in that law which precludes purchasing for a price paid, even from debtors under diligence by horning, which the purchaser is not concerned to notice or enquire after. 2do, The law is thus clearly explained by Lord Stair, Inst. tit. Repar. § 15, when speaking of the last clause of the act 1621 : Neither, says he, will this clause of the statute annul dispositions made to buyers for a just price paid, where the price was not an anterior debt due to the buyer ; and so also was expressly decided, *Nielson v. Ross*, No. 134, p. 1045 ; and also inferred from the decision, *Bathgate v. Bowden*, No. 140, p. 1049, where the interlocutor is, The Lords found the reason of reduction relevant, that after horning used by Bathgate against the common debtor, the disposition was made by him to Bowden, not for a price paid by way of commerce, but for satisfying a [1127] prior debt due to Bowden ; *ergo*, if it had been for a price paid by way of commerce, it would not have been reduced ; neither, in the present case, does the horning used signify any thing ; that being no proper diligence to interrupt disposal by sale, which only can be done by inhibition. Lastly, As the above decisions are *in terminis*, so has it never as yet been otherways found.

Replied for Brugh : That the reason why no decisions have occurred in the matter may be, that purchasers have been cautious how they bought from bankrupts, seeing the law is so clear against them ; yet one there is, 23d February 1709, *Hamilton v. Sir James Campbell*, where the voluntary assignation of this same Sir David Thoires is reduced upon the act 1621 (No. 150, p. 1059).

Duplied for Gray : That the decision did not meet ; for there both parties were creditors to Sir David, and the assignation was for no price instantly paid by Hamilton, but for payment of a prior debt, and so fell under the last clause of the act of Parliament.

As to the act 1696, it was alleged for Gray, That it was plain, by the terms thereof, that it only concerned creditors.

Answered for Brugh : That he did not concern himself with the import of that particular clause in the act 1696, touching deeds done sixty days before bankruptcy, but that he founded on the general scope of the act to prevent such fraudulent alienations, and especially on the first clause thereof ; which provides, that an insolvent debtor absconding, imprisoned, &c., shall be reputed notour bankrupt from the time of his imprisonment, &c. ; and therefore no deed done by him can subsist in prejudice of his creditors ; and this conclusion is more founded on the common principles of law and reason, than on this act, which seems to have taken that point for granted.

" The Lords preferred Alexander Gray, as having purchased *bona fide* for a just price, and not for satisfaction or security of former debts."

Act. BOSWELL.—Alt. DUN. FORBES.—Clerk, M'KENZIE.

Fol. Dic. v. 1, p. 83. *Bruce*, No. 45, p. 60.

No. 199. [1128] FORBES v. BREBNER and Others. January 26, 1751.

Payment in cash cannot be reduced on either of the statutes 1621 or 1696.

George Forbes being creditor to David Farquhar in £193 Sterling, arrested in the hands of George Elmslie, and obtained decree of furthcoming for £94, [1129] the sum he acknowledged due ; and that sum Elmslie offered to pay, if Forbes would discharge him of all he owed to Farquhar ; which Forbes refused to do, being suspicious he owed him more ; and proceeded to horning and caption, and imprisoned Elmslie in the tolbooth of Aberdeen. While the days of the charge of the horning were running, Elmslie had wrote a letter to Forbes, pressing him to comply with his proposal of discharging all he owed to Farquhar, and signifying he had the money ready to give him, and that if he would not take it in the terms offered, he would give it to other of his creditors ; and he actually therewith paid Brebner and his other creditors.

Forbes coming to be informed of the payments made in these circumstances, arrested in their hands, and pursued a furthcoming before the sheriff of Aberdeen ; wherein, beside libelling as in a common furthcoming, he insisted on this ground, That payments thus made were reducible upon the acts 1621 and 1696, and that therefore, the sums so unlawfully paid should be made furthcoming to him ; and the defenders having deponed in the furthcoming, that they owned nothing to Elmslie at the time of the arrestment, but acknowledged the payments made to them by him, during the currency of the pursuer's diligence, agreeable to the information the pursuer had got ; the sheriff assolizied the defenders.

The cause having been advocated, the Lord Ordinary, before whom it came to be discussed, after advocating the cause, appointed memorials to be given in ; and upon advising thereof, "sustained the defence, as the sheriff had done, and assolizied the defenders."

And the Lords "refused the reclaiming petition without answers."

The question turned chiefly upon the construction of the act 1621, which statutes, "That where a dyvor shall make any voluntary payment or right to any person, in fraud of the lawful and more timely diligence of another creditor having served inhibition, or used horning, arrestment, comprising, or other lawful means, to affect the dyvor's lands or goods, or price thereof to his behoof, in that case the creditor shall have good action to recover that which was voluntarily paid in fraud of his more timely diligence."

The words are strong, and at the first view would appear to comprehend payments made in *pecunia numerata* ; and no case can occur more favourable for this construction than the present, where the payment was maliciously made. Nevertheless, as there is no instance where a payment in *pecunia numerata* has been found to be affected by any of the statutes concerning bankrupts, nor has any of our lawyers ever said so ; so these words in the statute, having served inhibition, &c., or used other lawful means to affect the dyvor's lands, &c., were thought to limit the statute, so as only to concern conveyances of subjects which may be affected by such diligences ; notwithstanding of the reply, that even taking the statute in the strictest sense, a debtor's ready money as well as his other affects, is affected by horning and denunciation, as at the date of the statute it fell under his escheat, which is burdened with the debt in the horning ; as properly the escheat affected nothing to the creditor, although the Crown was, by special [1130] statute, subjected to the debt ; and that the subjects, which the statute supposes to be affected, are only the debtor's lands, or his goods, or the price thereof, none of which comprehended his ready money ; and as none of the statutes do restrain him from spending or squandering his ready money, it would have been strange to have restrained him from giving it to his creditors.

There was no occasion in this case to determine, what the case would be of payment made by delivery of moveables ; though it was mentioned in the reasoning as a thing not to be doubted, that such payment would fall under the statute. (See No. 131, p. 1042.)

Kilkerran (BANKRUPT), No. 15, p. 62.

No. 205. [1144] The TRUSTEE on the Sequestrated Estate of DAVID MARSHALL & JAMES PROVAN and Company, and Others. January 21, 1794.

A person purchased goods within sixty days of the seller's bankruptcy. Afterwards the purchaser procured bills granted by the seller to others, to be indorsed to himself, for the purpose of compensating the price with them. Found to be a transaction, falling under the act 1696.

David Marshall sold Provan and Company goods to the amount of £253, 6s. 9d. Sterling, for which they agreed to grant him bills payable six months after date. Provan and Company alleged this happened on the 10th January 1792; while Marshall contended, that it did not take place till the 24th of that month.

In the year 1791, Hamilton and Company had sold Marshall goods to a considerable amount, and in part payment had received two bills, accepted by Marshall, amounting together to £237, 13s.

On the 21st January 1792, Hamilton and Company indorsed these two bills to Provan and Company, who, in return, granted their own bill to Hamilton and Company for their amount.

David Marshall having soon after demanded from Provan and Company bills, in terms of their agreement, for the price of the goods which he had sold them, they pleaded compensation to the extent of the bills which they had thus got indorsed to them, and offered him cash for the balance.

Marshall's estate was sequestrated upon the 3d February 1792, and on the 20th he was rendered bankrupt, in terms of the act 1696.

The trustee on his sequestrated estate brought an action, in which he called both Provan and Company, and Hamilton and Company, concluding for payment of the price of the goods furnished by Marshall to Provan and Company; and

Pleaded: It is admitted that Provan and Company got Marshall's bills indorsed to them on the 21st of January. If, therefore, the sale of the goods by Marshall to them took place on the 24th of that month (a fact of which proof is offered), the transaction falls directly under the act 1696; the delivery of the goods being clearly an alienation by Marshall, within sixty days of his bankruptcy, in satisfaction of a prior debt.

But even if the sale had been made on the 10th January, as the transaction between Hamilton and Company and Provan and Company gives an improper and dangerous preference to the former, over the other creditors of the bankrupt, it is void, both on the spirit of the act 1696, and at common law; 9th March 1781, *Blackie v. Robertson*, No. 12, p. 887; *Cauvin v. Robertson*, 18th June 1783, *Fac. Col.* No. 107, p. 170, *voce* COMPENSATION, RETENTION.

Answered: When Hamilton and Company sold Marshall's bills to Provan and Company, they had no apprehension of Marshall's bankruptcy. Their having occasion to remit money to Manchester, where they knew that a bill granted by Provan and Company would be more readily received than one granted by Marshall, was their sole motive in making the exchange which took place without [1145] his knowledge. Although, therefore, the sale by him to Provan and Company had not taken place before the 21st January, the date of the indorsation of the bills, the whole transaction would have been fair and valid, as the act 1696 relates solely to alienations, &c., by the bankrupt himself, and was not intended to strike at transactions in which he had no concern, although they should be attended with a consequential benefit to some of the creditors. So far indeed from extending the statute this length, the Court have refused to set aside deeds even of the bankrupt himself, where they did not fall under the precise description of "alienations"; February 1728, *Creditors of Gratney*, No. 195, p. 1127; 31st July 1724, *Creditors of Watson v. Cramond*, *infra h. t.*

But the averment of the defenders is, that the sale by Marshall to Provan and Company took place on the 10th January, when this Company were in no shape creditors to Marshall. So that, in reality, the present question has no connection with the act 1696; and, at common law, a fair transaction in the course of trade cannot be reduced, merely because one of the parties has thereby escaped a loss which the supervening bankruptcy of a third party would have otherways brought upon him.

The Lord Ordinary "decerned conform to the conclusions of the libel."

The Court refused a reclaiming petition. The defenders presented a second, which was appointed to be answered.

At advising the cause, one Judge thought that its merits depended entirely on the fact, whether the sale by Marshall to Provan and Company happened before or after the 21st January. If before the indorsation of the bills by Hamilton and Company to Provan and Company (he observed) it was to be considered as a fair transaction; if after, although no fraud might be intended, it fell under the express words of the act 1696. The question therefore came simply to be *cui incumbit probatio*.

All the other Judges agreed with his Lordship, that if the sale took place after the date of the indorsations, the transaction fell under the act 1696; but they differed from him in thinking it valid, if the sale by Marshall took place on the 10th January. The act 1696 (it was observed), being made to repress fraud, and as every possible device would be fallen upon to evade it, the most liberal interpretation should be given to it. The presumption of law arising from it, is, that a person forses his bankruptcy sixty days before it occurs; and therefore all securities granted by him for prior debts, within that period, are annulled. But if the transaction in question were sustained, a person, even within a few days of insolvency, might defeat this salutary regulation, merely by informing a favourite creditor of his situation, and desiring him to assign his debt to some friend, to whom he had sold goods equal to its amount, for the price of which he would be entitled to plead compensation upon the debt thus assigned. Although, therefore, in the present case, there was no evidence of the bankrupt's being privy to the transaction between the two defenders, yet it was too dangerous, in point of precedent, to be supported. Indeed, independent of the badness of its general ten-[1146]-dency, it is clear, from the whole circumstances attending this transaction, that the indorsation of the bills arose from an apprehension of Marshall's bankruptcy; and on that account it was an improper accommodation by Provan and Company to Hamilton and Company; especially as the former had previously entered into an agreement with Marshall, to grant him their own bills for his goods, from which they were not entitled to depart.

The court "adhered."

Lord Ordinary, HENDERLAND.—Act. CULLEN.—Alt. CORBET.—Clerk, SINCLAIR.

R. Davidson.

Fol. Dic. v. 3, p. 56. Fac. Col. No. 95, p. 212.

No. 208.

[1150] SHAW v. HALL. November 17, 1747.

A prior disponee, though uninfert, entitled to challenge a second disposition, followed by infertment.

Richardson merchant in Kelso having in his person several adjudications, whereon he had not obtained infertment, when, in the year 1734, his affairs fell into disorder, conveyed these adjudications to Gabriel Hall his creditor, in security [1151] of what he owed him; and as the law was at that time understood to stand, Hall was advised that Richardson's own right being personal, he was effectually denuded by the disposition; and accordingly, without using the precaution to obtain himself infert by the superior upon the adjudications, he entered into possession. But the memorable decision between Bell of Blackwoodhouse and Gartshore * supervening in 1737, Joseph Shaw another creditor obtained from Richardson, in 1740, a disposition to the same subjects, and obtaining himself infert upon the adjudications, and thereby acquiring a preference to Hall, as the law now is supposed to stand on the footing of that decision, pursued an action of mails and duties.

Gabriel Hall for his defence pursues a reduction of Shaw's right on the act 1696; on this ground, That Richardson was notour bankrupt at the date of the disposition to Shaw; the relevancy whereof was contested by Shaw on this ground, that his preference to Hall did not arise from his disposition from Richardson, to which Hall's disposition as prior was preferable, but from his infertment from the superior. That being the

* Rem. Dec. v. 2, p. 15, voce COMPETITION.

case, his infetment was not reducible upon the act 1696, as the Lords found January 1734, Creditors of Scott of Blair *contra* Colonel Charteris, *infra h. t.*

Answered, That it might be true, were Hall's allegiance no other than that Richardson the common debtor had become bankrupt within 60 days of Shaw's infetment, the case would not fall under the act 1696, as that infetment flowed not from the common debtor ; and no more is determined by that decision. But here the allegiance is, that the common debtor was bankrupt at the date of the disposition to Shaw, which disposition to Shaw, Hall the first disponsee was, as creditor to the granter upon the warrandice, entitled to reduce on the act 1696, and the disposition to Shaw being reduced, the infetment obtained upon the adjudications fell of consequence.

Which the Lords " sustained, and found the reduction competent."

Fol. Dic. v. 3, p. 57. Kilkerran (BANKRUPT), No. 7, p. 53.

No. 211. [1154] RIDDEL v. Creditors of NIBLIE. February 16, 1782.

A disposition *ex facie* absolute, with a back-bond bearing, that no price had been paid, but that the infetment was to subsist as security for debts due, and to be acquired by the disponsee, sustained to the extent of debts contracted, whether before or after infetment.

Jamieson, upon the narrative of a price paid, disposed his lands of Langside to Niblie, absolutely and irredeemably ; and on this disposition infetment followed.

Of the same date with this disposition, a back-bond was granted by Niblie to Jamieson, declaring, that no price had been paid by him ; but that the infetment was meant to subsist as a security for certain debts of Jamieson, then in the person of Niblie, and for such other debts as Niblie should thereafter transact with Jamieson's creditors.

Both Jamieson and Niblie died soon after ; and their respective creditors having transferred their debts to trustees, Mr. Reid, for the creditors of Jamieson, instituted an action for setting aside the infetment. It contained, among others, a conclusion for restricting the security thereby created, to the debts due to Niblie [1155] at the date of the infetment, upon that part of the act 1696, c. 5, which annuls " infetments in relief or security of debts to be contracted."

The Lords, in respect this was not an infetment in relief or security, but an absolute disposition to the property, sustained the same to the extent of the debts due by Jamieson to Niblie, at whatever time contracted.

Reporter, LORD JUSTICE CLERK.—Act. OGILVIE.—Alt. NAIRNE.—Clerk, HOME.

Craigie.

Fol. Dic. v. 3, p. 58. Fac. Col. No. 33, p. 54.

No. 212. GEORGE PICKERING v. SMITH, WRIGHT, and GRAY. January 16, 1788.

An heritable bond granted in security of sums to be paid on a cash-account, found ineffectual, except as to payments made prior to the infetment.

James King granted to Smith, Wright, and Gray, bankers, an heritable bond for £2500 ; on which infetment was taken. They, on the other hand, by a separate deed, acknowledged, " that they had not then paid the above sum ; but that the bond was intended as a security for such payments as they already had made, or should thereafter make, during the currency of a cash-account which they had opened in his favour."

King accordingly received from time to time considerable sums ; but having afterwards become bankrupt, and disposed his estate to Pickering, as trustee for his creditors, the latter instituted an action for reducing this heritable security ; and

Pleaded : By the statute of 1696, cap. 5, it is enacted, for the prevention of fraud,

“That any disposition, or other right that shall be granted for hereafter, for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infektment following on such disposition or right.” The security in question having been evidently granted for a debt to be contracted “for the future,” if it ever was to exist at all, comes directly under the words of the law : So that it is needless, while the expression is thus unequivocal and clear, to enquire, whether future debts, altogether indefinite, may have been more especially the object of the statute. Though in these the danger of fraud might be greater than in definite debts, the language of the enactment proves, that it was apprehended to exist in both. Accordingly, the Court having applied the statute to indefinite debts, in the case of *M'Dowal contra Rutherford*, No. 210, p. 1153, applied it equally to such as were future, though definite, in that of *Kinloch contra Dempster*, 13th June 1750, Rem. Dec. v. 2, p. 233, *voce* RIGHT in SECURITY.

Answered : Prior to the statute, it was usual to give infektments in security of all debts to be contracted, and of all cautionary obligations to be incurred in future. By means of these, not only personal but real creditors, whose rights were posterior to those infektments, could be postponed at pleasure : A practice of a [1156] fraudulent tendency, and as such mentioned by Lord Stair, in a passage (b. 2, tit. 3, § 27), where the case of the Creditors of Langton * is referred to as an example, and which is thought to have given occasion to the act of Parliament quoted. But the present security, on the contrary, was made for repayment of a specific debt, being the balance of a cash-account, not exceeding £2500; the onerous cause for granting which security existed from the time when the defenders agreed to pay so much money. If the records were inspected, the estate would appear burdened to that amount ; but it is difficult to conceive how creditors could be thus ensnared, or how any loss could ever result from the discovery that in fact the burden was of no less extent.

Replied : The mere promise to advance money is of no significance, as it could not afford ground for an action of damages.

Observed on the Bench : So salutary an enactment ought not to be narrowed in its construction. Far from introducing any innovation, it does no more than confirm the doctrine of our feudal law. The loan of the money was essential to the constitution of the right in question. But it is absurd to conceive this right continually fluctuating between existence and non-existence, according as the money, during the currency of the cash account, should have been paid, repaid, and paid again ; the creditor being of course the vassal one day, the next not so, the third a second time vassal, and so forth.

The Lords sustained the reasons of reduction of the heritable bond, so far as respected the sums advanced posterior to the date of the sasine thereon.

Reporter, LORD STONEFIELD.—Act. DEAN OF FACULTY.—Alt. BLAIR.—Clerk, HOME.

Stewart.

Fol. Dic. v. 3, p. 59. *Fac. Col.* No. 14, p. 25.

No. 213. Creditors of Sir JAMES DUNBAR *v.* Sir GEORGE ABERCROMBY.
July 30, 1789.

An heritable security for sums posterior to its date, but prior to the delivery of it to the creditor, found valid.

In autumn 1774, Sir Robert Abercromby, the predecessor of Sir George, having agreed to advance £5000, on 20th December ensuing, to Sir James Dunbar, upon a security over his estate ; an heritable bond for that sum was executed in the month of October, and in November infektment followed. The bond and the instrument of sasine were deposited in the hands of a person who was the man of business of both the parties.

The money was advanced at different times until spring 1775, when the sum

* See No. 11, p. 33, and No. 146, p. 1054. See also COMPETITION and BASE INFECTMENT.

of £5000 having been completely paid, the heritable security was delivered up to Sir Robert Abercromby.

In a competition of Sir James Dunbar's creditors, it was objected, That as this money had not been all advanced prior to the date, either of the bond or of the infetment, they being so far a security for a future debt, fell under the sanction of the statute of 1696, cap. 5. And in support of the objection it was

[1157] Pleased : The sum of money, in security of which the bond was granted and the infetment taken, not having been paid for several months posterior to the date of the latter, it was, in the terms of the statute, as much a future debt as if the payment had not been made for years after. In the case of *Kinloch v. Dempster*, Rem. Dec. v. 2, p. 233, *voce* RIGHT in SECURITY, a preference claimed under an infetment in security of £20,000, was restricted to £8000, that part of the money which only was paid prior to its date ; and in the late case of *Pickering contra* Smith, No. 212, p. 1155, an infetment, in security of money to be drawn in consequence of a cash-credit with a banker, was not sustained.

Answered : If securities for future debts had not been precluded, the enactment of the statute of 1696 respecting the sixty days prior to bankruptcy, must have become nugatory, as often as the precaution was taken of having such previous securities ready to supply the place of those prohibited. But as an artifice of this kind, the security in question could never be employed. None of the parties ever meant that it should be given or received for any future debt ; and in fact it was not delivered sooner than the whole of the money was paid ; it having been retained till then in the custody of the granter's agent, who happened, which is a circumstance of no moment, to be likewise the agent of the creditor. The delivery no doubt was posterior to the date of both the bond and the infetment ; but this was equally necessary, and consistent with the regular practice of business. By that practice, which is essential to the absolute safety of the creditor, the debtor, before he receives his money, must have the bond executed, the infetment taken, and the latter likewise put on record ; so that in such cases it is the date of the delivery of the security which is alone considered.

The decision in the case of *Kinloch* regarded a future and uncertain debt ; the ground of that judgment, as stated by Lord Kilkerran, being, that neither the residue of the sum had been paid, nor the holder of the security laid under any such obligation to pay it, as could be the subject of diligence to the granter or his creditors ; *Kilkerran, voce* PERSONAL and REAL, p. 393.* The same observation is applicable to the case of *Pickering contra* Smith.

The Lord Ordinary sustained the objection.

But a reclaiming petition having been presented, and afterwards a hearing in presence appointed,

The Lords repelled the objection.

Lord Ordinary, SWINTON.—Act. WIGHT, *et alii*.—Alt. A. ABERCROMBY, *et alii*.—Clerk, GORDON.

Stewart.

Fol. Dic. v. 3, p. 60. *Fac. Col.* No. 86, p. 155.

No. 214. [1158] Creditors of JAMES STEIN *v.* NEWNHAM, EVERETT, and COMPANY.
November 14, 1789.

Decided in conformity with *Pickering* against *Wright, &c.*, *supra*, p. 1155. Affirmed on appeal.

By disposition and assignation followed with infetment, Stein made over to Newnham, Everett, and Company, an heritable bond for £12,000, as "a security for the reimbursement of such sums of money as should be drawn from them by orders, receipts, accepted bills, or promissory notes, for behoof of John Buchanan and Com-

* Under Lord Kames's report of the same case, *voce* RIGHT in SECURITY.

pany" (a partnership with which Stein had a concern), in consequence of a credit or cash-account which Newnham, Everett, and Company was to give to them.

Of this conveyance, as having been "granted for security of debts to be contracted for the future," the Creditors of Stein, who had become bankrupt, instituted a reduction on the statute of 1696.

On the part of the defenders, the topic sometimes resorted to, of a supposed analogy between the unquestionably valid infestments, for relief of cautionary engagements, for real warranty, or for guaranteeing the due discharge of offices of trust, and such securities as are granted for future debts, was insisted on; an analogy which, it was answered, fails in this, that in all the former instances, a debt is constituted, but in the last case there is nothing but an agreement to lend money, which forms no debt.

The late decision of Pickering *contra* Smith and others, was particularly appealed to, as being exactly in point for the pursuers; to which nothing new having occurred in the argument, it is sufficient to refer. See No. 212, p. 1155.

The cause was reported by the Lord President, as probationer, who observed, That the extent of the cash-credit being indefinite, there was a separate ground for annulling the conveyance, agreeably to the judgement of the House of Lords in 1734.*

It was likewise observed, that expediency could hardly be urged in support of the right under reduction, as bank-transactions, being of a momentary nature, require all those expeditious methods of recovering money which personal securities admit, but which are inconsistent with the tedious process of ranking and sale, so often necessary before any benefit can be derived from heritable security.

The Lord Ordinary having "found, That the infestment for security of Newnham and Company, could not avail them for any sums paid, or obligations undertaken by them, posterior to the date thereof,"

The Court adhered to that interlocutor; but remitted the cause to the Lord Ordinary to hear parties on the farther effect of the objection of an indefinite burden.

Lord Ordinary, SWINTON.—Act. MACONOCHE.—Alt. HAY.—Clerk, COLQUHOUN.

Stewart.

Fol. Dic. v. 3, p. 59. *Fac. Col.* No. 88, p. 159.

[1159] *. * The case was appealed,

25th February 1791.—The House of Lords ordered, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Newnham, Everett, and Co. Appellants, JOHN SCOTT, W. GRANT.—For Stein's Trustee, Respondent, T. ERSKINE, ALEX. WIGHT, JAMES BOSWELL.

No. 215. Creditors of JOHN BROUGH v. the Heirs of ROBERT SELBY. March 2, 1791.

An heritable security in relief granted to a cautioner in a cash-credit, found effectual only as to money advanced prior to the infestment. Heritable security, either to bankers for cash-accounts, or to the cautioners in bonds of credit, are now, by subsequent statute, legal.

Selby was a joint obligant along with Brough in a bond granted to a banker for a credit in a cash-account, to the extent of £500. Being, however, only a cautioner, Selby at the same time obtained from Brough a bond of relief in common form, and a disposition in security, of a tenement of land in Edinburgh, upon which disposition infestment immediately followed.

Brough became afterwards bankrupt, having previously operated on the cash-credit to the full amount, though at the date of the infestment, nothing had been drawn upon it.

* The case alluded to is, Creditors of Merchiston v. Charteris, *infra* h. t.

Selby having paid the debt to the banker, his heirs after his death, in the competition of Brough's creditors, claimed a preference in virtue of the disposition in security. To this the other creditors objected, That at the date of the infetment no part of the debt having been contracted, the security was void as having reference to a future debt ; and in support of this objection they

Pleaded : It is established by the decisions in the cases of Pickering *contra* Smith and Others, No. 212, p. 1155, and of Stein's Creditors *contra* Newnham and Others, No. 214, p. 1158, that heritable securities for money to be advanced after their date, in consequence of such a cash-credit as that in question, fall under the statute of 1696.

It is true, that here the disponent was not the principal creditor, but a cautioner or creditor for relief. The difference, however, is immaterial. The only essential circumstance is the debt being contracted prior or posterior to the security, on which surely it can make no variation, whether the claim under the security be made in the one character or in the other. If the contracting of the debt be subsequent to the infetment, the last will be equally unavailing to a creditor for relief as to a principal creditor. Nor is there any ambiguity as to the nature of the debt, for relief of which the cautioner becomes a creditor. For as upon the money being advanced, and not sooner, the principal debt arises to the principal creditor ; so at the same instant, the accessory debt arises to the cautioner, as creditor for relief. Before the actual advance of the money, he is not more to be [1160] considered as such, than the advancer of it was to be regarded as principal creditor ; for it does not stamp either of them with the character, that they have come under obligations to do what is future, the one in advancing the money, the other in becoming surety for such advance.

Answered : Such securities for relief of cautioner in cash-credits are in practice extremely common ; * nor do they seem less agreeable to law that those granted to cautioners for persons obtaining offices of trust, with respect to the validity of which however no doubt can be entertained. There is not an argument which can be urged for supporting an heritable security in either of the cases, that does not apply with equal force to the other.

It has been said, that before the money was actually advanced there was no existing debt, nor any room for a security in relief. But it is plain, that the cautioner had previously come under an effectual obligation to be responsible for the debtor's operations on the cash-credit, while over these he possessed no means of controul ; against which obligation, therefore, he was entitled to present relief, so that it cannot be regarded as a future debt.

The cases of Pickering and of Newnham, as they related to securities obtained by the creditor, afford not any precedent for the present, which respects a cautioner.

The Lord Ordinary pronounced this interlocutor : " In respect that in the bond of relief John Brough, the principal debtor, is bound to relieve, free, and harmless keep, Robert Selby, the cautioner, from the payment of the contents of the bond of credit, and for that effect to deliver it up to him cancelled, or report a valid discharge thereof, duly registered, against the term of Whitsunday then next ; repels the objection."

On advising, however, a reclaiming petition, with the answers,

The Lords altered this interlocutor, and found, " That the heirs of the deceased Robert Selby are only preferable, in virtue of his infetment, for the sums they can instruct to have been advanced at the date of the said infetment."

Lord Ordinary, DREGHORN.—For the Creditors, CULLEN.—Alt. ABERCROMBY.—Clerk,—MITCHELSON.

Stewart.

Fol. Dic. v. 3, p. 59. Fac. Col. No. 171, p. 351.

* A variety of late instances were produced from the register of sasines.¹

No. 317. [1163] WILLIAM KEITH, Trustee for the Creditors of JOHN SYME v. JOHN MAXWELL. July 8, 1795.

A debtor disposed his estate absolutely, under a back-bond to redispone, upon payment of the debt. The extent of the debt came to be notour, by means of an action in Court regarding it. Being rendered bankrupt; found he could not discharge the back-bond, so as to diminish the reversion, to the prejudice of his creditors.

On a settlement of accounts between Mr. Constable and the late John Syme, writer to the signet, his agent, there was a balance of £6000 against the latter, for which it was concerted, that he should grant a bond to John Maxwell, one of Mr. Constable's commissioners, which he accordingly did, on the 3d December 1779.

Maxwell, a few days after, granted a back-bond to Mr. Constable, declaring, that the bond, though *ex facie* simply in his favour, was truly granted to him in trust for Mr. Constable.

And on the same 3d December 1779, Syme likewise granted an absolute and irredeemable disposition of the lands of Barncailzie, and others, to Maxwell; who, on the other hand, on the 6th of that month, granted a back-bond to Syme, declaring, that the disposition was granted only in security of the bond for £6000; and therefore he obliged himself, whenever it was paid, to redispone the lands to Syme.

Maxwell was infeft on the disposition, 17th February 1781; and his sasine recorded 17th April thereafter. But Syme, till his death, remained in possession of the house and parks of Barncailzie.

[1164] Soon after this transaction, Syme's affairs fell into disorder; and on 12th June 1781, he was obliged to retire to the sanctuary.

Upon this, one of his creditors brought a reduction of the disposition and infeftment in favour of Maxwell; and in this process, in which the pursuers ultimately failed, the back-bond, granted by Maxwell was produced, and the whole transaction laid open.

The whole debts on which the diligence against Syme had proceeded, were afterwards paid, and he continued till his death to do business on a narrow scale, but he was never again solvent.

Maxwell having, on 31st December 1788, become cautioner for Syme in a cash-account for £500, the latter, of the same date, executed in his favour a bond of relief, in which he narrated the disposition granted by him to Maxwell, and the back-bond he had received from him; and declared, that the said disposition should subsist not only in security to Mr. Constable, of his debt of £6000, but also in security to Maxwell himself, for the consequences of his cautionary obligation; and to that extent, he discharged the back-bond.

Maxwell having, after Syme's death, paid a large balance due on the cash-account, he claimed a preference for it over the subjects contained in Syme's disposition, in virtue of the restriction of his own back-bond.

The trustee for Syme's creditors brought a reduction of his security on the act 1696, c. 5; 1st, Because the restriction of the back-bond was obtained several years after Syme had been rendered bankrupt; 2dly, Because it was granted in security of a future debt.

In defence, Maxwell

Pleaded: Syme's bond of relief being of the same date with the bond of credit, the defender's debt is a *novum debitum*, to which the act 1696 does not apply.

Neither does his security fall under that statute, as being for a debt to be contracted in future. It arises from an absolute disposition, qualified by a back-bond; and securities, although for future debts, when taken in that shape, are not affected by it; 16th February 1782, Riddel v. Creditors of Niblie, No. 211, p. 1154.

Besides, it is not the disposition and infeftment which is now sought to be reduced, but the restriction of the defender's back-bond, which being a personal deed, in no shape falls under the act 1696, the enactments of which are directed only against infeftments in security of future debts.

Answered: An absolute disposition, qualified by a back-bond, is supported; because, *ex facie* of the records, the disponent is wholly divested of the property, and no

creditor will contract with him on the faith of it. But this will not hold in the present case, where Syme was not only allowed to remain in the house of Barncaillzie, but where the back-bond, before the defender obtained the restriction of it, had been judicially produced, which made it publicly known that the lands were held in security only for a specific debt of £6000, and that the re-[1165]-versionary value still belonging to Syme himself, was consequently a fund on which his creditors might rely for payment.

Besides, as the defender originally held the infestment solely in trust for Mr. Constable, he could not invert the nature of his right, so as to make it a security for a private debt of his own, to the prejudice of Syme's other creditors, especially after his bankruptcy, as from that time he was not entitled to give partial preferences.

Replied : As the disposition and infestment were sustained in the process where the restriction of the back-bond was produced, the defender, so far from conceiving himself to be put *in mala fide* by it, was confirmed in the belief that he was safe in accepting the security which that right afforded. If Syme's other creditors discovered his reversionary interest by means of that action, they ought, if they counted upon it, to have immediately secured it, by inhibiting Syme, or adjudging the back-bond.

Neither will it avail the pursuer, that the infestment was originally granted only in security of a debt due to Mr. Constable. The defender, from the beginning, had an unqualified feudal right to the lands in his person. Mr. Constable's interest was secured by a separate back-bond from him, which he might have destroyed without the consent of Syme or his creditors. Syme might have sold the lands to the defender ; and if he had done so, the sale would have been completed by a simple discharge of the back-bond. And if a total discharge of it would have effectually vested him with the full property, the discharge which he obtained, must give him an effectual right, corresponding to its extent.

The Lord Ordinary, " in respect that the bond of relief 1788, discharging, *pro tanto*, the former back-bond, was granted *unico contextu* with the bond of credit for £500 to Sir William Forbes and Company, found, That the foresaid deed is not struck at by the first clause in the statute 1696 ; and in respect that the deed 3d December 1779, is, *ex facie*, an absolute and irredeemable disposition of the lands, but qualified by a relative back-bond, found, That that disposition and infestment does not fall under the second clause of the statute 1696, but must subsist in favour of Mr. Maxwell, until he is relieved of his engagements for Mr. Syme, whether prior or posterior to the date of the infestment ; and, therefore, upon the whole, assoilized Mr. Maxwell from the reduction."

On considering a reclaiming petition and answers, the Court, thinking the case attended with difficulty, ordered memorials.

When the cause came to be advised, it was

Observed on the Bench : After the judicial production of the back-bond, it was just as well known to Syme's other creditors, that the disposition was granted solely for the purpose of securing Mr. Constable's debt, as if a clause to that purpose had appeared *in gremio* of it. From thenceforward, therefore, the disposition is to be considered in no other light than as a security ; and, consequently, Mr. Constable himself could not have covered, by means of it, any future advances he might have made to Syme, and far less could the defender, whose only [1166] interest in the disposition was in the character of Mr. Constable's trustee. The restriction of the back-bond, therefore, falls to be reduced, and that without at all infringing on the doctrine fixed by the case of Riddel *v.* Nibblie.

The Court, accordingly, by a considerable majority, " reduced, decerned, and declared in terms of the libel, in so far as respects the security therein-mentioned, granted in favour of John Maxwell."

And on advising a reclaiming petition and answers, they unanimously, " adhered."

Lord Ordinary, JUSTICE-CLERK.—Act. ROLLAND, HAY, MORISON.—Alt. GEO. FERGUSON, MAT. ROSS.—Clerk, PRINGLE.

No. 237. [1199] Mr. ALEXANDER SUTHERLAND, and Others, Arresters v. The other Creditors of Mr. DAVID WATSON. July 3, 1724.

A bankrupt disposed his subject, taking the bond for the price payable to his creditors, with the *proviso*, that they should accept of certain funds, in full. Before the creditors had accepted, arrestments were used in the hands of the debtor in the bond. In a competition, the arresters were preferred. The Lords specially mentioned their *ratio decidendi*, viz. that the bond was conditional, depending on the acceptance of the creditors. Had the bond been simple, and to the creditors equally, they would have been preferred.

Mr. Watson having sold his office in the Bill-Chamber to Mr. Robertson, upon the 27th of August 1723, he took a bond for the price thereof payable to his creditors, "according to the respective sums due to them, as in a former disposition of his effects, 2d May 1723, or as they should be ranked by the Lords of Session." And the bond contained a provision, That "the creditors should accept of the funds conveyed to them by the first disposition, and what should accrue to them by the bond, in full of all their debts; and also with this provision, That if any of the creditors should use diligence for incarcerating Mr. Watson, or should decline or neglect to testify in writing to Mr. Robertson or Mr. Watson, their agreeing to the above-mentioned condition betwixt and Candlemas then next, such creditor should lose his share of the sum contained in the bond, and which should accresce to the creditors agreeing to the condition."

The disposition to which this bond referred, was to all his creditors therein-named, of his whole estate heritable and moveable, and of the half of the dues of the said office, reserving the other half for the subsistence of himself and family; but the disposition was also clogged with a *proviso*, "That if any creditors did diligence by arrestment and adjudication or otherwise (without the consent of the other creditors, or major part of them), then the creditors so doing diligence should forfeit their right in the subject disposed, and the same should accresce to the other concurring creditors."

Within sixty days of the date of these deeds, Mr. Watson became notour bankrupt in the terms of the act 1696; and Mr. Sutherland and others of the creditors did not accept of these conveyances, but arrested the price of the office in Mr. Robertson's hand, and they craved to be preferred thereto as the first arresters.

It was argued for the other creditors, That Mr. Watson having taken the bond in question, payable directly to his creditors, equally among them, it was the [1200] same thing as if he had granted an assignation of the bond in favour of his creditors, and the same had been intimated to the debtor of that date, which being prior to the arrestments, he was fully denuded of that debt in their favour; and therefore a subsequent arrestment by one or more of them could not deprive the creditors of their prior *jus quæsitum*. 2do, As such a conveyance was agreeable to all the rules of equity, so it was not reducible upon either of the acts 1621 or 1696; for there being no diligence used at the instance of the arresters, before the granting of the bond, they could not subsume, in terms of the act 1621, that there was any partial preference made in prejudice of their more timely diligence: And, as to the act 1696, it only annuls such deeds as are granted to a bankrupt's creditors, in preference to other creditors; but by this bond, no preference is given to one creditor more than another, but all are equally brought in.

It was answered for the arresters, That the bond in question was taken payable to the creditors as they should be ranked by the Lords of Session; which supposed that the price was affectable by diligence, there being no other form of ranking before them but in the course of diligence, which the arresters having first used, they were (even by the quality in the bond) the preferable creditors. 2do, There was a provision in the bond, that the creditors should, betwixt and a certain time, declare their acceptance of their proportion of the subjects in the disposition and bond, as in full of their debts: From which it was argued, that till the acceptance was declared, Mr. Watson, who was possessed of the bond, might have altered it; so that the subject was still in his power, and the arresters having affected it, they carried the right to the sum, which was still *in bonis* of Mr. Watson till the acceptance. 3tio, The act 1696 disables a bankrupt from doing any thing to the prejudice of his creditors, and

consequently he cannot even deprive them of the chance of their diligence ; for as creditors are not obliged to accept of any voluntary grant, but are at liberty to use diligence, if the bankrupt were allowed to rank them equally, it would deprive them of the preference they might gain to themselves. 4to, The bond and disposition were so qualified and clogged by the clauses above mentioned, that the creditors neither could nor were obliged to accept of them : There was a direct preference given to some of the creditors beyond others, by the provisions in the bond and disposition ; for by these, such creditors as did diligence, or did not accept betwixt and a certain term, were to lose their right, and that accresced to the accepters, which was just all one as if he had disposed to a few of his creditors, leaving out the rest.

The Lords preferred the arresters.

Reporter, LORD CULLEN.—Act. BOSWELL & FALCONER.—Alt. HAY & R. CRAIGIE.—Clerk, DALRYMPLE.

Fol. Dic. v. 1, p. 85. Edgar, p. 63.

No. 246. [1210] GRANT *v.* CUNNINGHAME, Trustee for the Creditors of the INCORPORATION OF SHOEMAKERS in Canongate. June 5, 1747.

The Incorporation of Shoemakers of Canongate having become solvent, granted a general disposition in favour of their creditors. A creditor dissatisfied, attempted to reduce it on the act 1696. Found, that as a body corporate was incapable of personal diligence, and equivalents were inadmissible, the act was inapplicable ; therefore the disposition was good at common law ; although some small dues of entries were reserved ; this being necessary for the future existence of the society.

It being discovered in 1743, that the Incorporation of Shoemakers in Canongate was utterly insolvent, it was proposed, by the Incorporation, and agreed to by the generality of the creditors, for saving the expence of diligence, that the Incorporation should dispose the whole effects they were then possessed of, to their creditors, equally among them, to be accepted in full satisfaction of their debts. And accordingly, on 14th May 1743, a disposition, proceeding on the narrative of the said proposals being accepted of, was granted by the Incorporation to Ninian Cunninghame, as trustee for the whole creditors, all particularly named, of all and sundry their effects, heritable and moveable, to be disposed of by the trustee, and applied for payment and satisfaction of the creditors, according to their respective interests, but declaring the trustee to be liable for his intromissions only, and not for omissions ; and this disposition was of the same date intimated to the tenants of the tenements.

On the 16th May 1743, Thomas Grant, one of the creditors, repudiating the disposition, used arrestment in the hands of the said tenants, and pursued a furthcoming before the Sheriff ; which being brought by advocacy before the Lords, he repeated a reduction of the disposition on the following grounds : 1mo, As fraudulent on the act 1696 ; and certain circumstances were insisted on as equivalent to the particular requisites in that statute for inferring bankruptcy. At least 2do, As fraudulent upon the common law ; and *separatim*, as containing special clauses with which no creditor was obliged to comply, viz. The creditors being obliged to accept of their dividend in satisfaction, and the trustees being declared free of omissions.

Upon the first, the Lords were clear, that no reduction could lie upon the act 1696, as the Incorporation, a body politic, was not capable of the personal diligence requisite by that statute, and that no equivalent circumstances are ever admitted to bring a debtor under the description of it : And were no less clear, that as a reduction at common law had no other effect than to bring in all the creditors equally, there could lie no reduction, at common law, of a disposition which gave the creditors the very same thing which they could obtain by the reduction ; and so the Lords have uniformly found, and lately in the case between Snodgrass and the other Creditors of Beat, No. 245, p. 1209.

Upon the other points, had the case been of a disposition by a man to his creditors, the objection would have been good, that a creditor could not be bound to accept of his dividend in satisfaction. But, as in the case of an Incorporation, there could be no other future acquisition, but what might arise from the trifling upsets of new intrants, which was said to be no more than sevenpence from each intrant, as it was too inconsiderable to be thought of, so no such upset-money [1211] was ever to be expected, and consequently the Incorporation would in effect end or die out with the present members, if these small contributions, for the use of their poor, were to be for ever mortgaged for the use of the creditors. And as to trustees being declared free of omissions, the Lords seemed not to approve of their former decision, in the case of the Creditors of Ouchtertyre, mentioned in No. 245, p. 1209, where it was found, on that very ground, that the trustee was declared free of omissions, that the creditors were not bound to accept. They now considered such clauses to be common and ordinary in trust-rights, and that no trustee will be found who will accept on other terms; and that the trust may be transferred to another where he is observed not to act carefully.

And, on these considerations, the Lords "sustained the disposition, and preferred the trustee to the arrester." See SOCIETY.

Fol. Dic. v. 3, p. 66. Kilkerran (BANKRUPT), No. 6, p. 52.

No. 250. [1214] WILLIAM WILSON and The Creditors of ROBERT BAILLIE v. NEIL M'VICAR. February 18, 1762.

A disposition, although containing extraordinary powers and conditions, sustained to the effect of giving the creditors at large right to the funds, and preventing the separate diligence of an individual creditor. See the note.

Robert Baillie, merchant in Edinburgh, having become bankrupt, a very numerous meeting of his creditors was held, who resolved to concur in joint measures.

At another general meeting of his creditors, Robert Baillie executed a general disposition of all his effects, heritable and moveable, containing a special assignation of all the different debts due to him, in favour of a trustee, for behoof of all his creditors. In consequence of which, William Wilson, who was the trustee named, entered to the possession of the subject.

After this, Neil M'Vicar, one of Robert Baillie's creditors, who had not acceded to joint measures, nor to the trust-disposition, laid on an arrestment in the hands of the trustee; upon which a competition ensued betwixt him and the acceding creditors.

Objected for Neil M'Vicar: The trust-disposition contains sundry extraordinary powers: The Court have often found dispositions by a bankrupt to a trustee, for behoof of all his creditors, insufficient to interpel the diligence of dissenting creditors.

[1215] Answered for the creditors: Supposing the present disposition not to be good as a disposition to a trustee, and containing extraordinary powers; yet still it may stand good as a disposition to all the creditors; the effect of which will be, that the trustee's right will fall; but the disposition itself will stand good, so as to bring in all the creditors equally, according to the preference of their several rights and diligences, and so as to interpel particular creditors from taking separate diligences for the future.

Justice and equity demand, that the disposition should be sustained to this effect; for, in the nature of things, it is fair and just, that, if a man has not funds to pay all his creditors, he should surrender all the property he has, to be divided in proportion to their several rights. And, on the other hand, nothing can be more unreasonable, or inconsistent with the principles of justice, than an unequal and unproportioned division of a bankrupt's funds; that after a debtor is reduced to the state of bankruptcy, his creditors should strive to get the start of one another by a sort of legal scramble for his effects, and that the diligences of the law should be used as engines for an advantage plainly unequal and unjust.

Though the right of the trustee shall fall, the execution of such a disposition as sustained will be easy. As no creditor will be allowed to do diligence for his separate behoof, contention, confusion, and expence will be avoided. On the other hand, any one creditor wanting to have the bankrupt's subjects turned into money for the common behoof, may bring a multiple poinding in the name of the trustee, and, upon the dependence, can in course obtain a sequestration, and get a factor appointed by the Lords, who is bound to do diligence, and administrate according to many wise and useful rules established by authority of the Court. And, in the same manner, in order that the heritable subject may be turned into money, any one creditor may, on a disposition compleated by infeftment, bring a ranking and sale; or he may adjudge, and, on that adjudication, a sale may proceed.

"The Lords found, That Neil M'Vicar is not entitled to be preferred upon his arrestment."

Act. BURNET, LOCKHART.—Alt. GARDEN, JO. DALRYMPLE.

Fol. Dic. v. 3, p. 64. *Fac. Col.* No. 80, p. 177.

No. 259. [1228] PATRICK GRANT v. ALEXANDER DUNCAN. January 29, 1717.

An heritable bond was granted for ready money paid some time before bankruptcy, but upon which sasine was not taken till within the 60 days. The Lords found the bond was to be considered as of the date of the sasine, and therefore null as to the point of bankruptcy, but without prejudice to the personal obligation.

Patrick Grant, being a creditor to Alexander Hamilton, did raise a declarator of bankrupt against the said Alexander, and Alexander Duncan, who had obtained an infeftment of annualrent in the bankrupt's lands, within 60 days before he fled; and after probation, the qualifications of the act of Parliament were found proven.

It was alleged for Alexander Duncan: The act of Parliament did not concern his case; because the ground of his infeftment is not a bond granted in payment or satisfaction of any preceding debt, but is an heritable bond granted for money *bona fide* lent and paid down by the defender's father, when the common debtor was in sufficient credit, though some time after he broke suddenly.

It was answered for the pursuer: The fact is as follows. The defender's heritable bond is upon the 21st of June 1709; the pursuer finding nothing on record against the common debtor, became creditor in the sum of £422 the first of August thereafter, and infeftment followed upon the defender's debt the 13th of October; Hamilton broke in the month of November thereafter; and the pursuer did prosecute diligence upon his debt without delay: and, from that, 1mo, alleges, that the defender is in the case of the act of Parliament, in as far as his infeftment is taken within a month of the common debtor's flying: 2do, The infeftment is for further security of the personal obligation to pay, and so is in the precise words of the act, which provides, that all voluntary deeds by dyvors, at, or after their becoming bankrupt, or within the space of 60 days before, in favour of any of their creditors, for satisfaction or further security in preference to other creditors, shall be void and null: 3tio, His case is in the meaning and reason of the law, which was to prevent the frauds of sinking debtors, that it should not be in their power to favour a creditor in *meditatione fugæ*; and that creditors keeping up their precepts of sasine, whereby others finding no real diligence might be induced to lend, should be reckoned to have contracted with their debtors only at the dates of their sasines; and if the granting of original bonds would elude the act, there would be no difficulty to get friends to advance the money, and get new securities, or creditors might retire their former securities, and take new original bonds. And albeit the act does specially provide against that practice, yet co-creditors would not know the fact of retiring former debts, nor have any mean of probation, but the parties oath, which proves oft times dangerous; besides such original debts might be assigned to third parties ignorant of the facts, and thereby the act eluded.

It was replied: The act was not intended to be a snare to creditors laying down their money *bona fide*, who can never be presumed to deal fraudulently; but was intended against creditors transacting former debts for new securities, or accepting of

corroborations ; and the defender is neither in the words nor meaning of the act. The words of the act provide against payment or further security of creditors, that is to be understood anterior creditors ; for an original bond is not [1229] said to be granted to a creditor, but he who lends the money becomes creditor by the bond. 2do, Though the sasine be taken within 60 days, in that case the act only provides that the bond shall be reckoned of the same date with the sasine ; but still it is an original bond for money truly paid *bona fide*. 3tio, Neither is it to be regarded, that the precept of sasine is for further security of the debt, because the bond containing a personal obligation and precept of sasine, is a transaction for security of the money advanced ; whereas a right for further security, in the meaning of the act, is a corroborative right of a former debt. 4to, The inconveniences insisted on are but imaginary ; for this act provides more amply against the frauds of bankrupts, than the law of any other nation : and though it may be difficult to prove the fact of receiving bonds in satisfaction of former debts, in such a case *non deficit jus, sed probatio* ; and the Lords, in several former cases, have found, as the defender now pleads, that such as acquire *bona fide* are secure, No. 192, p. 1120, Campbell of Glenderowal v. Graham of Gorthie, in the case of a bill of exchange, where the act was only found to take place, if the same was for security, and not for money received ; and lately, in the case of the Creditors of Orbiston, where the Lords sustained a disposition, in so far as it was not granted in satisfaction or security of former debts, *voce* RIGHT IN SECURITY.

It was duplied : The present case differs greatly from those formerly determined ; for a bill of exchange may safely be negotiated and purchased *bona fide* ; and a disposition in like manner. But, in this case, there is a bond containing a personal obligation for payment of the money, and a precept of sasine for further security ; and no sasine being taken, creditors intervened. The personal obligation is not quarrelled nor quarrellable as in the former cases, upon which the defender might have done all diligence ; but the effect of the act is only against the sasine in preference to other creditors.

“ The Lords reduced the sasine.”

Dalrymple, No. 168, p. 232.

No. 261. [1233] The Trustees for the Creditors of JOHN LOWIS of Merchiston v. Colonel FRANCIS CHARTERIS of Amisfield. June 19, 1731.

A debtor granted an heritable bond, bearing to be for money instantly advanced. The creditor did not take infetment till several years after the date of the bond, by which time, the debtor had become bankrupt. Although it was contended this was a *novum debitum*, not security for a prior debt, yet the act of 1696 was found to apply, and the security held to be of the date of the sasine, consequently reducible.

John Lewis, while apparent heir of the estate of Merchiston, had had some transaction with Colonel Charteris of an extraordinary nature. Soon after succeeding to the estate, Mr. Lewis became bankrupt, and executed a trust-disposition *omnium bonorum* in favour of Mr. Archibald Murray, advocate, and others, for behoof of his creditors.

Colonel Charteris claimed as a creditor upon two heritable bonds, one for £3743, 4s. 4d. Sterling, the other for £1000. The first was dated in 1718, the other in 1721. No infetment was taken on either till after Mr. Lewis's bankruptcy in 1727.

The creditors pursued different actions against the Colonel relative to these claims. One on the statute of 12th of Q. Anne, and other acts for preventing usury ; and one on the act of 1696, relative to bankruptcy.

It was alleged that the Colonel had never actually lent Mr. Lewis one farthing. But that, about 1707 or 1708, Lewis had lost at play, to a Count Nicola and another [1234]-other gambler, about £400, for which he had granted bills ; of which £190 had been conveyed to the Colonel ; and that, from this small beginning, by accumulating interest, premiums, forbearance-money, hush-money, &c. ; for which new bonds were periodically taken, the sum had at last swelled to the enormous amount claimed.

During the course of these transactions, Mr. Lewis had made payments in cash to the Colonel, to a large amount.

In as far as the bonds bore to be in corroboration of former bonds, the Colonel claimed no preference; but each of them bore that besides certain sums had been instantly advanced. To this extent he claimed preference, and insisted, that the narratives of the bonds were *probatio probata* of the fact. While, on the other side, it was contended, that there were such pregnant circumstances of suspicion attending the transactions, that the Colonel must enter into a full explanation. He was ordered to condescend. His condescendence was found not sufficiently satisfactory. The creditors, on their part, stated circumstances of suspicion and fraud. The Court "found the narratives of the bonds in question did sufficiently astruct their onerous cause." The creditors appealed; and the House of Lords adjudged that the bonds did not sufficiently astruct their onerous cause, "without some further proofs thereof from circumstances or otherwise." The cause accordingly returned to the Court of Session, where the Colonel brought forward the circumstances he founded on, which the creditors attempted to obviate. The Court of Session found the bonds void and null. Colonel Charteris appealed. The House of Lords varied the interlocutor so far as to find the bonds not null, but paid.

On the branch of the cause which depended on the act 1696, the Lord Newhall, Ordinary, had pronounced this interlocutor: "Finds that the evidences adduced by the Creditors against the Colonel, that the bond in 1718, in so far as concerns the sum of £1707" (said to have been instantly advanced), "were not sufficient to document that the said sum was *ab ante* contracted before the date of the said bond" (repeated the same interlocutor as to the bond granted in 1721), "but found that both the said bonds, bearing date so many years before Merchiston's bankruptcy, fell under the act of Parliament 1696, in regard the infestments thereupon were not taken by the Colonel till within the 60 days of Merchiston's becoming bankrupt, according to the disposition of the said act; and that the clause of the said act, making the securities to be considered as of the date of the infestment, was noways introduced in favour of the creditor infest, to give him the privilege of a new debt then contracted, of the date of the infestment, but was introduced allenarly in favour of the co-creditors, and *in pœnam* of the creditor infest, who had kept up his precept of sasine latent; and therefore, that both the first bond as to its whole sums, and the second bond, fall under the act of Parliament 1696, and are reducible upon the said act."

Colonel Charteris, in a petition against this interlocutor, repeated the arguments which had been used in former cases, particularly Chalmers v. Creditors of Riccarton, No. 260, p. 1231, in order to show that *nova debita* do not fall under the act 1696.

[1235] The Creditors answered, That it may be a doubtful question, and has been variously decided, whether *nova debita*, strictly so called, fall under the act 1696 or not; but the present question does not depend on that.

The Colonel alleges he lent his money in 1718 and 1721; and then received bonds. When the bankruptcy happened in 1727, and not till then, he took infestment. The Lord Ordinary has found the bonds reducible: 1st, Because the money was not borrowed at the time of the infestment, which is the legal date of the security, but was borrowed long before: 2dly, Because, in the construction of law, and in the express words of the act of Parliament, the date of the security is not the date of the bond, but the date of the sasine. Therefore the debts must be considered as contracted in 1718 and 1721; but, according to the appointment of the statute, the heritable security is to be considered as granted in 1727, falling within the period of the bankruptcy. It follows that the bonds are reducible, in the same manner, as if either a different bond, or no bond at all, had been granted in 1718 and 1721; and the bonds in question had not been granted till the date of infestment in 1727: There can be no doubt, that security given in 1727, for a debt contracted in 1718, would be null, in the event of bankruptcy within 60 days.

The matter may be considered in another light. Since, by the act, the bonds are to be considered as dated in 1727, the case is the same as if a bond had been granted in 1727, bearing in its narrative, that it was for money lent in 1718 and 1721; and the infestment taken in 1727. There can be no doubt this security would be void upon the statute.

If this be not the meaning of the act of Parliament, it seems to have none; for the act does not allow the date of the bond, as actually written, to be considered,

but *fictione juris* makes it the date of the sasine, and so only it must be considered. But the law does not say, that when the debt is contracted several years before, the money shall *fictione juris* be understood to have been lent at the date of the sasine, and thereby place it in the situation of a *novum debitum*. By no means. The time of the contraction must remain as it *de facto* happened; only the date of the sasine is to be reckoned the date of the security.

If an inhibition had been used against Lowis in 1722; these bonds would not have fallen under that inhibition, because the debt was contracted before. But, in this question of bankruptcy, the bonds are held as dated in 1727. So the point which the Lord Ordinary has determined is this; that the heritable bonds being, in law, granted in 1727, after the bankruptcy, for debts contracted in 1718 and 1721, the securities are void by the statute. Accordingly, it is explained by the words of the interlocutor, that the making the security to be considered as of the date of the infetment, was not introduced in favour of the creditor infet, to give him the privilege of a new debt, then contracted, of the date of the infetment, but was introduced in favour of the co-creditors, and in *pœnam* of the creditor infet, who had deceived others, by keeping his precept of sasine latent.

[1236] The grand object of the act of Parliament is to prevent persons, in collusion with their debtor, from taking rights upon which infetment may follow, and keeping them up latent till other persons be induced to lend money, perhaps to the extent of the estate; and then, in collusion still with the debtor, step forward and take infetment, to the disappointment of all others. If the act does not prevent this, it does little; for, otherwise, any one may lend a person money to the extent of his estate, take heritable security, keep it up till contractions of the like value be made, and then effectually take infetment. It is precisely to prevent this, that, at whatever time the contraction is made, the law makes the security of the date of the sasine; and presumes a fraud from the keeping the precept latent. By this means creditors have an opportunity to bring their debtor under the state of bankruptcy, when they see an infetment taken. A creditor, therefore, who means to rely on his infetment, is under the just necessity, either of completing it instantly, or losing the benefit of it.

It follows, then, that as the words of the act must be taken as consistent with themselves, and as they are plainly conceived, so, if an heritable bond, in the case of bankruptcy, is to be held to be of the date of the sasine, Charteris' bonds are to be considered as dated in 1727, while he admits the debts were contracted long before; therefore the securities are securities for anterior debts.

The Lords adhered to the interlocutor of the Lord Ordinary, finding the bonds reducible upon the act 1696.

Colonel Charteris presented a second petition; upon advising which, with answers, their Lordships still adhered.

This branch of the cause was not brought under appeal. By the fate of the bonds, on account of usury and extinction by payment, above-mentioned, it became unnecessary to resist the decision, in so far as founded on the act 1696.

Lord Ordinary, NEWHALL.—For the Creditors, ARCH. MURRAY, RO. DUNDAS.—For Colonel Charteris, JAS. GRAHAM, JO. FORBES, DUN. FORBES.

In the House of Lords, For the Creditors, RO. DUNDAS, J. STRANGE, A. HUME CAMPBELL, WM. HAMILTON.—For Colonel Charteris, DUN. FORBES, WM. MURRAY.

Fol. Dic. v. 1, p. 86. Session Papers and Appealed Cases in Advocates' Library.

No. 265. [1242] JOHNSTON v. BURNET and HOME. January 29, 1751.

A security for a *novum debitum* found not to fall under the clause of the act 1696, relative to the date of the sasine.

Thomson had a credit from the British Linen Co. for which he and Home granted bond to the Company; and, of the same date, Thomson and Burnet gave a bond

of relief to Home, in which he disposed to him certain subjects in security of his relief; on which Home took infeftment. A prior creditor of Burnet's pursued reduction of this heritable bond, on the ground, that, before Home's infeftment, Burnet had been rendered notour bankrupt in terms of the act 1696; and, by that statute, the bond must be considered as of the date of the sasine. Answered, The clause in the statute, declaring dispositions by bankrupts to be held as of the dates of the sasines, concerns only securities granted to prior creditors, but does not affect *nova debita*, such as the present.—The Lords assolizied from the reduction.

See the particulars of this case, No. 200, p. 1130.

Fol. Dic. v. 3, p. 67.

No. 5. [5] ANDREW JOHNSTON and BEATRIX COLQUHOUN v. The Trustees for the Creditors of Messrs. FAIRHOLMS, Bankers in Edinburgh. December 18, 1770.

Trust-disposition by bankrupts to certain trustees for behoof of their creditors reduced upon the act 1696, c. 5.—Non-acceding creditors using arrestments with the public banks, where the trustees had lodged the bankrupt's funds, preferred upon their diligence.

Upon the 26th of March and 3d April 1764, Adam and Thomas Fairholm granted a disposition of their whole estate, heritable and moveable, in favour of certain persons in trust for behoof of their creditors, with power to sell their whole subjects, recover the debts, and to divide the proceeds from time to time [6] among the creditors, equally in proportion to their debts, without prejudice to any preferable right or diligence done by any of the said creditors prior to the completion of the present right. It was farther provided, that if the major part of the creditors should think fit to chuse other trustees, those named should denude in their favour.

A numerous meeting of the creditors, on the 2d of April, agreed to the measures proposed. A deed of accession, approving of the trust-disposition, was made out and signed; which contained provisions, empowering the trustees to decide all differences that might arise amongst the creditors, or betwixt them and Messrs. Fairholms; and it was farther declared, that if any of the creditors did not accede, it should be lawful for those who did accede to insist in such diligence as they had raised or should raise, the benefit of which to be applied to the common behoof of the acceding creditors, the rights and preferences competent to any creditor prior to the trust being saved and reserved.

Soon after this meeting, the Messrs. Fairholms were rendered bankrupts, in terms of the act 1696, by an acceding creditor.

The pursuers, creditors of the bankrupts, did not accede to the trust, or subscribe the deed of accession; and having, in December 1764 and January 1765, arrested in the banks the monies deposited there by the trustees, thereafter brought an action for reducing the disposition, as contrary to the enactment of the statute 1696, c. 5.

The Lord Ordinary "Sustained the reasons of reduction of the trust-disposition libelled, in so far as the pursuers have an interest therein; and appointed parties to be ready to debate on the effect of the arrestments founded on."

Two points came accordingly to be argued, 1mo, The validity of the trust-deed; 2do, The effect of the pursuers arrestments. They were brought fully before the Court; the first, in a reclaiming petition for the trustees, with answers for the pursuers; and the second, in mutual informations.

Upon the validity of the trust-deed, the trustees pleaded :

1mo, When the words of the statute were accurately attended to, they did not, in sound construction, go farther than to void dispositions made to one or more creditors in preference to the rest, but not to render ineffectual fair conveyances executed for the benefit of all, and in order to make an equal distribution among them of the bankrupt's estate. If the Legislature had intended to make void all conveyances by a bankrupt after his bankruptcy, the enactment would have been general; but the

term, in preference to other creditors, which was the criterion as to deeds struck at by the statute, plainly supposed the exercise of partiality and injustice in favour of a part, and rendered it of course impossible to construe the enactment as comprehending deeds made for the manifest advantage of the whole creditors.

It was still clearer that the disposition challenged did not fall under the intendment of the statute. The object of the act 1621, c. 18, was to preserve [7] an equality in the distribution of bankrupt's estates, by preventing them from making gratuitous conveyances to confident persons. This law was imperfect, as it did not prohibit a bankrupt from executing conveyances of his estate to favourite creditors in satisfaction of their debts. To remedy this defect, the statute 1696 was introduced; the equality of division was the principle of both; and though landed property was no doubt at that time the chief object of consideration, it never could be presumed that it was the intention of the Legislature to render ineffectual a conveyance executed for so just and good a purpose as an equal distribution of the personal estate; a measure founded on the very principle the statutes meant to enforce. An act of bankruptcy did not transfer the property of the bankrupt's estate. He was entitled to do every act with regard to his estate that was not restrained by the statutes; and as the statutes did not reach sales of his property or payments when honestly made, far less could they be understood to restrain the most equitable of all acts, the execution of a fair deed, making a proportional distribution of the bankrupt's estate amongst his creditors.

The principle adopted by the Legislature in regard to the diligence of creditors, as well against the real as the personal estate of their debtors, was decidedly in favour of the rule of equal distribution to all interested. Instances of this occurred in the statute 1661, relative to the *pari passu* preference in appraisings, and in the Act of Sed. 28th Feb. 1662, which regulated the preference of diligence against the personal estate of a deceased debtor.

2do, The decisions of the Court upon this branch of law, whenever the conveyance was fair and in form unexceptionable, confirmed the principle maintained; while those, again, that were adverse, were involved in peculiar circumstances. In the case, 17th November 1725, Muirhead *contra* Creditors of Watson, No. 238, p. 1201, it was found, that a disposition by a bankrupt, in favour of his whole creditors, was not reducible upon the act 1696 at the instance of a posterior arrester. In the case, July 1729, Farquharson *contra* Creditors of Cumming, No. 241, p. 1205, the Court went perhaps too far; and in the next accordingly, 28th Jan. 1735, Mansfield *contra* Brown and Stobo, No. 243, p. 1207, the question underwent a limitation; but in the case 16th Nov. 1757, Trustees for Jackson's Creditors *contra* Simpson, No. 248, p. 1212, the general question came under consideration of the Court, and was decided in favour of the trust-disposition. Principles of Equity, fol. p. 245.

The decisions upon the other side, 12th July 1734, Snee *contra* Trustees of Anderson, No. 242, p. 1206, and 3d Feb. 1736, Earl of Aberdeen *contra* Trustees of Blair, No. 244, p. 1208, were very different from the present. In that of Snee, some very unreasonable stipulations were made in favour of the trustees: They were the bankrupt's relations, whom the creditors had no power to change: They were empowered as arbiters to determine the expense of their own management; and there was a forfeiture imposed upon the creditors who should quarrel the trust-right. In the case, 4th Nov. 1764, Mudie *contra* [8] Trustees of Strachan, No. 252, p. 1217, the trustees had proceeded in a manner extremely irregular; a partial preference had been directly given to two creditors in the disposition, and the creditor who sued the reduction had been in the course of diligence when the trust-deed was executed. In the case, 27th Jan. 1767, Peters *contra* Trustees of Dunlop, No. 253, p. 1218, a direct partial preference had been established to a whole set of creditors, viz. all the bankrupt's friends who had become surety for him in certain bonds due to the Crown; so that the disposition fell directly within the statute; and as this specialty rendered it unnecessary in the House of Lords to take the general question into consideration, it could not be argued upon as a precedent.

3tio, The expediency of giving effect to a disposition of this kind was a material consideration. The establishment of a proper system of law for the distribution of the estates of bankrupts among their creditors had been an object of attention in most countries. That adopted in the present instance, which had been executed with fairness, and not clogged with any unreasonable conditions, was the most expedient and

inoffensive to creditors that could be devised. Unless a plan of this nature was sanctioned, not only would injustice be done, but immense losses to creditors would be incurred. If a creditor at hand was permitted to carry off a bankrupt's estate, the exclusion of all creditors at a distance, it would be a reproach upon the law of the country; and if it was declared to be law, that a bankrupt could not by a deed save as the present do justice to all his creditors, the confidence of trade and credit would be destroyed.

Whenever also a bankrupt's estate was situate in foreign countries, as it was impossible that each creditor could follow separate measures for himself; so the estate could not, but by the aid of a conveyance of this nature, be collected for the benefit of the creditors at large.

The arresting creditors answered:

Imo, It had been a favourite object in the law of this country, and what all the bankrupt statutes had specially in view, to give full weight to every form and mode of diligence by which creditors might operate payment out of their debtor's effects. Any practice therefore, or decision tending to disappoint the effect of legal diligence, was not authorised by a new statute, must be held as running counter to the genius of the law. The enactment of the statute 1621 never meant to alter or weaken that fixed rule: It was directed to redress abuses of another description. The legislature did not then intend to put all creditors, the most negligent with the most alert, upon an equal footing; the *pari passu* rankings of adjudgers, and preference of executors, by the statute 1661, and Act of Sed. 1662, were then unknown; so that the clear and express intendment of the act 1621 was to leave the bankrupt's estate fully open to the diligence of creditors.

The statute 1696, c. 5, made no alteration upon this rule; but on the contrary, intended that all the bankrupt's effects should be left open as they stood at the time of the bankruptcy, to be applied for the payment of debts according [9] to the due course of law, and of that diligence the creditors might think fit to pursue. It was accordingly expressly enacted, "That all voluntary dispositions, assignments, or other deeds," granted by notour bankrupts, &c., to any of their creditors, and in preference to others, should be void and null, and should be so found at the suit of any of their just creditors. This statute effectually tied up the hands of bankrupts, but farther it did not go; nor did it ever intend or provide that the consequences thereof should be an equal distribution among the creditors of the whole estate. Though it disabled the bankrupt from making any distribution in the way of conveyance, it by no means excluded the diligence of creditors, but, on the contrary, left them at full liberty to act as by law authorised. The *pari passu* ranking of adjudications, by the act 1661, and of executors, &c., by the Act of Sed. 1662, was then well known, and left in full force; and though personal estates were then so inconsiderable as to escape the attention of the legislature, no alteration was made, or farther equality among the creditors introduced; far less was it intended or declared that the distribution of them should be left to the pleasure of notour bankrupts, to the exclusion of the operation of legal diligence.

The distinction taken up upon the words of the statute was a mere criticism that had no operation upon the sense. The statute made no distinction as to the form of the deeds, whether they were granted to the whole of the creditors or only to a part; for if the deeds appeared to be an alienation of any of the effects in favour of creditors, they fell under the prohibition of the act. The deed also, though granted to the whole, was at all events to the prejudice of those creditors who did not accept; as it compelled them to submit to a mode of management contrary to their choice, and to deprive them of the power of using that diligence the law allowed.

2do, The decisions of the Court upon this point were conclusive; so that in consequence of those that had been lately pronounced, it might truly be considered as at rest. The earlier cases of Muirhead *contra* Creditors of Watson in 1725, No. 238, p. 1201; and of Farquharson *contra* Creditors of Cumming in 1729, No. 241, p. 1205, were little to be regarded, and might now, without impropriety, be termed erroneous. The case of Mansfield *contra* Brown and Stobo in 1729, No. 243, p. 1207, went in favour of the present argument. The case of Snee *contra* Trustees of Anderson in 1734, No. 242, p. 1206, and that of the Earl of Aberdeen *contra* Trustees of Blair in 1736, No. 244, p. 1208, were precisely in point; and in that of Snee, the Lords, in the most express

terms, declared their sentiments, the following clause being inserted in the interdictor : " And farther find, That no disposition by a bankrupt debtor can disable creditors from doing diligence." The case of *Simpson contra Trustees of Jackson* in 1757, No. 248, p. 1212, was perfectly distinguished from the present. Previous to the disposition, the acceding creditors had done separate diligence, had attached the effects, and ascertained their shares : *Simpson* had done no diligence : The acceding creditors had of course obtained a preference [10] independent of the disposition ; so that in these circumstances the general point of law did not fall to be considered. The case, 4th Nov. 1764, *Mudie contra Trustees of Strachan*, No. 252, p. 1217, was a direct precedent ; and in the late case, 27th Jan. 1767, *Peters contra Trustees of Dunlop*, No. 253, p. 1218, the judgment of the Court, unquestionably proceeded on the abstract point ; which, without adverting to alleged specialties, was in general terms affirmed in the last resort.

3tio, The argument drawn from expediency, when duly considered, had no solid foundation. It had indeed been long a speculative question, Whether such dispositions were beneficial or hurtful ? . They were for some time considered in a favourable light ; but experience discovered the reverse ; and then the Court returned to that construction of law, from which, by an inclination to equity, it had been diverted. By such deeds, the hands of the creditors were found to be tied up, and the estates of bankrupts thrown under the management of persons of their own nomination, whose fidelity and diligence were unknown. It became also obvious, that if debtors were allowed, under pretence of executing dispositions in favour of the whole, to circumscribe and frustrate the effect of the diligence of particular creditors, they would easily fall upon schemes to give more substantial preferences to those they wished to favour ; so that more bad consequences would flow from such a privilege than were sufficient to overbalance the trivial advantages which it was supposed might result.

The alleged injustice that would be done to creditors at a distance, was an objection that went too far. If this apprehension was well founded, it could be urged with equal force to set aside even prior diligence when the debtor was not a bankrupt, though insolvent at the time. This would be a repeal of the act 1621 ; yet no reason could be assigned why a bankrupt should have the power, by a voluntary deed, of excluding that diligence which was posterior to his disposition, more than that which was prior to it.

As the bankrupt statutes of Scotland could not operate *extra territorium*, any benefit that might be supposed to arise from a disposition to effects in foreign countries would not thereby be excluded. If a case could be supposed, where effects were so situate that they could be reached by no diligence whatever, such a disposition might be sustained as beneficial ; but that never could be conceded, when, as in the present instance, the effects were confessedly in Scotland, and could all be attached by the diligence of this country.

Upon the effect of the pursuers' arrestments, the trustees pleaded :

Though the trust-disposition challenged should not be held sufficient to bar the creditors from attaching the estate of the bankrupt by legal diligence, the arrestments used by the pursuers could have no effect ; nor could they in virtue of them pretend to draw more than a rateable proportion of the fund *in medio* along with the other creditors. Messrs. Fairholms were not by their bankruptcy divested of the property of their estate : The disposition executed [11] was therefore effectual in law while not challenged ; and no challenge had been made till the money was paid into the bank for behoof of the creditors ; which was the same thing as if it had been paid to themselves. If the bankrupts had converted their estate into money, and paid it proportionally among the creditors, such payments must have been sustained ; and there was no reason for a different rule, where the money arising from the estate had been lodged in the bank by the express appointment of the creditors. The money so lodged was truly their money ; they had each a right thereto in proportion to their debts ; it was the same as an actual payment, and must be equally secure against the diligence of dissenting creditors, 23d Jan. 1756, *Souper contra Creditors of Smith*, No. 76, p. 744 ; 30th July 1766, *M'Kell contra Trustees of M'Lurg*, No. 21, p. 894.

If an arrestment such as the present was found good and preferable, it would not only be inconsistent, but productive of manifest iniquity. A dissenting creditor

could not either with justice or congruity contest the right of the trustees to recover for behoof of the creditors, and at the same time convert their actings to his own advantage. If this was allowed, it would give that creditor the exclusive benefit of the disposition and trust granted for behoof of all the rest.

The arrestments in the present case were, in another point of view, inept and insufficient to attach the share of the acceding creditors. Neither the trustees nor the banks were debtors to the bankrupts, but to the creditors *quoad* the shares of those creditors who had acceded; and it was a settled point, that an arrestment used, not against a debtor to the common debtor, but against the debtor's factor, or against the trustees of the debtor to the common debtor, was inept, 12th Dec. 1752, Campbell, No. 74, p. 742; 9th Feb. 1759, Stalker, No. 77, p. 745. If the money recovered had been retained by the trustees, an arrestment used against them by the pursuers would have been inept; and the case was not altered by the money having been lodged in the banks, which being the depositaries either of the trustees or creditors, could not, in the furthcoming, depone that they owed the sums deposited to the bankrupts.

The arresting creditors pleaded:

In the event that the trust-deed was reduced, it followed as a necessary consequence, that nothing done thereon prejudicial to the interest of the pursuers could be sustained. As neither the trustees nor acceding creditors would then have any title to the bankrupts effects, these would fall to be considered as the funds of the bankrupts, and, like all moveable funds in the hands of third parties, effectually attachable by the diligence of creditors. A disposition of this kind by a notour bankrupt, instead of being held equivalent to a payment, had been deemed a fraudulent alienation, and as such prohibited by the act 1696. Though the disponent therefore had not only uplifted the fund, but paid it over to the creditors intended to be favoured, their right could still be no better than that of the disponent; their title still depended upon the disposition; and if that was null or reduced, the fund became truly the bankrupt's property. But, in the present case, the money never had *de facto* been paid over to the acceding [12] creditors, but lodged in the bank; so that if it would have been recoverable though paid over, *a fortiori* must it, while *in medio*, be liable to attachment by legal diligence.

The decisions referred to, 23d Jan. 1756, Souper, No. 76, p. 744; and 30th July 1766, M'Kell, No. 21, p. 894, admitted of an obvious and conclusive answer. In neither of these had the common debtor been rendered bankrupt in terms of the statute: His disposition to trustees was not therefore reduceable; and hence a creditor could not by arrestment carry off what had been recovered by an effectual deed. The decisions, 4th Nov. 1764, Mudie *contra* Trustees of Strachan, No. 252, p. 1217; and 27th Jan. 1767, Peters *contra* Trustees of Dunlop, No. 253, p. 1218, were precisely in point; the pursuers of the reduction having been preferred on their arrestments in the hands of the trustees.

The objection to the competency of the arrestments was founded on the fallacy in taking for granted that the money arrested belonged to the acceding creditors. Whenever the trust was set aside, that money, whether in the hands of the trustees or the bank's, became the property of the bankrupts; the holders came of course to be proper debtors to them; and hence the arrestments had been most competently laid in their hands.

At advising this cause the Bench was full. The decision was given on the general point; and though the deed in the present instance was acknowledged to be extremely fair and unexceptionable, the Judges were of opinion that it could not be sustained: They did not, however, entirely disapprove of such deeds; but thought themselves bound by a *series rerum judicatarum*, in particular by the judgment in the case of Strachan in 1764, No. 252, p. 1217; and by the late case of Dunlop in 1767, No. 253, p. 1218, affirmed, as they understood, upon the general point, in the House of Lords—Four Judges dissented. As the trust was accordingly reduced upon the statute, the Judges, on the second point, were clear it followed as a necessary consequence that the arresters were preferable.

The following judgments were pronounced:

"The Lords, on the petition and answers, adhered to the Lord Ordinary's interlocutor, sustaining the reasons of reduction of the trust-disposition, in so far as the pursuers have an interest therein, and reduced accordingly; and on the report and

information, they preferred Andrew Johnston and Anne Law, the arresters, on their arrestments produced."

Lord Ordinary, GARDENSTONE.—For Johnston and Law, RAE, &C.—For the Trustees, ADV. MONTGOMERY, MACQUEEN.—Clerk, GIBSON.

R. H.

Fac. Col. No. 60, p. 179.

No. 10. [24] THOMAS MITCHELL v. MARJORY FINLAY. November 12, 1799.

The act 1696, c. 5, found not to apply to a wife's infetment on an antenuptial marriage-contract, by which the husband had become bound to give her infetment on a house and yard for her liferent, in case of survivancy; although he was not himself infet for two years after the date of the contract, and his own and his wife's infetment, both taken on the same day, were within sixty days of his notour bankruptcy.

By an antenuptial marriage-contract, James Milne became bound to give Marjory Finlay infetment on a house and yard belonging to him, but in which he was not infet, for her liferent, in case of survivancy.

James Milne did not himself take infetment for above two years after. His wife was infet upon the clause in the contract, on the same day with himself.

He became notour bankrupt within a month after the infetments.

Thomas Mitchell, one of his creditors, brought a reduction of the obligation to infet in the contract, and of the infetment taken on it, founded on the act 1696, c. 5.

The Lord Ordinary assoilzied the defender.

In a petition, the pursuer admitted, that in the case Jan. 29, 1751, Johnston, No. 200, p. 1130 (contrary to the older case, June 19, 1731, Creditors of Merchiston, No. 261, p. 1283), it had been found, that infetment on an heritable bond, granted for a *novum debitum*, though taken within sixty days of bankruptcy, does not fall under the act 1696. But, he contended, that in that case there had been no undue delay in taking infetment; and, at least, much less than in the present, where there was reason to presume it had been postponed intentionally, till the husband was on the eve of bankruptcy.

The pursuer further contended, that Milne's own infetment, which was necessary to support the defender's, being a voluntary act on his part, was struck at by the statute; June 5, 1793, Brough's Creditors v. Spankie and Jollie, No. 222, p. 1179.

Observed on the Bench: The defender was entitled to complete the security, by expeding infetment in her husband's person as well as her own; and therefore this is not to be considered as the act of the husband.

The petition was refused without answers.

Lord Ordinary, CRAIG.—For the Petitioner, GILLIES.—Clerk, HOME.

D. D.

Fac. Col. No. 140, p. 315.

No. 21. [38] MACDOUGALL's Creditors v. MACDOUGALL. January 31, 1804.

A father, makes advances to his eldest son to a considerable amount, and in about two years becomes bankrupt. His creditors cannot reclaim these from the son out of any separate estate he may have since acquired.

While Mr. Allan Macdougall was proprietor of an estate valued at upwards of £30,000, and carrying on considerable business as a Writer to the Signet, though at the same time indebted in large sums to many persons, he defrayed the expense of promoting his eldest son John, then a lieutenant in the army, to be a captain in the 91st regiment. This amounted to £1214, 11s. 3½d., which was regularly entered to

his son's account in his books, as paid to him, or by his orders, in the course of his recruiting, in the end of the year 1793, and beginning of 1794.

In the end of the year 1796, Mr. Macdougall stopped payment, and conveyed his estate to a trustee for behoof of his creditors, who in their name brought an action against Captain Macdougall for repayment of the sum advanced by his father.

The Lord Ordinary pronounced this interlocutor (6th June 1801): "In respect it is not alleged that there was any fraud on the part of Mr. Allan Macdougall, or that any diligence had been done against him at the time the advances in question were made to the defender, sustains the defences, assoilzies the defender from the conclusions of the libel, and decerns."

The creditors reclaimed, and

Pleaded: 1, The money advanced was not in the way of donation, but was set down to the son's account, of which, the father himself having now occasion for paying his debts, and still more his creditors, have a just title to demand repayment. The whole items of the account remain undischarged in any way whatever. Neither by entry in his books, nor by any act or deed at the time, did he express his intention of making it a gratuity. Indeed, in justice to the rest of his family (laying his onerous creditors out of the question), he could never have formed the idea of giving so large a sum to his presumptive heir, at the risk of exhausting his funds, and leaving nothing to a numerous family of younger children. A father and son are apt to deal loosely in matters of business, leaving it to after circumstances to determine what shape the transaction shall assume; if he had been prosperous in life, perhaps he never would have [39] called back the money so advanced. But, on the other hand, by retaining this sum at his son's debit in his books, he reserved his claim against him, in the event of his being unable to provide otherwise for his younger children or onerous creditors. Of this reserved claim, his creditors are entitled to avail themselves.

2. But supposing the money was given, not on the footing of a debt to be repaid, but as an absolute grant, not subject to any power of revocation, or condition of repayment, it may be challenged upon the act 1621, which declares "all alienations, dispositions, &c., made by the debtor of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after contracting of lawful debts, to be null and of no avail," &c. That every father lies under a natural obligation to provide for his offspring, need not be disputed; but that this is "a true, just, and necessary cause," in the sense of the statute, taking off the effect of presumptive fraud, cannot be conceded. A father is bound to provide for his offspring, so long as he has the means of doing so; so long as he has any free estate to bestow; but no one is either bound or entitled, either by a natural or civil obligation, to provide for his family at the expense of others. It is not necessary to instruct actual fraud to justify a challenge, the policy of all the bankrupt acts being to declare certain acts to be fraudulent in the eye of law, independent altogether of the intention of the granter. The preamble of the act 1621, so far from making any exception in favour of children, on account of the natural obligation to provide for them, places them in the front of suspected persons, in whose favour devices are most likely to be practised to the injury of creditors. Provisions in favour of children have accordingly always been understood to be gratuitous in a competition with creditors; Mackenzie's observations on 1621; Ersk. b. 4, tit. 1, § 34; Bankt. b. 1, tit. 10, § 75 and 77; Stair, b. 1, tit. 9, § 15; and children have always been obliged to show, that at the time of granting the provisions in their favour their father was solvent.

To obviate any plea of hardship, by obliging Captain Macdougall to sell his commission to repay the sum claimed, the creditors renounced all claim upon the commission, and agreed to restrict themselves to payment from the estate of Polquharn, to which he had lately succeeded from a distant relation.

Answered: 1, So little does it ever appear to have been Mr. Macdougall's intention, to retain the sums expended for fitting out his son as a debt against him, particularly when he was in possession of the family estate destined to that son, that he never thought of taking any obligation for repayment of the sums advanced. A father never can be allowed to act in such a manner, as that having put his son into a certain situation and rank in life, on the faith and understanding that he is making him a present for that purpose, he may afterward ruin all his future prospects, by calling

back that money, on the pretence [40] that it was a debt against him. The account was opened by the bookkeeper, as evidence of the sums paid by him on the son's account; and vouchers were taken as evidence of these disbursements. If it had been intended that this should constitute a debt against the son, these would have been preserved; but they were delivered up to him on his going abroad, and no acknowledgment of any kind taken from him in return.

2. The argument upon the statute implies, that there was fraud in the transaction sufficient to set it aside; fraud on the part of the father, for advancing a moderate sum to his eldest son, befitting the station of one who had the *spes successionis* of the estate, then the property of the family; and that there was also fraud in the son in accepting this sum of money, and this two years before his father was obliged to stop payment. But this advance was not made without "true, just, and onerous causes." The father lay under the strongest obligation to provide for the eldest son of his marriage; and, in discharge of that obligation, he expended a very moderate sum considering the situation and rank of the parties. Mr. Macdougall had at that time every reason to believe that his effects were equal to the discharge of all his debts. A natural obligation is sufficient to protect a deed granted in favour of a near relation from being reducible. By the statute, wives and children are put exactly on the same footing; yet a provision to a wife has been sustained though made by an insolvent person, even in a postnuptial contract; 11th January 1738, Robertson, No. 75, p. 957; 17th February 1738, Mackenzie, No. 76, p. 958; 22d January 1714, Lockhart, No. 74, p. 956; Creditors of Ferguson v. Swinton, 2d February 1796, No. 109, p. 1001. No case has ever occurred, where the situation of wives and of children have been looked on in different points of view; and in no case has a provision to a wife been sustained, and a provision to a child, in the same circumstances, held ineffectual; Bean v. Strachan, 1st August 1760, No. 37, p. 907; Creditors of Scott v. his Younger Children, 13th June 1760, No. 100, p. 985.

Replied: There is a manifest distinction between provisions to a wife and provisions to children; the former being in the eye of law onerous, so far as rational; the latter gratuitous in a question with creditors.

The Court (11th December 1802) "sustained the defences"; and on advising a reclaiming petition, with answers (31st January 1804), they "adhered."

The Court was divided in opinion. It was observed by one of the Judges in the minority, that the principle of an implied condition clearly applied to this case, as the son could now from his separate estate afford to replace this sum, if his father had required it; and that as his creditors now require it, they are entitled to urge the same plea as the father, who never gave any discharge of these advances.

Lord Ordinary, HERMAND.—For the Creditors, SOLICITOR-GEN. BLAIR, ARCH. CAMPBELL, JUN., SCOTT.—Agent, H. DAVIDSON, W.S.—Alt. LORD-ADVOCATE HOPE, HAY.—Agent, ALEX. FORSYTH.—Clerk, PRINGLE.

F.

Fac. Col. No. 140, p. 316.

No. 24. [43] RICHMOND and FREEBAIRN'S TRUSTEE v. The PELICAN INSURANCE-OFFICE. June 26, 1805.

Payments by bills of exchange, made within sixty days of bankruptcy, good in the case of a running account, operated upon to an equal extent, on both sides of the account.

The Directors of the Pelican Insurance-Office, in 1798, appointed Richmond and Freebairn their agents in Edinburgh. The instructions required "the agent to remit immediately all sums received for new policies, or renewals, when the payment exceeds £50 on one number, and is to transmit the balance of his account quarterly, within one month after each quarter-day, either in money, in bank-bills, or in good bills, at a short date."

Of this date (5th September 1801), Richmond and Freebairn were rendered bankrupt.

The account with the Pelican Office at this time stood thus :

PELICAN LIFE OFFICE, London, in Account with RICHMOND and FREEBAIRN,
Insurance-Brokers, Edinburgh.

Dr.				Cr.			
1801.				1801.			
March 4.	To Sundries,	£	s. d.	Feb. 9.	By Cash,	£	s. d.
		135	14 0			6	9 0
July 11.	To cash,	13	19 8	" 12.	By ditto,	2	5 0
Aug. 31.	To profit and loss			April 1.	By ditto,	7	7 9
	for commission,	16	19 7	May 21.	By ditto,	8	12 9
	To James Beveridge,			June 10.	By ditto,	5	13 0
	for drft. on him,	465	0 0	July 6.	By Charles Freebairn,	127	0 0
				" 11.	By cash,	107	18 0
				" 14.	By ditto,	4	13 9
				" 22.	By ditto,	41	10 0
				"	By ditto,	86	19 0
				Aug. 6.	By ditto,	188	2 6
				" 31.	By J. Richmond, for		
					Life Policy, £30	18	4
					By Charles Free-		
					bairn,	12	14 0
						43	12 4
					By balance to new account,	1	8 8
						£631	13 3
						£631	13 3

[44] The trustee for Richmond and Freebairn's creditors brought a reduction of the two bills for £13, 19s. 8d. and £465, as having been remitted within sixty days of the bankruptcy, contrary to the provision of the act 1696.

On the 16th December 1802, this interlocutor was pronounced : " The Lord Ordinary having heard parties' procurators on the libel, reasons of reduction and defences, sustains the defences ; repels the reasons of reduction ; assoilzies the defenders from the conclusions of the libel, and decerns."

The trustee reclaimed ; and

Pleaded : The spirit of the bankrupt-act 1696, is to incapacitate the debtor from hurting some of his creditors, by preferring others, at a time when his approaching insolvency might lead him not to do equal justice to all. In order to accomplish this purpose, it does not inquire into the *bona fides* of the favoured creditor, nor the nature of the debt, but annuls whatever the debtor has done for the purpose of discharging it, for sixty days preceding bankruptcy, unless it be by a payment in money. The debt contracted by the agent to his employer, is in no different situation from any other debt. If it had been known that he was to become bankrupt, and could not discharge this debt, he certainly would not have been employed ; but neither would a creditor have lent his money, if it had been conceived, that, on the stipulated day of payment, the debtor would be incapacitated from discharging the debt. In both cases, the personal credit of the debtor has been trusted ; and in both, every assignation or other deed, in security or satisfaction of the debt so contracted, must be set aside, if within the statutory period ; *Campbell v. Graham*, 16th January 1713, No. 192, p. 1120 ; *Manson v. Angus*, 1771, APPENDIX, PART I., No. 7, p. 15, *h. t.* ; *Machutcheon v. Welsh*, 29th January 1794 (not reported, see APPENDIX, PART II.).

Answered : The statute was never intended to regulate cases such as this, where the transactions have been carried on down to the date of bankruptcy, on both sides of a current account. The question here is not about a security given for an antecedent debt, but it is a case of mutual debit and credit, under a running account, which must be taken altogether as one transaction ; the different articles *hinc inde* being counter parts of one another, and not to be disjoined. It would be great injustice, if, in such a case, all the indorsations of bills and transmissions of securities during sixty days were reduced ; while all the engagements undertaken on the faith of these securities, already deposited, or of their being sent at some future time, are held effectual obligations. It has been already found, that such was not the intention of the act 1696 ; *Stein's Trustee v. Sir William Forbes and Company*, 1st March 1791, No. 204, p. 1142 ; and this must hold, so long at least as no preference is granted within sixty days, that is, as long as the payments made are not more than those received ; by which the fund for the other creditors is not more diminished, but remains just as it did, at the period of

sixty days previous to the bankruptcy. If it were otherwise, the agent would be allowed to receive money, which he cannot repay to his employers residing at a distance ; and, by doing so, he commits a fraud against his employer, if the law will not allow him to send it to its real proprietor. By such conduct, the agent himself could not profit ; neither can those who derive right from him. If the creditors seek equity, they must give equity ; they cannot convert an equitable rule to an unjust purpose.

The Court adhered.

Lord Ordinary, GLENLEE.—Act. H. ERSKINE, WOLFE-MURRAY.—Agent, THO. SCOTLAND, W.S.—Alt. SOLICITOR-GENERAL BLAIR, FORBES.—Agent, W. MOLLE, W.S.—Clerk, PRINGLE.

F.

Fac. Col. No. 215, p. 178.

No. 28. [52] JAMES DUNDAS, Trustee on the sequestrated estate of RICHMOND and FREEBAIRN v. JAMES SMITH. June 2, 1808.

An indorsation of a bill in payment, in the ordinary course of trade, is not liable to reduction on the statute 1696, though it be within sixty days of the indorser's bankruptcy.

Richmond and Freebairn were insurance-brokers in Edinburgh, James Smith was underwriter in their office for behoof of himself, his father, and others. He had underwritten there during the year 1800, and they had received the premiums up to the end of that year. He had also underwritten [53] there during the year 1801, though it did not appear that they ever received any of the premiums of that year. (See *Bertram v. Trustee for Richmond, &c.*, 26th November 1802, No. 33, p. 7122.)

On the 4th of August 1801, Richmond and Freebairn indorsed to James Smith two bills for £200 each, drawn upon and accepted by James Beveridge of London, due on the 12th–15th October, the other 16th–19th October. Smith remitted the bills to his father at York on account of the premiums due to him. At that date, there had been no balance of accounts struck between Smith and Richmond and Freebairn for the transactions of the year 1800 ; but Smith was creditor in account for more than the sums contained in these bills. There did not appear to have existed at that time any apprehension of Richmond and Freebairn becoming bankrupt. They were, however, made bankrupt in terms of the act 1696, on the 6th of September 1801 ; their estate was sequestrated ; and James Dundas was appointed trustee upon it.

The trustee brought an action against James Smith, for reducing, under the act 1696, the indorsations of the two bills above mentioned. The interlocutor of the Lord Ordinary, (May 24th 1805), was,—“ Finds, that in practice there is a current account, debit and credit, between the broker and underwriter who do business at his office, fluctuating from time to time, so long as the parties continue in credit, and till the actual failure of the one or the other ; so that it would be unjust to allow the creditors of either to avail themselves of one side of the account, without taking the other side of it into view. That the bills passing between them cannot be considered in the light of securities for anterior debts, so as to fall under the act 1696, and that such bills, especially when remitted to persons at a distance, are properly payments in cash. Finds, in terms of the report, that there was no mutual settlement of accounts betwixt the parties, striking an acknowledged balance previous to, or at the period of the indorsations in question, and that such transactions as took place between them went on posterior to the indorsations in question, in the same manner as previous thereto. Finds, that upon the 6th day of August, Richmond and Freebairn indorsed to the defender bills for £400, accepted by James Beveridge, which bills the defender indorsed to his father Thomas Smith, and other correspondents at York, for whom he was in use to underwrite at Richmond and Freebairn's office here. Finds, that although there may be no valid distinction, in a general view of the act 1696, between foreign and inland bills, so as that the one should be exempted from the sanction of that statute, and the other liable to it ; yet if, in the ordinary course of business,

an underwriter in this country, unconscious of failure in the circumstances of the broker whom he employs, not only for himself, but for his correspondents in England, accepts of an indorsation of bills of exchange from that broker, and remits them to such correspondent, while the credit of the broker is unimpeached, the transaction cannot be set aside upon the act 1696, unless it shall appear that such remittance was in payment of a debt [54] already liquidated. Finds no evidence that the debt due to the debtor's English correspondents, who received the remittance of the £400 under challenge, had been liquidated at the time of the remittance; the alleged delay of which, as well as the circumstance that the bills are said to have been indorsed indefinitely to account of the balance which might ultimately be due to the defender, affords real evidence, as well of the *bona fides*, as of the application of the general doctrine assumed, in the first part of this interlocutor, to the circumstances of the case; assoilzies from the reduction in regard to this article."

The cause came before the Inner-House by petition and answers.

Argument for the pursuer.

These indorsations were, in terms of the act 1696, "dispositions, assignations, or other deeds, made by the bankrupt, in the space of sixty days before his becoming bankrupt, in favour of his creditor, either for his satisfaction or further security."

For it is clear law, that they are not taken out of the statute merely by being indorsations of bills, 2d February 1700, *Durward v. Wilson*, No. 191, p. 1119, 16th January 1713, *Campbell v. Graham*, No. 192, p. 1120, *Manson v. Angus*, 16th July 1771, in which this point was determined on full discussion, and the judgment of this Court was affirmed in the House of Lords, 22d March 1774, No. 7; *M'Hutcheon v. Welsh*, 29th January 1794, not reported. (See APPENDIX, PART II.) See Bell's Law of Bankruptcy, v. 1, p. 171.

2dly, There is no authority whatever for saying, that indorsations of foreign bills are in a different situation from indorsations of inland bills. The observation of the collector in the case of *Campbell v. M'Gibbon*, No. 202, p. 1139, is now admitted, on all hands, to have been onerous; and it was decided that there was no such difference in the case of *M'Hutcheon v. Welsh*.

3dly, It cannot take the indorsations out of the act that they were in payment; for the statute expressly includes deeds made "for satisfaction."

4thly, It cannot have this effect, that the indorsations were given *bona fide*, without contemplation of bankruptcy; for the very object of the statute, in fixing the retrospective term of 60 days, was to supersede all inquiry into that circumstance, by adopting a general presumption from a circumstance that was always certain;—accordingly, this plea has uniformly been disregarded in actions on this statute.

5thly, These indorsations are not taken out of the statute merely by the circumstance that they were made during the existence of an open account. The Court may just as well rescind the statute *in toto*, as deny effect to it in all cases, where the parties happen to have an open account. There is not the smallest authority for such an exception. Indeed, it would destroy the effect of the statute altogether; for not only are open accounts very common, [55] but it is quite easy to keep an account open for the very purpose of eluding this statute. The case of *Sir William Forbes and Company*, No. 204, p. 1142, did not establish any such rule. In that case, the indorsation was sustained because a subsequent advance to a greater amount had been made by the indorsee. The case of the *Pelican Insurance Office*, No. 24, was circumstantiated; but at the utmost only established, that indorsations within the 60 days must compensate advances by the indorsee within the 60 days.

The mere existence of an open account on which no advances at all have been made subsequent to indorsations, or even within the 60 days, has never been found to take those indorsations out of the act 1696.

These are all the circumstances that can be imagined to take this case out of the statute.

Argument for defender.

It is not necessary for the defender to dispute simply and precisely any of the pursuer's propositions. He maintains, that the indorsations do not fall under the act 1696:

1st, Because they were payments made *bona fide* in the ordinary course of business.

The deeds, &c., which the act declares reducible, are "granted in favour of creditors, and in preference to other creditors"; but payments, made in the ordinary

course of business, are neither of these ; so that they do not come under the words of the act. Still less do they come under the spirit of it. For it never was intended to rescind all the ordinary dealings of every person who became bankrupt for 60 days back. Such a provision would have done far more harm than good ;—accordingly, payments in money have always been held not to fall under the statute, because these were presumed to be of this description, *Bean v. Strachan*, 1st August 1760, No. 37, p. 907 ; *Ersk. b. 4, tit. 1, § 41*. But now that the use of cash is almost entirely superseded, payments in the ordinary course of trade are generally made by indorsation of bills. In this form, however, they are still payments in the ordinary course of trade, and as such must be exempted from the reduction on the act 1696.

2dly, This is still clearer where a current account of debit and credit subsists between the parties, as in this case. For there it is obvious, that the payment is not only not given in contemplation of bankruptcy, but it is not given merely either for satisfaction or security of a prior debt. It is given with a view to future transactions as much as past ; and can never be said to be given to one creditor in preference to others, since not only there can be no view to a preference, but it is quite uncertain whether the person, to whom it is given, may ultimately be a creditor or not, even independently of such payment.

This view was adopted by the Court in the case of *Sir William Forbes*, and still more clearly in that of the *Pelican Company*.*

[56] The idea that deeds of any kind within the 60 days would be sustained, merely because they were in satisfaction or security of debts contracted within the 60 days, is supported by no authority ; and there is no reason to suppose it was the principle of decision in either of these cases.

The majority of the Court adopted the first argument of the defender ; and founded their opinion upon this, that, in the circumstances of this case, the indorsations of the bills must be viewed as payments in the ordinary course of trade ; and, therefore, did not fall under the act 1696.

It was observed by several Judges, that indorsation of bills were certainly not exempted in general from the operation of the act 1696 ; and one Judge (*Lord Armadale*) expressed a decided opinion, that the mere circumstance of a current account existing between the parties was by itself of no relevancy in defence against a reduction on the act. That if in fact the bankrupt was debtor to the indorsee at the commencement of the 60 days, it signified very little whether the account had been balanced or not previously to that period ; and that none of the cases quoted went upon this circumstance alone, but on advances being made by the indorsee subsequent to the indorsations, or at least within the 60 days.

The interlocutor of the Court (2d June 1808), was, “ Adhere to the interlocutor of the Lord Ordinary.”

Lord Ordinary, *HERMAND*.—Act. *DAV. CATHCART*.—Alt. *JOHN CONNELL*.—*THO. SCOTLAND, W.S.*, and *DAV. MURRAY, W.S.*, Agents.—P. Clerk.

M.

Fac. Col. No. 47, p. 174.

No. 3. [1262] *Marquis of CLYDESDALE v. Earl of DUNDONALD*. January 26, 1726.

This great cause consists of various branches. That part of it which regards Base Infetments is distinguished by the marginal note opposite. The other subjects will be referred to in the particular Titles to which they belong. It has been thought best to record the whole case together, where it first occurs.

BRANCH I.

Clause of Return.

The estate and honours of the family of *Dundonald* being provided to heirs-male in the year 1716, *John Earl of Dundonald* having only one son, *William*, the last Earl, from whom he had no great expectation of issue, executed a deed, by which,

* See also *Thomson's Trustees*, 28th February 1806, No. 25.

"failing heirs-male of his own body, he obliges himself to provide and secure his estate in favour of Lady Anne Cochran his eldest daughter, and the heirs-male of her body; whom failing, to his other daughters, in their order," &c. Earl William having died in his minority, without issue, the Marquis of Clydesdale, only son to Lady Anne Cochran, brought an action to have it declared, "That the heirs-male of the said Earl John's body having failed, he the Marquis, as heir-male of the said Lady Anne's body, was heir of provision to the said Earl his grandfather; and craving that the present Earl of Dundonald might be decerned to make up his titles to the estate, and convey the same in his favour." On the other hand, this Earl of Dundonald, the heir-male of the family, brought a counter action of declarator by way of defence; among other conclusions, insisting that it might be found, "That William first Earl of Dundonald having conveyed his estate to heirs-male, with a clause of Return to himself failing heirs-male, this imported a prohibition to alter; and therefore the said Earl John had no power, by a gratuitous deed, to alter the conveyances and course of succession which their ancestor had established for the preservation of his name and family." These conveyances stood thus: The said William first Earl of Dundonald, by diverse deeds, in the years 1653, 1656, and 1657, settles his estate upon "William Lord Cochran his eldest son, and the heirs-male of his body; whom failing, to return to himself." And in the year 1680, by a procuratory of resignation; and 1684, in his grandson's contract of marriage, the same Earl William, after the decease of this son, renews the settlement "in favour of John Lord Cochran his eldest grandson, and the heirs-male of his body; whom failing, to William Cochran of Kilmaronock, his second grandson (father of Thomas the present Earl), and the heirs-male [1263] of his body; whom failing, to his other grandsons; whom failing, to himself; whom all failing, to the eldest heir-female of his own body, without division."

From these deeds it was pleaded for the Earl, That where a maker of an entail divests himself of the fee, and substitutes himself to his own donees; such substitution being purchased at no less value than the whole subject, is in the strictest manner onerous, and consequently unalterable by any of the intermediate substitutes in prejudice of the maker. If one should give a sum of money to the maker of a tailzie, to get himself put into the substitution, such substitution would be onerous and unalterable in prejudice of him who gave the consideration for it: And is not the intention as strong, when a man gives away his estate, with a provision of return to himself in a certain event, that the same should not be arbitrarily disappointed, as where he had only contributed a small matter for being named a substitute? To confirm this, see 31st January 1679, Drummond *contra* Drummond; * 10th December 1685, Mortimer *contra* College of Edinburgh: † In which cases, though the substitution was in money, and not in lands, it was found, that the institute could not alter in prejudice of a clause of return; and the *ratio decidendi* was purely the onerosity of the substitution, which equally applies to all estates, whether in land or money. And in a late case betwixt the Duke of Douglas and Lockhart of Lee, in a land-conveyance, a return to the tailzier was found to be an onerous substitution, not to be gratuitously altered, *voce* FIAR ABSOLUTE, LIMITED.

It was allowed by the Marquis, That the Lords in some cases have made a distinction betwixt a clause of return and a simple substitution; that a clause of return was something stronger, and yet not the same with a prohibitory clause: But it was contended, That the Lords never found this in any case where an estate was provided to an heir *alioqui successurus*; which failing, to other heirs; which failing, to return to the granter, &c. Indeed, where an estate is given away to a stranger, or one *not alioqui successurus*, with a limitation to particular heirs, and a provision of return to the granter; this has been explained to have the force of a paction betwixt the granter and the stranger receiver of the estate, that failing the heirs in the limitation, the estate should return to the granter. And this is most just, because where a proprietor makes such a deed, it is evident he is not settling his succession, but is giving away his estate from his successors for a particular use; and this reasonable condition is implied, that *causa cessante, cessabunt effectus*, whert that use is at an end, that himself or his righteous heir shall have back the estate. And this cannot be better

* Stair, v. 2, p. 686, *voce* FIAR ABSOLUTE, LIMITED.

† President Falconer, No. 97, p. 67, *voce* FIAR ABSOLUTE, LIMITED.

illustrated, than from consideration of the late case betwixt the Duke of Douglas and Lockhart of Lee, cited for the other party : There a part of the family estate of Douglas, being given away to the heir of a second marriage, and the heirs of his body ; which failing, to return to the right heir of the family of Douglas ; the Lords did justly interpret, " That that clause of return was not a simple substitution, but was of the nature of a paction betwixt the family and the heir of the second marriage, that fail-[1264]-ing him and his heirs (in support of whom alone the estate was given) the estate should come back to the family " : There is therefore a wide difference betwixt this case and every case where a man is settling his estate upon his own heir. In all such cases, the last substitution being by way of a clause of return, there is no conveyance for a certain use, no implied condition ; it is no more than a common expression, pointing out whom the proprietor intends should be his heir, failing such another ; still leaving every substitute in his full right of property and power of disposal. It is to no purpose, therefore, to insist upon the onerosity of such a clause of return : There is no question the maker of a tailzie, disposing his estate to his heir *aliouqui successurus*, since he might retain it to himself, can make it return upon what conditions he pleases ; but where his principal design is confessedly that only of pointing out the succession of his heirs, can any secondary intention be drawn from a clause of return importing a limited tailzie ? The Marquis's lawyers beg leave to say, the presumption lies on the other side, since the Earl of Dundonald made no use of the known irritant and resolute clauses calculated for the restriction of property, that he designed only a simple destination, and had no view to limit his successors. Taking the matter in this view, the decisions cited for the Earl will be found nothing to the purpose, they being in relation to sums of money given as provisions to children, and consequently grants for a particular use ; which use being at an end, the intention was obvious, that the sums should cease to be due : So that bonds of this nature are understood to be so far personal, that they go not to gratuitous assignees.

It was urged in the second place for the Marquis upon this head, That whatever effect a clause of return may have with regard to the persons in whose favour conceived, it can operate nothing in favour of the intermediate heirs who are called to the succession before these persons. Now let it be granted, there was the strongest security in favour of the Earl of Dundonald's heirs whatsoever, what is that to the heirs-male ? Is there anything thereby stipulated in their favour ? Or is it a tenable point, because the Earl took care to tie down his son, and the heirs-male of his body, not to dispose of the estate to a stranger in prejudice of his heirs of line, that therefore his son, or any of the subsequent heirs-male, could not better the case of the heir of line, and give him the succession sooner than the Earl had stipulated ? This is the very case : The Marquis of Clydesdale is the heir whatsoever, the very person in whose favour the return is conceived ; how then can it be said, that the deed in his favour is in prejudice of the clause of return ? And if not in prejudice, how comes the clause to be made a foundation upon which to reduce it ?

To this it was replied for the Earl, " It is a principle, Wherever a substitution is onerous in favour of the last termination, it gives the force of a *fideicomiss* to the whole destination." If which were otherwise, this absurdity would follow, that the substitute who was made preferable in the succession, would have a weaker right than he who was called after him : Besides, that the matter could not otherwise be expedited ; for when the gratuitous alienation is made, it is pro-[1265]-bable the onerous substitute may have no title to quarrel it, many being before him in the right of succession ; and when perhaps after a long tract of time, the succession is open to him by the failure of the intermediate substitutes, they themselves being all the while out of possession, he has but a slender lay that this shall turn to his account, when in all probability the provision of return is quite forgot, or cut off by prescription in favour of third parties.

" The Lords found, That neither the clause of return in the contract 1653 and 1656. nor the substitution in the procuratory of resignation 1680, or contract of marriage 1684 years, did disable the last John Earl of Dundonald, gratuitously to alter the succession by a deed in favour of his daughters, in prejudice of the heir-male of the former investiture." See FIAR ABSOLUTE, LIMITED.

BRANCH II.

Minor.

Another head of the Earl's declarator was to this purpose, that at any rate the deed in the 1716 falls to be set aside, in respect that the last Earl William, in the 1725, with consent of curators, made a new deed of settlement in favour of the present Earl. Against which deeds, in the 1725, it was objected, That they were done on deathbed, and in minority ; either of which was sufficient to set them aside.

It was pleaded for the Marquis, It is a received maxim in our law, that a minor, even with consent of curators, cannot prejudice his heir, or gratuitously alter the settlements made by his predecessor. Sir George Mackenzie, in this matter, is express in his treatise of Tailzies, where he says, " It hath been doubted if minors can make tailzies, even with consent of tutors and curators : And I conceive they cannot ; for though it cannot be properly said that they themselves are lesed, seeing they continue still fiars ; yet a minor may be justly said to be lesed, in that he wrongs his family and nearest relations."

In support of the deed, it was pleaded for the Earl of Dundonald : It is the known law of Scotland, that a minor with consent of curators, or by himself where he has none, has the same power over his estate, as if he was of full age ; under this single exception, " unless the minor himself is lesed by the deed." The original of the maxim, that a minor cannot prejudice his heir, comes from this, that generally speaking these two go together, a lesion to the minor himself, and a lesion to his heir and family. Now in the present case it happens to be quite otherwise ; Earl John, the minor's father, intended to disinherit the present Earl of Dundonald, while at the same time he was his representative both in name and honours ; which was the most irrational action of that gentleman's life : A deed, which had he been minor when he did it, he could have reduced on the head of lesion, granting it otherwise unalterable. Is it not then unreasonable to maintain, that his son, the heir of the family, was lesed by the alteration ?

Replied for the Marquis : The pretended favour of conjoining the estate and honours alters not the case : The settlement made by the predecessor is presumed [1266] in law to be the most advantageous for the minor ; and it admits no arguments against this presumption. Besides, there is another reason drawn from utility : For be it once introduced, that a minor, to whom the law ascribes a weakness of mind, may alter the deeds of his predecessors without a sufficient onerous cause, it will lay him open to such importunities, as may prove highly pernicious to his family ; and therefore such importunities it is the common interest to guard against.

" The Lords found, That William last Earl of Dundonald could not, in his minority, though with consent of curators, gratuitously make any alteration of the destination of succession contained in the said bond of tailzie 1716." See MINOR.

BRANCH III.

Deathbed.

In answer to the other objection of deathbed, against the deeds made by Earl William in the 1725, and in support of these deeds, it was urged for the Earl, It is a principle indeed, That deathbed deeds are not good against the heir. But this will not apply to the present case ; in respect that neither the Marquis, nor the Duchess of Hamilton, his mother, were in any sense heirs to Earl William, whose deeds are craved to be reduced, 1mo, In that they could not have been served as heirs of provision to him ; 2dly, *Esto* they could, yet an heir of provision, who cannot serve in the subject, is not such an heir as in law is entitled to the privilege of deathbed. To make out the first point, Earl John is not obliged, by the bond of entail 1716, to resign in favour of himself, whom failing, in favour of Lady Anne ; but he directly obliges himself to resign to Lady Anne. By this clause she was stated a proper creditor, and by no means heir : There was nothing in the person of the granter, which she could carry by a service, in the event the obligation was to take effect ; and it is evident, where there is no service, there can be no heir. But then, as to the second point, *Esto* Lady Duchess could have served heir of provision ; yet by the original constitution of the law of deathbed, and by the records as far back as they are to be

found, an heir of provision has not this privilege, but singly the heir of the investiture, or, in other words, the heir in the subject alienated. This is distinctly held forth by our learned countryman Craig ; who, after he has told us, on the subject of deathbed, that *in lecto ægritudinis nemo potest hæredi suo præjudicare*, when he comes to explain who it is that can succeed as heir, L. 2, Dieg. 13, § 5, his words are, “ Apud nos, hæres is solus est, qui in feudum rerum immobilium, aut rei alicujus immobilis succedit ” ; and afterwards, § 25, “ Is proprie hæres non dicitur, nisi qui a lege ad successionem vocatur ; sunt enim qui non ex lege, sed ex conventionem partium succedunt ; sed hi nomen hæredis non merentur.” And surely, as there is no reason for extending this law in the general, there is much less in this particular case : The deed complained of, is a deed altering a former ; which former was, in the eye of the law, a lesion prejudicial to the granter and his family : And as the law of deathbed was introduced for preventing impositions [1267] and abuses to the ruin of families, would it not be a most irrational decision, that the deed of a successor, rectifying a ruinous conveyance made by his predecessor, should be reduced upon the same ground of law, on which the deed itself whereby the ruin came could have been reduced ?

Replied for the Marquis, That there is no distinction in the law of deathbed, betwixt a right of a person that is heir, in virtue of a personal deed, and him that is heir by an investiture completed with infeftment. Craig indeed points at a distinction ; but his opinion on that head has been exploded, and justly. The foundation of the law of deathbed was, to prevent persons being imposed upon, by the importunities not only of priests, but of near relations, at a time when, through weakness, they are presumed not capable of resisting solicitation, to alter the succession in prejudice of those persons, who, during their firm health, were the true heirs, to whom the estate was by law to descend, by whatever title, as heirs, whether of line, male, conquest, or provision ; and without distinction, whether they were heirs in virtue of a personal deed, or a deed on which infeftment followed. And, as this is established by constant practice, it is unnecessary to take notice of any other decision, than what passed in the case Hepburn of Humby *contra* Hepburn, 25th February 1663 ; * where there are three points determined, every one of which destroys the objection made in this case. The first is, “ That the pursuer of the reduction had a good title, though he had only a personal provision in his favour, conceived in a contract of marriage upon which no infeftment had followed : ” And the reasoning there was precisely the same that is now made use of for the Earl of Dundonald. 2do, It was determined, “ That the law of deathbed did operate in favour of an heir-male, by virtue of a personal provision, even in prejudice of the heir of line, who was heir of the investiture : ” How much more in favour of the heir of line in prejudice of a collateral heir-male ? And 3tio, It was determined, “ That though the right of the heir-male arose only from the deed of the defunct, who had made a disposition in his favour to the exclusion of heirs of line, and had reserved a power to alter ; yet that alteration could not be made on deathbed, to the prejudice of that very person whom the defunct, by his own deed, had created heir.” And if it be said that this case was settled betwixt the parties, let it be considered what Lord Stair takes notice of, That the Lords were mostly of opinion that these points were law in every case.

“ The Lords found, That William last Earl of Dundonald could not, on deathbed, gratuitously make any alteration of the destination of succession, contained in the bond of tailzie 1716.” See DEATHBED.

BRANCH IV.

Prescription, Base Infeftment, Hæreditas jacens.

Base infeftment is good against the granter and his heirs, though neither registered nor clothed with possession.

Another head of the Earl of Dundonald’s declarator was to this purpose, “ That in so far as concerned certain parcels of the estate, the gratuitous deeds of alteration ” (under which the Marquis claims) “ must be declared [1268] ineffectual, as granted by persons who, with respect to these parcels, were only in the state of apparent heirs.” The matter stood thus : William, first Earl of Dundonald, in his son the Lord Cochran’s marriage-settlement, disposed to him and the heirs-male of the marriage, the lands of

* Stair, v. 1, p. 186, *voce* DEATHBED.

Dundonald, Ochiltree, Cochran, &c., in virtue whereof, the Lord Cochran was infeft in these lands. Again, in the year 1656, there was a contract of excambion betwixt the Earl and his son, by which his son redispomed to him the lands of Ochiltree ; in lieu whereof the Earl dispomed to his son, and the heirs-male of his body, &c., the lordship of Paisley and lands of Glen, in virtue whereof the son was thereafter infeft. After this there were certain other lands purchased by the said Earl William, to himself in liferent only, and to the said Lord Cochran, and the heirs-male of his body in fee : And though all these several lands were thus habily vested by infeftment in the person of the said Lord Cochran, and the heirs-male of his body ; none of the later Earls, descendants of the Lord Cochran's body, made up any title to these infeftments : To which, therefore, it was pleaded, That the present Earl of Dundonald, as the nearest heir-male of his body, has the only right.

Objected to this, in the first place, for the Marquis, That in as much as William the first Earl of Dundonald, had, in the year 1680, resigned the said lands wherein his son died infeft, in the hands of the superior, for new infeftment thereof to John Lord Cochran, his grandson, in virtue whereof he was infeft, and on the footing of which infeftment the family have possessed downwards to the death of Earl William in the 1725 ; therefore, any claim the present Earl could have, as apparent heir of the infeftments, which stood in the person of William Lord Cochran, his grandfather, was lost both by the negative and positive prescription.

Answered for the Earl, 1mo, Were there otherwise *termini habiles* of prescription, of which afterwards, it could only commence from the death of the Earl, whose liferent was reserved in the several conveyances, because the Lord Cochran could not sooner begin to possess, without which there can be no positive prescription : Now, he having deceased no sooner than November or December 1685, the forty years had not expired when the present Earl brought his action of declarator. 2do, As to the negative prescription, though there had been possession from the 1680, still the years of William the first, the liferenter, behoved to be deducted ; because, while he lived, the present Earl, heir of the Lord Cochran's infeftments, was *non valens agere* : And the Lords have found in a course of uniform decisions, that prescription cannot run against the fiar during the life of the liferenter. In the next place, there can be no negative prescription in this case, because, as well that title to which the prescription is ascribed, as that title under which the present Earl claims, were both in the same person : For as John Lord Cochran was infeft upon the settlement 1680, so he was apparent heir of his father's infeftment, and possessed by virtue of both titles ; and upon this medium, the argument for the Earl of Dundonald goes yet higher, that no prescrip-[1269]-tion could run but from the death of Earl William last deceased, who was the apparent heir of the Lord Cochran, and in possession of his estate.

Replied : Earl William's lifetime and possession can never be deducted to stop the positive prescription : For 1mo, He was infeft in the years 1659 and 1662, publicly in most of all the estate, by a charter to himself and his heirs whatsoever, which was inconsistent with the settlements in the deeds 1653 and 1656 ; and therefore it may be, and is contended, that the prescription began even from the 1662 : For, from that time, it was competent to the heirs-male to have quarrelled that infeftment made to the heirs whatsoever, and either to have reduced it, or to have obliged Earl William to denude ; and since that was not done, every purchaser from the Earl of Dundonald can found upon his possession from that time, to complete the prescription in their favour, and are not concerned to enquire what liferents were given or reserved by former settlements : There is a charter and sasine absolute, which is all the act of Parliament requires ; and now there is a possession of sixty years in consequence of it. In the next place, Supposing the possession did only commence from the 1680, the years of the liferent are not to be deducted, because the fiar and liferenter, both of them, possessed upon the footing of the new conveyance, the public infeftment that reserved Earl William's liferent ; so that in place of his possession being deducted, it expressly accretes to the conveyance 1680, as being in virtue of the same infeftment : In this case, the possession of the liferenter is plainly the possession of the fiar. As to the second part of the answer, That the Earl was *non valens agere* : 1mo, By the act of Parliament, this seems to be no objection to the positive prescription ; otherwise the records can give no security. Persons can see who are infeft, and who in possession ; but they never can know who are *non valentes agere* : And indeed the objection seems to be competent by our law, against the negative prescription only.

But next, the maxim is entirely misapplied ; for if it be not, there can never be a prescription : Any heir starting up at the end of a hundred years, was, in this sense, *non valens agere* ; the succession was not devolved on him ; the fault was his predecessor's, and not his ; and non-existence would for sure be the strongest incapacity that could debar any heir. But this is not the meaning of the law : The incapacity must lie upon the person to whom the right does or might belong, during the course of the forty years ; and therefore, if these persons to whom the right belonged during that time, were in a capacity to have interrupted the prescription, there is no place for the maxim. In this case, all the Earls of Dundonald from the 1680, were in a capacity to have interrupted. It is true, they chose not to do it ; and so much the stronger is the prescription, when it is fortified by an express consent, as well as by a negligence or inactivity for so many years.

Objected for the Marquis, in the second place, to this head of the Earl's declarator : That William Lord Cochran's infectment, in the Lordship of Paisley, was only a base infectment, holden of his father the granter, not clad with possession, which was null by the law at the time ; and therefore the posterior infectment, [1270] upon the surrender of the same granter, in the year 1680, is the preferable right to the lands of Dundonald and Cochran, contained in the settlements 1653, and to the Lordship of Paisley, contained in the settlement 1656.

Answered, 1mo, That it was no nullity in base infectments, not to be clad with possession : For even before the statute 1693, they were to all effects valid rights, excepting only in competition with posterior onerous public infectments, or such base ones as implied warrandice first in possession : They were titles to force production of all infectments, whether public or private : they excluded posterior arresters ; they excluded the terce of the granter's relict, and were good in competition with posterior gratuitous rights flowing from the same author (see Stair, l. 2, t. 3, § 27, Bell v. Rutherford, No. 2, p. 1260 ; Spottiswood, *voce* KIRKMAN). All this is plain from the express words of the act 1540, which first introduced the distinction of base infectments, clad or not clad with possession : That act presumed, and statuted upon the presumption, that whoever took a base infectment, and allowed the granter to retain possession, did the same *ex fraude* to induce a second purchaser to give a price for the lands ; and therefore statutes, " That persons having such base infectments, shall not be heard against a second heritable possessor, by any title which implies warranty." This is all the act provides, or needed to provide, there being no place for such presumption of fraud in the case of a posterior gratuitous infectment. But 2do, Base infectments, not clad with possession, were always good against the heir of the granter, by an express clause in the same statute 1540. Suppose then John Lord Cochran had served heir to his grandfather Earl William, he could not have quarrelled the infectment ; but he was in the same case as if served heir, being liable *præceptione hæreditatis*, by accepting the disposition 1680, to fulfil his grandfather's anterior deeds. 3tio, This base infectment was a good right in the person of William Lord Cochran, even in competition with any posterior, however onerous right, flowing from the granter ; in as much as the granter having reserved his liferent, the liferenter's possession was, in the eye of the law, the possession of the fiar.

Replied to this last article : The Lords have found, on the contrary, " That an infectment by a father to his son, was not clad with possession by the father's possession, although he had a factory from his son, Gardiner *contra* Colvil (*infra* h. t.)." And however it might be pretended, that if a third party should denude in favour of one in liferent, and another in fee, upon which deed a base infectment followed, that in such a case the possession of the liferenter would clothe the whole base infectment with possession, because the liferent and fee are one and the same right, originally constituted by one infectment ; and because the liferenter had no other infectment in him, every person inquiring into the liferenter's possession, could ascribe it to no other title than that infectment : It is quite another thing, where a father is infect in the property, then infects his son in fee, with a reservation of his own liferent, and continues his own possession : For there his possession is not by virtue of his son's infectment, but by virtue of his own right, which he hath reserved in so far as concerns his own liferent [1271] and possession ; and so that possession of the father does not lead any person to find out the infectment of the son : Having seen the father originally infect in fee, they naturally ascribe his title to that, and enquire no further. But indeed the matter in this case does not principally hang upon a *bona fides* : It

is the nature of the thing determines the question ; where a father reserves his life-rent, his son's infetment is not at all his.

It was pleaded for the Marquis in the third place, against this conclusion of the declarator, That the rights made to William Lord Cochran, by his father, were not fully completed, no public infetment, but a base sasine only without possession had followed upon them ; besides, that the Earl had not fully acquired in the rights of the estate in his own person : And therefore since the *dominium directum*, yea in effect the whole real right remained with Earl William the granter, and that John Lord Cochran was himself the heir, and only person to whom the right of these base infetments could devolve, and who could complete these titles, or take up the possession by virtue of them ; it was optional to him, either to connect a right to these titles, and to insist against his grandfather to complete them, or to neglect those titles which remained so lame and incompleated, and to take a split-new right from his grandfather, in whom the radical right still continued : And since he chose to do so, and did complete that new right by a public infetment, no other heir coming after can set up these defective titles, in opposition to the new right 1680 ; which being granted, as said is, to the same person who was heir to these incompleated lame titles, did entirely absorb, and render them useless. And although this reasoning must hold absolutely, had the infetments 1653 and 1656 both been completed *in suo genere* ; it holds much stronger with regard to the lands now in question, lying in the shire of Renfrew, that are contained in the deed 1653 ; because the sasine upon that deed was not registered in the register appointed for the shire of Renfrew, but only in the shire of Ayr, within which other lands lie, not now in dispute. The analogy of the decisions of the Lords goes a great deal further upon this point : They have sustained a wife's right to a terce, and a husband's right to the courtesy, where the husband or wife were infet upon a void title ; upon this very foundation, That though the infetment might be quarrellable, the husband or wife, as they were heirs to the bad infetment, were heirs to the good ; and though they possessed by virtue of the most lame, no heir could quarrel, because they might have taken up the good one ; and it was the same by which they possessed, since the line of descent was one and the same in both. 2do, They have found that an apparent heir of an investiture might discharge the reversion of an apprising, so as to bar any after heir from quarrelling. These things were determined lately in the cases of Linton *contra* Blair,* and Mader *contra* Mader.* There is another case better known, and that is the case of the estate of Kincardine, *infra* h. t. : That estate was sold for the debts of Earl Alexander, upon whose titles the right of the purchaser and so many creditors stands ; Earl Alexander's title was not by service to his predecessors, but by an apprising led against his elder [1272] brother Edward, the undoubted proprietor ; which apprising was liable to many objections ; the grounds of it were lost, itself satisfied by intromission, numberless nullities in it : Yet, since Earl Alexander had acquired it, and made it the title of his possession, when at the same time he was the apparent heir of the investiture, the Lords would not allow Earl Alexander's son to pass by that right, or to take up the right of Earl Edward his uncle against it. But the present case is stronger than all these : Those titles were somewhat inconsistent with, and at best but collateral one to another. Here was only a lame title, which required a new deed of Earl William to complete it : It belonged to his grandson ; and accordingly, without putting him to any trouble, he fully completed the right : Where is the defect in such a case ? And here it may be further observed that the conveyance in the 1680 being granted to the heir in those deeds 1653 and 1656, in pursuance of the obligations contained in these very deeds, the disposition itself granted to John Lord Cochran the grandchild, was of equal strength with, and did import a precept of *clare constat*, when it proceeded from the same person by whom such a precept fell to be given. Neither doth this import any defect in our records : Everybody that looks into them must see, that the first infetments were but base, flowed from Earl William, and by course did descend to John Lord Cochran ; and consequently that the completing the titles, by the same Earl, in the Lord Cochran's person, which they likewise see in the records, was agreeable to, and no more than a full implement of the first deeds.

To which the Earl made this answer, It cannot be pleaded, that the Earl of Dundonald's resignation in favour of his grandchild, does convey what was not in the

* See HEIR APPARENT.

resigner's person, but in the person of his son, and after his death, in *hereditate jacente* of him. Neither does it in the least alter the case, that the superior's resignation in the present question, was in favour of the apparent heir of the vassal : For the apparent heir's taking infestment on that surrender, gave him no more right to the property, than if made to a stranger ; he became thereby superior, it is true, but remained still but apparent heir as to the property : There was something more to be done to make a title to the property, he must thereafter have served, and infest himself as heir to the vassal ; or perhaps he might have done it, on a precept of *clare constat* granted by himself in his own favour ; but without such infestment, the property remained in *hereditate* of William Lord Cochran the last vassal, to be taken up by his next apparent heir, who is the present Earl of Dundonald. Nor are the known and fixed forms of transmission of property, whether *inter vivos*, or from the dead to the living, ambulatory and precarious, to be observed or not, as one pleases : They have their foundation on principles firmly settled, " that property cannot be conveyed but by " infestment, nor one infestment transmitted but by another." Neither does it make the least difference, though the base infestment had not been clad with possession ; still it was a right in the person of a deceased ancestor, whereof he was never divested ; it remains therefore in *hereditate*, till an heir shall make up a title to it. Nor is the want of registration a solid objection ; because it is [1273] not a nullity, but solely a ground of preference in a competition : Infestments are notwithstanding real rights, and produce all actions which arise from real rights, though they may be defeated in a competition. See March 25, 1623, L. Dunipace ; * March 24, 1626, Gray ; † June 12, 1673, *Faa contra* L. of Pourie and L. Balmerinoch. ‡ 2do, They are always good against the grantor and his heirs, which of itself is enough in this case : And the Lords found, 30th June 1705, Keith of Ludquhairn *contra* Sinclair of Diren, § " That the assignee of an heir, who had served to his ancestor infest only by an unregistrate sasine, was preferable to a subsequent heir, making up his title to his ancestor last infest by sasine on record." It might be noticed, in the third place, That in some respects this argument is yet weaker than the former, of its being a base infestment not clad with possession : For there was nothing to hinder John Lord Cochran to have registered his father's infestment by warrant of the Lords, by which it had been as unexceptionable, as if registered within sixty days of its date, excepting only as to intervening competing rights : Stair, tit. Compet. § 22. But now admitting that William Lord Cochran's base infestments had been void, as either not clad with possession, or not recorded ; nay, admitting there had been no infestment at all, but only a naked personal disposition in the person of William Lord Cochran, yet still unless a title had been made up to that personal disposition by some of the preceding apparent heirs, the present Earl must have the only title to that disposition, and lands thereby conveyed, notwithstanding the posterior gratuitous infestment flowing to John Lord Cochran from his grandfather the superior. If the law stood otherwise, and that even a personal right could be passed over by the heir ; or which is the case in hand, if John Lord Cochran could by law pass over his father's right, and complete a title in himself without noticing it : Then it is certain, that the acquiring a new right from his grandfather was no passive title to his father ; so was our law before the statute 1695, and so is it still, if the heir past by has not been three years in possession : What then should have become of his father's onerous creditors ? If his right was sopited by the new right taken from the grandfather, they were undone ; for the acquirer was liable in no passive title, and yet the right was carried out of the person of their debtor : A plain consequence, if the law stood as the Marquis pleads it. But this the justice of the law would never suffer : For though the acquirer was not passive liable, he could be charged by his father's creditors to enter heir to him ; and upon his renunciation, the disposition to the father could be adjudged. Is not that then a demonstration, that the surrender by his grandfather did not transmit his father's disposition ? And if it did not, what can hinder the present Earl, who is the heir in that right, to take it up ? It will not hold what is pleaded in the last place, That the disposition 1680 is virtually a *clare constat*. *Id agit* by a precept of *clare constat* to transfer the infestment of the ancestor ; it is an infestment given to the receiver *qua* heir ; the direct contrary *agebatur* by the surrender 1680, *sciz.* to give a new right, as if no such infest-

* Durie, p. 61, *voce* REGISTRATION.

† Stair, v. 2, p. 187, *voce* NON-ENTRY.

‡ No. 1, p. 563.

§ Forbes, p. 22, *voce* REGISTRATION.

ment had ever been : It cannot then be equal to a precept of *clare constat*, when in effect, though in other words, it [1274] bears, that *clare constat* there was no right in the person of William Lord Cochran at all. And it may further be observed, there is no right given to John Lord Cochran by his grandfather, but what might have been given even in his father's lifetime ; which therefore could never be a *habile method* of making up a title to the rights that were in his father's person.

"The Lords found, That the procuratory of resignation 1680, and charter and sasine following thereon, in favour of John Lord Cochran, joined with the subsequent infestments and possession of his heirs, did not effectually establish, in the person of the last John Earl of Dundonald, granter of the bond of tailzie 1716, the property of the lands and estate wherein William Lord Cochran, son to the first Earl of Dundonald, died vest and seised by either public or base infestments : And repelled the allegiance of prescription pleaded for the Marquis of Clydesdale, and also the allegiance of not registration of William Lord Cochran's sasine 1653 in the register for the shire of Renfrew, and that the infestments 1653 and 1656 were not clad with possession : And found therefore, that the lands and estate wherein William Lord Cochran died vest and seised, and to which no title was made up by his successors, by service, precept of *clare constat* as heirs to him, or by disposition from him, are yet in *hereditate jacente* of the said William Lord Cochran ; and that the present Earl of Dundonald may serve heir to him, in such of the said lands and estate as are settled upon heirs-male." See PRESCRIPTION. See SERVICE and CONFIRMATION.

BRANCH V.

Apparent Heir, three years in possession.

There was a separate point insisted on for the Marquis, arising from the act 1695, by which an apparent heir, passing by another heir who had been three years in possession, is obliged to fulfil the deeds of that heir whom he passes by : Whence the Marquis insisted, That allowing the Earl of Dundonald to be apparent heir to William Lord Cochran, and that he can connect his title by a service ; he must implement the deeds of the heirs who have been interjected between him and the said Lord Cochran, particularly the bond of entail 1716.

In answer to this it was contended, That the act of Parliament, subjecting the heir passing by to the debts and deeds of the intermediate apparent heirs, does not extend to gratuitous bonds of entail, or destinations of succession, made by such intermediate apparent heirs, and that it does by no means concern disputes among the several heirs, but singly such as arise between heirs and creditors ; as is evident from the whole contexture and strain of the statute, especially when compared with the genius of our former law. It is inscribed in the Rubrick, an act "for obviating the frauds of apparent heirs" : It proceeds upon the preamble "of the frequent frauds and disappointments that creditors suffer upon the decease of their debtors, and through the contrivance of apparent heirs to their prejudice" ; and for remeid thereof, statutes, &c. Here is the abuse intended to be redressed, viz. "the frauds done to creditors upon the decease of their [1275] debtors" ; and the statute ought not to be further extended, than in favour of those who were creditors to the deceased apparent heirs. The argument for the Marquis is laid singly upon the generality of the words debts and deeds. But as this is an extraordinary statute, contrary to the genius and analogy of all law, "That one can by his debts or deeds affect a subject to which he has no title" ; though so far as it goes, it must be binding, this much ought to be granted, that it is not to be extended. For this reason it has justly been made a question, if, under the word deeds, direct conveyances were at all comprehended : And it is believed the late decision in the case of Muirhead of Drumpark,* was the first where it was so found : But then it proceeded upon this special ground, that being in a marriage settlement, it was an onerous deed : It was a debt on the granter, implying warrandice ; wherefore the Lords thought such deeds fell under the reason of the law. It is material to observe, that the law requires a possession for three years by the intermediate heir, in order to make the heir passing by liable for these debts and deeds : The reason whereof can be no other than this, that *bona fide* contractors, by seeing a man so long in possession, were induced to believe he had completed his title to the estate : For had the intention

* See PASSIVE TITLE.

been, to enable him, even while he had no title, to alienate the estate gratuitously, by a naked destination of succession, in prejudice of the next heir ; what reason had there been for requiring a three years' possession to capacitate him for this end ? Would not the possession of one day have been as good as the possession of a year, if it had been in the intention of the statute at one blow to overturn the firmest foundations of our law ?

"The Lords found, That the Earl of Dundonald, by serving heir to William Lord Cochran, and passing by Earl John, maker of the gratuitous bond of tailzie 1716, is not by the act of Parliament 1695 obliged to fulfil the said bond of tailzie." See HEIR APPARENT. See PASSIVE TITLE.

BRANCH VI.

A Person passing by an Apparent Heir, three years in Possession, and liable for his Debts, has recourse against his Representatives in any other Subject.

January 1727.

This question came afterwards to be debated betwixt the parties, Whether the present Earl of Dundonald, who enjoys the old estate as heir to William Lord Cochran his grandfather, who died last vest and seised therein, passing by the several intermediate Earls of Dundonald, who never made up the proper titles to that estate, but one after another possessed as apparent heirs of William Lord Cochran, shall, upon the act of Parliament, 1695, be bound to pay the personal debts contracted by the said apparent heirs, without relief against the Marquis their representative, who as heir to them enjoys their proper estate ?

And it was contended for the Marquis, That he is only heir of provision in virtue of the deed 1716, and as such liable for the debts only in the last place, after discussing of other heirs ; and that he has relief off these other heirs, and such [1276] as in the construction of law are liable as other heirs ; which is the Earl of Dundonald's case in consequence of the act 1695.

Answered, The act 1695 was introduced allenary for the security of creditors, and to prevent their being disappointed of their money, where they contracted upon the faith of the apparent heir their debtor's being three years in possession ; but by no means in favour of an heir, so as to give him relief of any debts to which he is liable *qua* heir served ; nay it might even be thought a question, " If the creditor himself could have any benefit from the act, in such a case where the debtor hath an heir served, on whom an estate hath devolved sufficient for payment of his debt." But be in that what will, it is enough to say, that the act of Parliament introduced only an accessory security for the creditors, and from a principle of equity made an estate, which really was not the debtor's, liable to his debt, because of his possession, and the *bona fides* of the creditor : But if the person to whom the estate truly belonged made the creditor secure, by paying him his money, there was nothing in law to hinder him to have his recourse against the proper heir of the debtor, either for relief, or by taking assignation, and insisting in name of the creditor.

"The Lords found the Marquis of Clydesdale obliged to relieve the Earl of Dundonald." See HEIR APPARENT. See VIRTUAL. See PASSIVE TITLE.

Fol. Dic. v. 1, p. 87. Rem. Dec. v. 1, No. 70, p. 138.

No. 10. [1282] DOUGLAS of Morton v. the Tenants of KINGLASSIE. February 1662.

A base infetment of annualrent was granted, to take effect after the granter's death, upon which a decree of pointing the ground followed, during the granter's life. This decree, upon which possession could not follow during the granter's life, was held sufficient to make the base infetment public.

In an action of mails and duties pursued by Douglas of Morton, against the tenants of Kinglassie ; wherein, for Morton there was produced an infetment of annualrent granted by — Hamilton of Kinglassie, to — Hamilton his second son, author

by progress to Morton, with a decret of pointing the ground thereupon :—It was alleged by the creditors comprisers, That the infettment and decret could furnish no action or interest in their prejudice, because the infettment was base, holden of the granter, wherein the annualrent was suspended during the granter's lifetime ; whereas, long before the term of payment, and before any decret could be effectually given thereupon, for pointing of the ground, they were infett, holden of the superiors. And if they had been compearing, they would have alleged, that no such decret for pointing the ground could have been granted during old Kinglassie's life ; seeing the annualrent was only payable after his death, and the ground only then poindable therefor. —It was answered, That though the annualrent was suspended, yet the citation of the tenants and heritor for pointing the ground, and decret following thereupon, made the right so public, that no posterior infettment whatsoever could be preferred thereto. And though the decret was not to have present execution, yet the ground might be decerned poindable, the term of payment being first come, and bygone ; just as when an infettment of that nature is granted for an annualrent payable at the very next term : The party infett, may raise his summons and obtain decret and sentence before the term.

The Lords repelled the allegiance, and preferred the annualrenter. See *LEGAL DILIGENCE*.
Fol. Dic. v. 1, p. 88. Gilmour, No. 40, p. 30.

No. 35. [1302] CAMPBELL v. Lady KILCHATTAN. January 15, 1663.

A wife's infettment for security of her jointure, cannot be clothed with possession during her husband's life ; therefore the husband's possession is understood to be her possession, and her infettment accordingly preferable according to its date.

Major William Campbell being infett in an annualrent out of certain lands belonging to the deceased Ninian Stewart of Kilchattan, pursues a pointing of the ground, and obtains decret, which is suspended against him on the one part, and the Lady, liferentrix of Kilchattan on the other part.—It was alleged for the relict, That she is infett in the property upon her contract of marriage, whereby she was provided to the lands by old Kilchattan her father-in-law, and her husband ; to whom and her, the father-in-law was obliged to grant infettment in conjunct-fee, and she is accordingly infett.—It was answered, That any infettment that she and her husband had, it was only base, to be holden of the superior not confirmed ; whereas the charger was infett and in possession, not only by uplifting his annualrent, but by a decret for pointing the ground, which could [1303] not be prejudged by a not confirmed infettment, being null before the confirmation.—It was replied, That the charger could not obtrude the nullity of her husband's and her infettment, seeing her husband was his own author.—Duplied, That the charger had obtained a confirmation of her husband's right, *ad hunc effectum* allenarly, to make his infettment of annualrent valid.—Triplied, That the confirmation of her husband's infettment did confirm her's also, notwithstanding of any such clause.—Quadruplied, That the confirmation being past only to secure the charger, and on his own expences, *actus agentis non operatur ultra ejus intentionem*, just as if there had been a procuratory of resignation in favour of both husband and wife, and the resignation had been made only in favour of the husband and not the wife.—Answered, If it had been so, the infettment would have operated in favour of the wife, as was found in the case betwixt Lochinvar and the relict of the Laird of Blairquhan, wherein resignation being made and past, and infettment thereupon in favour of Blairquhan and his Lady, nevertheless sasine was only given to the Laird, and not to the Lady ; the Lords nevertheless found that the sasine was profitable to the Lady. See *HUSBAND and WIFE*.

The Lords found the relict's infettment sufficient against this charger. And withall, they considered what was not alleged for her, viz. That *in favorem* of a relict's infettment upon her contract of marriage, for her liferent right, a base infettment to be holden of the superior not confirmed, was sufficient against a singular successor, as has been formerly decided.

Fol. Dic. v. 1, p. 89. Gilmour, No. 61, p. 43.

No. 37. [1305] Lady BURG v. Her TENANTS, and Sir JOHN STRACHAN. July 18, 1667.

The husband's possession is accounted the wife's possession, so as to validate her base right ; although it be not the natural possession, but by tenants, wadseters, &c.

The Lady Burgy pursues the tenants of her liferent-lands to remove ; comparence is made for Sir John Strachan, who alleges that he stands publicly infeft in this land, and in possession, and will not suffer his tenants to remove.—It was replied, That the pursuer's infeftment in liferent is long before Sir John's, and could take no effect till now that her husband is dead.—It is answered, That the Lady's infeftment is base, and, therefore, though it be prior to Sir John's public infeftment, it cannot be preferred thereto, unless it were alleged it was clad with possession before the public infeftment, either by the Lady's own possession, or at least by her husband's possession ; but she cannot allege either, because these parties were in possession from the date of her infeftment, till the date of this public infeftment.—It was answered for the Lady, That she offered to prove, her husband was in possession after her infeftment, and before the defender's infeftment, by himself, or at least by those who derived temporary, or redeemable rights from him, or his authors, as liferents, wadsets, and unexpired comprisings.—It was answered, That albeit *favore matrimonii* the husband's possession, though common author, be counted the wife's possession, yet the possession of a wadsetter, or appriser, are neither said to be the wife's possession, nor the husband's, because they possess *proprio jure*, and the husband had only a reversion.

The Lords found the allegiance relevant for the Lady, that her husband possessed after her infeftment, and before the public infeftment, either by himself, or by any deriving a temporary right from him, or his authors.

Fol. Dic. v. 1, p. 89. Stair, v. 1, p. 475.

* * Dirleton reports the same case :

A base infeftment given by a husband to a wife, was sustained after the husband's decease, as public, and clad with possession, albeit the husband was not in possession the time of granting the right : In respect, either he, or others, by redeemable rights and tacks given by him, came in possession thereafter. *Dirleton, No. 100, p. 39.*

No. 10. [1351] The COMMISSIONERS for the Shire of BERWICK v. CRAW. June 18, 1678.

A bastard having no lawful issue, has no power of testing ; and can neither nominate executors, nor leave legacies, unless he obtain legitimation from the King.

Umquhile Thomas Bruntfield being a bastard, and having no near relations, did nominate John Craw his executor, and left several legacies to public uses, and specially for building a stone bridge over the water of Blacader, the sum of 4000 merks ; and says, That Blacader was owing him 5000 merks, which he appointed to pay George Gordon, and to build the bridge ; and he appointed the Earl of Hume and others to see the same performed ; and after several other legacies, by the last words in the testament, he leaves what could be spared after the expences of his funerals, to his executor ; who built the bridge without advice of the overseers ; whereupon the Justices of Peace in that shire, appointed some of their number to pursue the executor for payment of the superplus of the 4000 merks, over and above what was waired on the bridge, which was but 1000 merks, to be employed for the like end, viz. for the building of another bridge.—The defender alleged absolutor, he having fulfilled the defunct's will in building the bridge ; and what could be spared of the estate, was left to himself ; neither was 4000 merks left generally to pious uses, but to build this bridge ; which being done, no party had interest to pursue for any further, the defunct's intention being only the bridge ; and no part of his estate could be interverted or applied without his will, more than Herriot's mortification for an hospital

of so many poor boys might have been interverted to a better use, or restricted to their necessity; and there is nothing more religiously observed than the wills of defuncts, by all civil nations; the intervention or stretching whereof, would discourage all such good works; and therefore, though the pursuit be favourable, there is no law for it, nor have the pursuers any interest in it. 2do, The defender is not only executor, but is donatar to the bastardy of the defunct, who having no children, could neither test nor legate.—The pursuer answered, That this legacy being for a public use, was *actio popularis*, most proper for the Justices of Peace, who have the charge of bridges; and as to the legacy itself, it is clear, not to be simply for the building of a bridge, but 4000 merks for building of it, which ought to have been all employed on the bridge, to have made it fair; but the defender, without any advice of the overseers, hath made it slight; and it [1352] cannot be controverted, but the whole 4000 merks might have been wared out upon a bridge there, of a fine structure; and therefore the executor should not *lucrari ex sua culpa*, but the superplus ought to be disposed for another like pious use: And as to the defence of the gift of bastardy, it ought to be repelled, in respect of the legitimation produced, whereby the King gave *testamenti factionem* to the defunct, though a bastard.

The Lords sustained the process at the pursuers' instance, and found, That the executor had not fulfilled the defunct's will, and that the superplus ought to be employed to another pious use; and therefore the Lords ordained the rest to be bestowed upon the other bridge, designed by the Justices of Peace; and ordained the name and arms of the defunct to be put on the bridges; and repelled the defence of bastardy, in respect of the legitimation. *Fol. Dic. v. 1, p. 92. Stair, v. 2, p. 621.*

No. 15. [1355] REID v. The OFFICERS of STATE. June 20, 1747.

A creditor of a bankrupt may take a decree of constitution against the Officers of State, and proceed to adjudge the estate of a bastard.

Reid being creditor to a bastard, who deceased without heirs of his body, raised a summons against the Officers of State, concluding for a decret of cognition for constituting his debt, and adjudication of the estate of the bastard.

No appearance was made for the Officers of State; but the Lords doubted how far this method was competent, thinking the proper way to affect the estate of a bastard, was to apply for a gift.

Pleaded, That this method was laid down by Stair, b. 3, tit. 3, § 46, who cited Craig, l. 2, d. 17, as of the same opinion, and a case where it was so found, No. 3, p. 1346.

Observed, That Craig in the cited place did not come up to the opinion delivered by Stair, he only saying that the bastard's estate went to the King burdened with his debts; which was also the whole of the decision; but as adjudication was the only diligence by which the effects of bastards could be affected, it ought to be granted.

The Lords found the bastardy proven, and the verity of the debt, and remitted to the Lord Ordinary to proceed accordingly.

Act. WILLIAMSON.—Alt. ABSENT.—Clerk, FORBES.

Fol. Dic. v. 1, p. 90. D. Falconer, v. 1, No. 190, p. 256.

No. 3. [1384] LUDOVICK GRANT v. MANSFIELD, RAMSAY, and COMPANY.
December 9, 1779.

A creditor recovering payment out of the estate of the principal debtor, found not bound to assign to postponed creditors, on that estate, his right of action against a cautioner.

Mr. Charles Gascoigne entered into a minute of sale with Sir James Campbell, concerning the lands of Dalderse, belonging to the latter. The price was £27,000;

of which £15,000 was to be heritably secured on the lands themselves ; £3000 was to be paid immediately ; and, for the remaining £9000, Mr. Gascoigne, the purchaser, and his two cautioners, Mr. Francis and Mr. Samuel Garbet, were to grant a personal bond, which was to be guaranteed by an assignment of £12,000 capital stock of the Carron Company, belonging to Mr. Samuel Garbet.

After the execution of this minute of sale, which contained neither procuratory of resignation, nor precept of sasine, Mr. Gascoigne, the purchaser, and his two cautioners, became insolvent ; and Sir James Campbell, in addition to the collateral securities formerly stipulated, insisted, that the whole price should be-[1385]-come a real burden on the lands. His demand was complied with in the following manner : Sir James granted a disposition, declaring the price to be a real burden on the lands : Mr. Gascoigne granted heritable bonds for the price, in the different proportions already mentioned ; and the infeftments, on these several rights, were taken and recorded on the same day.

The heritable bonds for £9000 and £3000, came by assignment into the persons of Mansfield, Ramsay, and Company, bankers in Edinburgh.

The estate of Dalderse was brought to a judicial sale by Mr. Gascoigne's creditors. The interests produced were, 1st, The heritable bond to Sir James Campbell for £15,000 ; 2dly, The heritable bonds for £9000 and £3000, in the persons of Mansfield, Ramsay, and Company ; and, 3dly, Several adjudications led by Mr. Gascoigne's personal creditors ; one of whom, Mr. Ludovick Grant, had executed an inhibition after the minute of sale, but before its completion, in the manner already narrated.

In the ranking, two questions occurred. The first was, Whether Mansfield, Ramsay, and Company, on drawing the sum of £9000 out of the price of Dalderse, the estate of the principal debtor, were obliged to assign to the postponed creditors on that estate, the collateral security of the £12,000 Carron stock, granted by Mr. Samuel Garbet, the cautioner, to Sir James Campbell.

Pleaded for the postponed creditors :—A creditor preferably secured on two subjects, may take his payment wholly out of one ; but, as he cannot, by so doing, postpone in an arbitrary manner, any secondary creditor, he must assign to him, whose security is thereby diminished, that by ranking in the cedent's place, the secondary creditor may communicate the loss resulting from the preferable security, to all those standing in the same degree of preference. Nor can any distinction arise from the nature of the security which is to be assigned. Whether it is a cautionary obligation, or an incumbrance on a separate estate, the catholic creditor might have operated his payment out of it ; and equity requires, that his debt should be paid by equal proportions out of the whole funds.

Answered :—Assignments of this nature, having their foundation solely in equity, cannot be demanded where equity requires the catholic creditor to draw his payment, if possible, from particular funds. The obligation of Mr. Garbet, to whose prejudice the assignment is here demanded, was merely subsidiary, taking place upon the failure of the principal debtor ; and whenever the principal debtor pays, his cautionary obligation is at an end. Hence the creditor taking his payment out of the funds of the principal debtor, does nothing arbitrary or unjust. On the contrary, to act otherwise, would be an extension of the cautionary obligation, palpably wrong and oppressive, to which no court of equity will give a sanction ; Principles of Equity, p. 18.

The next question, respected the effect of the inhibition used by Mr. Grant after the minute of sale, but before the sale was completed. It was admitted, that the heritable security for £15,000, being part of the original bargain, was unchallengeable ; and it seemed likewise to be admitted, that the security for £3000, [1386] which, by the original agreement, was to be paid immediately, was in the same predicament. But with regard to that for £9000, it was

Pleaded : By the minute of sale, Sir James Campbell became bound to convey the lands, upon receiving £3000, an heritable bond for £15,000, and a personal bond for the remainder ; and although the minute contained no procuratory, nor precept, by which the purchaser could be instated in the feudal right, yet Sir James Campbell could have been compelled by action at law, or by adjudication, to implement the precise terms of his agreement. The after transaction, therefore, by which the whole price is made a burden on the lands, as also the heritable bond for £9000, being a deed entirely voluntary on the part of the debtor, must be affected by the inhibition.

Answered : Even after the minute of sale, Sir James Campbell continued in the

property of the lands. The insolvency of the purchaser, and his cautioners, entitled him to reprobate their personal security; nor could he have been obliged, either by the purchaser or his creditors, to divest himself before receipt of the price. The condition, therefore, under which this sale was carried into execution, created a real burden on the estate, from which the creditors of the purchaser affecting it, for their payment, cannot shake themselves loose.

As to the first point, "The Lords, in respect Mr. Garbet was only a cautioner, found, That Mansfield, Ramsay, and Company were not obliged to assign the security granted by him, upon the stock of the Carron Company, in farther security of £9000, contained in the bond granted by Charles Gascoigne."

As to the second, The Lords "found, That the inhibition at the instance of Ludovick Grant did not affect either of the bonds in question, so as to make them reducible at his instance." See INHIBITION.

Lord Ordinary, ELLIOCK.—Act. ILAY CAMPBELL.—Alt. MACLAURIN.

Craigie.

Fol. Dic. v. 3, p. 72. Fac. Col. No. 94, p. 180.

No. 4. JAMES ERSKINE v. GEORGE MANDERSON. January 14, 1780.

A co-debtor found entitled to receive assignation of diligence from the creditor, that he might the more speedily operate his relief.

Manderson and Hay were joint acceptors of a bill payable to Erskine, who sued both of them for payment; and, as Hay pleaded no defence, immediately obtained decret against him.

Manderson, however, being still sued for the whole debt, made offer of payment, on condition of receiving an assignation to the decret against Hay, the *correus debendi*; which being refused, he, in a process of suspension, brought on that ground,

Pleaded: "A creditor cannot arbitrarily discharge his diligence done against one *correus debendi* to the hurt of the rest, who have a right to claim assignation"; Dalrymple's Decisions, No. 167.* When a debt is discharged by a *correus*, it is [1367] certainly just that the creditor thus satisfied, should communicate to him a right, which he himself can no longer exercise.

In the present case, the assignation may be of important use; as without the circuit of a process of constitution, it will entitle to immediate execution against Hay; by which means alone, perhaps, such danger as that arising from his suddenly converting his effects into cash, and leaving the kingdom, could be prevented. The creditor, therefore, should not be permitted to withhold that conveyance, notwithstanding the opposite tendency of a decision reported by Lord Stair in 1666,† and of a later one by Lord Fountainhall,‡ which indeed is less connected with the present question, or of the opinion of Mr. Erskine,‡ founded on the authority of those judgments. It is, however, to be remarked, that Lord Fountainhall has subjoined to the last-mentioned decision, this acknowledgment, "that with respect to the *beneficium cedendarum actionum*, our practice is not yet arrived at a full consistency."

Answered for the creditor:—By the Roman law, the *beneficium cedendarum actionum* was indeed allowed to cautioners; but the reason of it was, that there were no other means by which they could operate their relief. In ours, such a claim is rejected, because they may obtain relief without that extraordinary remedy; though perhaps it might enable them to execute diligence more speedily. Nor is it necessary to add, that the case of no co-obligant is so favourable as that of a cautioner, which the suspender is, being joint acceptor of a bill for behoof of another. That the above is the doctrine of our law, is evident from Erskine, p. 474; † Stair, July 10, 1666, Hume *contra* Crawford; ‡ and from Fountainhall, v. 1, p. 687, Dec. 12, 1695, Wood *contra* Gordon, *voce* DEBTOR and CREDITOR.

* Page 231, Wallace v. Elibank, 25th January 1717, *voce* DEBTOR and CREDITOR.

† The case reported by Lord Stair, above alluded to, is Hume v. Crawford, v. 1, p. 393, 10th July 1666, *voce* DEBTOR and CREDITOR: That by Lord Fountainhall, is Wood v. Gordon, v. 1, p. 687, 12th December 1695, *voce* DEBTOR and CREDITOR: The opinion of Mr. Erskine mentioned, is in b. 3, tit. 3, § 68.

The Lords found, "That the creditor was bound to grant the assignation demanded by the suspender."

Lord Ordinary, ALVA.—Act. R. SINCLAIR.—Alt. BUCHAN-HEPBURN.—Clerk, CAMPBELL.

Fol. Dic. v. 3, p. 72. Fac. Col. No. 98, p. 189.

No. 2. [1389] CAIRNES v. CAIRNES of Bellamore. July 1687.

Found that in our law parents have not *beneficium competentiæ*.

Fol. Dic. v. 1, p. 95. Harcarse (SUMMONS), No. 928, p. 261.

No. 3. [1390] BONTEIN v. BONTEIN. February 21, 1745.

A father bound himself to pay his son £20 per annum. He became unable. The defence of *beneficium competentiæ* was sustained; although the son was thereby reduced to indigence.

* * This case is mentioned in the case which immediately follows.

No. 4. Hogg of Cammo v. JULIA, &c., Hoggs, his Grandchildren. November 30, 1749.

A person, to bring about an advantageous marriage of his son, gave a false state of his affairs. He conveyed his estate in his son's contract of marriage, reserving a liferent. The deficiency appeared at his son's death; and the father was not permitted to plead *beneficium competentiæ*, so as to retain his liferent.

The case between John Hogg and Julia, &c., Hoggs, his granddaughters, by his eldest son, deceased, *vide* stated 21st July 1749, *voce* FRAUD; where the said granddaughters were found preferable for the provisions made for them in their father and mother's contract of marriage, to the liferent therein reserved to their grandfather; but reserving to him to be heard, How far he is entitled to the *beneficium competentiæ*? And the debate upon that point being now reported by the Ordinary—The Lords "found him entitled, upon the *beneficium competentiæ*, to £30 Sterling yearly, and that over and above £100 Scots, which, in his son's contract of marriage, was provided as an yearly aliment to an infirm daughter."

As no doubt was made by the Lords, but that the *beneficium competentiæ* obtained with us, notwithstanding of two decisions, one observed by Gosford in the 1669; and another by Harcarse in the 1687; as our later practice had, from example of the civil law, sustained it; so, in the reasoning among the Lords, the nature of it was opened and explained in a more distinct manner than is to be met with in any of the writers upon our law.

It was observed, that although it may have taken its rise from the obligation upon children to maintain their parents, it was nevertheless of a very different nature from the action to aliment, in so much, that it is competent, even where the action to aliment does not lie. The action to aliment only lies, where the child has to spare, over what is necessary to aliment himself; as in no case can one be obliged to aliment another, who is no more than able to aliment himself. But the *beneficium competentiæ* is a right, which lies to the parent against his children, who happen to be his creditors, of retaining *ne eget*, even though the effect thereof should be to expose the child to poverty.

An instance of this occurred in the year 1745, between Bontein of Mildovan and his son. The case was, Mildovan had bound himself to pay to his son £20 Sterling yearly for his aliment, which was but a moderate subsistence; but it happened that the father's circumstances fell so low, that he was unable to pay it, and the Lords sustained his defence against payment upon the *beneficium competentiæ*, although the son was thereby reduced to want. In like manner, an ac-[1391]-tion to aliment

does not lie against grandchildren, while there are children able to aliment their father, and who are *primo loco* liable; but the *beneficium competentiae* being a right in the parent of retention *ne egeat*, obtains, notwithstanding there be other children able to aliment, and who, in an action for aliment, would be *primo loco* liable.

And accordingly, the Lords repelled the two defences pleaded in this case for the said Julia, &c., Hoggs, That the whole remaining fund of the father's effects was no more than sufficient for a moderate subsistence to themselves; and that John Hogg, their grandfather, had two sons in opulent circumstances, able to aliment him; and found him entitled, on the *beneficium competentiae*, to £30 Sterling yearly, and that over and above £100 Scots yearly, for the aliment of his infirm daughter.

But, after pronouncing this interlocutor, a difficulty occurred in the execution.

John Hogg was debtor to his grandchildren in nothing; nor was there any real estate on which he had security, other than the houses in Edinburgh, on which the widow's liferent, which exhausted them, was preferable; and, as she was to him a stranger, and an onerous creditor, the *beneficium competentiae* did not lie against her; and The Lords, without determining any thing, "Remitted to the Ordinary to hear parties on the method of execution"; but gave this hint, that as the widow had a personal obligation for her liferent, she might, upon her barring John Hogg from the houses upon her preferable right, be obliged to assign to him the personal obligation, whereupon he might adjudge the £1000 bond, which was resting of the price of Saughton, and was heritable as excluding executors; and, when the grandchildren came to attack that subject, he would exclude them to the extent of his *beneficium competentiae*: And, accordingly, upon the Ordinary's report, this method of execution appeared to be competent.

This judgment was, upon an appeal, reversed.

Fol. Dic. v. 3, p. 73. Kilkerran, No. 1, p. 67.

No. 5. [1392] PATRICK REID v. MATHEW DONALDSON. July 11, 1778.

A person who had obtained a *Cessio*, was sued by a creditor who had been called. The bankrupt urged, that the decree of *Cessio* protected not only from personal diligence, but from diligence against effects acquired after the decree, except in so far as exceeding a competency. The Court suspended only as to personal diligence. But they expressed an opinion, that the tools by which the bankrupt earned his subsistence, could not be affected.

Patrick Reid obtained decret of *cessio bonorum* against his creditors. Afterwards, Donaldson, one of the creditors called in the *cessio*, pursued Reid for payment of his debt, obtained decret in absence, and was proceeding to do diligence against his effects.—In a suspension,

[1393] Pleaded for Reid: The decret of *cessio* protects the suspender not only from personal diligence, but likewise from diligence against his effects afterwards acquired; except in so far as the charger is able to instruct, that the suspender has effects over and above a competency for the subsistence of him and his family. This is agreeable to the doctrine of the Roman law, from which we borrow the action of *cessio*, and the *beneficium competentiae* given by that law to the obtainer of the *cessio*, ff. l. 42, § 3, 6, is likewise adopted into ours, *Quon. Attach. c. 7*; Bankton, v. 3, p. 18, § 1; p. 19, § 5; Erskine, p. 696, § 27. The charger, therefore, can attach no effects belonging to the suspender, without first condescending on such effects, that it may be known whether a competency would remain.

On the part of the charger: No objection was made in this case to suspending, as to diligence against the person of the bankrupt; but, it was insisted, that the decret of *cessio* does not protect effects of the bankrupt, afterwards acquired, from the diligence of his creditors. Our law does not indulge the bankrupt with a reservation of effects sufficient for an aliment. The opinions of Lord Bankton and Mr. Erskine, adduced by the suspender, seem to be founded solely on a passage in the *Quon. Attach. c. 7*, which supposes that every debtor, both before and after a *cessio*, is entitled to this privilege. That passage, therefore, can merit no regard as an authority. The law is fixed by the usage. No instance ever occurred, in which this reservation was

allowed, either at obtaining the *cessio*, or out of effects afterwards acquired. The charger, therefore, is not bound to condescend, as the suspender is not entitled to have anything reserved. Such a condescendence might likewise be the means of disappointing the diligence altogether.

The Court were of opinion, That the charger must be allowed to proceed in his diligence to attach the effects, without condescending; and that the debtor had no right to have any part of his effects set aside to him for his maintenance; but in case the charger, in the execution of the diligence, should proceed to any act of rigour, such as attaching the tools by which the suspender, as an artificer, gains his daily bread, the Court would then judge on the circumstances of the case, whether the diligence ought to be supported.

"The Court suspended the letters *quoad* personal diligence against the suspender; but, in other respects, found the letters orderly produced."

Fol. Dic. v. 3, p. 73. *Fac. Col.* No. 31, p. 52.

No. 6. ROBERT PRINGLE v. ALEXANDER NEILSON. August 5, 1788.

A person who had obtained a *cessio*, was afterwards employed as a clerk, with a salary of £25. He furnished a small house. A creditor attempted to poid and arrest. He pleaded *beneficium competentiae*. The Court suspended only *quoad* personal diligence, wearing apparel and working tools.

Robert Pringle, formerly a retail dealer in the town of Dalkeith, after having obtained a *cessio bonorum*, was employed as a merchant's clerk; in which capacity he had a salary of £25 per annum. Having furnished a small house for [1394] the reception of his family, consisting of a wife and several children, a poiding of the furniture was attempted by Alexander Neilson, a creditor of his, to the extent of £4, 16s. 9d., who had been summoned in the process of *cessio*. An arrestment of the salary was also used.

Robert Pringle offered a bill of suspension, in which he

Pleaded: A decret of *cessio* does not, like a certificate of bankruptcy in England, procure a total release to the debtor, any property he afterwards becomes master of, being still, in general, attachable by his creditors. But while, in this manner, a proper care has been taken by our law, to hinder a perversion of this humane remedy, it has been equally an object of attention, that it should not, by an over-rigorous execution of diligence, in virtue of prior debts, be entirely frustrated. With this view, the *beneficium competentiae* has been introduced, whereby not only the debtor's wearing apparel, and the implements of his trade, but also such a portion of the effects acquired by him after obtaining the *cessio*, as is indispensably necessary for his support, are secured to him. In the present case, where the sums earned by the debtor are barely sufficient, with the utmost frugality, to maintain him and his numerous family in that decent manner, which the nature of his employment requires, the proceedings that have been held must appear equally irregular and unauthorised; *Quon. Attach.* c. 7, § 3; *Erskine*, b. 4, tit. 3, § 27.

Answered: In consequence of a *cessio bonorum*, a debtor merely obtains an exemption from personal arrests. Whatever he afterwards acquires, whether by his own industry, or by other methods, is liable to the diligence of his creditors.

If, indeed, a creditor were to exercise his right in an oppressive manner, as by poiding the body-clothes of his debtor, or the tools which are necessary for providing his subsistence; this, as an abuse of legal execution, would be liable to correction. But, beyond this, our customs have never gone; the *beneficium competentiae*, as known in the Roman law, being only admitted with us in the case of gratuitous obligations, or in those where the parties stand in the relation of parent and child to each other. And, in circumstances such as the present, where the sums due to the user of the diligence are so inconsiderable, that after payment, there is still a sufficiency left for enabling the debtor to live, with that frugal economy, which becomes one in his unfortunate situation, it seems impossible to doubt the legality of the measures that have been followed; 11th July 1778, Patrick Reid *contra* Matthew Donaldson.

The Lord Ordinary suspended the letters "*quoad* the suspender's person, wearing apparel, and working-tools; but found the letters orderly proceeded *quoad ultra*."

After advising a reclaiming petition for Robert Pringle, with answers for Alexander Neilson, it was

Observed on the Bench : There is no example, where the *beneficium competentis* in the extent known in the Roman law, has been recognised in the Scots courts [1395] And in the case under consideration, it does not seem necessary to give any determination on the point. But, if the creditors of a bankrupt, who had obtained a *cessio*, were to proceed in such a way, as not even to leave him the necessary of life ; as the purpose of the law would thus be frustrated, it would doubtless be competent for the Court of Session to apply a remedy.

"The Lords refused the petition," thus affirming the judgment pronounced by the Lord Ordinary.

Lord Ordinary, DUNSINNAN.—Act. DICKSON.—Alt. GEO. FERGUSSON.—Clerk, SINCLAIR.

Craigie.

Fol. Dic. v. 3, p. 73. Fac. Col. No. 42, p. 70.

No. 2. [1397] WILLIAM DOUGLAS v. Colonel ERSKINE. February 18, 1715.

Bills for fungibles are not privileged as bills of exchange. Indorsee considered as an assignee.

Colonel Erskine drew a bill upon his salt-grievs of Torrie or Kincardine, to deliver 420 bolls of salt to Archibald Ronaldson, for which he had received satisfaction. Ronaldson indorsed the bill to William Douglas for value received, who pursued the Colonel to deliver the salt, who alleged, 1mo, That a salt-bill had not the privilege of a money-bill, which passes *de manu in manum* ; but that bills for salt are liable to all exceptions as other debts, and an indorsee is but an assignee. And, in this case, the true cause of the bill was a mutual bargain, whereby Ronaldson was to pay the salt in meal, or the Colonel to pay the value of 200 bolls [1398] of meal in salt ; and, as the Colonel drew the salt-bill libelled, so Ronaldson gave an obligation, of the same date, to deliver 200 bolls of meal to the Colonel ; and having broke shortly after, he absconded, never delivered the meal, nor required the salt for the space of several years, till of late, that the pursuer obtained from him an indorsation. The defender also alleged, That he had retention, in respect of the counter-obligement by Ronaldson never implemented ; and that, the bill having lain over for so many years, the counter-obligement was relevant and competent against Ronaldson and his assignee or indorsee.

"Which the Lords sustained."

Dalrymple, No. 139, p. 193.

No. 57. [1460] ANDERSON v. TURNBULL. July 19, 1706.

Aprecept to account for fungibles, drawn in favour of a third party, requires intimation.

Arbuthnot, merchant in Stonehive, draws a precept on Herriot in Dirleton, in favour of David Anderson, merchant in Montrose, that he may count with him for 190 bolls of meal, and 51 stones of iron ; and take his receipt for what he should pay him ; and Arbuthnot obliges himself to allow it to Herriot. Anderson pursuing, compearance is made for George Turnbull, writer to the signet ; who craved to be preferred, as having arrested this debt in Herriot's hands, as creditor to Arbuthnot, long before any intimation made by Anderson of his precept ; which being only of the nature of an assignation, could take no effect till intimated ; and so he, by his arrestment, did first affect the subject.—Alleged for Anderson, 1mo, His order and precept being of the nature of an inland bill of exchange, it needed no intimation, being between merchants, and *in re mercatoria* : And Stair, lib. 3, tit. 1, § 12, says, intimation being only a municipal custom, holds not in orders among merchants ; and, therefore, the first order to pay, is preferred to arresters, though neither intimation nor acceptance follow. [1461] And Mr. Forbes, on bills, page 166,* prefers an indorsement to an arrestment ; 10th July 1698, Ewing *contra* Geills ; all such deeds, for the

* Edition 1703.

dispatch of trade, being regulated by the laws of nations, and not by local customs of particular countries.—Answered, That bills of exchange, for liquid sums, had that privilege and exemption to be free of intimation; but this was not of that kind; for it neither bore a liquid sum, nor value, but required a previous counting. Likeas, no summar diligence, by horning, could have followed on the registration of this precept, as is appointed by the acts 1681 and 1696, to follow on bills of exchange; nor could a protest be taken for payment, seeing a counting behoved to precede to liquidate the debt; which requires an ordinary action, and not a summar charge of horning; and, therefore, it not being in the case of bills of exchange, it cannot plead the privilege to be free of intimation; else all assignations might claim the same, which might subvert all our securities.—The Lords found a precept of this nature required intimation, and so preferred the arrester.—Then Anderson objected against Turnbull's arrestment, that it was null, being on the Admiral's precept in an affair about a bill, which is no wise maritime, and so *a non suo iudice*.—Answered, The Admiralty being a supreme court, his arrestment extends over all; and there is nothing more ordinary than to pursue for bills of exchange before the Admiral; and to annul such arrestments might endanger and unsecure the lieges. And though once an adjudication was annulled, led on a bond registrate in the Commissary-books, as an incompetent judicatory, and another competing adjudication preferred; yet the Lords thought the consequence of that decision so great, that they afterwards altered the same. The Lords sustained the arrestment. See JURISDICTION. *Fol. Dic.* v. 1, p. 96. *Fountainhall*, v. 2, p. 344.

No. 115. [1533] WILLIAM HENRY RALSTON v. JOHN LAMONT. May 23, 1792.

The sexennial limitation of bills does not affect the claim of recourse competent to the acceptor of a bill against the drawer.

In an action of multiplepounding, brought for authorising the distribution of effects which had belonged to a person deceased, Lamont claimed as a creditor, in consequence of his having honoured two draughts by the deceased upon him; the one dated in 1778, and the other in 1779.

Ralston, a competing creditor, objected to this claim, as cut off by the sexennial limitation of 12th Geo. III. cap. 72; and, in support of the objection,

Pleaded: The enactment in general provides, that no bill of exchange, or inland bill, shall be effectual to produce action, unless within six years from the term of payment; and it is of no consequence whether the action is to be brought by the drawer against the acceptor, or by the holder against the drawer, acceptor, or indorsers, or by the acceptor against the drawer, for his relief. This seems no less evident from the words of the enactment, than from its object; which clearly was to limit all obligations arising from transactions of this sort, within such a short period as was suitable to their nature and general use.

Answered: The actions precluded by the statute, are those which naturally arise out of the bills, and in which the pursuers rest upon these documents as the sole foundation of their claim. Such are those brought by the drawer or holder against the acceptor for payment, or by the holder against the drawer or indorsers, for recourse. The present case is of a quite different nature, the production of the bill being only useful as a circumstance of evidence. The obligation itself, or the right of action, arises from the advance of the money, which may be proved in many different ways.

The Lord Ordinary repelled the objection.

In a reclaiming petition, besides the argument on the statutory limitation, it was contended, That the bills having been accepted in general terms, a presumption arose, that, at the time, the acceptor had in his hands effects belonging to the drawer. That presumption, however, appeared to be sufficiently obviated by the circumstances of the case.

After advising the reclaiming petition with answers,

The Lords adhered to the Lord Ordinary's interlocutor. See PRESCRIPTION.

Ordinary, LORD JUSTICE-CLERK.—For Ralston, MONTGOMERY.—For Lamont, MACLEOD-BANNATYNE.—Clerk, MENZIES.

No. 199. [1641] GEORGE SCOUGAL v. ANDREW KER. February 24, 1762.

A bill was indorsed away 20 months after the term of payment, during which time diligence had been done upon it. It was found to have lost its privileges, so as to render compensation against an onerous indorsee competent.

Andrew Ker purchased some cattle from Charles Ker, in May 1755, for the price which he accepted a bill to Charles, payable at the term of Martinmas thereafter.

In July 1757, about 20 months after the term of payment, Charles Ker indorsed the bill for value to George Scougal, who brought his action against Andrew Ker the acceptor, for payment; and having obtained decret in absence, the same was suspended by Andrew Ker.

Pleaded for the suspender: The bill having been allowed to lie over for 20 months after the term of payment, without being indorsed, or any diligence done upon it, has lost the privilege peculiar to bills, and is now subject to every exception competent against the original creditor: The suspender is therefore at liberty to plead compensation upon a debt which Charles Ker the indorser owes to him, equal to the contents of the bill.

By the custom of merchants in all the nations of Europe, bills, before the term of payment, pass current by indorsation as bags of money, without being subject to compensation, arrestment, separate discharge, or other defence, arising from the debt or deed of the original creditor, or intermediate indorsees, in prejudice of the last onerous indorsee: But, after the term of payment is elapsed, and the money is not paid in terms of the acceptance, the debtor in the bill is considered as in a state of bankruptcy, and no merchant will give value for such bill: It may be taken in security of debt, in the same way as an assignation to a decret, or any other ground of debt, but will not be taken as a bag of money. The indorsee, in this case, trusts solely to the faith of the indorser, nor is he tied down to any of the rules of negotiation; if the bill is not paid, he returns it upon the indorsers, and gives himself no further trouble; he is, in effect, a trustee for the indorsers; and therefore, he cannot complain, if every legal objection, competent against the indorsers, is pleaded against him. Nor does it make any difference, whether the non-payment has been owing to [1642] any *mora* upon the part of the acceptor, or merely to the creditors indulgence in keeping the bill too long by him; for, if we shall suppose that the bill has been presented for payment at the term, and that the acceptor has refused to pay, very possibly the cause of his refusal may have been, that he had a liquid ground of compensation against the creditor in the bill; in which case, the creditor ought not thereafter to have indorsed it; and, at any rate, the person who takes the indorsation, takes it on the faith of the indorser, and not of the acceptor, who has thus failed. If, on the other hand, the drawer has kept the bill by him, without ever taking any step against the acceptor, or so much as presenting it to him when the term of payment comes, it is plain, that such bill has not been taken as a proper bill, to pass current in the way of commerce, but has been intended as a security for money, which is but too common a practice; and as such writings are the most frail and informal of all securities, there is no reason why in that case they should be indulged with any extraordinary privileges.

The term of payment, therefore, is the period at which the privileges of bills ought regularly to expire, as it is then that a bill ceases to be considered as a bag of money; at the same time, as the act 20th Parl. 1681 has allowed six months after the term of payment for registration and summary diligence, it may be thought that the other privileges of bills ought, from analogy, to have the same endurance; but certainly they ought then to be at an end; the bill no longer admits of summary execution, but must be pursued by way of ordinary action, like any other simple ground of debt, and consequently ought to be subject to the common defences pleadable in ordinary actions. Accordingly, it has been found in many cases, that compensation upon a debt of the indorser, is pleadable after the elapse of three, four, and five years; and for the same reason, the compensation ought to be sustained in the present case; for, unless either the term of payment, or the six months allowed for summary diligence, shall be adopted as the rule for the expiration of all the extraordinary privileges of bills, it does not occur what other period can be fixed upon between these and the long prescription; and it is obvious what mischief would follow if bills were allowed to pass current as bags of money for 40 years.

Answered for the charger :—It is clear, that bills pass current for some time at least, without being liable to any exceptions proponable against the authors and indorsers ; This arises from the very nature of such writings, without which they could not answer the end for which they were introduced and received in all trading nations. The only question is, At what period of time does this privilege expire ? The natural and obvious answer is, That it lasts as long as the bill passes current by indorsation, and produces action as a probative writ. The term of endurance of bills is indeed, in most nations, limited to a few years ; in England to six, in Holland to seven, and in France to five. In Scotland, it happens unluckily, that there is no short prescription of bills ; and perhaps it might be inconvenient, if all their privileges were allowed to accompany them as long as they are probative, and pass by indorsation ; but surely it is equally improper to go to the contrary extreme, and circumscribe these privileges to [1643] the short term of six months. It is true, that the form of registration and summary diligence is confined by the legislature to six months from the term of payment ; but this has no manner of connection with the other privileges of bills : It is a statutory privilege, superadded by the law of this country to those which bills had from their own nature, and from the law of nations. The legislature did not mean to abridge those other privileges ; on the contrary, the preamble of the act expressly refers to the law and custom of other nations. Nor is it of any importance, that, after the six months, payment must be sued for by way of ordinary action. Before the statute, no summary execution at all was competent ; and yet it is admitted, that bills even then passed current for some time, without being liable to exceptions arising from the debt or deed of the indorser.

And it would be still more unreasonable to limit the privileges of bills to the term of payment. No person scruples to give money for an indorsation where the term of payment is but a short time elapsed : He may indeed recur upon the indorser, though he should not negotiate very punctually ; but he likewise trusts to the faith of the debtor in the bill, who is bound by his acceptance, and lays his account with being liable to every person into whose hands the bill may come ; nor can there be any good reason why the acceptor should be benefited by the negligence or indulgence of the creditor in not demanding payment exactly when the bill becomes due.

As the law, therefore, does not limit the privileges of bills to either of the periods above-mentioned, the only question is, How far the Court, from motives of expediency and public utility, ought to limit those privileges to any shorter term than the duration of the bill itself, and what this shorter term ought to be ? This question, originally arbitrary, is now fixed by decisions ; upon the faith of which, the lieges have in all probability rested ; for the Court having found, in the case of *Farquharson contra Brown*, 6th February 1719, No. 183, p. 1626, that a bill which had lain over for three years had lost its privileges, it was thereafter decided, in the case of *Grierson contra Earl of Sutherland*, February 1728 (No. 184, p. 1626), That a bill which had lain over for two years and eleven months, from the term of payment, was still current as at the beginning ; and that compensation upon a debt of the indorser's was not pleadable against the onerous indorsee : From which decisions, it is plain, that the space of three years from the term of payment has been fixed upon by the Court as the proper period for the duration of the extraordinary privileges annexed to bills in this country.

“The Lords found compensation competent.” See COMPENSATION.

Act. ILAY CAMPBELL *et* BURNET.—Alt. PAT. MURRAY *et* WALTER STEWART.

Fol. Dic. v. 3, p. 91. *Fac. Col.* No. 79, p. 174.

No. 9. [13] JOHN PHILIP *v.* JAMES and WILLIAM MILNE. January 15, 1800.

An onerous indorsee is entitled to demand payment of a bill of exchange from the acceptor, after six years from the term of payment, although it was accepted solely for the accommodation of the drawer, the acceptor's subscription not being denied, nor payment alleged.

In March 1787, James and William Milne accepted a bill payable three months after date, drawn by James Milne, son of the former, and brother of the latter.

The drawer indorsed it to Robert Brand. After his death, it was assigned to his representative to John Philip, who, in 1794, raised an action against the acceptors for payment of it.

They stated in defence, that it had been accepted by them solely for the accommodation of the drawer; that it had been indorsed by him without value; and they pleaded prescription.

The Sheriff gave judgment against them, in respect that they did not allege payment.

In a suspension, the Lord Ordinary found that the bill was prescribed, and called on the charger to say, "Whether he would, in terms of the statute of limitations, undertake to prove resting and owing by the writ or oath of the debtor?" And on his refusing to do so, suspended the letters *simpliciter*.

Upon advising a petition, with answers, the Court were of opinion, that if Brand was an onerous indorsee, the charger was, in the circumstances stated in the defence, entitled to payment without further proof; but, before answer (29th November 1797) remitted to the Lord Ordinary to inquire into the fact.

A proof was allowed, from which his Lordship (29th February 1799) held it established, that Brand was an onerous indorsee; and following up the opinion of the Court found the letters orderly proceeded.

In a reclaiming petition, the suspenders contended, that as six years had elapsed without diligence or action on the bill, it was, in terms of 12th Geo. III. c. 72, at an end as a document of debt; and that therefore it was incumbent on the charger to prove a debt now subsisting against the acceptors, which was not instructed by the defence.

The charger

Answered: That the right of an onerous indorsee could not be affected by the cause of granting the bill; and that the defenders having interposed their credit as cautioners for their near relation, though *ex facie* joint obligants with him, and not pretending that they had paid the bill, must still do so to the third party who had trusted to their security. See 19th November 1784, Robertson v. Clarkson, No. 56, p. 13244.

The Court were not unanimous; but the general opinion was in favour of the charger, the bill being as much due now as on the day it was accepted, and it not being a relevant defence that it was originally granted without value.

The Lords adhered.

Lord Ordinary, MONBODDO.—For the Charger, JOHN CLERK.—Alt. W. RAE.—Clerk, COLQUHOUN.

D. D.

Fac. Col. No. 155, p. 349.

No. 20. [25] STEPHENSON v. STEPHENSON'S TRUSTEES. June 16, 1807.

In a bill payable on demand, prescription runs from its date.

William Stephenson advanced a sum of money to his two sons, Joseph and Thomas, to purchase stock for their farms, and obtained from them a promissory-note for £892, 7s. 2½d. dated the 5th of January 1796, payable to him on demand, with interest.

No demand was made either for principal or interest during the life of Joseph and Thomas Stephenson; but after their death, William Stephenson raised an action against the trustees of Joseph, and the children of Thomas Stephenson, [26] for payment of this promissory-note. The action was not raised till January 1804.

The trustees stated in defence the sexennial prescription, and the Lord Ordinary took the case to report.

Against this defence, the pursuer

Pleaded: The sum contained in the promissory-note was payable on demand. No demand was made till the present action was raised; and as the sexennial prescription introduced by the act 1772, c. 12, begins to run only from the term "at which the sums in the said bills or notes become exigible," it is evident, that prescription has not run in the present case.

It is very true, that in many cases a bill payable on demand becomes exigible the instant it is granted. The same thing may be said of a bill payable at sight. But until the holder of the bill shall fix the term of payment by demanding his money,

payable on demand, or presenting his bill, if payable at sight, the money does not become exigible in the sense of the statute. In the general case, the term of payment is accurately pointed out by the precise day mentioned in the document. But in bills payable on demand, or at sight, the term of payment is fixed by a reference to a particular act to be done by the creditor, and it is then only that the term of payment arrives. If, therefore, prescription were to run from the date of the bill, it would commence before the term of payment. In cases of foreign bills, where the holder and the acceptor reside in different quarters of the globe, it is evident, a bill on demand is not exigible for many months after its date. It is indeed only in very particular cases, that the date of the bill can be the term of payment; and as the tendency of our decisions has been rather to enlarge than to limit the period of prescription, *Douglas, Heron and Co. v. Grant*, Nov. 19, 1793, No. 108, p. 4602, it is impossible to hold that prescription can in any case begin to run before the money contained in the promissory-note becomes payable.

Answered: The indefinite endurance of bills of exchange, and the discrepancy of decisions which necessarily ensued, gave rise to the act 1772, introducing the sexennial prescription, the express object of which was to remedy this grievance. Bills of exchange were introduced for commercial purposes, and it is only in this view that they are invested with extraordinary privileges; but if they were to have an endurance of forty years, they would be applied to other purposes, and thus supersede bonds and all other securities. Accordingly, before the act 1772, this evil was strongly felt; See No. 188, p. 1628; Bankton, b. 1, tit. 13, § 31. Now, the doctrine of the pursuer would introduce this uncertainty into one class of bills, viz. such as are payable on demand, and put them upon the same footing as bills of exchange were before the enactment of that statute.

The act 1772 declares, that prescription on bills shall run from the time when the debt contained in them "is exigible," i.e. from the time when it is in the power of the creditor to demand payment. Now, in bills on demand, [27] it is in the power of the creditor to call upon the acceptor for payment the day they are granted, and consequently prescription must run from that date. Had it been meant otherwise, it would have been provided, that prescription commenced from the period when the debt was exacted, or payment of it demanded, which is very different from the time when it is exigible; for a debt may be demanded when it is not exigible, and it may be long exigible before it is demanded. By the other construction of the statute, it would follow, that an act which professed to limit the endurance of bills of exchange, should extend the period of endurance of bills payable on demand to an indefinite endurance, because, as the demand may be indefinitely delayed, there is no term from which even the long prescription of forty years can commence. As to foreign bills on demand, cases may be figured where they are not exigible on the day of their date, on account of the distance of the parties. But it was with a view to such contingencies, that so long a period as six years was fixed on as the term of prescription, which is much longer than is requisite in the general case.

The Lords, 14th Jan. 1807, "find, That the promissory-note libelled on is cut off by the sexennial prescription."

And they afterward, by a very great majority, adhered, upon advising a reclaiming petition, with answers.

It was observed, that both the words of the act 1772 and the general scope of the statute, were in favour of the decision, and that if the opposite doctrine were to be held, we should never see a bond in this country, as a bill payable on demand would supersede all formal securities. Two of the Judges, however, held, that a debt was not exigible, in the sense of the statute, until it was demanded; and therefore, that to give effect to the sexennial prescription, it was necessary that a demand for payment should be made by the holder of the bill.*

Lord Ordinary, CULLEN.—Act. MONYPENNY.—Agent, JAMES HAY, W.S.—Alt. BAIRD.
—Agent, W. WHITE.—Clerk, MACKENZIE.

J.

Fac. Col. No. 283, p. 639.

* A similar decision was pronounced the same day in the case of *Cook v. Macjanet*, where the Lord Ordinary had repelled the defence of prescription in a bill payable on demand, and the Court altered his Lordship's judgment.

No. 22. [28] JOHN SHARP v. MARGARET HERVEY and Others. June 24, 1806.

An acceptor of a bill, "as security jointly and severally," has not the benefit of the act 1695, ch. 5.

On the 3d June 1796, the pursuer drew a bill, which was duly accepted, as follows:

"£938, 7s. 3d. Sterling. Stirling, June 3, 1796."

"Against the term of Whitsunday next, pay me, or order, at the house of James Thomson, jun., Stirling, £938, 7s. 3d. Sterling, for value received of (Signed) JOHN SHARPE."—(Addressed) "To James Thomson, jun., Stirling, as principal, and John Hervey, merchant there, as security, jointly and severally. (Signed) JAMES THOMSON, jun. JOHN HERVEY."

[29] During its currency in the years 1797, 8, 9, 1800, and 1801, various payments were made to account.

Thomson became embarrassed in his affairs; and, on the 17th August 1803, applied for and obtained an act of sequestration. Before the expiry of the ten months allowed by the bankrupt statute to every creditor to produce his grounds of debt and oath of verity thereon, Thomson made an offer of a composition of 12s. per pound, of which himself and Mr. Mayne of Powis were to grant bond for 10s. His own bond was to be taken for the remaining 2s. The offer was unanimously accepted by the creditors present, and the bankrupt was discharged. The pursuer, however, was not present at any of the meetings, and had not produced his grounds of debt.

Thomson made payment of £60, 15s., but it became necessary to raise an action against Thomson, Mayne, and Harvey, for payment of the balance.

Thomson offered no defence. Mayne objected that his bond of caution made him only liable for a composition, "on such debts as are or shall be ranked;" now the debt pursued for is not ranked, and the document of debt is *ex facie* prescribed. Before any decret can go out against the defender (Mayne) the debt must be proved against Thomson.

Hervey objected, 1st, That in respect of the act 1695, ch. 5, he is entitled to be free.—2d, That the pursuer did not give in his claim under the sequestration, in consequence of which he has not only been deprived of his dividends, but has allowed the bankrupt to obtain a discharge on a composition of no more than 12s. in the pound.

The decision on Hervey's first defence only is to be noticed.

The Lord Justice-Clerk, Ordinary (22d Feb. 1805) found, "That the ground of debt pursued on in this case is struck at by the act 1695, respecting the septennial limitations of cautionary objections."

During the dependence of the cause before the Lord Ordinary, the defender Hervey died; and his heirs and trustees sisted themselves.

The case came before the Inner-house by petition and answers.

Argument of the pursuers.

The act 1695, c. 5, applies only to bonds or contracts for sums of money, where there is a clause of relief in the bond, or where a separate bond of relief is intimated to the creditor. This statute, being correctory of the former law, has always been subjected to a rigid interpretation, and limited to the precise cases provided for by its enactments.

Thus it has been determined by numerous decisions, that bonds of corroboration and other accessory securities do not come under this act. Dict. *voce* PRESCRIPTION, Div. 7, Sect. 2, No. 223, p. 11025.

So likewise a cautioner in a bond of relief is not entitled to the benefit of the act, 29th July 1762, Ewart v. Lothian, No. 226, p. 11027.

Neither is a bond of presentation, nor a bond *ad factum prestandum* included in it. Dict. *voce* PRESCRIPTION, Div. 7, Sect. 1, No. 209, p. 11010.

[30] Likewise, no cautioner has the benefit of the statute but he who is bound along with the principal in the original bond, and not he who accedes *ex post facto*—Caves v. Spence, No. 221, p. 11020.

Thus restricted in its interpretation, the act cannot include a cautionary obligation in a bill of exchange.

1st, Because in the year 1695 such a document was almost unknown, and had

not obtained any of those privileges which that species of document has, from the subsequent extension of commerce, obtained. By the act 1681, c. 20, foreign bills had, from their importance, been privileged in registration and execution; but it was not till the year 1696, a year after the act now in question was passed, that inland bills were put in the same situation. According to Sir George Mackenzie (*Observations on act 1681*), these privileges had been withheld, "because, if that had been allowed, all debts had still been constituted by bills and not by bonds; and so had been privileged by too summary petitions." Inland bills, therefore, could not at that time have been a means of borrowing money; and were not in law considered to be either a contract or bond. They were an unprivileged and unimportant document, and could not have been in the contemplation of the Legislature when the act was framed.

2d, Because a cautionary obligation can only be constituted by a writing accompanied by the solemnities of the act 1681; 21st July, 1772, *Crichton and Dow v. Syme*, No. 328, p. 17047; November 25, 1782, *Wallace v. Wallace*, No. 333, p. 17056. In a bill, therefore, which is destitute of these solemnities, a cautionary obligation cannot be contained.

3d, Because the nature, uses, and privileges of a bill are altogether inconsistent with the constitution of a cautionary obligation; and the term cautioner, to which alone the act is directed, cannot apply to an acceptor or indorsee. In law, a bill is not a bond or contract, nor is it acknowledged as a mode of borrowing money. "A bill is an open letter, a request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third shall order it to be paid; or it may be payable to the bearer" (*Jacob's Law Dict. voce Bill of Exchange*). By law, a bill is destined and created for mercantile convenience; and for this purpose is invested with extraordinary privileges. All the acceptors and indorsees are jointly and severally liable; and the onerous holder cannot be met with many of those objections which might be pleaded against the original creditor, or any of the successive indorsees. But to permit, in favour of an acceptor, an exception under the act 1695, would be to impede the credit and circulation of bills, and deprive them of that quality which alone can render them useful in mercantile affairs.

In fact, every indorsee is a cautioner, and is entitled to be relieved by the person from whom he received the indorsation, *retro* to the drawer. But it has never been maintained that the act 1695 applied to such a case.

[31] So far as the act 1695 is concerned, it makes no difference whether there is a clause of relief in the bond or contract, or there be a separate bond of relief intimated to the creditor. Now, if, in the present case, the acceptance had been unqualified, and a separate bond of relief had been intimated to the drawer, it is clear that the act of Parliament could not have applied. Such a plea could not have availed against an onerous indorsee; yet, if the act applies at all, it must reach this as well as any other case, and the expiry of seven years must have brought with it a relief from the obligation. The frequent change of the creditor, arising from indorsation, and the privileges granted and required to render a bill indorsable, shew that it is not a bond or contract in the sense of the act.

Every creditor, likewise (who has not dispensed with it), is entitled to the *beneficium ordinis*. But all the acceptors of a bill are jointly and severally liable; and the word cautioner introduced into the bill itself can serve no other purpose but to ascertain with more accuracy the ultimate relief of the one acceptor against the other. On these principles the Court have proceeded in deciding several cases.

Thus, it was decided, that where there were three acceptors of a bill, and another person had, by a separate missive, promised that, in farther security, the bill should be paid when demanded, the act 1695 did not apply to this separate obligation, 7th Dec. 1784, *Howison v. Howison*, No. 228, p. 11030.

So likewise it was found that a cautionary obligation could not be constituted by bill; the term cautioner added to the subscription of an acceptor was held *pro non scripto*, and he was found jointly and severally liable; 27th November 1753, *Gibson v. Campbell*, No. 11, p. 1406.

Neither is there any room for argument on the ground that a person, who has incurred only the qualified obligation of a cautioner, cannot be subjected to the unqualified obligation of an acceptor. Every person subscribing a bill or any other

obligation is presumed to be acquainted with the law by which his obligation is governed.

Argument of the defender.

Bills of exchange, both inland and foreign, had become of national importance, and were known and sustained in law, at a date far previous to the year 1695. Foreign bills had, in the year 1681, been clothed with the privileges they at present enjoy, and inland bills were put in the same situation in the year 1696. From this it is obvious, that in practice their importance had been acknowledged, and their utility discovered; and the Legislature, in this as in most other cases, merely obeyed the antecedent dictates of public opinion. But there is evidence from the decisions of the Court, that bills had been in use at a much earlier period; 1st Feb. 1669, *Brown v. Johnston*, No. 6, p. 16803; *Stair*, b. 1, tit. 11, § 7; 23d July 1629, *Lindsay v. Gray*, No. 123, p. 1543. The proper subject of bills is money; and whether they are used as a mode of borrowing money, or transferring it from one place to another, is a circumstance altogether contingent and accidental. In daily practice, the object of a bill is to borrow money; and it was so in the present instance. Of all the modes of borrowing money, that by bill comes the most forcibly within the intention of the act. The formalities attending the execution of a bond afford the cautioner time for reflection; while, in a moment of rashness and facility, a bill, from its simplicity, is the most likely to be subscribed. Whether, therefore, the importance of the document, its object, or its simplicity be considered, there is no reason for concluding that it was not in the view of the Legislature. But farther, a bill is a contract. By one writer, it is called a contract of *mutuum*; by another, a contract of mandate; and by another it is said to partake of the nature of both. To what class it belongs is immaterial; but it is, in this case, a contract containing, *in gremio*, a clause of relief. *Stair*, b. 1, tit. 11, § 7, *Bankt. b. 1, tit. 13, § 1*, *Ersk. b. 3, tit. 3, § 25*.

That, in a case where the bill has undergone indorsement, and where the bond of relief is contained in a separate writing, the act 1695 should not apply, is obvious. A bill is not liable to any objections which do not appear *ex facie*. But, on the other hand, a bill is liable to every objection appearing on the document itself. Now, in this case, the qualified acceptance was on the face of the bill; and every indorsee must have seen that it came within the act 1695. Accordingly, a qualification more inconsistent with the nature of a bill, was sustained in a case wherein the exclusion of the *jus mariti*, in a bill taken to a wife, was found to be effectual; 11th January 1750, *Mungel*, No. 9, p. 5771.

If, however, a cautionary obligation cannot be constituted by bill, the document must be null. By the act and consent of the drawer himself the obligation was qualified, and the acceptance would not have been adhibited but upon that condition. To hold *pro non scripto*, so important a condition, and to extend an obligation beyond the intention and without the consent of the person by whom it is to be incurred, is inconsistent with the principles of justice.*

* The following cases may not perhaps be unacceptable, and may throw some light on the subject of this report. They are to be found in a collection of cases in the form of a dictionary, made by the late Lord Elchies, and lately presented to the Advocates' Library by Sir James Montgomery, Bart. (J. W.)

MSS. Elchies' Collection, p. 54, *voce* Bill.—A bill drawn upon, and addressed to a father and son, the father as principal and the son as cautioner, but accepted by both simply, was found null *quoad* the cautioner, 15th Jan. 1736, *Gillespie v. Barr*.

Ibid. p. 56.—A bill drawn on one as principal, and other two as cautioners conjunctly and severally, being paid by and indorsed to the cautioners, recourse sustained against the successors of the principal, 18th June 1742, *John Alexander v. Scott*.

Ibid. p. 61.—A bill accepted by one as principal, and another as cautioner, being suspended by the cautioner, for that a cautionary obligation could not be created in the form of a bill; the suspender, on oath, acknowledged that he had wrote the bill; that he agreed to become cautioner, and therefore wrote it in that form; that the charger objected to the word cautioner, and that the suspender answered, that he would be bound in no other way. First Lord Kilkerran, and then the whole Court, repelled the reason of suspension; and Drummore (who was in the chair), doubt-
[33]—ed if being bound as cautioner was a nullity, 27th November 1753, *James Campbell v. David Gibson*.—(This newly acquired Collection of Decisions by Lord Elchies, will be inserted in APPENDIX, PART II.—W. M. M.)

[33] Several of the Judges agreed with the interlocutor of the Lord Ordinary; and expressed their opinion, That what might be the effect of such a qualified acceptance in a question with indorsees, it was unnecessary to inquire. This was a question with the drawer, by whose act and consent the acceptance was qualified and cautionary. The obligation was distinctly that of a cautioner. A bill might be evidence of the contract of *mutuum* as well as a bond or any other writing; and is one of those obligations incurred in an urgent and momentary exigence, which it was the humane intention of the statute to limit to seven years. Where a person has accepted a bill as cautioner, the obligation must either be of that nature, or null; because it is impossible, consistently with justice, to render an obligation more extensive than the parties themselves have stipulated. There is no greater anomaly in such a qualified acceptance, than in an indorsation without recourse, which is frequent in practice.

But a majority of the Judges were of a different opinion; and observed,

A bill is a document of a nature distinct from that of a bond or contract; is introduced for different purposes; and is invested with different privileges. Its province is in law considered to be the transference, not the loan of money. It does not, therefore, come under any of those transactions enumerated in the act 1695, and to which that act was intended to apply.

With the nature of a bill, a cautionary obligation is altogether incompatible; and in a question with the drawer or creditor, there can be no cautioner. A party subscribing incurs a joint and several obligation, and is not entitled to the benefit of discussion. The law, therefore, by which cautionary obligations are governed, totally fails in its application to such a case; neither is any injustice committed against the acceptor, because every one voluntarily subscribing either a bill or any other obligation, is presumed to know the legal consequences of the obligation which he has undertaken.

The following interlocutor was pronounced, 24th June 1808.

"The Lords having resumed consideration of this petition, and advised the same, with answers thereto, adhere to the interlocutor reclaimed against, in so far as it repels the defences stated for John Hervey, and decerns; finds the respondent entitled to the full expense of extract, but no other expense, and decern; but remit to the Lord Ordinary to hear parties on the question against whom the decree shall go out, and to do thereanent as his Lordship shall see cause."

Lord Ordinary, JUSTICE-CLERK.—Act. JOHN MACFARLAN.—Alt. AR. FLETCHER.—
JO. BRUNTON and A. JAFFRAY, Agents.—M. Clerk.

J. W.

Fac. Col. No. 61, p. 226.

No. 19. [1677] FAIR v. CRANSTON. July 11, 1801.

The representative of a person, in whose repositories was found a bill blank in the drawer's name, was found entitled to insert his own name as drawer.

There was found in the repositories of James Fair, agent for the British Linen Company at Jedburgh, deceased, a bill at three days' date, for £40, blank in the drawer's name, subscribed by three acceptors, of whom Robert Cranston was one. On the back was marked a receipt for £15.

William Fair having been confirmed executor to the deceased James Fair his father, inserted his own name as drawer, and brought an action against Cranston, in which he obtained decree in absence. Cranston having attempted a suspension, Lord Cullen found the letters orderly proceeded. On advising a representation, with answers, his Lordship pronounced this interlocutor: "In respect it is clearly proved, by the excerpts from the books of the late Mr. James Fair, that the bill in question, dated the 11th day of June 1793, payable three days after date, was granted for the sum of £40 Sterling, then advanced by him to the suspender, and the other acceptors of that bill, and that a partial payment of £15 Sterling was made upon the

17th of September thereafter, and which partial payment is marked on the back of said bill; and further, although the said James Fair omitted to subscribe his name as drawer, and that it remain-[1678]-ed in that situation till his death, in the year 1796; yet, as the present charger, his son, has expedited a confirmation as executor to him, and has thereby vested in himself a right to the said bill, and adhibited his name as drawer, before producing the same in judgment: Therefore, adheres to the interlocutor complained of, and refuses the desire of the representation; but supersedes extract till the third sederunt day in May next."

The cause was brought before the Court by petition; in which it was pleaded, That the bill must be considered as blank in the creditor's name, and therefore void and null; Erskine, b. 3, tit. 2, § 28; Macraith v. Murdoch, No. 37, p. 1436; Walkingham v. Campbell, No. 23, p. 1684; Douglas and Wood v. Logan, No. 41, p. 1438; Cathcart v. Representatives of Dick, No. 42, p. 1439; Robertson and Ross v. Bisset, No. 18, p. 1677; act 1696, cap. 25.

It was further pleaded, That the writing founded on being defective as a bill, could not be sustained on any other footing, as a voucher of debt. It was not a bill, because not a mandate. It was no promissory note, because it contained no promise to pay. It was not a deed, because it had not the statutory solemnities: And it was not holograph of Cranston.—The confirmation conveyed the document, such as it was; but it could not make it better; Erskine, b. 3, tit. 2, § 28.

The Court refused the petition without answers.

A second petition was likewise refused without answers.

The Court were nearly unanimous. It was observed on the Bench, That from the books of the deceased, and the partial payment, it was evident who was meant to be drawer, which was sufficient in an action for payment of the debt, which this was, not a charge upon the bill. It was likewise said, that a blank acceptance, found in the repositories of a defunct, may be filled up by his representative, and diligence may proceed in his name.

For Pet., JOHN CLERK.—Agent, WM. RIDDELL, W.S.—Clerk, HOME.

No. 22. [1681] Sir JOHN KENNEDY of Culzean v. Mr. HUGH ARBUTHNOT of London, Mariner. July 13, 1722.

The act was extended to a disposition of tailzie, blank only in the substitution; so as to annul that substitution, though afterwards filled up according to the directions of the tailzier.

The deceased Hugh Kennedy of Baltersan, whilst on deathbed, made a disposition of his estate to his only son John, and the heirs of his body; which failing to blank. And the disposition appears to have been signed with a blank, as to the substitutes. Subjoined to the subscription of parties, there is a doquet, empowering Fergusson of Auchinblain to fill up the blank in the disposition, with the names of John Kennedy younger of Culzean, and his heirs, &c.; and the said blank appears now to be filled up accordingly. The words of the doquet are, "I Hugh Kennedy of Baltersan, do hereby declare, that I give power and warrant to William Fergusson of Auchinblain, to insert the names of John Kennedy younger of Culzean, and his heirs; and failing him, to Sir Archibald Kennedy of Culzean, and his heirs, in the above disposition. I have subscribed thir presents at Baltersan, 17th February 1701, before these witnesses, Mr. Alexander Fairweather, minister at Maybole, and the said William Fergusson, writer hereof." John Kennedy, only son to the said Hugh Kennedy, maker of the disposition, dying without issue, Hugh Arbuthnot of London took out briefs to serve himself heir of line to Hugh Kennedy, who died last vest and seased; the service being before the macers, the Lords named assessors, and Sir John Kennedy having insisted that the lands of Baltersan should be struck out of the claim, both parties agreed to dispute their rights. And,

It was objected for Hugh Arbuthnot against the disposition, That the same was void as to the substitution in Sir John's favour, because the deed is after the act anent blank writs, and was blank as to the substitution at signing; so that what-

ever may be said of the other parts of the disposition, what clauses were blank at the signing are utterly void.

It was answered, That since this act 1696 does declare, "That all writs otherwise subscribed and delivered blank, than is by that act directed, shall be null," it can never concern a blank substitution in a deed of this kind, because the filling up the substitute, contrary to the act, can never in sense annul the writ as to the institute ; but since the certification is, "that the writ shall be null, not that the filling up of the blank shall be null," the law must certainly and only concern those writs, where the subsistence of the writ depends upon the filling up of the blank ; for instance, where the creditor's name in a bond is blank, or the first institute in a disposition : But since the writ cannot be void, where the institute is filled up, although the substitution be blank ; this is *causus omissus* in the law : The filling up of that substitution is left upon the footing of the former law ; and therefore cannot be quarrelled upon pretence of this act. 2do, This act can have no relation to a blank filled up by an order in writing of the granter himself, where the name of the person to be filled up is expressly mentioned in the written order, and that order signed before witnesses in the most solemn [1682] manner : Here there could be no fraud, nor occasion to give pleas, to prevent which the act was introduced, more than if the blank had been filled up before signing the original deed.

"The Lords found the disposition was not filled up in terms of the act 1696, anent blank bonds, &c., and therefore must still be looked on as blank in the substitution."

It was pleaded in the next place for Sir John Kennedy, Though the Lords have found the disposition no better than blank as to the substitution, after which he has no access to serve heir of tailzie to Hugh Kennedy, the maker ; the doquet is still a legal declaration of the said Hugh Kennedy's intentions that he should be substitute, and must have at least the force of a *fideicommiss*, so as to oblige the heirs-at-law to make the substitution in Sir John's favour, by granting a direct conveyance.

To which it was answered, It is not every declaration of intention that constitutes a right or transmission, else there would be soon an end of our settled forms and solemnities. In constituting rights and conveyances, the regular, legal, dispositive, or obligatory words must be used, before a person can be deemed to convey, or bind himself ; and therefore, though one's intention do appear, if it is not expressed in proper words, to convey or oblige, it has no legal effects ; and it would doubtless be of very dangerous consequence, to give any colour to the alteration of the style, by which heritage is ordinarily conveyed. For this reason it is, that heritage cannot be conveyed in a testament, though made in *liege poustie* : And the Lords in such a case would not even find, that the testament imported an obligation upon the heir-at-law to denude : Nor would a substitution be sustained, if made in a testament ; because a substitution is still a disposition of the heritage to the substitute. Upon the same account, a missive letter of a defunct, declaring his intention to dispoise his estate to a third party, in prejudice of his heir, would neither be good as a disposition, nor import an obligation upon the legal heir to denude.

Replied, As to the great danger of allowing the style of conveyances to be altered, Sir John Kennedy knows no danger at all in it : Besides, he is insisting upon nothing that is contrary to the formal style of conveyances ; for when the heir-at-law comes to implement the will of the defunct, he will be obliged to implement it by a very formal conveyance : But the law hath not tied down proprietors to a precise form, especially in naming of substitutes ; any thing in the world does it, that expresses the will of the granter. And indeed it is no absurdity, that a man should name a substitute by a missive letter, if the date be supported, the writer expressed, and such formalities adhibited, as will hinder it to be a null deed. It is true, it has been introduced by custom, that no deed concerning heritage can be contained in a testament, for which, perhaps, no good reason can be assigned ; but the law hath not prohibited heritage to be disposed of by any other deed ; so that there is no arguing in this case from a testament, to any other form of writing.

[1683] "The Lords found, That the doquet imports a substitution in favours of the persons therein named." (Referred to *voce* VIRTUAL, SUBSTITUTION.)

The doquet being sustained as a good nomination of the substitute, it was objected against it by Mr. Arbuthnot, that it was made on deathbed, and so not good against him the heir.

It was answered for Sir John, That this deed, though done on deathbed, is not reducible, because it was not to the prejudice of him who was apparent heir at the time, he being the institute, and the heirs of his body first in the substitution; and that it was unheard of, that a remoter heir, who came only to be heir at the end of many years, could quarrel a deed as done *in lecto* in his prejudice, if it was not to the prejudice of him who was apparent heir at the time. It is very true, that if a deed be done in prejudice of the immediate apparent heir, and that immediate apparent heir die, without ratifying or homologating the deed, the next in succession can quarrel that deed, *ex capite lecti*, not as heir to the granter, but as heir to the apparent heir who is leased; and not upon that ground, that the deed was done to the prejudice of him the remoter heir, but because it was *ab initio* in prejudice of the immediate heir. This seems to be an undoubted point of law, plainly established by practice; for since the immediate apparent heir, by consenting to the deed, or homologating, can validate any deed on deathbed, so as to exclude every after-heir, yea though the immediate apparent heir should never enter heir; it is a plain proof, that the deed must be in prejudice of the immediate heir at the time, otherwise not reducible, because he can only consent for his own interest. And in this way falls to be explained the decision, 16th July 1672, Gray *contra* Gray; Stair, v. 2, p. 101, *voce* DEATHBED.

Replied for Mr. Arbuthnot, He must take the liberty to contest the principle, "That the law of deathbed favours only the immediate and not the remoter heirs," since the rule, as it is established by our law and practice, regards heirs without distinction; and the reason of the law seems to concern the remote, as well as the immediate heir. The intention of this constitution, was, doubtless, to prevent the importunities of designing people, who might take advantage of the weakness, or want of judgment of persons in sickness, to persuade them to defraud their heirs; and, in proportion as a sick person might be easier wrought upon, to disappoint a remote relation than a nearer, it would have been reasonable in the law to guard against that event more carefully: For example, a dying person leaving an infant son, and perhaps a sister or sister's children, would be very hardly prevailed upon to disinherit his infant child, but might more easily be persuaded by importunity, to substitute strangers to his own son, to the clear exclusion of his heirs in blood. And if it shall be supposed, that it was the intention of the law to prevent such abuses, reason demands, that the sanction of it should strike at that sort of abuse, which is more easily committed, with the same force at least, as against that other sort which is more difficult to be committed. It is no objection to this, that the immediate apparent heir's consent, does exclude every after-heir from quarrelling; whence it was inferred, [1684] that deathbed is only competent, when the immediate heir is leased; for his consent has this effect, whether he or any subsequent heir suffer by the deathbed, in respect, 1mo, That thereby all suspicion of fraud or imposition is taken away; and, 2do, That the consent is *fictione brevis manus*, of the same import, as if the dying person had disposed to the heir, and the heir in *liege poustie* had conveyed to the stranger, which would exclude all possibility of challenge, at the instance of the remoter heir.

"The Lords found the action of deathbed competent to Mr. Arbuthnot, though a remoter heir, notwithstanding that the nearest heir was the substitute." (Referred to *voce* DEATHBED.)

Fol. Dic. v. 1, p. 104. *Rem. Dec.* v. 1, No. 33, p. 65.

No. 23. Executors of Mr. ROBERT WALKINGSHAW v. CAMPBELL. January 8, 1730.

A bill drawn payable "to the bearer," was considered to be null as a blank writ.

John Campbell of Mamore drew a bill upon Ronald Campbell, writer to the signet, payable to the bearer, which was accepted.

The holder of the bill was Captain Patrick Ronalds, whose creditors, the Executors of Walkingshaw, arrested the sum in the hands of the acceptor. In a forthcoming, it was objected, That the document was null upon the act 1696, relative to blank writs.

After a variety of procedure, the Court pronounced this interlocutor : " Having considered the petition with answers, with the memorial, together with the act of Parliament anent blank bonds and writs, Find the bill in question not obligatory."

A second petition is introduced in this manner : " This question has depended before your Lordships since 1725. It has received six different interlocutors ; and, by no less than four of these interlocutors, the bill was found good ; by two of which, in presence, the defence on the act of Parliament was repelled." This second petition was refused without answers.—The memorial alluded to in the interlocutor was written by Lord Kames. It was argued, That bills may be considered as blank writs in two different shapes ; 1st, When the name of the drawer is blank ; and 2dly, When there are both a drawer and acceptor subscribing, but the creditor's name to whom payable is blank. The first only, it was contended, was under the eye of the legislature in the act 1696. The main design of the statute was to obviate a fraud, at that time much in use, committed by people *labentes* or *lapsi bonis*, of taking blank obligations from their debtors, which they had the opportunity of conveying privately away, in defraud of their lawful creditors. This object of the act corresponded ill with the nature of bills of exchange, the purpose of which is, that they shall pass freely from hand to hand like bags of money. It must have been this consideration which occasioned the exception of blank indorsations contained in the act : And the intention of the act is as much accomplished as it can be with regard to bills, by rendering them null, if [1685] blank in the drawer's name. For this indeed there was reason. It became an additional check against Forgery ; and, without the subscription of a drawer, the contract supposed in a bill is imperfect, and the possessor is deprived of his recourse.

As to bills subscribed both by drawer and acceptor, but blank in the name of the creditor, there can be no reason for comprehending these more than blank indorsations under the act. Both are in precisely the same situation ; and, in the spirit of the act, a bill blank in the creditor's name, ought to be exempted as well as one blank in the indorsation. The law is correctory, and ought rather to be restricted than extended in interpretation. It is besides worthy of notice, that a bill " payable to the bearer," is in fact not truly a blank writ in any respect. The drawer is in fact the creditor. The bearer is " his order."

All this argument was disregarded.

Fol. Dic. v. 1, p. 104. Session Papers in Advocates' Library.

No. 12. [1730] Children of WOLMET v. DOUGLAS and CUNINGHAM.
November 20, 1662.

A donation by a husband to a wife being revoked by posterior donation to the children ; in accounting for the interim profits, the wife was considered as a *mala fide* possessor, because she knew of the right of her children. The relation of the parties was here deemed an important circumstance.

In a pursuit at the instance of the Children of Wolmet, for the profit of the coal of Wolmet, intromitted with by Jean Douglas Lady Wolmet in her viduity, by virtue of a tack of the coal granted by umquhil Wolmet to his children for their portions : It was alleged for the defender, 1st, absolvitor, because the said Jean had right to the said profit of the said coal, ever since her husband's death, by virtue of the wadset of the lands and coals of Wolmet, granted by umquhile Patrick Edmonstoun of Wolmet, to James Loch, wherein there is a back-tack of the land and coal set to the said umquhile Wolmet, and the said Jean his spouse, for the annualrent of the money. It was replied for the pursuers, that the foresaid back-tack was taken by Wolmet *stante matrimonio*, and so was *donatio inter virum & uxorem* null in itself, *nisi morte confirmetur*, and was confirmed by Wolmet's death, but revoked by Wolmet's tack granted to his children after the said back-tack. It was answered for the defender, That the

reply ought to be repelled, because the back-tack was no donation, but a permutation, in so far as the lady, by her contract of marriage, was infeft in the half of the lands of Wolmet; which infeftment she renounced in favours of James Loch, at the taking of the wadset, and in lieu thereof, she got this back-tack, which therefore can be no donation, which must be gratuitous without a cause onerous. It was replied by the pursuers, That the duply is not relevant; for albeit it be not a pure donation, yet *quoad excessum* the superplus of the benefit of the back-tack, above the benefit of the contract of marriage, is gratitude, and a donation; and the reason of the law against donations betwixt man and wife being *ne mutuo amore se spolient*, it holds in it, and it would be easy to elude the intent of that good law, if donations contrived under the way of permutation without any real equality were allowable. It was answered for the defender, that the duply stands relevant, and the superplus of a permutation cannot be called a donation more than the benefit of an advantageous vendition: it is true, that if the donation of the back-tack had been *ex intervallo*, after the lady's renunciation, it would (not) have been *unicus contractus*, but two distinct donations; or if the matter exchanged had been *aliquid ejusdem speciei*, as an annualrent of 500 merks, with an annualrent of 1000 lib., the superplus would have been a donation; or if the lady had received a notable excess above the half, yea, above the third, of what she quitted, it might have been revocable by her husband, she being reponed to her first condition, by her contract of marriage, but here there is no such exorbitant excess, she having quitted a certain land rent for the profit of a coal, which is most uncertain, for the hail land rent would [1731] not pay the back-tack; and it is now wadset; and likewise she is personally liable for the back-tack duty.

The Lords repelled the defence and duply, in respect of the reply and triply; and found the excess so considerable in this case, that it was as a donation, and was revoked by the children's tack; but found, that before the defender made payment of what should be found due by this account, she should be reponed and put *in statu quo prius*, by her contract of marriage.

It was further alleged for the defender, absolvitor, because that albeit her right to the back-tack were revoked by the children's tack, yet she is *bona fide* possessor, *et fecit fructus consumptos suos*, according to the law of this kingdom, and of most of other nations necessarily introduced, for the good and quiet of the people; because, as to and profits, they spend as they have, and therefore what they spend *bona fide* by a colourable title, they are secured in that, albeit their title be taken away; yet they shall not be called in question for what they have enjoyed *bona fide* before sentence or citation.—It was answered for the pursuers, That the defence was not relevant in that case, where the question is not of industrial fruit, but of natural fruit, such as coal. 2do, It is not relevant, unless it were *cum titulo*, not *ipso jure* null; but here the defender's title being a donation betwixt man and wife, is by the civil law, which herein we follow, null *in se nisi morte confirmetur*. 3tio, There must be *bona fides* which is not here; because it is instructed by a minute of a contract, produced within five months before the children's tack, that the Lady consented to the providing of the children by the profit of the coal; and she cannot be presumed ignorant of so domestic an affair in favour of her own children done by her husband; and she hath given up an article in her account of the expence of registering the children's tack, by herself; and so she must be presumed to have possessed as pro-tutrix for her children, and not to defraud or exclude them.—It was answered for the defender, That the defence stands yet relevant, and the law makes no difference betwixt industrial and natural fruits; he who possesses lands *bona fide* is no more accountable for the grass that grows of itself, nor for the corn that he labours for. 4to, And coal is an industrial fruit, having as much pains and expence as corns and other industrial fruit, and more uncertainty: As to the title, albeit it be invalid, yet *sufficit coloratus vel putativus titulus*; and albeit in the antient Roman law such donations were null, *in se nisi confirmetur morte*, yet by the subsequent course of law, *per orationem Antonii*, they are declared valid themselves, unless they be revoked, and therefore are not null, but *annullantur medio facto*; and there are many nullities which may consist with a colourable title, *ad hunc effectum lucrari fructus consumptos*; as if the nullity be not *ex defectu substantialium*, but by defect of some solemnity, as the not registration of a sasine will not make it so null, but that the possessor *bona fide* thereby may employ the fruits; but if it want tradition of the

symbol, it will be null *in se* ; but here such donations have all their essentials, but they are only annullable by a subsequent fact ; and as to the evidence, that the Lady was in [1732] *mala fide*, they are noways sufficient ; by her consent, that the children should be provided with the coal, was in contemplation of her eldest son's marriage, which took effect ; and the rest are mere presumptions ; and *dato*, she had known *privata notitia non nocet*, unless there had been some intimation, citation, or judicial act, to put her in *mala fide* ; and especially private knowledge infers not *mala fides*, unless it had been anterior to her possession.—The pursuer answered to the last point, That albeit private knowledge in some cases would not infer *mala fides* among strangers, yet a mother, knowing the right of her own children, whereof one were in her womb, it puts her in *mala fide*, seeing she was thereby obliged to have sought tutors, and preserved their right.

The Lords found the evidences sufficient to prove the defender to have been in *mala fide*, and therefore repelled this defence also, and ordained the defender to compt for the intromissions ; but found that the charge ought not to be stated according as the profit of the coal fell out to be, but as the profit thereof might be *communibus annis*, in regard she quitted her certain liferent of the lands for an uncertain coal ; and therefore abated a fourth part of what the free profit of the coal was found to be by the last account. See HUSBAND and WIFE.

Fol. Dic. v. 1, p. 109. *Stair*, v. 1, p. 141.

No. 11. [1783] Lady MARGARET MACGILL v. PATRICK CRAWFURD. July 4, 1716.

Payment by a tacksman to the apparent heir who let him the land, made before intimation of a decree of preference in favour of a liferentrix infet, held to be *bona fide* ; though the process commenced before letting the subject.

Lady Margaret Macgill being infet in liferent in the lands of Kerse, and a competition thereafter arising betwixt her and the creditors, she was at length preferred ; but, during the dependence, the apparent heirs-portioners set a tack of the lands to Patrick Crawford, to whom he made payment of the tack-duty, before intimation of the decreet of preference ; and, in a process at Lady Margaret's instance against him for the same tack-duty, by virtue of the said decreet, he alleged *bona fide* payment, he having paid to the setters before any legal intimation of the decreet.

Answered for the pursuer : That, before setting of the tack, her action was commenced ; and, being a real action, the decreet is to be drawn back to the action, or rather to the first term after her husband's decease, at which time her jointure fell due, by virtue of her infetment, which effectually stated her the true and real creditor, whereas the setters were not yet infet : And, by law, the tacksman was obliged to know the condition of those with whom he contracted, whose right had been rendered litigious before the setting of the tack ; so that the depending process and the lady's infetment, whereon it was founded, sufficiently interpellated every person concerned, as tenants, intromitters, &c. ; and, if it were otherways, every intrant tenant, after a multiplepounding raised, might pay the rent to the setter, and so disappoint the effect of the law. Nevertheless,

The Lords found the payments made by the defender to the setters of the tack, which were made prior to the intimation of the lady's decreet of preference to him, relevant to extinguish the tack-duties of those terms that fell due prior to the said intimation.

Act. RIGG.—Alt. HUTCHISON.—Clerk, ROBERTSON.

Fol. Dic. v. 1, p. 112. *Bruce*, No. 10, p. 14.

No. 12. POOR GEORGE TERSIE *v.* MARGARET BURNET, Relict of William Strachan in Edindiak, and WILLIAM FORBES his grandchild. February 22, 1711.

Payment to a second son as apparent heir, the eldest being supposed to be dead was held to be *bona fide*.

In the action at the instance of George Tersie, as assignee by Adam Gordon, eldest son and apparent heir to the deceased John Gordon of Murraillhouse *v.* Margaret Burnet and William Forbes, as representing William Strachan, for the mails and duties of the lands of Murraillhouse, for several years that William Strachan possessed the same as tenant: The Lords sustained the defence of payment by the defender *bona fide* to John Gordon, second son to the said deceased John Gordon, who was held and reputed his apparent heir, in respect of his eldest brother Adam Gordon's long absence off the kingdom, and his being held to be dead.

Fol. Dic. v. 1, p. 112. Forbes, p. 503.

No. 15. [1786] LYON *v.* LAW. February 23, 1610.

Intimation of an assignation being made only to a cautioner, the Lords found that the principal was in *bona fide* to make payment to the cedent, so as to liberate him and all other cautioners, no intimation being made to him.

Fol. Dic. v. 1, p. 113. Haddington, MS. No. 1971.

No. 18. [1788] MACKIE *v.* DUNBAR. December 9, 1628.

A relict having no direct action against her husband's debtors, unless confirmed, was found unwarrantable to pay her a third without sentence; and the debtors were obliged to pay the whole, notwithstanding, to the executor.

In an action Mackie *v.* Dunbar, the executors of a defunct pursuing the intromitter with the goods and gear of another defunct, for payment to them of a debt owing by that defunct to him, to whom the pursuers were executors, and they alleging that they had paid the third of that debt to the relict of the defunct, to whom they were executors; for the which they craved defalcation: This allegiance was repelled, and no defalcation was admitted for the relict's third, seeing no sentence was obtained by the relict against them therefor, without which they could not have been compelled to pay the same, seeing the debtor remains only obliged to the executor, and the executor to the relict, in those things which she hath not in possession in her own hands, and the relict hath her direct action against the executors, and not against the debtors to her husband. See EXECUTOR.

Fol. Dic. v. 1, p. 113. Durie, p. 407.

No. 19. HOMES *v.* JOHN BONNAR. December 14, 1661.

A debtor having transacted with the supposed creditor, and obtained his discharge, his *bona fides* was found relevant only for what was truly paid.

Mary and — Homes, as donatars to the escheat, and liferent, of umquhile John Home, pursued John Bonnar, for count, reckoning, and payment of the sum of 16,000 merks due to the rebel, for the price of a house. The defender alleged absolvitoria because he had *bona fide* made count, reckoning, and payment to Mr. Alexander Home, assignee constituted by the rebel, before any citation or diligence done against

him, to put him *in mala fide* so to do, and produced the assignee's discharge, bearing, that the defender had made count with [1789] the assignee, and that there remains only the sum of 1100 merks, which he acknowledges to have received, and therefore discharged him of the whole. The pursuers alleged, the discharge, not bearing payment of the whole sum, but only of 1100 merks, nor yet bearing, that the instructions were given up to the assignee, cannot exoner the defender; but he must yet reproduce the account and instructions thereof; likeas he has produced a great part thereof in this process; because no discharge could be relevant to liberate this defender, but only payment made *bona fide*.

The Lords found the discharge sufficient to liberate the defender; mainly, because, albeit the discharge mentions not the instructions to be given up, yet the defenders were not obliged to preserve the same, or be at the hazard thereof. The pursuer further offered them to prove, that the defender had yet in his hand the account and whole instructions, and therefore ought to reproduce the same, that the Lords might consider, whether the rebel's assignees had allowed anything to him, which ought not to be allowed, and did belong to the donatar; which the Lords sustained.

Fol. Dic. v. 1, p. 114. Stair, v. 1, p. 70.

No. 2. [1806] Earl of SOUTHESK and CARNEGIE *v.* BROOMHALL. February 12, 1663.

A bond of presentation found implemented, though the debtor was not produced till a day after the time appointed, which being *modica mora*, was not regarded, unless the creditor could instruct some detriment by the delay.

Broomhall having taken the Lord Sinclair with caption, Southesk and his son gave bond to produce him to the messengers, or to pay the sum on the third of February, betwixt two and ten; whereupon Southesk having reproduced him, craved by supplication his bond up, or to be declared satisfied and extinct.—The defender answered, first, He not being a member, or dependent on the College of Justice, cannot be called thus summarily; especially to declare a bond void, which is in effect a reduction. 2dly, The bond was not performed, in so far as the Lord Sinclair was not reproduced till the 4th of February.—The pursuer answered, That the defender living in Edinburgh, and not compearing, the bill, *per modum quærelæ*, might be sustained. To the second, it being *modica mora* of one day, without damage to the defender, and there being trysting amongst the parties all the time betwixt, it was sufficient.

The Lords sustained the petition, and found it extinct.

Fol. Dic. v. 1, p. 114. Stair, v. 1, p. 177.

No. 3. KENNAWAY *v.* DAVIE. November 16, 1672.

Found in conformity with the above.

James Davie having enacted himself to cause William Cassils compt and pay to David Kennaway some excise uplifted by him, or to return him to prison by such a day, or otherwise to pay the debt; whereupon Kennaway pursues for payment:—The defender alleged absolvitor, because he had fulfilled, in so far as Cassils had offered himself to the Bailie upon the precise day agreed upon, being Saturday, and upon Monday thereafter had actually entered to prison, and there continued several months, which being *modica mora*, was sufficient.—It was answered, That implement could only be in the terms of the bond; and if need be, it was offered to be proven that Cassils was set out by the Bailie, with Davie's consent, without the consent of Kennaway, or by order of law.

[1807] The Lords found, That Cassils' entry being the next lawful day, it was *modica mora*, and was sufficient implement, unless the pursuer could instruct a detriment to him betwixt the days ; and found also that reply relevant, that Davie consented to the prisoner's liberation, to make him liable.

Fol. Dic. v. 1, p. 114. Stair, v. 2, p. 119.

No. 4. POLSTEAD, Citizen of London v. Mr. RICHARD SCOT, Minister. July 7, 1681.

It would be a good defence against a bond of presentation, that the presenting had become *factum imprestable*, without any fault of the debtor or his cautioner. But the being imprisoned for another debt was considered to be the fault of the debtor.

Samuel Polstead, having apprehended Maxwell of Kirk-house by caption upon a bond of 2600 merks, did, at the desire of Mr. Richard Scot, minister, dismiss him upon a bond, " to present him at Dumfries the first day of February last, or otherwise to pay the sum " ; and now being charged to pay the sum, he suspends upon this reason, that Kirk-house was taken with another caption at Edinburgh, whereby it became *factum imprestable* to present him at Dumfries the day foresaid, but he was willing to present him now in as good condition as he was before.—The charger answered, *non relevat*, for albeit death, or sickness, or any accident not occurring by the prisoner's fault, might have been relevant, if the party had been offered so soon as that accident ceased ; yet it cannot be extended to any impediment by the prisoner, or his cautioner's fault or fact, such as to be under the hazard of other captions ; for if that had been expressed, as it is pretended to be implied, no man of sense would have dismissed a prisoner in these terms that he should be reproduced such a day, if he were not taken by other captions for his own debt.

The Lords repelled the reason simply, albeit the prisoner had been offered immediately after he was free of the other caption.

Fol. Dic. v. 1, p. 114. Stair, v. 2, p. 888.

No. 5. RICHARD OCKLEY v. GRIERSON of Lag. March 3, 1682.

A reasonable cause for not presenting the debtor at the precise hour, will be sustained.

A person obliged to present a rebel upon a precise day, betwixt two and three, not having offered him till between seven and eight, being charged for the debt, suspended upon this reason, that their journey was retarded some hours, upon the account that the day of presentation was a public fast-day by authority, and that the rebel was carried to the pursuer's house, and offered to him, but he refused to accept of him ; and the defender not being master of the caption, could not put him in prison.

The Lords sustained the reason ; the suspender giving his oath, that the fast was the reason he was not presented at the precise hour, and burdened the suspender to present the rebel *cum omni causa*, within fifteen days.

Fol. Dic. v. 1, p. 114. Harcarse (CAPTION), No. 229, p. 54.

No. 6. [1808] ALEXANDER PITBLADO v. ISOBEL MAYNE. November 22, 1695.

In order to free the cautioner, he must present the debtor in terms of the bond, and take instruments.

On a petition given in by Alexander Pitblado, writer, against Isobel Mayne in Dunfermline, it fell to be argued, where a prisoner in the messenger's hands grants a bond of presentation, with a cautioner, to sist himself such a day, or else pay the debt ; if it be sufficient to exoner the cautioner, to allege that none for the creditor or messenger appeared at the diet prefixed, to accept or require the prisoner, and to take instruments on his absence or not compearance ; or if it be incumbent on the debtor to attend at the time limited in the bond of presentation, and to enter his protest on his readiness to deliver himself to the messenger and his employers, and take instruments in their absence, and so protest that the cautioner must be free of his bond.—The Lords found, though the messenger did not attend, yet that did not excuse the other party's absence ; but the cautioner, for his liberation, ought to present him at the place and time appointed, and take instruments if there be none to receive him ; even as it would be no excuse to say in an order of redemption, I needed not come and offer the money, because I can prove you, nor none for you, were present to have received it, though I had come ; for it was your duty to have attended, and you could not divine whether the other party would come or not.

Fol. Dic. v. 1, p. 114. Fountainhall, v. 1, p. 680.

No. 7. CALLANDER v. BRUCE. February 12, 1704.

The debtor being said to be sick on the day fixed for presenting ; the cautioner was found liable, not having offered to produce him when recovered.

Bruce of Newton being debtor to Callender of Craigforth, in the sum of 600 merks, by bond ; and, being apprehended by caption, he, to relieve himself out of the messenger's hand, grants a bond of presentation, wherein Alexander Bruce, his son, is cautioner with him ; whereby they oblige themselves either to pay, or present him at Craigforth's house, without a suspension, at a precise day therein-mentioned ; at which day Alexander compears, and intimates to Callender, by a notary, that his father was fallen sick, and it was impossible for him to travel, but offered to produce him within some few weeks after when he should grow better ; which Callender refused, because it was Alexander's single assertion, and no testificate produced. Callender having charged Alexander, on the bond of presentation, both for the penalty, and the original debt in his father's bond, he suspended, on this reason, that he was neither *in mora* nor *culpa*, for not presenting his father on the precise day, because he was then sick ; and it were against humanity, *et contra bonos mores*, to oblige them to what is naturally or morally impossible ; *et nemo tenetur ad impossibile, vel præstare casus fortuitos*.—Alleged, Though his sickness (providing it was real and not simulate) did excuse at that time ; yet this did not extinguish the obligation of presenting ; but how soon he reconvalesced, and was able to come abroad, he was [1809] bound to have presented him.—Answered, Though these obligations be *stricti juris*, and to be performed *in forma specifica*, yet that must not be understood judicially, but with an equitable latitude ; and the offering him *primo quoque tempore*, on his recovery, cannot take place here, because I did that already, in so far as when I signified to you his indisposition and inability to travel, I likewise offered to present him how soon he grew better ; but Callender unjustly refused to consent to a prorogation of the day ; and that offer not being agreed to, the bond must be simply null as fully implemented, especially seeing he may have his person still, by which he has no prejudice, the debtor being in no worse condition now than he was at the time he should have been sisted : And, if sickness be a relevant ground whereon, by the Lords' act of sederunt, a prisoner may be let out during the continuance of his sickness, then

multo magis ought it to liberate one from going to prison ; and you should have required me to present him of new, which you never did ; and *modica mora*, in such cases, makes not one incur the penalty, says Paulus, in l. 91, § 3, *D. de verb. oblig.* and Lanfrancus Balbus, *decis.* 345.—Replied, Your offering to renew your bond to a new day can never exoner you, though I had not accepted it ; because I was not obliged to believe your assertion, especially there being no testificate from physicians of his sickness ; and if this excuse were allowed, bonds of presentation should be rendered ineffectual ; for the party, by a little excess of drink, might render himself feverish, and those about him might be fully persuaded of his sickness, and so the creditor might be eluded ; neither was the offer sufficient to liberate from presenting him when he grew well, nor were they obliged to require him to his duty, seeing *dies interpellat pro homine* in all these cases ; and such bonds must not be turned to shams. Some of the Lords were of opinion, that Craigforth's refusal to accept of his offer, on a prorogation of the term, did liberate the cautioner, and fully implement his obligation ; but the plurality found, though he should prove his father was really sick at the time prefixed ; and that he offered then to continue bound for some weeks, that did not free him, seeing he did not offer to present him when he recovered ; and, therefore, found him liable for the penalty in the bond of presentation, and likewise for the original debt.

Fol. Dic. v. 1, p. 114. *Fountainhall*, v. 2, p. 222.

No. 8.

HENDERSON v. GRAHAM. July 22, 1710.

A debtor enlisted, which secured him from personal diligence ; yet a bond of presentation was found not fulfilled, there being an impediment by the act of the debtor, which did not exist when the bond was granted.

Andrew Robertson, merchant in Edinburgh, being debtor to William Henderson there, in £8000 Scots by bill, and having retired out of the kingdom, he is stopt at Durham, and incarcerated in that gaol ; and being arrested by sundry other of his creditors, Janet Graham, his mother, transacts with his creditors, and gives them a bond of presentation, to produce his person at Edinburgh on [1810] such a day, death, sickness, &c., being excepted, and that without an expedite suspension, past bill, or sist of execution, otherwise she obliges herself to pay the debt. On this bond he was liberated, and came to Scotland, and was presented by his mother precisely at the day, whereupon she took instruments and went away, and when the messenger having the caption touched him, to make him his prisoner, he pulled out of his pocket a testificate, or declaration, under the hand of one of the officers of my Lord Carmichael's dragoons, that he was listed as a soldier there, and thereon craved the benefit of the late British act of Parliament, called an act for the better and more speedy recruiting of Her Majesty's forces, which discharges all personal execution against them. Upon this, the messenger dismissed him ; and Henderson having charged Janet Graham on her bond of presentation, she suspended, on this reason, that she had fully satisfied and performed her bond, in presenting him without any suspension or sist of execution, and though he had listed himself a soldier, yet that was a *casus incogitatus*, and unprovided for, and neither past bill nor sist of execution in the proper received sense of these words (which is only legal judicial acts of a judge), she can never be liable for that extraordinary accident, not comprehended in her bond. Answered, *Esto* it were yielded she had literally implemented her bond, yet it is plain she had neither fulfilled the spirit nor meaning of the writ ; for though she presented him corporally, yet it was in armour inaccessible to law, and with a pocket-pistol to stop execution, and fright away the messenger ; whereas all such transactions must be understood to be entered into with that sincerity and *bonne foy* that it shall be effectual security to the creditor, out of which he is not to be tricked nor shammed : and where is the *bona fides* ? I consent to let you out of Durham prison on your mother's engaging to present you again, free from any legal impediment that may stop your imprisonment, and you come with a coat of mail as a soldier, this is *fraudem et legi et contractui facere* : and whereas it is pretended that the mother can never be reached, unless she was accessory to the plot, and knew of his being

listed, the pretence is of no moment ; for she stipulates against a sist of execution, and is not his listing an effectual stop and sist, as much as if it had been past by the Lords ? and an obligant in a presentation was found liable by the Lords in a nicer case than this, 7th July 1681, Polstead, *contra* Scot and Maxwell, No. 4, p. 1807, where the debtor to be presented being imprisoned *medio tempore*, so the sisting him became imprestable, yet being by his own fact and fault, the Lords found the bond incurred. Now here Robertson stopt his incarceration by his voluntary inrolment among the dragoons ; *et fraus sua nec ei nec alteri debet prodesse*. It was farther alleged, That the British act prohibited the imprisoning soldiers, but it did not take them out when in. Now Robertson, in the construction of law, was a prisoner by the presentation, as if he had never been out ; and if the messenger, either by cowardice, or too much caution, dismissed him, you have none to blame but yourself. See Rolland's case.* Answered, in the [1811] Laird of Meldrum's case, the contrary was found by the Lords, and also in Sir George Hamilton's, and Mr. William Stirling, who had all listed themselves to elude the diligence of law, therefore the messenger acted prudently. Some of the Lords thought her bond not forfeited, unless she had known of her son's obtaining that enlisting, which could be only proven by her oath. But the plurality found her accession did not concern this case, and that she did not fulfil her bond, not having presented him free of all impediments, with respect to the creditors' power over their debtor's person, to dispose of him as fully as they could have done at the time they dismissed him out of Durham gaol, and took this bond in place of it. *Fol. Dic. v. 1, p. 115. Fountainhall, v. 2, p. 591.*

No. 5. [1815] MENZIES v. M'KAY. January 22, 1635.

A miller could not lawfully seize horses and meal abstracted from his miln, contrary to his right of thirlage, upon pretence of an old law giving that power ; though he should prove such seizure to have been customary in the neighbourhood.

One M'Kay pursuing a spuilzie of a horse, the defender alleged, That (conform to the law of *Regiam Majestatem*) he being infest in the miln of , to which miln the lands occupied by the pursuer were expressly thirled ; against which thirlage the pursuer having carried his corns growing upon these lands, and grinding the same at another miln, the defender apprehended the horses bringing back the meal, made and grinded at the said other miln, which by the said law of the Majesty, he might lawfully do ; likeas it is the custom of the country, not only in this miln, but in the other milns about, viz. in Athole, where the miln libelled, and the lands libelled, so thirled lye, to do the same.—The Lords sustained this exception, to liberate the defender from spuilzie, but not from restitution of the horses again ; and the reason the exception was sustained, was because the defender alleged that he sent back the horses again that same night to the pursuer's house, and re-delivered the meal to the pursuer's wife, albeit the pursuer received not the horses.

March 14, 1635.—One Gilchrist M'Kay pursuing Archibald Menzies, both indwellers in Athole, for spuilzieing of a horse, with a sack and meal therein, being on the horse's back ; and the defender alleging, That he might lawfully intromit with the said horse and meal ; because, conform to the law of the Majesty, the pursuer being tenant in the lands of , which are thirled to the miln of , pertaining to such an heritor, on whom he condescended, and of which miln the defender is miller ; the said pursuer was transporting the meal of the corns growing upon the said lands so thirled, having ground the same at another miln than the said miln whereto the corns were astricted ; which he having so apprehended, it was lawful to him, conform to the law of the Majesty so to do, and keep the said horse and meal, but danger of spuilzie, at the least ay and while the pursuer be satisfied for the miltures of the said corns, so abstracted.—The Lords found this exception relevant to purge the spuilzie, the defender re-delivering the horse again, with sack and meal,

* See this case, and those mentioned p. 1811, *voce* PERSONAL PROTECTION.

as sufficient as the same was the time of the said spuilzie, albeit it was founded upon an old law of the Majesty unallowed, and not being in consuetude and observance; seeing it was offered to be proven by the defender, that it was the [1816] continuing custom of Athole, not only at the miln libelled, but also at other milns, to do the like in case of abstraction foresaid; and because thereafter the pursuer offered to prove, that the heritor of these lands, whereof he was tenant, was infeft in lands *cum molendinis, &c.*; and that the excipient qualified not the thirlage of the same lands to his miln libelled clearly, whereby it might appear that the thirlage was constitute and uncontroverted, but alleged only, that the possessors of the lands foresaid were in use past memory of man, to come and grind their corns at the said miln, as astricted thereto, and to pay greater multures than out-sucken multure; and was not more special, upon a determinate and clear constitution of thirlage; therefore the allegiance was repelled, and the use of coming to the miln as thirled, and paying of multure not as out-sucken, as said is, was not sustained to make a thirlage, but the spuilzie sustained, reserving always the modification to the Lords.

Fol. Dic. v. 1, p. 116. Durie, p. 743 & 761.

No. 7. [1817] *Lairds of BERFOORD and BINSTOUN v. Lord KINGSTOUN.*
January 27, 1665.

A person having right to teinds, and using inhibition thereon, cannot turn out the possessor *brevi manu*, if he has any pretence of right.

Berfoord and Binstoun pursue the Lord Kingstoun for spuilzie of certain corns; he alleged absolvitor, because he legally drew the same, as their teind, by virtue of his tack, from the present minister, and inhibition thereon. It was answered, 1st, That was not sufficient summarily to draw the defender's teinds, unless there had been a sentence on the inhibition, which is but a warning, and so must not infer removing, *brevi manu ad vitandum tumultum*. 2dly, If he had legally pursued them for a spuilzie, they would have alleged, and now allege, that they have tacks standing from the minister for the time, who, though deposed, yet lives; and all incumbents' tacks serve during their natural life, and no tack from the next incumbent prejudices during the life of the former, conform to an express act of Parliament.—The defender duplied, That albeit an act of Parliament required removing not to be summarily in lands, it did not so in teinds. 2dly, The pursuer's tacks are null without consent of the patron. The pursuer triplied, That they are standing cled with seven years possession, and their tacks are subscribed by the patron. Quadruplied, he was not then patron, but was standing fore-faulted unrestored. Quintuplied, It is sufficient *coloratus titulus cum possessione*, till the reduction; and the Lord Bothwell's son, patron, was after restored, whereby it revived.

The Lords repelled the defence, in respect of the pursuer's tacks, and found the defender might not *brevi manu* intromit, there being any pretence of title; but they desired the pursuer to restrict to wrongous intromission, and without oath *in litem*. See SPUILZIE.

Fol. Dic. v. 1, p. 115. Stair, v. 1, p. 257.

No. 13. [1821] *The Lord SALTON v. JAMES CLUB.* June 25, 1700.

The Lords thought, that when a tenant steals off his corns, as soon as reapt, to another heritor's grounds, the master may reap the rest, and stack them, but may not cast them in, or dispose of them, without decree and poinding.

Salton having set his lands of Over and Nether Bogheads to one Fraser, he subsets one of these rooms to James Club; and Fraser failing in payment of his tack-duty, and Club removing to Pitsligo's lands, Salton pursues Club both upon the right of hypothecation in the fruits of the ground for his year's rent, and on arrestment. Alleged, The hypothec can go no farther than the tack-duty payable by Club, the

sub-tenant, to Fraser, the principal tenant. Answered, The Master may distress any part or room of his ground for the rent as far as the corns or fruits thereof will pay him ; and he is not concerned what is Club's tack-duty, whether it be adequate or elusory, unless he hath homologate his tack, or acknowledged him as his tenant, by accepting rent from him ; but he may poind or distress any part of his ground for his year's rent ; and it would not be a good defence for a lodger in a house to say, you can only poind the trunks and cabinets in my chamber for the mail it pays, but not for the whole house rent ; certainly the landlord may take the plenishing of any one room for the whole, *omnia invector et illata* are hypothecate. The Lords found it would diminish exceedingly the Master's privilege of hypothec, if his tenant, sub-setting a part, he had only access to compel the sub-tenant to pay no more than his tack-duty amounted to ; but found the hail fruits growing on the ground subset were impignorate to him for the rent, as well as the fruits and goods on the rest of his ground, unless he had accepted him as subtacksman. See Anderson *contra* Provand and the Town of Edinburgh, Stair, v. 1, p. 260, *voce* TACK.

In the same process, the Lords thought, where a tenant steals off his corns, as soon as shorn, to another heritor's ground, the Master may shear the rest, and stack them for conservation only, but may neither cast them in, nor dispose on them, without a decret and formal poinding, and appretiation of the same.

November 11, 1701.—In advising the concluded cause, Lord Salton *contra* Club, his tenant, mentioned 25th June 1700, the Lords found the offering of caution for the year's rent did not take away the master's hypothec in the fruits, so as to warrant or authorise the tenant to carry away the corns at his own hand, off the ground ; for though it may be rigid severity in a master to refuse caution, yet *tutius est incumbere rei quam personæ ; nec satisfactio illius fraudulentum et malevolum propositum mutat*.

November 18, 1704.—In the action pursued by the Lord Salton *v.* Club and others, mentioned 25th of June 1700, it came to be debated, if these accomplices who assisted Club to carry his goods and corns off the ground, to the prejudice of his master's hypothec, could be liable *in solidum*, or only *pro rata* for the damage, where violent away-taking was not proven ? But the Lords considered the intromission as unwarrantable ; and though the benefit did not [1822] redound to them, yet it was a delinquency *in suo genere et mali exempli* ; and, if allowed, would encourage tenants to help their neighbours to defraud their masters, by clandestine conveying their goods and corns off the ground ; and if a master can vindicate his corns from a third party *bona fide* bargaining for them, *multo magis* may he pursue those who assisted in abstracting them ; therefore they found all the assistants liable *in solidum* in this circumstantiate case. Stair, book 1, tit. 9, thinks, though strict law makes all concurreurs in a delinquency liable *in solidum* for reparation of the damage done, yet in equity they are only bound *pro virili parte*, and for making up the insolvent parties their share : But the Lords decided *ut supra* against them, as they who could not be ignorant they were *versantes et co-operantes in actu illicito* ; and that the tenant's intromission and away-taking, was either clandestine or violent, and in either of the two cases unwarrantable ; and if they passed unnoticed, such combinations would be frequent among tenants, to assist one another in defrauding their masters. Some thought the decision rigorous. See HYPOTHEC.—SOLIDUM ET PRO RATA.

Fol. Dic. v. 1, p. 116. *Fountainhall*, v. 2, p. 99, 123, 240.

No. 4. [1824] FEUERS of Dunse *v.* HAY of Drummelzier. November 22, 1732.

The nature of a burgh of barony. A burgh of barony not a good title for acquiring a servitude of pasturage by prescription.

The village of Dunse, belonging in property to Hume of Aiton, was, by a charter from the Crown, erected into a free burgh of barony, " with power to the inhabitants

to buy and sell, to have markets and public fairs, to have burgesses who should choose their own bailies and other officers : With power to the said burgesses and inhabitants to have and hold the said town of Dunse, with its pertinents, for ever in a true and free burgh of barony, with privileges, &c." [1825] By a second charter, the town of Dunse is again "erected into a free burgh of barony in favour of Sir Patrick Hume of Aiton, with all and sundry lands, cottages, tenements, houses, yards, tofts, crofts, acres belonging to the same, with every other of its pertinents ; with power to the inhabitants and free burgesses of the same, received and admitted by Sir Patrick Hume of Aiton, and his foresaids, to sell and buy, &c., with power to the said Sir Patrick to name bailies and other officers, and of having a public market and yearly fair, and of gathering the customs and duties of the same, he always applying them to the common good of the burgh ; and with power to him to admit baxters, butchers, &c."

In a declarator of servitude of common pasturage upon the commonty of Dunse, at the instance of the burgesses and inhabitants of the town, as an incorporated body, against Alexander Hay of Drummelzier, now proprietor of the same ; a proof was admitted before answer ; and it came out, that they had been in possession of the servitude past memory of man, by keeping a common town-herd, and pasturing their horse, nolt, and sheep, promiscuously over the commonty. When a proof came to be advised, the question occurred, whether a burgh of barony, *qua* such, can acquire a servitude of pasturage by prescription ? Several objections and answers were made ; to clear which, two things were premised. 1mo, What is the true nature of a burgh of barony. 2do, What legal foundation there can be for such a servitude.

With respect to the first, burgage is a species of feudal holding well known in our law ; the burgh is the subject or fee held ; the incorporate body of burgesses and inhabitants, hold it of a superior : where the King is superior, it is a burgh royal ; where a subject is superior, it is a burgh of barony. The incorporation then, or politic body, is the vassal which holds : the burgh is the subject held ; and, in this case, it is held of Drummelzier who is superior, who again holds of the Crown. And here lies the difference betwixt a barony and a burgh ; a barony is a feudal subject held directly and immediately by the baron as the vassal : a burgh is a complex term, comprehending the body politic of the inhabitants, and the burgh properly so called : the body politic is the vassal who holds ; the burgh properly so called is the subject held, and the baron is no other than over-lord, or superior, of the politic body.

As to the second point, The possession was *nec vi, nec clam, nec precario*, which, by the principles of the Roman law, and of ours, makes prescription in cases of servitude, as presuming a title by grant or otherways, though after long possession the evidence be lost. And in this a servitude of pasturage goes hand in hand with a servitude of dry multure, and with many other servitudes : long possession of a servitude of dry multure presumes a title, though now lost ; as no man will pay dry multure voluntarily. In the present case, the immemorial possession of such a large pasturage will never be interpreted *voluntatis* of the proprietor, but *necessitatis*. In this view, prescription of a common pasturage, stands upon the footing of an actual grant from the proprietor of the land ; and [1826] therefore, whatever arguments can be moved against the prescriptibility of such a right by an incorporation, must equally conclude, that an incorporation cannot acquire such a servitude, even by a grant from the proprietor.

A title upon long possession, is presumed from circumstances less pregnant than those mentioned. It is established, that a vassal cannot burden his fee so as to prejudice the superior : yet servitudes burdening the fee by prescription, are effectual. Why ? Because of the superior's consent, inferred from suffering possession for forty years without interruption. Now, if a superior's consent be presumed from a forty years' possession of common pasturage upon his vassal's property, how much stronger must the presumption be when the possession is upon his own property ?

It was added for the pursuers, that they have charters of their burgh of Dunse, their property, *cum pertinentibus* ; which is a sufficient title to acquire even property by prescription, much more a servitude upon property.

Now, as to the particular objections in their order. And 1mo, It was objected, "That the town of Dunse is erected into a burgh of barony in favour of the baron ; the burgh is his property, and any servitude acquired to the burgh, must belong to him, and not to the inhabitants, to whom the burgh belongs not."

Answer : The burgh incorporated, and united into a feudal subject, held as such

by the inhabitants, must be distinguished from the particular houses, yards, &c., which are the constituent parts of the burgh. These particular houses, yards, &c., belong to Drummelzier; but the burgh, *qua* incorporated subject, belongs to, and is held by the body-politic; that is, it belongs to them as far as the use and possession goes, and so far only they hold it: for the feudal holding is not confined to the property of land, but is extended to burdens upon property, witness infeftments in security; and even to *jura incorporalia*, such as jurisdictions, offices, &c. This being so, nothing bars the inhabitants of Dunse, to acquire such a servitude to their own town, as far as their interest in the town extends; just as a tacksman may acquire a servitude to his possession, of which he has the benefit while his tack endures, and the proprietor, when the tack is at an end.

Objection II. A corporation such as that of Dunse, erected solely for merchandize, manufactures, &c., cannot acquire property or servitude by prescription, not being the end for which they were erected; and an example was given of the new bank.

Answer 1. A burgh is *nomen universitatis et dignitatis*: it is a feudal holding, implying a vassal and fee; and therefore the vassal may acquire by consent or prescription, as well as any other proprietor. Thus it was found, that a burgh is equivalent to a barony, so as even to acquire salmon-fishing by prescription, 26th January 1665, Heritors of Don *contra* Town of Aberdeen, Stair, v. 1, p. 255, *voce* SALMON-FISHING; 6th December 1678, Brown *contra* Town of Kirk-[1827]-cudbright, Stair, v. 2, p. 652, *voce* PRESCRIPTION; and this without any title but the town's charter, containing a clause *cum piscationibus*; upon which it was found, that such a clause granted to an incorporation, or community of a burgh, with immemorial possession, is sufficient.

Answer 2. Though Drummelzier, and not the incorporation, were the vassal, according to the supposition, yet such an incorporation may still acquire by consent or prescription. By consent it cannot be doubted; for colleges, universities, hospitals, hold property; banks, *qua* such, are proprietors; and even this incorporation of Dunse holds property, having a common good, as above set forth: that it can acquire by prescription, can as little be doubted, because prescription rests ultimately upon consent. Our countryman, Craig, foresaw no difficulty in this doctrine: In his Treatise of Feus, l. 2, dieg. 8, § 33, treating of common pasturage, he has these words: "*Hæc autem pascua vel sunt publica vel privata; pascua autem ea sunt publica, quæ sunt alicujus collegii aut universitatis; neque tamen promiscue omnibus ea permittenda, sed eis qui sunt ejusdem collegii aut universitatis.*" 'Tis true, that this pasturage can only be a personal, not a real servitude. But of this hereafter.

Objection III. Pasturage is a real servitude, which presupposes a dominant as well as a servient tenement. But, in this case, the body-politic of the inhabitants of Dunse hold, *qua* such, no dominant tenement to support the servitude.

Answer 1. The dominant tenement is the burgh of Dunse, erected *cum omnibus et singulis terris, cotagiis et tenementis, domibus, ædificiis, hortis, toftis, croftis, acris ejusdem, et singulis aliis suis pertinent.*

Answer 2. What if there were no dominant tenement? If a college, or other incorporation, can acquire such a right by consent, they may also acquire it by prescription, as above observed. Upon this supposition, indeed, it will only be a personal, not a real servitude; but though a right is not a real servitude, it does not follow that it can be nothing at all. Personal servitudes, in all the different shapes that can be contrived, are received, and well known in our practice; and the instances are without number of their being acquired by prescription. "A claim was sustained, at the instance of the minister of Leith, against some merchants in Edinburgh, importers of herring, dry-fish, &c., at Leith and Newhaven, to pay 20 shillings the last of herrings, and the twentieth part of killing and ling; he having proved forty years possession of the said servitude; 10th February 1666, Minister of North Leith *contra* Merchants in Edinburgh," Stair, v. 1, p. 354, *voce* PRESCRIPTION. "One, who had some burgh acres, refusing payment of the second minister's stipend, because he paid his whole teind to the first minister, was found liable, in regard that the heritors of the burgh acres had been in use, past memory of man, to pay the second minister's stipend over and above the teind paid to the first minister; 22d July 1668, Boswell *contra* Town of Kirkcaldy," Stair, v. 1, p. 558, *voce* PRESCRIPTION. Again, in a process against feuars holding of a town, concluding against them to bear a proportion of the private stents of the town, "the Court [1828] sustained immemorial possession, as

relevant to make them liable in time coming, though their charters from the town bore a feu-duty, *pro omni alio onere*; 14th July 1674, Town of Inverness *contra* Feuars of Drakies," Stair, v. 2, p. 275, *voce* PRESCRIPTION. This case, by the bye, is extremely similar to that in hand, being a personal servitude acquired to a community by prescription. Upon the same principle, "40 years' possession was found to give right to a Sheriff to ride a fair, and to exact so much for the Sheriff-gloves, and for the price of the best staig in the fair; 11th July 1672, Earl of Callender *contra* Town of Stirling," Stair, v. 2, p. 99, *voce* PRESCRIPTION; 18th July 1665, Douglas *contra* Town of Jedburgh, Newbyth, MS., *voce* PRESCRIPTION. The Sheriff of Inverness pursued a declarator, that he had right to three days' salmon-fishing in the water of Ness under the bridge, every summer, as a casualty of his Sheriffship, which was sustained upon 40 years' possession; for, since this was but a servitude upon fishing, it was found it might be constituted by long possession, as Sheriff-gloves and other casualties of offices are; 13th December 1677, Earl of Murray *contra* Town of Inverness, Stair, v. 2, p. 579, *voce* PRESCRIPTION. These and many more that may be given, are all of them examples of personal servitudes acquired to offices and communities, by prescription alone. At the same time, they serve as an additional answer to the second objection: Here we have communities acquiring servitudes by prescription, though not the end for which they were erected; and here we have servitudes acquired to offices by prescription, though less connected with these offices, than common pasturage is with the community of a town.

Objection IV. Supposing there were no dominant tenement, yet this real servitude cannot be acquired by prescription, not being of that nature to be *utile prædii*, which is the characteristic of a real servitude.

Answer 1. Properly speaking, no servitude is useful to the *prædium*, but to the proprietor of the *prædium*. But more directly, whatever may be the notion of the Roman lawyers, from whom this objection is borrowed, neither reason nor later writers are so strict in the definition of a real servitude. It is enough, if it can be a pertinent or accessory of the *prædium dominans*, so as, in the main, to make it *præciosius*. Thirlage, which is a most proper servitude, is a good example, which makes the miln *præciosius*, but in no proper sense can be said to be *utile prædii*.

Answer 2. Though the objection should be sustained to take this claim off the footing of a proper real servitude, it will still be a good personal servitude; and, if so, it must be effectual as long as the person or community subsists; and also must be effectual against purchasers; because, though but a personal servitude, it is however a real right.

Objection V. If such a servitude be sustained, it will be inexplicable. The extent of real servitudes is in proportion to the extent of the dominant tenements; but here there is no dominant tenement whereby to measure the extent of this real servitude.

[1829] Answer 1. *Esto* a servitude, upon which there has been possession past memory of man, were attended with this difficulty, it will not follow that a right so well established must be cut down *in toto*: What else upon that supposition can follow, but that the pursuers should be continued in their possession as formerly. Craig, in the fore-mentioned place, upon this very question, has the following words: "Si nihil in pastura constituenda cautum sit, tunc aut proportionibus fundorum, quibus pascua cohærent, exerceri debent; aut ex usu et consuetudine præscripta in communibus pascuis, pascendi modus potest præscribi." Here he gives his opinion, and a very just one, both where there is a dominant tenement to measure the extent of the servitude, and where there is no dominant tenement; having his eye upon the case mentioned by him immediately above, of a common pasturage belonging to a college or university, or such an one as this in dispute.

Answer 2. This servitude is by no means inexplicable, at least *quoad* the defender and the neighbouring heritors: The extent of the servitude is fully and distinctly ascertained by the proof. And, therefore, were there a division of the common, by act of Parliament, the pursuers would be entitled to a share of the common, in proportion to their extent proved. It is a different question, were a division to be instituted among the inhabitants themselves, What share should fall to each of them? But in this the defender has no concern. At the same time, it is believed such a question can never occur, there being no law extant for dividing the common property or servitudes belonging to a burgh or body-politic.

"Found, That the erecting Dunse into a burgh of barony, doth not afford a title

to acquire a servitude of pasturage by prescription. In the same cause it was found, that the infeftment of a house, with or without a yard, is a sufficient title to prescribe a servitude of pasturage, 24th November 1732." See SERVITUDE. See PRESCRIPTION. *Rem. Dec. v. 2, No. 4, p. 6.*

No. 3. [1838] JACK v. The TOWN of STIRLING. January 27, 1681.

The old council, yearly, at Michaelmas, must chuse a new council ; but the major part only need be changed. These two councils, with the deacons of the trades, elect the Provost and Bailies, dean of guild, treasurer, and all officers within burgh. No person can continue to hold any of these offices, except that of councillor, for more than two years.

Bailie Jack, and other Bailies and burgesses of Stirling, pursue a declarator against Robert Russell, present Provost, and other Magistrates of the town, that they had done wrong in perpetuating themselves in the magistracy, and have not observed the order of election prescribed by act of Parliament 1469, cap. 29, and Parliament 1487, cap. 108, and Parliament 1503, cap. 80, nor yet the custom of the burgh, whereby the guildry did yearly offer seven persons to be of the new Council ; which the Council was accustomed to accept ; but of late they picked out only one or two, by which this provost has been eight years continued ; and the whole Council is made up of his near relations, whereby the common interest of the burgh is mis-managed, and their common good set in tack, or collection, without roup, to the Provost's son, who is also made overseer of the hospital, having a considerable rent of 8000 merks yearly ; whereas by act of Parliament 1593, the common goods of burghs are only ordained to be set yearly by roup.—The defenders alleged, 1mo, That the statutes founded upon were in desuetude, and that the several burghs in the kingdom had, by prescription, their different customs settled, that neither justice nor policy would allow to be altered. 2do, These acts, though in vigour, do not import that no person can be continued, by the new election, in the Magistracy or Council, but only that one election should not be for more years, but a free election should be every year. 3tio, This town hath a special set produced, bearing, the Council to consist of fourteen merchants and seven tradesmen. 4to, There is produced an act of the Council of Stirling, That Magistrates shall continue to be elected for no more than two years together ; and that all councillors, at their election, swear never to alter the same ; which excludes the clamour of perpetuating the same persons in office.—The pursuers answered, That desuetude, or prescription, cannot operate against the laws established for the common good of the kingdom, but only against the rights of private persons ; and, therefore, these laws are so oft renewed by several kings, for the common good of all the burghs, and whole kingdom, founded upon the nature of the incorporation of burghs, being a society of merchants and tradesmen ; and having a common good, and government of the society, it is inconsistent therewith, that a few persons should inhance the whole power, and perpetuate themselves ; but that they ought to be changed, that they may be made countable to their successors in the office. And, as to the set of this town, by the Convention of Burghs, of fourteen merchants and seven tradesmen, that only determines the proportion of merchants and trades, but says nothing as to the manner of the election of the Council or Magistrates. And, as to the biennial act, it was only done *pendente processu*, and will not exclude the perpetuating of the same faction, unless the order be observed, prescribed by the acts of Parliament, That the old Council should choose the new, and that both these, and the deacons of crafts, or one out of each craft, [1839] should name the Magistrates yearly : Which necessarily imports, that the whole Magistrates and whole Council must be changed yearly, otherwise the old Council may elect themselves to be the new, or alter only a member or two ; but the act bears, That the Council and whole officers shall be changed yearly.

The Lords repelled the defence of desuetude and prescription, and found the statutes founded on, not concerning private right, but the public good of the kingdom, to stand in vigour ; and, therefore, ordained the old Council, yearly, at Michaelmas, to choose a new Council ; but found, that it did not import that every person in the

Council should be changed, but that the major part, at least, should be changed viz. seven merchants and four tradesmen; and that these two Councils, with the deacons of the trades that were already constitute in deaconries, should elect the Provost and Bailies, Dean of Guild, Treasurer, and all officers within burgh, comprehending the overseers and masters of the hospital; but that no person should continue to be Provost, Bailie, Treasurer, Dean of Guild, or other officers within burgh, except councillors, more than two years; and that all the common good of the town and hospital should be set yearly by roup. See COMMUNITY.

Fol. Dic. v. 1, p. 117. *Stair*, v. 2, p. 844.

No. 8. [1842] JAMES ANDERSON and other BURGESSES of Wick v. MAGISTRATES.
February 17, 1749.

None but those who are resident can be elected bailies; but it is not necessary that the provost, or any of the councillors, be resident burgesses.

The town of Wick was erected into a royal burgh by a charter from the Crown, anno 1589, containing regulations for electing the magistrates and council, in the following words: "Cum speciali et plenaria potestate liberis inhabitantibus et burgensibus dicti burgi, et suis successoribus in futurum, cum expresse avisamento et consensu dicti nostri consanguinei *Georgii* Comitis de *Caithnes* et ejus hæredum et successorum, et non aliter, seu alio modo, præpositum et quatuor bailivos, dicti burgi incolas seu inhabitatores, una cum thesaurario, gildæ-decano, consulibus, burgensibus, serjeandis, aliisque officiariis necessariis, intra dictum burgum, pro gubernatione ejusdem, faciendi, eligendi, constituendi, et creandi, eosque toties quoties expediens videbitur, pro causis rationalibus deponendi."

Certain burgesses of the town finding a deviation from the charter in the later practice, and new regulations established by a set of the town made by the royal burghs, anno 1716; and apprehending that this set tended to establish a foreign interest within the town, brought a process of declarator, for asserting the independency of their town, and for restoring their form of government to its original standard. The conclusions of the declarator are: 1mo, In general, That the charter of erection 1589 containing regulations for electing the magistrates and town council, ought to be found and declared the rule, and that the set made by the royal burghs, anno 1716, ought to be declared of no force, so far as it differs from the charter. 2do, In particular, That no person should be entitled to elect or be elected a magistrate or councillor but burgesses and inhabitants, in terms of the charter.

The answer to the first conclusion was, That the old form of popular elections, universal in Scotland, was justly altered by the act 29th, Parliament 1469, because of the difficulties and confusion attending such elections; an aristocratical form of election being introduced in place of the democratical, by appointing the old council to chuse the new: That the charter 1589, though granted long after the alteration, was probably made out by inadvertency in the old stile: [1843] That the set 1716, by the Convention of burghs, proceeding upon the known inconveniences of popular elections, was an alteration for the benefit of the town, no great deviation from the charter, and agreeable to the spirit of our law, as it now stands; and therefore that this set must be the rule, as the Convention of burghs is authorised to make regulations about this matter.

To the second conclusion, it was answered with regard to the electors, That though an honorary burghess, merely *qua* such, ought not to be admitted to a vote; yet honorary burgesses, who have property in the town, are entitled to be electors, both by the charter and by constant practice, though they may not be inhabitants: That these persons are also qualified to be elected, especially Sinclair of Ulbster, of whom the town holds most of its property, and to whom they pay a considerable feu-duty; and that country gentlemen who have property in the town, are perhaps more interested and better qualified to promote its welfare than many of the inhabitants:

That whatever reason there may be for the bailies being burgesses and inhabitants, who must constantly attend the dispensing of justice, there is no such necessity that the provost should be a burgher or residenter : That in fact a practice has prevailed in most of the small burghs of the kingdom, of chusing country gentlemen to be provosts ; and that this practice is authorised by a judgment of the House of Lords in the case of Dumbarton, 19th February 1735 : And lastly, as to the councillors, that neither the words of the charter, the practice of other burghs, nor reason, require that they be inhabitants.

The pursuers replied to the first, Where a royal burgh is erected without prescribing a form of government, or where the form of government is doubtful, by uncertain practice, it is the province of the Convention of burghs to adjust differences, and to ascertain the form of government by a writing called a set. But the Convention of burghs have no power to alter a set prescribed by the King, more than to deprive a royal burgh of any of its rights and privileges. Nor is there any pretext of an established usage or practice, past memory of man, contrary to the charter of erection. We find the popular election of magistrates was the form so late as the 1708 ; which no doubt continued till it was altered by the set 1716. And this alteration was not only made without any proper authority, but was really a partial and unjust deed by the Convention of burghs, founded upon a false and affected narrative of uncertainty in the form of election, brought about by the influence of the Earl of Breadalbane, without so much as allowing the town to be heard for its interest ; and calculated to put the government of the burgh in the hands of the Earl, and of Sinclair of Ulbster, who derives right from him.

As to the second conclusion, it is extremely clear, from the charter, that none have right to vote but *liberi inhabitantes et burgenses* ; and that none are qualified to be of the magistracy or council, but the same *liberi inhabitantes et burgenses*. The defenders admit this so far, as that an honorary burgher is not qualified to elect or be elected ; and, consistently with this admission, how they can [1844] plead for country gentlemen, whatever property they may have in the town, if neither inhabitants nor burgesses, is what the pursuers cannot comprehend. Nay, the defenders further admit authority of the charter to exclude any from being bailies but burgesses and inhabitants ; and yet, with the same breath, they insist that a stranger may be provost, though the charter makes no distinction betwixt the qualifications of provost and bailies. And it is of no consequence what may be the custom of other burghs, when this burgh has its privileges upon the express condition of chusing no man for provost but a burgher or inhabitant ; and the same regulation is laid down with regard to all the other office-bearers, and also with regard to the councillors.

As to the judgment of the House of Lords in the case of Dumbarton, the pursuers say that that judgment is not applicable to the present case. It was a reduction of an election upon this ground, that a country gentleman was chosen provost, who was disqualified by the statute law of the kingdom. The election being reduced by this Court, the judgment was reversed by the House of Lords upon the following ground, that a contrary usage had prevailed so far against the statutes, as put the town in *bona fide* to elect a stranger for a provost ; and therefore that this particular election ought to be sustained, leaving the statutes to have their full force in time coming ; which was really doing no more than what the Court of Session has done in this very case, by sustaining the elections of this town for the years 1745 and 1746, being in *possessorio* ; reserving to the pursuers to ascertain the form of election in time coming by a declarator, as accords ; nor more than what they have done in many similar cases, by sustaining informal sasines and executions, upon the force of consuetude ; but declaring all such informal deeds to be null in time coming, and making acts of sederunt to that purpose.

It was further observed, that the charter of erection, confining the privilege of bearing office within this burgh to burgesses and inhabitants, particularly with regard to the provost and bailies, was no singular regulation, but copied from the public law of the kingdom. It was an old sore, distressful to the royal burghs, especially to the meaner sort, that they were constantly laid open to their powerful neighbours, noblemen and gentlemen ; who, grasping at power and profit, wanted to get the government into their own hands. An ample remedy was provided for this sore by the act 26th, Parliament 1535 ; an effectual remedy at this day, when judges take care to put it in execution. The act proceeds upon this narrative, " That the

royal burghs are impoverished and almost ruined by the disuse of merchandize, occasioned by electing strangers for magistrates, who consume the common-good of the burgh, and aim at nothing but their own profit : Therefore enacted, that no man in time coming be chosen provost, bailie, or alderman, but an honest substantial burgess, who is a merchant or indweller within the burgh." And this statute is renewed and enforced by the act 8th, Parliament 1609.

The only answer that can be given to the charter of erection, and to the statutes supporting it is, that a contrary custom has prevailed through most of the [1845] royal burghs in Scotland, and in the town of Wick in particular, of electing strangers to be provosts. But supposing this to be the fact, which is not admitted, the pursuers can find no foundation for giving a practice, however long continued, the effect of altering or annulling that very charter upon which the being of the incorporation is founded : If it be in force as to any one particular, it must be totally in force. And as the inhabitants of the town of Wick have no power, even by consent of the whole incorporation, to alter one article of their charter of erection ; no practice of theirs can have that effect, which at best is but an implied consent.

And, as to the statutes now mentioned, the pursuers say, that laws touching the public police go not into desuetude : Some of our best authors are of that opinion ; and the Court of Session was of that opinion, in the decision observed, No. 3, p. 1838, 27th Jan. 1681, *Jack contra Town of Stirling*. But, be this as it may, one thing is certain, that no contrary practice has been specified, to infer, that the statutes under consideration are in desuetude. And, because this proposition is of consequence to the nation in general, as well as to the pursuers in particular, the following considerations are suggested :—There are but two ways by which a statute can be abrogated ; one is by a posterior statute, the other by a contrary custom, inconsistent with the statute, consented to by the whole people ; for, if custom have the same force with a statute to make law, custom must have the same force with a statute to unmake law, or to unmake a statute. When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute ; and so much is implied in the very term desuetude.

So far the matter is clear ; the difficulty lies only in the application of the doctrine to particular cases, and in specifying such an universal contrary custom as to have the force of a new law ; which will be readily sustained in some cases, and with difficulty in others. Statutes which have lost their utility, by change of manners and circumstances, will very readily go into desuetude, and the allegation of a contrary practice will be readily admitted without much proof : Nay, it will be presumed without proof ; for example, Who is it that doubts of the following statutes being antiquated and in desuetude, viz. the act 122d, Parliament 1581, prohibiting horses to be kept at hard meat from the 15th May till the 15th October ; the act 116th, Parliament 1581, obliging landed gentlemen to reside at their country-seats under a penalty ; the act 84th, Parliament 1426, obliging all men going beyond seas, to take their bills of exchange from bankers within the country ; the act 144th, Parliament 1436, that none be found in taverns after nine at night, &c. These, and such like statutes, however useful when made, have lost all their utility by change of manners and circumstances, and would be considered at present as so many idle restraints upon the liberty of the subject ; and desuetude will be presumed from the nature of the thing, without necessity of any direct evidence.

[1846] But statutes that are beneficial to the lieges at present, as much as when enacted, require a very special allegation of an universal contrary custom to prove them to be in desuetude. Their utility will always be a presumption in their favour ; and, therefore, instances, however numerous, of their being encroached upon, will be just so many instances of illegal practice. To come to particulars : There is a statute prohibiting members of the College of Justice to purchase pleas, which certainly deserves to be in eternal observance. Let us suppose, that by the relaxation of discipline, such purchases had become frequent and general ; the custom no doubt might excuse from the penalty, as introducing a sort of *bona fides* ; but, would the Court find the statute in desuetude, upon specifying endless deviations for a considerable space of time ? The Court would certainly give no such judgment ; because particular instances, however numerous, can never comprehend the whole people, or the bulk of them. The Court, as in similar cases, would sustain such purchases *in præteritum* ; but would declare, perhaps by an act of sederunt, that they will put

the law in execution in time coming. And they would do the same with regard to their own acts of sederunt, prohibiting agents to be factors upon bankrupt estates, and appointing rankings to go before sales, if these salutary acts were broke in upon by any general practice to the contrary. There is a statute discharging the pulling bent growing upon sand-hills at the sea-shore. This statute can never go into desuetude ; for even ten thousand instances of a practice contrary to the statute, would be considered as so many transgressions deserving punishment, and not to be countenanced so far as to abrogate the law.

And this in effect comes to the same with what is said by writers upon the English law, which gives as strong an effect to custom as the laws of this or any other country do. The doctrine is laid down in the following words : " But every custom which appears to have been unreasonable in itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to particular persons, is void ; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation."

But, to prevent mistakes, the pursuers must observe, that though salutary statutes can scarce be annulled totally by disuse, they will yield to private rights established by prescription, or by immemorial possession. The statute 1455, discharging heritable offices to be granted, being introduced in favour of the Crown, may certainly go into desuetude, by numberless instances of heritable offices granted contrary to the statute ; for the crown, as well as a private person, may renounce a benefit introduced in its own favour, and so many repeated instances may be justly considered as a virtual renunciation. But let us suppose that the statute was introduced for the good of the public : Upon that supposition, the numberless grants of heritable offices must be considered as so many transgressions of the public law, which will not infer that the law is in desuetude. Yet, as to the particular grants made by the crown, there is little doubt but they may be secured by prescription, or by immemorial possession.

[1847] To apply these considerations to the present case, the two statutes confining the privilege of bearing the office of provost, bailie, or alderman within burgh, to merchants who dwell within the burgh, are at present as necessary to the well-being of the royal burghs, as when they were made. And the grievance complained of in the preamble to the first of these statutes, would be as sorely felt by the burghs at present as ever, if an universal practice were introduced and supported contrary to these statutes. All the instances then that can be specified, of country gentlemen elected provosts of burghs, were they more numerous than they are, cannot be considered in any other light, than as so many encroachments upon the public law, which can never imply any thing like an universal consent, even of the royal burghs, to pass from the benefit of the statutes ; especially as many instances that can be given, must be mixed with more frequent instances of burgesses being chosen provosts, &c.

But there is more to be said against the relevancy of such instances. Supposing a stranger is chosen provost without opposition, and consequently with the presumed consent of the whole community ; this instance, and many such, do really prove no more, but that the burgh, upon some view of benefit from the person elected provost, has been willing to dispense with its privilege upon that occasion. And the dispensing with a privilege upon particular occasions, will never infer a passing from the privilege altogether ; for it is inherent in the very nature of a privilege, that it may be exercised or forborn at the pleasure of the party privileged. And, as the instances are few, of reducing an election of Magistrates, because a stranger is chosen provost, this is legal evidence that the bulk of the instances where strangers are elected provosts, must have been by consent of the whole community ; which proves just nothing at all. Such instances cannot bar that burgh, nor any other burgh, from exerting their privilege afterward, of being governed by their own inhabitants as magistrates.

Thus then the case stands. Instances of strangers being chosen provosts of burghs, by consent of the whole community, however numerous, cannot, in the nature of the thing, bar a burgh, or any single burgess within burgh, from exerting the privilege in any future election, by objecting to the nomination of a stranger to be provost ; and, if the objection be once made, and brought before this Court, it ought to be sustained. But, at the worst, supposing these instances to be considered as a sort of custom established contrary to the law ; yet such custom ought never to have any weight, except as to by-gones. If the effect be given to it, of supporting a stranger provost for the year of his election upon a *bona fides* acquired by custom ; this is the

utmost effect that ought to be given it. But then, as such custom can have no effect *ad futura*, it can never stand in the way of a declarator tending to regulate the election in time coming.

And what strongly supports the declarator is, that there can be no *jus quasitum* to any single person to entitle him to stand up in opposition to it. Ulbster, for example, though he and his father have been frequently chosen provosts of [1848] this burgh, and have always had the interest, by virtue of the set 1716, to obtain themselves or their minions to be chosen provost; yet this same gentleman has acquired no privilege, whether by prescription or otherwise, to be perpetual provost or dictator of this burgh: Whatever illegal interest he may have, he has certainly no legal interest to oppose this declarator, more than any other gentleman in Scotland.

"Found, that in the election of a provost and bailies, resident burghesses, and heritors being also burghesses, though not resident, have a right as electors, and none others. Found, That none but those who are resident, can be elected bailies; but that it is not necessary the provost, or any of the councillors, should be resident burghesses."

N.B. The judgment concerning the councillors proceeded upon this ground, that there is no law requiring the councillors to be inhabitants. See *DESUETUDE*.

Fol. Dic. v. 3, p. 99. *Rem. Dec.* No. 103, p. 192.

No. 80. [1961] CORPORATION OF WRIGHTS OF GLASGOW v. JAMES CROSSE.
March 8, 1765.

A freeman may be employed to make coffins, for behoof of an undertaker who is not a freeman.

James Crosse, a freeman wright of Glasgow, and some time deacon of the corporation, was employed by Daniel Miller, an unfreeman wright, to make two coffins at different times.

Miller had the direction of the funerals in both cases, and provided all the articles wanted. In the first instance, the wood of the coffin was got from Miller, and two of his servants assisted Crosse in making it, at his shop in the city of Glasgow. In the second, part of the wood was brought from Miller's, and the whole work performed by Crosse and his servant.

[1962] Upon a complaint, the magistrates condemned Crosse to a fine of 100 merks as guilty of a breach of the exclusive privileges of the corporation, by packing and peeling with unfreemen.

Crosse having suspended, it was pleaded for the chargers, That, as Miller was the person employed to furnish the coffins, and supplied the wood for that purpose, so the intervention of Crosse was no more than a colour to enable an unfreeman to work with impunity within the liberties.

Answered: Miller might have contracted with an unfreeman to make the coffin, and then brought it into the city ready made; so that, to find that he could not employ a freeman to make it, would be to the manifest hurt of the corporation.

Indeed, the furnishing of coffins cannot come under the exclusive privilege of the corporation of wrights. A wright can only make the wooden part; the cutting of the cloth belongs to the taylor craft; and the preparing of the nails, screws, and hammers, belongs to the craft of hammermen. A work which requires the intervention of so many different crafts, cannot be peculiar to any one corporation. And, accordingly, the profession of undertakers has been established, whose province it is to take the whole management of funerals, to employ the different craftsmen, and to provide every necessary article; but it cannot be said that undertakers are bound to enter with any particular craft.

The Lords "suspended the letters *simpliciter*."

Nota. It was objected, in the beginning of the proceedings, that the corporation had not produced their seals of cause; but this objection was passed from, it

being admitted that the corporation had been long established and acknowledged as such ; so that, even without a seal of cause, their privilege would be supported by prescription.

For the Chargers, LOCKHART, COSMO GORDON.—Alt. MONTGOMERY, SIR DAV. DALRYMPLE, W. STEWART,—Clerk, PRINGLE.

G. Ferguson.

Fac. Col. No. 7, p. 209.

No. 17. [26] MEIKLEJOHN and Others v. MASTERTON and Others. May 28, 1805.

A majority of a corporation must be present to constitute a legal meeting, where no quorum is fixed by the constitution of the corporation.

The burgh of Culross, formerly a burgh of barony, was erected into a royal burgh by James VI. in the year 1588. The convention of burghs in 1658, named Commissioners for settling the number and quality of the Town Council, which was fixed at nineteen, the three magistrates included ; and the moderator of the Town Council was to have two votes at the yearly election, in the [27] event of an equality of votes. Nothing was fixed regarding a quorum, or the number necessary to constitute a legal meeting.

One of the Councillors having died, and the Town Council being thus reduced to eighteen, a meeting was called for the 28th September 1803, which was attended by nine members of the Council, including Bailie Masterton, who, by the custom of the burgh, as being the Magistrate entitled to preside at that meeting, had the right of giving a casting vote, in case of equality. The other nine councillors declining to attend, Masterton and his friends (being in one interest, and with his right of giving a double vote if called for), conceiving themselves to form the majority of the Town Council, proceeded to business.

Upon the 29th September, the day of the Michaelmas election, the two parties made separate elections of councillors ; in trying the merits of which, it was necessary to determine, whether the meeting held on the 28th September, was a legal meeting ; because if it was a legal meeting, Bailie Masterton had a right, as preses of said meeting, to take the chair on the 29th, and to give a double vote, in case of equality, in chusing the preses of that meeting ; whereas, if the meeting of the 28th was not legal, that right belonged to another of the bailies, Bailie Meiklejohn, as having presided at the immediate preceding meeting ; and upon this depended the whole after steps of election, the two parties being equal in point of numbers. In support of the objection, that ten councillors ought to have been present at the meeting of the 28th, as being the majority of the corporate body, Meiklejohn and others, in a hearing in presence,

Pleaded : In all corporations, consisting of a definite number, the rule is, where nothing determinate is fixed in the constitution of the burgh, that the majority of the whole body must be present to form a legal meeting. It never can be supposed, that any number, however reduced the members of the corporation may be, shall be sufficient for the purposes for which the charter was granted ; and that the survivors, by refusing to fill up the vacancies as they happen, might monopolize the whole government of the burgh to themselves. In all cases, to do a corporate act, the major part of the members must be present ; 29th July 1747, *Mason and others v. Magistrates of St. Andrews*, No. 20, p. 1271 ; 24th December 1803, *Macnab v. Martin*, APPENDIX, PART I., *voce APPEAL*, No. 2 ; 25th June 1792, the *King v. Bellringer*, Term. Rep. iv. p. 810 ; 6th May 1795, the *King v. Miller*, Term. Rep. vi. p. 268.

Answered : In a corporate body, where the charter is silent regarding a quorum, it is expedient and necessary that all acts of administration should be effectual, if done by any number lawfully assembled, provided due premonition has been given to the rest ; *Bacon's Abr. voce Corporation* ; *Kyd on Law of Corporations*, vol. i. p. 422 ; 1741, *Attorney-General v. Davy*, *Atken's Reports*, p. 212. But even if the presence of a majority of the corporation were required to do a corporate act, this can only be a majority of the existing members. It seems preposterous to maintain,

that the major part of a body, [28] which does not exist, shall be requisite to form a legal meeting; it can only be a majority of those who in reality compose the corporation, and have it in their power to act; otherwise it would follow, that if by death or resignation, the number was reduced below its original majority, the burgh would be disfranchised. In the present case, this singular consequence would follow, that if the nine separating members had appeared, as they ought to have done, upon the 28th, the nine who did attend, one of whom being entitled to preside, and to have the casting vote, would have had a majority in their favour; but that by separating from the others, they annul what was done at a meeting, which, had the whole attended, would have just decided in the same way. Were this objection sustained in no case whatever, where the members of a corporation are equally divided, would the party not entitled to the casting vote ever allow themselves to be outvoted, or they need only withdraw, and prevent the remaining members from forming a legal meeting.

The Lords "found (5th March 1805), That there was not a majority of councillors present to constitute a legal meeting of council"; which was adhered to (28th May 1805), by refusing a reclaiming petition, without answers.

For the Complainers, H. ERSKINE, J. CLERK.—Agent, D. SPOTTISWOODE, W.S.—
Alt. SOLICITOR-GENERAL BLAIR, BURNET, BOYLE.—Agent, JA. HORNE, W.S.—
Clerk, PRINGLE.

F.

Fac. Col. No. 210, p. 469.

No. 8. [2038] Captain DUNDAS v. RODERICK M'LEOD, Writer to the Signet.
December 13, 1743.

A Cautioner before the Admiral-court *judicatum solvi*, is not freed by the death of the defender during the dependence. The defender's representatives, though foreigners, may be called by an edictal citation.

The Captain, an officer in the Dutch service, having enlisted several men, entered into a charter-party with Charles Greig, ship-master, for transporting his recruits to Holland. When the ship that they were to go in, came into the road of Leith, the Captain sent his men from Leith to the ship; but, when he came there, he found one Lieutenant M'Leod, an officer also in the service of the States, had taken possession of the ship with another parcel of recruits, and would not allow his men to come a-board; whereupon they returned to Leith, where several of them deserted; and those that remained put him to a considerable charge before he got another opportunity of transporting them. Upon which the Captain brought a process before the Admiral, against Lieutenant M'Leod, for recovering his damage: And to prevent the effect of a warrant which had been issued out for apprehending the defender, until he should find caution *de judicio sisti et judicatum solvi*, Roderick M'Leod appeared, and became caution *de judicio sisti*, &c. After this the process went on; a proof was allowed to both parties, which was advised, and the defender found liable in damages; but before decret he died: whereupon the Captain transferred his process against the defender's representatives, and decret was pronounced against them: and the cautioner, Roderick M'Leod, suspended on the following grounds, Imo, Because the obligation he came under was an accessory one, pendent entirely on the effect of the obligation that should come out against the principal, and so fell under the rules that relate to cautionary obligations. That though the two different cautions *sistendi et judicatum solvi*, are tacked together, yet there could be no doubt that the *sistendi* was at an end by the defender's death; and, by the principles of the civil law, when the party dies the instance against the dead man is at an end; and until the process and instance is renewed by an action against the heirs, no procedure can be had. The *lis* as to him is *mortua*, and consequently the caution found falls to the ground: and when it is considered that cautionary obligations are, in all cases, *stricti juris*, it was equitable and just to circumscribe it so that it should not

affect the cautioner, if the defender died before decret was obtained against him ; or this reason, if the ac-[2039]-tion for the same thing was altered, the cautioner was free ; or, if the pursuer went from one judge to another, he was let loose, according to the opinion of several lawyers. Now, when the principal defender dies, there is a *mutatio personæ* in the litigation. It may be said, indeed, that an heir is *eadem persona cum defuncto* ; but, notwithstanding this fiction of law, there is certainly a difference of persons, though, as to some effects, they may be considered as the same ; e.g. the very calling an heir shows he is not considered, in every point of light, as *eadem persona* with his predecessor, otherwise the citation of the predecessor would be sufficient. In a word, the suspender is bound for Lieutenant M'Leod only, and not for his heirs ; he is bound only for what shall be decreed in this action against him, not in an action against his heirs ; and, as all *fidejussory* obligations ought to be strictly interpreted, there does not appear any solid ground in law upon which he can be made liable.

2do, Supposing the cautioner were liable *judicatum solvere* what was decreed against the heirs, yet that still supposes the Court has a jurisdiction to decern against them : But, the case here is, that the heirs of Lieutenant M'Leod, called in the transference, are persons living in Holland, and who never were in Scotland in their lives ; so that the decree is plainly good for nothing, as being pronounced *a non suo judice* : So that here is the suspender, a cautioner, decerned, where there is no principal ; where if he should pay, in obedience thereto, he can have no recourse. See Hodge, 20th January 1680, No. 5, p. 2034 ; Stuart, 16th November 1636, No. 3, p. 2033, l. 2, *ff. judicatum solvi* ; and l. 3 and 7, *eod. tit. Groenwigen et Bugnion de legibus abrogatis ; Miningerus ad tit. instit. de satisfact.*

Answered : That if the *cautio judicatum solvi* shall be found to be of no greater security than that of sisting the person of the defender, when called in judgment, which is evacuated upon the death of the defender ; a stranger who might be occasionally here, and, as such, with his effects subjected to the arrest *jurisdictionis fundandi causæ*, behaved to remain here never so long, till the event of the cause, although he had never so much credit abroad, or business to transact elsewhere. It was therefore necessary that another kind of caution should be introduced, as well for the security of the pursuer, as the conveniency of the defender ; and that was the caution *judicatum solvi*, that whatever became of the defender himself, whether he turned bankrupt, or by going abroad should not be found, or if he should die, the pursuer might be secured of his payment of what should be decerned to him. It is for this reason, that enactments in maritime courts are not, that the cautioner should be bound for the defender in whatever might be decerned against him, but *impersonaliter judicatum solvi* ; and, if this were not the case, there would be little difference betwixt the caution for the defender's compearance, and that other caution *judicatum solvi*, that the acts and sentences of the Court should be performed ; seeing, in both cases, the suspender argues the cautioner ought to be free upon [2040] the death of the defender. There is likewise this other difference betwixt them, that a cautioner *judicatum solvi* is taken to be *fide jussor totius causæ*, whereas the cautioner *de judicio sisti* is only taken to be *fide jussor litis exercitationis*, to which our custom does exactly agree ; and when the action is finished by decret, the same goes out against both defender and cautioner at the same time, and diligence may proceed against the cautioner himself, as well as against the defender, without charging the cautioner ; because, in such cases, there is no privilege of discussion betwixt principal and cautioner : Nor can the death of the defender be reckoned such an alteration, as to free the cautioner, seeing his representatives come in his place. To the second reason of suspension it was answered, That where the judgment is once founded by arrest, whether of the original defender's person or effects, as in the present case, as decret would have gone against the original defender by reason of the *jurisdictio fundata*, so it must regularly proceed against the representatives, if the passive titles were proven, as in this case, or declaratory, that the judgment may have its effect. See 14th February 1627 and 1632, Pyrnon.* Voet in his commentary on the title *Qui satisf. cog.* § 10 and 11,—l. 8, § 3, *ff. de fide juss.*

The Lords found, That a cautioner *judicatum solvi*, before the Court of Admiralty, is not liberated by the death of the principal defender, before final sentence ; and that it was competent to bring the representatives of the principal defender into

* Pyrnon v. Ramsay's Executors, Durie, p. 273 & 644, *voce* WRIT, Privileged.

process, though foreigners, by edictal citation; and that the said representatives were regularly brought into Court by this action: and therefore found, that in the case the cautionary obligation *judicatum solvi* does subsist.

Fol. Dic. v. 3, p. 114. C. Home, No. 254, p. 409.

No. 13. [2051] MARY RAY of the Parish of St. Pauls, Covent Garden, and John WILSON, her Attorney v. Mrs. GEORGIANE BELLAMY. June 21, 1763.

A foreigner found in this country is not bound to find caution to another foreigner.
judicatum solvi.

Georgiane Bellamy, a celebrated actress, came to Edinburgh in 1762, and soon thereafter, a petition was presented to the Sheriff, by John Wilson, setting forth That she was indebted to Mary Ray, his constituent, in upwards of £1000 Sterling and praying a warrant to apprehend and imprison her person, until she should make payment, or find sufficient caution; and, upon preferring this petition, Wilson made oath, that he had good reason to believe she had lately left London, and disposed of and carried away her effects, in order to disappoint her creditors of their payment.

The Sheriff granted warrant for imprisoning her until she should find caution *judicio sisti*; which was soon thereafter complied with.

Wilson then insisted in his libel before the Sheriff, and presented a second petition craving an enlargement of the warrant of commitment, until she should find caution *judicatum solvi*, or at least, not to withdraw her person and effects from under the jurisdiction for 40 days after decreet.

This petition being refused, Wilson offered a bill of advocation, and likewise brought an advocation of the principal cause.

The Lord Coalston Ordinary having advocated both causes, and conjoined them, made avisandum to the Lords with this point, How far the defender is in this case obliged to find caution *judicatum solvi*?

Pleaded for the pursuers: The general rule of law is, that all strangers must find caution, both *judicio sisti et judicatum solvi*. This rule is laid down by Sir James Balfour in his Practices, who confirms it by a decision as far back as 27th March 1537, in the case of Curl *contra* Watson, observed *voce* FORUM COMPETENS; and Lord Stair, lib. 4, tit. 47, § 23, when treating of the admiral-court, where such caution is uniformly exacted, gives this good reason for it, because the admiral's jurisdiction being most conversant about strangers, he is authorised summarily to seize their persons, till they find caution *judicio sisti et judicatum solvi*.

Lord Bankton makes the like observation with respect to the practice of the admiral-court, vol. 1, p. 460, § 33; and, in the next page, § 36, says, that "foreigners owing debts to the inhabitants of this country, may be seized by summary-warrant at the suit of the creditor, till they pay or find caution."

This last author indeed is of opinion, that this remedy will not be granted to a foreigner accidentally in this country, against another stranger, likewise occasionally here, in relation to debts contracted abroad; but in this opinion he is singular; and that the distinction has not been allowed in practice, appears from sundry precedents. Thus, in the case of Irvine of Elvies *contra* Vernon, observed [2052] by Lord Haddington, 1610 (*voce* FORUM COMPETENS), "warrant of arrestment was granted by the Lords at the instance of an Englishman, upon the goods of another Englishman, neither of them being in this country *animo remanendi*, upon bonds made in England not bearing any condition of payment to be made in Scotland." So also in the case of Arnold *contra* Young, observed by Fountainhall, February 22, 1684; and by Harcarse, No. 487, December 1683 (*voce* FORUM COMPETENS). "The Lords, upon a bill craving warrant to arrest a Frenchman's effects in this country, till caution should be found *judicio sisti et judicatum solvi*, granted warrant in these terms." It is indeed true, that these two cases respected only arrestment of the effects, but the principle is the same; and, accordingly, in the case of Robertson *contra* Bell,

11th January 1676 (IBIDEM), it was judged, that Englishmen may be arrested in any burgh, though by strangers.

Answered for the defender: The only cause of arresting either the goods or persons of strangers is, that otherwise they are not liable to the jurisdiction of the courts in this country; where the effects are arrested, these only become liable to attachment, and the decree of the court can have no further effect than to the extent of the goods arrested. If, on the other hand, the person be arrested, it is thereby subjected to the jurisdiction of the court, so that the defender must appear at all the diets of the process. This is all that a pursuer is intitled to claim of a stranger defender, in order to put him in the same case with a native subject, and for this the caution *judicio sisti* is sufficient. So it is laid down by *Peckius de jure sistendi*, l. 45, § 7; and the practice of the Court has, from the earliest times, been agreeable to this doctrine. Sir Richard Maitland observes a case: An Englishman v. Angelo, an Italian, 22d January 1564 (*voce FORUM COMPETENS*); in which, upon application to the Lords by bill, warrant was granted to secure the person of a stranger till he should find caution *judicio sisti*; but, at the same time, the pursuer was also ordained to find surety for the pursuit of the action of damage and interest in case he prevailed not. Another case is also observed by Lord Stair, 10th July 1666, Thomson, No. 4, p. 2034, which shews, that it was then clearly understood by the Court, that caution, as law will, imported only *judicio sisti*, not *judicatum solvi*.

The same doctrine was observed in a very late case, 7th March 1755, John Harries *contra* Robert and John Lidderdale, No. 11, p. 2044; and it appears from the collection of this case, that it was observed from the Bench, "That an arrestment *jurisdictionis fundandæ gratia* is usual in most countries, and in our country; but, to oblige a defender to find caution *judicatum solvi*, is not usual, except in maritime causes before the admiral-court; and that it would be dangerous to commerce, and to personal liberty, if a debtor were always obliged, when found in a foreign country, to find caution *judicatum solvi*."

It will at the same time occur, that there is a remarkable difference betwixt the case of Harries and the present. There the caution was asked to secure a [2053] debt due to a native; whereas here it is sought by a stranger to secure a debt contracted in another country. Of old, it was much doubted, whether this Court could take cognisance of debts contracted betwixt foreigners in foreign countries. Haddington observes, that the Court found they could not, 23d November 1610, Vernour *contra* Elvies (*voce FORUM COMPETENS*). But, even supposing that a stranger who contracts debts in this country may be forced to remain until he give satisfaction as to these debts, there is not the same reason, that a stranger, coming occasionally to the country, should be deprived of his personal liberty, because he is not ready instantly to pay, or to find caution for payment of every claim that may be brought against him by other strangers, on account of dealings he may have had in other parts of the world. This would deter strangers from coming to this country, and would prove highly prejudicial to commerce.

The practice of the court of admiralty can have no influence. It was by no means introduced on account that strangers are often defenders in that court; for that is not true in fact, but for a quite different reason, viz. The great dispatch with which it is necessary to follow out maritime causes; and accordingly the practice is confined to maritime causes only. In these, caution must be found *judicatum solvi*, whether the defenders are strangers or natives; but, in causes not maritime, such caution cannot be required by the Admiral.

The case observed by Balfour, in 1527, is shortly stated, and was soon after corrected by the decision above mentioned, observed by Sir Richard Maitland. Again, in the case of Robertson *contra* Bell, the reason of the decision immediately subjoined, viz. "This being the practice on the English side," shews, that it proceeded from some peculiarity in the border-laws observed at that time, as it were *lege talionis*; besides, it does not appear that caution *judicatum solvi* was in that case required. And as, in the other two decisions quoted by the pursuer, the caution was confined to the extent of the effects which were arrested; so, for the same reason, when the person only is arrested, the caution ought to be carried no further than that the person should be sisted at the diets of court.

To conclude, the defender has now resided here for many months, without any appearance of an intention to elope; and it is observable, that the pursuer Wilson,

in his oath before the Sheriff, did not venture to affirm, that he believed her to be *in meditatione fugæ*; it may therefore be doubted, whether any caution whatever ought to have been exacted from her.

Replied to this last observation: It stands confessed, that the defender is utterly insolvent, that her fixed residence was at London, and that she fled from there to avoid the diligence of her creditors; her stay here therefore can only be considered as a temporary expedient, dictated by necessity; and the same motives which forced her to leave England will induce her to fly from this country, whenever a decree shall be passed against her. Such being her circumstances, no [2054] oath whatever is requisite; and, unless a more effectual remedy be granted, it is apparent, that the caution *judicio sisti* will be of no earthly significance.

Observed from the Bench: There is neither justice nor necessity for ordering caution *judicatum solvi*. No justice, because such order might bear extremely hard upon foreigners, who, though they may find persons inclined from humanity to become cautioners *judicio sisti*, will not always have it in their power to procure caution *judicatum solvi*. No necessity, because, when a decree is pronounced, the pursuer may apply to the judge-ordinary, and upon making oath that the defender is *in meditatione fugæ*, he will then obtain a warrant to apprehend her.

"The Lords found, That the defender is not, *in hoc statu* of the process, obliged to find caution *judicatum solvi*; reserving to the pursuer, in the future steps of process to apply, that such caution may be found, as she shall be advised." See FOREIGN See FORUM COMPETENS. See MEDITATIO FUGÆ.

Reporter, Lord COALSTON.—Act. LOCKHART.—Alt. MONTGOMERY & FERGUSON.—Clerk, TAIT.

A. Wight.

Fol. Dic. v. 3, p. 113. Fac. Col. No. 112, p. 259.

No. 16. [2057] WILLIAM SCOT, Merchant in Newcastle v. JOHN CARMICHAEL, Merchant in Morpeth. December 6, 1775.

A summary warrant cannot be issued at the instance of one foreigner against another, when transiently in this country, to the effect of obliging him to find caution *judicio sisti*, in relation to a foreign debt.

In October 1775, Scot transmitted to his doer at Edinburgh the following affidavit: "William Scot, of the town and county of Newcastle-upon-Tyne, merchant, maketh oath and sayeth, That John Carmichael, late of Morpeth, in the county of Northumberland, shopkeeper (who has lately retired to Edinburgh, as this deponent believes, to avoid the payment of his debts), is justly and truly indebted unto this deponent in the sum of £65, 0s. 6d., for goods sold and delivered, and for which said sum this deponent has not received any satisfaction or security whatsoever; and, in regard that the wife of the said John Carmichael is now selling off his stock, and refuses to pay his debts, this deponent verily believes the said John Carmichael intends to defraud this deponent and his other creditors, and not to return into England." And the agent was authorised to endeavour to get Carmichael secured.

The agent accordingly gave in a petition to the Sheriff, praying him to incarcerate Carmichael till he should find caution *judicio sisti*, in any action to be brought against him for payment of the above debt; and the Sheriff having ordered Carmichael to be brought before him for examination, he emitted the following declaration: "Declares and acknowledges, that he is resting to the petitioner William Scot the debt mentioned in the petition: Declares, that he left Morpeth on the 25th September last, and came to Edinburgh, and has remained there ever since, until yesterday that he went to Leith to see if he could find a conveyance to carry him to Newcastle: That he intends to return to his own home at Morpeth, and that his wife is carrying on his business in his absence, and paying off his debts; and that, since he came here, he has sent different parcels of goods to his wife at Morpeth; and that he did not leave [2058] Morpeth with any view to avoid the effects of writs of arrest against him, as

he knew of none against him. And being interrogated, if his wife was paying off debts at Morpeth, why she did not pay the petitioner Mr. Scot his debt, or any part of it, though demanded by himself, and also demanded by his clerk, as appears by the letters produced, last Monday ? declares, That his wife has wrote to the declarant that she had been paying off debts, as they occurred, since he came from home ; and that, when Mr. Scot made the demand upon her, she was not in cash to pay him, but promised to pay his debt how soon cash came to her hand, and wrote him to that purpose."

The agent then insisted, that as it appears, from the above declaration, that Carmichael intends to leave this kingdom ; and as it appears, from the affidavit produced, that Mr. Scot does not believe he meant to return to England, but that his intention is to defraud his creditors, therefore craved warrant, in terms of the petition ; and that he, as attorney foressaid, was willing to make oath in the above terms. And accordingly he deponed, that he really and truly believed, in his conscience, that Carmichael was *in meditatione fugæ*, and about to leave this kingdom, and not to return to England, in order to defraud his constituent, and his other creditors, of their just debts ; upon which the Sheriff granted warrant as craved ; and Carmichael being incarcerated, presented a bill of suspension and liberation upon juratory caution, which the Lord Ordinary reported to the Court.

The suspender insisted, that his incarceration is doubly illegal. In the 1st place, because he himself is not subject to the jurisdiction of this country, not having been born here, nor having resided forty days so as to have a domicile ; having only come to this country for his health, and in order to purchase goods, and about to return. And, 2dly, because Mr. Scot himself is not to be held a subject of this part of the united kingdoms, nor entitled to that privilege in the law of Scotland, by which a creditor can have his debtor secured till he find caution *judicio sisti* : That, to allow Englishmen to get other Englishmen imprisoned, as *in meditatione fugæ* from this country, when neither of the parties are resident in it, but have their proper *forum* in England, would be a manifest absurdity, and lead into inextricable confusion. For example, the suspender, who is an Englishman, would be obliged to find caution *judicio sisti* in this country, and, upon his return to his own country, which is also that of his creditor, he would, by the power of another jurisdiction, be again attached, and again obliged to find bail, so that he would be laid under the necessity of putting himself to a great deal of trouble and expence, which could be attended with no good effect whatever. And the suspender referred to the authority of Bankton ; and to a decision collected in the Dictionary, as precisely in point : " The Lords refused to sustain themselves judges between two foreigners being in this country occasionally, *non animo remanendi*, especially in matters of debt contracted forth of the country." Haddington, 23d November 1610, Vernour *contra* Elvies ; *voce* FORUM COMPETENS.

[2059] The cause was decided, after a hearing in presence. Several of the Judges delivered an opinion, that the warrant was legal and well founded in this case. It was said, there was no good distinction between a foreigner's person, and his moveable estate in this country, which was clearly subject, *ab initio*, to the jurisdiction, though it cannot be explicated without an arrestment ; but that their being found here did create a temporary jurisdiction equally as to both ; more especially in a case of necessity such as the present, accompanied with an intention to defraud. On the other hand, it was observed, that there was not before the Court sufficient evidence of fraud on the suspender's part ; so that the question came simply to this, whether the mere personal existence of a stranger in this country shall subject him to its jurisdiction ? which, it was said, was neither agreeable to principles of law nor expediency.

The bill was passed without even juratory caution. See MEDITATIO FUGÆ.

Reporter, GARDENSTON.—Act. M'LAURIN.—Alt. J. BOSWELL.—Clerk of the Bills.

Fol. Dic. v. 3, p. 114. Fac. Col. No. 202, p. 143.

No. 2.

[8] TASKER v. MERCER. February 27, 1802.

The cautioner forfeits his bond, unless he produce the person of the debtor in a state as he may be liable to be attached by diligence.

Mrs. Susanna Frances Tasker, raised an action against Richard Mercer, an Irish gentleman residing in Edinburgh, for payment of a debt. Being apprehensive of his intention to leave Scotland, she presented a petition to the Magistrate of Edinburgh, stating that he was *in meditatione fugæ*, and praying that he should be imprisoned until he found caution *de judicio sisti*. The Magistrates refused the petition; but on a bill of advocacy, the Lord Ordinary remitted the cause to the judges, instructing them to alter their interlocutor, and to grant warrant to incarcerate Mercer until he found caution for six months; and the Court adhered to the judgment of the Lord Ordinary, finding that the caution should extend to the action already brought, as well as to any that might be brought within that period.

Accordingly Mr. Richard Hotchkis, Writer to the Signet, judicially enacted himself in the usual terms as cautioner, under penalty of payment of the debt.

An action for this purpose was immediately raised, in the course of which the pursuer called upon the cautioner to produce the principal debtor, in terms of the bond. But, in the mean time, Mercer retired to the Sanctuary, and presented a petition in his own name, and in that of his cautioner, for a personal protection. The cautioner contended that he was entitled to a warrant to bring the debtor in Court, as required by the creditors; and the debtor maintained, that as he had done nothing to forfeit the benefit of the Sanctuary, his person should be protected from the diligence of his creditors, both on his way to the Court, and also on his return to the Abbey.

The Court remitted the consideration of this petition to the Lord Ordinary, who, having heard parties, reported the cause. The creditor

Pleaded: The object of a creditor, in obtaining caution *de judicio sisti*, is to secure the debtor's appearance in Court, that he may make his debt effectual by diligence, and the bond is not implemented unless this object be attained; Inst. b. 4, tit. 1, § 2, Balfour Pract. p. 191, c. 3, 4; Bankton, b. 1, tit. 23, § 33, 36; Curl v. Watson, 27th March 1527, No. 37, p. 4825; Young v. Arnold, December 1683, No. 46, p. 483; Ayrie v. Chatto, February 6, 1701, No. 39, p. 4826. It is not merely sufficient that the debtor appear personally in Court, but he must appear in such a state, that the decree may be as effectual against him as before caution; for the interposition of the cautioner prevented the creditor from securing the person of the debtor by imprisonment, and he must therefore produce him in the same condition as when the bond was entered into. But by bringing Mercer to Court from the Sanctuary under a personal protection, the cautioner brings him in a very different state from that in which he was when he interposed by the bond; so that if this were held sufficient to implement of a bond of this nature, [9] the object of *cautio de judicio sisti* would be altogether defeated; Cowan v. Aitchison and Walker, November 28, 1797, No. 1, p. 2061, and it is a remedy to which every creditor of a stranger is by law entitled; Stair, b. 4, tit. 47, § 23. Herries v. Lidderdales, March 7, 1755, No. 11, p. 2044; Ray v. Bellamy, June 21, 1763, No. 13, p. 2051; Wright v. Gammell, February 1782, No. 9, p. 8553.

Answered: The object of a *meditatio fugæ* warrant is to prevent a debtor from defeating the diligence of his creditors by leaving the country; and the remedy of *cautio de judicio sisti*, is not to be extended beyond the evil which is dreaded. By this bond, the cautioner undertook that Mercer should not leave Scotland, and that he would produce his person when called upon, and he is ready to do so. He never entered into a bond, that Mercer should not avail himself of any privilege which debtors enjoy by the law or usage of the country. It might as well be maintained that he became security that he should not obtain a peerage; for in that way the diligence of a creditor would have been equally ineffectual. The obligation of the cautioner cannot affect the rights of a debtor who has done nothing to forfeit the privilege of the Sanctuary, and who is, like all other persons in his situation, whose presence may be required in Court, entitled to the benefit of a personal protection; Arrot v. Magistrates of Edinburgh, 1799 (not reported).

The Court, by a considerable majority, "Found, That the defender Richard Mercer, by retiring to the Abbey, could not liberate himself or his cautioner Mr. Hotchkis from the effect of the security already granted to produce him in Court, in terms of the bond of caution *judicio sisti* at the pursuer's instance; and therefore, unless he is produced accordingly, the penalty in the bond must be incurred: And that in the present question between the pursuer and the said Richard Mercer and his cautioner, no regard can be paid to the circumstance of Mr. Mercer's being booked at the Abbey as aforesaid: Remit to the Lord Ordinary to grant warrant, at the instance of Mr. Hotchkis, to bring the person of the said Richard Mercer from the Sanctuary into Court for the purpose mentioned in the petition given into the Court by him; but to grant no protection against the further diligence proceeding at the instance of the pursuers; and on the other hand to grant the prayer of the petition presented to his Lordship by the pursuer for the apprehending of the said Richard Mercer, in the terms therein specified; but find it unnecessary and incompetent, *in hoc statu*, to determine any question between the said Richard Mercer and his other creditors, who are no parties to this proceeding, reserving to him to claim the privilege of the Sanctuary against them, if he shall be so advised, and to them all objections thereto, as accords."

From the observations of the Court in this case, there appeared to be some difference of opinion among the Judges with respect to the nature of a *meditatio* [10] *jura* warrant; but the Court in general seemed to think, that the debtor and his cautioner could not by any voluntary act or deed defeat the diligence of the creditor, without incurring a forfeiture of the bond.

Lord Ordinary, POLKEMMET.—Act. BAIRD.—Agent, RO. DICK.—Alt. CLERK.—Agent, R. HOTCHKIS, W.S.—Clerk, MENZIES.

J.

Fac. Col. No. 26, p. 50.

No. 3. [2073] HALYBURTONS v. GRAHAM of Mosknow. July 12, 1735.

One person bound himself generally to pay all debts due by another to a third party. A debt prescribed *quoad* the principal, found not to be exigible against him.

Graham of Mosknow, in the year 1687, "became bound to pay to Captain Blair, all debts or sums of money, and accounts resting by Irvine of Bonshaw, deceased, to the said Captain Blair, according to instructions of the same to be given in by him." Within the years of prescription of this obligation, Captain Blair's representatives insisted in a process against Graham of Mosknow for payment of two bonds due by Irvine of Bonshaw to Captain Blair. The defence was, that these bonds were prescribed.—Answered, Imo, That the prescription was interrupted by the aforesaid obligation: 2do, Supposing the prescription to be run, *quoad* Irvine of Bonshaw, Mosknow must be liable upon his own obligation, which was not prescribed.—Replied to the first, Taking an additional security from a third party will be no interruption *quoad* the principal debtor, unless done with his concurrence; far less will a general obligation make an interruption, which is not taking a document upon any particular debt.—Replied to the second, The defender is not an *expromissor*, who takes a debt absolutely and ultimately upon himself; he is only *adpromissor*, liable indeed directly to the creditor, but virtually cautioner and entitled to relief. Hence every exception competent to the principal debtor must be competent to him, and if he should pay he can have no relief: And the creditor has himself to blame, who allowed the debt to prescribe against the principal, which must operate in favour of the cautioner, equally as if he had granted a discharge; and it is *triti juris* that every security past from, *quoad* the principal, is *eo ipso* a liberation *quoad* the cautioner.—The Lords sustained the allegiance of prescription. See PRESCRIPTION.

Fol. Dic. v. 1, p. 123.

No. 4. [2074] — v. CRIGHTON. December, 1612.

A bond was found simply null, because not subscribed by the principal, although subscribed by the cautioner. *Fol. Dic. v. 1, p. 124. Haddington, MS.*

No. 5. SHAW v. MAXWELL. November 28, 1623.

A cautioner was bound, although the principal was not, the debt being an account subscribed by a married woman, without her husband. The cautioner could have no relief from the husband.

In an action betwixt Shaw and Maxwell, for payment of a sum contained in an account of merchant furnishing, which was subscribed by the woman to whom the furnishings were made, and by a cautioner for her :—The Lords sustained this action against the cautioner, albeit the woman, who was the principal, had an husband at the time of the furnishing, and at the time of subscribing of the account by her, who had not subscribed the same ; and the cautioner was found to stand effectually obliged, albeit the principal was not so bound, the account not being subscribed by her husband ; and albeit the cautioner could not pursue the principal for his relief, for the same reason. See HUSBAND and WIFE.

Act. —.—Alt. BELSHES.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 124. Durie, p. 83.

No. 7. [2075] The Earl of KINGHORN v. ROBERT CLELAND. February 6, 1672.

A cautioner in a suspension being minor, but attested to be sufficient, the attestor was found liable for the debt, he knowing that the cautioner was minor, and would be freed *ex capite minorennitatis*.

Robert Cleland having attested a cautioner in a suspension raised against the Earl of Kinghorn, in these words ; “ that the raiser of the suspension was worth the sum charged for, for which he did oblige himself ” ; the suspension being discussed in favours of the Earl ; and the cautioner, who was one William Sinclair, having reduced his bond upon minority and lesion, the Earl did pursue Cleland as attestor in the terms foresaid. It was alleged for the defender, That the attestation could import no more but that the cautioner had an estate worth the sum charged for ; but could not bind him, in case, upon minority, he should free himself of that bond. It was replied, That the clerk of the bills having warrant to receive cautioners, where they are attested by responsal men, whatever damage the creditors suffer by the attestation, whether as to the insufficiency of the estate of the cautioner, or the inability of his person to bind himself, the attestor ought to be liable. The Lords ordained Cleland to give his oath if he [2076] knew that the cautioner was minor the time of the attestation ; and that, notwithstanding, he might free himself upon minority, yet did attest him sufficient ; *quo casu*, the attestor being *in passimo dolo* they found him liable. *Fol. Dic. v. 1, p. 124. Gosford, MS. p. 240.*

No. 8. JOHN NIMMO v. Sir GEORGE BROWN. February 2, 1700.

A cautioner was found liable, although the bond fell under the statutable nullity of being subscribed by but one witness.

Doctor Hepburn having granted bond to John Nimmo for a sum of money, and Sir George Brown of Colston being cautioner therein ; the Doctor retiring to England, Sir George is charged for the debt ; who suspends on this reason, that the principal's obligation was null, being only subscribed by one witness, and consequently the

cautioner must be liberate, *quia sublato principali fundamento corrui accessorium*, and he can have no recourse nor relief against the principal. Answered, The nullity objected was only statutory by the act of Parliament 1681, before which the inserting of witnesses' names was sufficient, without subscription; and wherever a natural obligation takes place, there a cautioner stands bound, whereof the law gives several instances; as where one engages cautioner for a wife, though it be null *quoad* her, yet the cautioner stands bound, 28th November 1623, *Shaw contra Maxwell*, No. 5, p. 2074; or if one binds with a minor, he has not the minor's privilege of restitution; or where one notar signs a bond for a sum above £100, though it be null as to the principal *quoad* the exccrescing sum, yet the cautioner will be liable in the whole, as was found 8th July 1680, *Sophia Johnston contra the Laird of Romano*, No. 9; and the reason is, *quia subest debitum naturale cui fidejussor accedere potest*; especially being Colston cannot, on his oath of calumny, deny in this case, but he saw the principal subscribe, at least that it is his hand-writ. The Lords repelled the reason of suspension, and found the cautioner liable.

Fol. Dic. v. 1, p. 124. Fountainhall, v. 2, p. 86.

No. 9. JOHNSTOUN v. The Laird of ROMANO. July 8, 1680.

A cautioner, bound as full debtor with the principal, found liable for the whole sum, though the principal was freed by a legal exception, one notary only having subscribed for him.

Sophia Johnstoun, as executrix to her father, pursues Romano, as representing his father, who was cautioner in a bond of £130 for Adam Smith, in September anno 1638. The defender alleged, That the principal party had subscribed only by one notary, and therefore the bond would only be effectual against him for £100, and so could not be further extended against the cautioner, who could get no more relief, and specially in so favourable a case against a cautioner, upon an old debt, within a few days of prescription. It was answered, That here the cautioner is bound as full debtor conjunctly and severally, and both he and the principal are bound for the same sum, although different solemnities are required in their subscriptions, the cautioner having subscribed [2077] with his own hand, and the principal requiring notaries, so that the customer is not bound *in majus*, but is bound *magis*, as cautioners for wives, pupils, and minors, who are bound as full debtors, though the principal will be free; and the favourableness of the case doth not alter the point of right.

The Lords repelled the defence, and found the cautioner liable for the whole.

Fol. Dic. v. 1, p. 124. Stair, v. 2, p. 784.

No. 16. [2081] GRANT v. FORBES and HENDERSON. July 8, 1758.

The cautioner for a messenger is liable for malversations done to those against whom, as well as for whom, the messenger is employed.

John Grant became cautioner for John Henderson, a messenger, to the Lord Lion, in the following words: "I, John Grant, the younger of Rothmaise, by the tenor hereof, bind and oblige me, my heirs, executors, and successors, as cautioner and surety for John Henderson in Giach, to the Honourable Alexander Brodie, of Brodie, Esq.; Lion King of Arms, that the said John Henderson, where he shall dwell and remain, shall leally, truly, and honestly, use and exerce the office of a messenger, to all and sundry our Sovereign Lord's lieges, upon their reasonable expenses: And if he does in the contrary, what damages, skaith, or expenses, any of them shall happen to sustain through the negligent, fraudulent, and informal execution of the said messenger in the said office, we bind and oblige us, conjunctly and severally, both cautioner and messenger, to pay the same to the party interested and wronged."

The commission from the Lord Lion to Henderson was clogged, as all commissions

to messengers are, with the following clause: "And I (i.e. the Lord [2082]) do ordain these presents to be registered in my court-books, within eight days after the date hereof, otherwise to be null." But Henderson's commission was not registered in these books.

Further, the bail-bond was taken to the late Lord Lion alone, and not to his predecessors in office, and Henderson never renewed his commission with the present Lord Lion.

Afterwards Henderson was guilty, in concurrence with several others, of a violent abduction, oppression, and extortion against Thomas Forbes.

Forbes having pursued Henderson and his accomplices for these criminal acts made John Grant likewise defendant in the suit, not as an accomplice, but as cautioner for Henderson the messenger.

John Grant's defence was, That though he, as surety, was bound to all persons employing Henderson, that Henderson should serve them faithfully; yet he was not bound to those against whom Henderson was employed, to make reparation to them for all the misdeeds and outrages which Henderson might commit against them. That there was a good reason to take surety for the sake of the employers, to wit, that there were but few messengers, and if these refused the employment of any one, no other person could do the office; but, that it was not the genius of the British law, or of any law, to demand surety for a person that he should not do mischief. That the act 46, Parl. 1587, which gave rise to the taking bail-bonds in Scotland for messengers, ordained, "That every person so admitted of new (i.e. into the office of messenger), shall find guid and responsible soverties for observation of the injunctions contained in the end of this present act, to our Sovereign Lord's use, with costs, skaithes, dammages, and interest of parties greeved, be the falsehood, negligence, or informality of any officer:" From which it appeared, that the surety then demanded, was only to protect from the falsehood, negligence, or informality, of officers; all of which might create an injury to the employer, but could create none to the party against whom the employment was directed: That when the injunctions to messengers referred to in this statute are looked into, it appears there are none of them which respect abuse or oppression upon a person against whom diligence was to be executed; they are entirely confined to certain regulations intended for enabling messengers, with the greater certainty, to do their duty to their employers.—That the 73d act of the same parliament enacts, "That none be retained, or hereafter remitted to that service, but he that with his utheris injunctiounes shall find soverty to be always furnished with a sufficient ready horse, quhairupon to serve his Hienes and lieges; and that his soverty shall be answerable for the damage and interest of his falsehood, slouth, and informal doing, in his Hienes service, or uther parties, gif any shall happen:" From which it appears still further, that the law required surety only for the damage occasioned by the falsehood, slouth, i.e. negligence and informality of the messenger.—That in other statutes, particularly the 84th act of the same parliament, due and separate provisions are made for the security of those [2083] against whom the messenger may commit abuse or oppression. By this act it is enacted, "That officiares of armes committand falsed or oppressions of the lieges, in execution of their office, shall be called therefor before the justice or his deputy, or justice-aire or, particular diettes, and punished to the death in case they be found culpable."—That the bail-bond goes exactly upon this plan, and follows the very words of the statutes: It obliges the surety to "pay what damage, &c., any of the lieges shall sustain through the negligent, fraudulent, and informal execution, &c.," and obliges the surety that the messenger shall exerce his office to the lieges upon their reasonable expenses; which last words show, that the surety was found for the sake of the employer, and not for the sake of the person against whom the employment was directed; seeing, by the law of Scotland, the messenger was paid his expenses by the person who employed, and not by the person against whom he was employed.

It was answered for Mr. Forbes, That as messengers were invested with powers which no one durst resist, the law was doubly attentive to protect the subjects from the abuse of those powers; and as greater oppressions could be committed by messengers against those whom they were employed to seize, than against those who employed them, it was absurd to limit the surety found to these last. That the words falsehood, slouth, and informality, must be explained by the spirit of the law, which intended to secure the subject against every malversation; and if the two statutes of

the year 1587 were explained by the strict meaning of their words, such manner of interpretation would tend to explain away these, and many more of our old statutes, which are worded so as to explain the intendment and spirit of them, but not to enumerate every possible case falling under them.—That the act 212, 1594, “ordained that the saids officers that has not found sufficient caution for due administration in their office, or where cautioners are deceased, or are not sufficient, to find caution of law, betwixt and the 1st day of August next to come; otherwise the not finding of the said caution is presently declared to be the cause of their deprivation; whilk deprivation shall be immediately published at the market-cross of the sheriffdomes where the said officers remainis.” Here the act, referring to the former ones, makes use of the general words, undue administration, which shows, that the whole subjects were to be protected by the caution found.—Sir George Mackenzie, in his *Criminals*, title *Reforment*, says, “If a messenger do any wrong in the execution of his office, he is liable therefor *ad damnum et interesse*, and finds caution for that effect to the Lion at his entry.” And in his observation upon the 73d act, 1587, he says, “Messengers find caution to the Lion at their admission *de fidei administratione*”; showing thereby his opinion, that the obligation of the surety was general, as the pursuer contends, not limited, as the defender contends.

“The Lords found John Grant the cautioner, conjunctly and severally with Henderson, liable in damages to Forbes, and likewise in Forbes’s expenses of process against both Henderson and John Grant.”

[2084] In reclaiming against this interlocutor, John Grant contended, With regard to his being made liable in the costs of suit, which had been incurred in pursuing Henderson, That supposing him, as surety, liable for the damage occasioned by the messenger; yet he could not be liable for the expense of process in ascertaining that damage, unless it had been expressly provided for in the obligation; that no surety can be liable till the debt is liquidated against his principal, and the only proof of that debt is an extracted decree; that in that event he is indeed liable in the debt itself, for which he had bound himself; but not for the expense of proving that debt, for which he had not bound himself.

It was answered for Forbes, That the words of the bail-bond extend to all “damage, skaith, or expenses, any of the lieges should sustain”; and therefore must comprehend the expense incurred by the party in ascertaining the damage he has suffered.

“The Lords adhered.”

Separatim, it had been objected by John Grant, 1mo, That as the late Lord Lion’s commission to Henderson was granted under a condition, that the commission should be registered in the lion-court books within eight days of the date of it, which condition Henderson never had fulfilled, the commission in itself was void; and therefore, that John Grant, who was only surety on the supposition that Henderson was a messenger, was free, and no surety, when it appeared that Henderson was no messenger.

Answered for Forbes, That whatever nullity there might be in the commission; yet Henderson had acted as messenger, was reputed to be such, and thereby the surety stood bound in the same manner as if Henderson had acted under a proper authority.

It had been objected, 2do, for John Grant, That as the late Lord Lion, to whom the bail-bond had been taken, was dead at the time of the offences said to have been committed against Forbes; and, as the bail-bond was not taken to his successors in office, John Grant, the cautioner in the bail-bond, was free: That the late Lord Lion was the only creditor in the obligation, and the obligation ceased with his death.

Answered for Forbes, As by the conception of the bail-bond, damages are made payable to the party interested and wronged; so every person must be understood to be a creditor to whom the wrong or damage was done, whether the Lord Lion, who took the bail-bond, was dead or alive, when such wrong or damage was committed.

“The Lords repelled these objections.”

Act. MILLER, AND. PRINGLE, ADVOCATUS, HAMILTON-GORDON.—Alt. J. DALRYMPLE, MONTGOMERY, LOCKHART.

J. Dalrymple.

Fac. Col. No. 118, p. 216.

March 7, 1759.—The House of Lords Ordered and Adjudged, That the appeal of this cause be dismissed, and that the interlocutors complained of, be affirmed.

No. 24. [2091] Sir GEORGE HAMILTON and FLEMING of Farm, his Son-in-law and Assignee v. Sir JAMES CALDER of Muirton. June 18, 1706.

A cautioner for a public collector's cashier, being bound that the cashier should account "monthly, quarterly, and yearly," was found liable for the whole arrears, although the cashier had not been called to account in terms of the contract, and had become bankrupt.

Sir George and Muirton being tacksmen of the King's customs from 1686 to 1688, John Murray was their cash-keeper, and Sir James Calder his cautioner. Murray falling short in his counting, and dying in 1693, Sir George pursues his heirs; and after a tedious count and reckoning, extracts a decret against them for £9000 or £10,000 Scots of balance he was owing them; and on this decret, he registers Muirton's bond of caution to pay him that sum; who suspends on these reasons. That the bond of cautionry was never a delivered evident, but in Murray's custody at the time of his decease.—Answered, 1mo, Oppones the bond now in my own hands, and *esto* it had been lying beside Murray, he was Sir George's trustee and factor. The Lords repelled the first defence.—2do, Alleged, he had arrested effects of Murray's, and so cannot recur on the cautioner.—Answered, A creditor may use all legal diligence till he be paid, and the one does not exclude the other, and on payment he shall be assigned.—This was also repelled.—3tio, Alleged, by John Murray's count books, the tacksmen are debtors to him in a balance of £3000.—Answered, If Sir George were using his books *in modum probationis*, this might be obtruded, otherwise his own books can never prove for him.—The Lords found his books not probative in this case.—4to, Alleged, Sir James, as cautioner, cannot be bound, considering the terms of his obligation, to wit, that they should fit accounts with the said Murray the cash-keeper monthly, quarterly, and yearly; and Sir George having neglected this, his fault cannot be profitable to him, nor prejudicial to the cautioner, *nam socius tenetur socio etiam ob culpam levem*; likewise, he was solvent if diligence had been done against him before his death; and if you have suffered my relief to perish by your delay, that must not be imputed to me; which was so decided on the 30th November 1697, Sir James Dick against one who became cautioner for the clerk to his brewerie, and was assoilzied, because he was obliged to count every three months with him (*limitata fidejussio limitatem pro-[2092]-ducit effectum*), and Sir James did it not; and that there was a *jus quæsitum* to the cautioner by that clause, No. 23, p. 2090; and it cannot be presumed that Muirton would run the risk of a general indefinite intromission, which might exceed his estate; but relied on the short monthly countings, in which there could be little hazard.—Answered, The bond of cautionry is opposed, that it obliges him to pay whatever Murray shall fall short in, and that at any time when required; and the clause of quarterly, &c., relates to exercising his office; and such a short period for counting was impracticable, for the articles of his charge behoved to come from all the corners of the nation, which could not be done on a sudden; and Sir James Calder understood it so; for, in a discharge he gave to Murray's Representatives in 1700, he expressly excepts Sir George Hamilton's claim, and his own recourse of warrandice in case Sir George prevailed; and in a letter he desires Sir George to prosecute these counts, that he may be free of his cautionry; and there was a great specialty in Sir James Dick's case; for there he was required by way of instrument, to count with his clerk by his cautioner, and he having omitted to do it, the cautioner was very justly liberate: But Muirton never interpellated Sir George Hamilton to count with Murray till after his death.—The Lords also repelled this fourth defence.—Then it was alleged in the 5th place, That there is a great difference betwixt a cautioner for the prestation of a fact, and one's fidelity in their administration, whom the law calls *fidejussor indemnitis*, and a cautioner for a debt, or a special sum of money; for cautioners for factors, executors, and curators, are only liable to make up what is wanting of the principals; and if you send goods to a factor at Campvere, when you know him to be a bankrupt, you have no access against his cautioner, 4th March 1630, Ritchie contra Paterson, Durie, p. 499 (pace Prover); and Heringius de *fidejuss.* c. 20, is positive, that the creditor has no recourse against the cautioner, if he let the principal debtor turn insolvent; and Carpsovius, *definit. forens. par. 2, conclus. 19, num. 10*, says, *talis creditor cessans convenire princi-*

nam donec solvendo esse desinit, non potest debitum a fidejussore exigere, and founds in l. 41, D. *de fidejuss.*—Answered, The cases stated by these two lawyers, are where the creditor was premonished, and required by the cautioner, to look to the principal, and did it not, which cannot be pretended in this case.—The Lords found (five against nine) Calder still liable as cautioner, but allowed him to propone any thing, that might diminish the debt owing by Murray, the principal; for though it was constituted against his representatives by a decree *in foro*, yet Muirton the cautioner, not being compearing there, it was entire for him to propone any thing he could yet say against the debt.

December 20, 1707.—Sir George Hamilton of Tullyallan, being tacksman of the customs, he made John Murray, merchant in Edinburgh, his cash-keeper, on Sir James Calder of Muirton's becoming cautioner, that he should make up [2093] whatever Murray should fall short in his accounts. After the expiration of the tack, Sir George pursues Murray, first before the Commissaries of Edinburgh, and then by a decret of suspension *in foro* constitutes Murray's Representatives debtors in a balance of 20,000 merks, and upwards; and then he charges Sir James Calder of Muirton on his bond of cautionry to pay that sum; who suspended on this reason, That his bond was never a delivered evident, but found beside Murray after his decease, and delivered up by his widow, and he never looked upon himself as debtor; and at most it only imports his fidelity, *et de indemnitate servanda*, and he should have been called to the discussing of the principal debtor, that all proper and competent defences might have been proponed, and not have been carried on against Murray, without ever acquainting him. Answered, He opposed the bond of cautionry, now lying in his hands, which cannot be taken from him but by his own oath; and no law obliged him to call him to the process, discussing the principal debtor; seeing, by your engaging, you undertook that hazard, and you was so far from being ignorant or forgetful, that, by letters produced, you acknowledged your being cautioner, and desired the accounts might be fitted and cleared; and, in a discharge you gave Murray, you expressly reserved and excepted your relief and recourse against him for your cautionry. The Lords found Muirton liable; but then he contended, he must be heard against the accounts as if he were *in libello*, seeing the two decreets against Murray were *res inter alios acta* as to him; and he must be allowed to object against the relevancy and probation of each article, as if there were no such decreets, but the affair still entire, seeing their collusion could not seclude him from all his objections and defences. Answered, The affair was managed with all the contention possible, so far was it from any collusion; but if there were any defences either arising *ex facto* *vel jure*, omitted by Murray, Sir George Hamilton was willing to receive the same; but to lay open his decreets, and begin *de novo* to instruct every article, was both unjust and impossible, as has been refused, both to cautioners for executors, and in arrestments, 4th March 1623, Wood *contra* The Executors of Ker, Durie, p. 54 (*voce* *RES INTER ALIOS*); 24th June 1665, Irvin *contra* Strachan (*IBIDEM*); where a decret of liquidation against the principal, upon probation by witnesses, was sustained against the cautioner, and he found concluded thereby, though he was not called. The Lords found it was competent to Sir James, the cautioner, to found on any thing, either in law or fact, that was omitted; and for that end the whole count-books and instructions ought to be made patent and open to his perusal; but refused to repon him as to any articles already determined, either *quoad* relevancy or probation, else there should be no *finis litium*, and there might be a clashing and interfering betwixt the interlocutors already pronounced in the decret, and those that might happen to be given in reviewing it again. See *RES INTER ALIOS*.—*RES JUDICATA*.

No. 45. [2115] MAXWEL of Grubton v. E. NITHSDALE. December 19, 1632.

A cautioner, against whom sentence had passed, and who had thereupon paid, was found to have no relief against the principal, because the principal, who had a good plea, was not called, nor the distress intimated to him.

The deceast Lord Herreis being bound as cautioner for umquhile Lo. Maxwel in anno 1587, that he should depart out of the country, and not to return without the King's license, under the pain of 5000 merks; the said Lord Herreis is convened before the King, being then present, and before the Lords of Secret Council, to be him decerned to pay the sum, because the principal had contravened, by returning without license; whereupon decret being given, and he charged to pay, thereafter he made payment, and reported the thesaurer's discharge; and the donatar to the Lo. Herreis escheat, after declarator thereon, assigning and disponing his right of relief against the Lo. Maxwel, and also the [2116] right of a sum of other 5000 merks falling under the same escheat, which was conditioned to be paid to that same Lo. Herreis, by the Lord Maxwel, in name of tocher to ——— Maxwel of Grubton, who pursues this Earl as heir to the person obliged to the Lord Herreis's rebel, both for the penalty paid, and whereof the Lo. Maxwel was obliged to relieve him, and also for the tocher-good: The parties compearing and defending, the Lords found, that the pursuer, as having right by progress *ut supra*, nor the Lo. Herreis himself, if he were pursuing, and living, could not seek this relief, notwithstanding of the sentence foresaid by the King and Secret Council, and albeit he had paid conform to the sentence, and albeit he had been charged before he had paid, because the principal party, viz. the Lo. Maxwel, who was alleged to have contravened and come against his bond, and thereby to have incurred the penalty, was not called to that sentence of the Secret Council, but the cautioner only, against whom that fact of contravening ought most properly to have been tried; neither did the cautioner, who was convened, decerned, and distressed, ever intimate to the principal that pursuit, or sentence, or charge given to him, at any time before his alleged payment of the sum, as he ought to have done, and which, if he had done, the principal now proponed a defence, which was then competent before the payment made by his cautioner, which would have relieved both principal and cautioner, viz. Compensation of a greater debt owing by the King's Majesty, and which was confessed by the King, in presence of the Lords of Secret Council also, and there acknowledged to be true, and done before the alleged payment made by the Lo. Herreis as cautioner; in respect whereof the Lords assolvizied from the pursuit, and found the cautioner, for omitting the intimation of the said distress before his payment, could not seek relief against his principal, who was not cited to that pursuit, and who had the foresaid defence to liberate himself and his cautioner, if that had been notified to him; and as for the other part of the summons, anent the tocher-good, the Lords found this exception relevant, viz. That it was subscribed by the Lo. Maxwel, being then minor, and having curators, without their consents; neither was it respected what the pursuer replied, that albeit he was minor, yet the obligation was good, being done in a contract of marriage with his sister, and upon that condition of tocher the marriage followed, and was perfected, and bairns procreate betwixt them now living, and the sister renounced all bairns part of gear competent to her therefor; so that, after 40 or 45 years since the contract, it was not time now to allege this nullity, the sister having discharged more than she received, and which could not now be conveniently tried, all the parties being dead, so that the probation of that which was due for her bairns part of gear discharged by her is now perished; notwithstanding whereof the nullity was sustained; for *frater non tenetur dotare sororem L. (Cum plures) 12, § (Cum Tutor) 3, ff. De administrat. and periculo Tutorum. tit. 7, lib. 26, et ibi Glossa, sed Bartolus contra*; the rather this was done, because the parties were married [2117] a year or more before the contract, and the Lords reponed also the sister to that discharge, given of her bairns part of gear contained in the contract done, in respect of the condition of the tocher, which was found null, as said is. See MINOR.

Act. STUART *et* DUNLOP.—Alt. NICOLSON *et* CUNNINGHAME.—Clerk, Scot.

Fol. Dic. v. 1, p. 127. Durie, p. 660.

No. 46. [2117] KIRKWOOD v. FERGUSON. July 19, 1633.

A cautioner who had received from the principal debtor a right to intromit at his own hand for his relief, afterwards pursued for spuilzie, was assoilzied.

Margaret Kirkwood pursues Robert Ferguson for spuilzie of goods out of her house, committed in February; and the defender excepting upon a disposition preceding, made by the pursuer to him of these goods, for relief of his cautionry, wherein he was bound for the pursuer, in which disposition she gave him power to intromit with the goods at his own hands, and renounced all action of spuilzie, and all other action competent to her therefor; by virtue whereof he intromitted, and so alleged he ought to be free of spuilzie; the exception was repelled, and the action sustained; because the sum wherefore he was cautioner for the pursuer was not payable till Whitsunday, and the spuilzie was committed in February before that time, so that neither the term being come, nor he distrest any ways therefor by the creditor, that disposition could not sustain his intromission had at that time foresaid; but the Lords reserved the modification to themselves after probation.

December 14.—One Kirkwood pursuing Ferguson in Galloway for spuilzie of her goods out of her house in Glasgow; the defender excepting that he was cautioner for the pursuer in a sum owing by her to her creditors, for his relief whereof the pursuer had disposed to him these goods; in which disposition she gave him power, for his relief, to intromit with these goods libelled at his own hand, without all danger of spuilzie, or any action to follow thereon against him, which she renounced; according whereto, fearing his relief to be uncertain, and seeing that the pursuer disposed some of the said goods (whereby his relief might be frustrate), he intromitted, and he was content being relieved to restore all again with which he intromitted; this exception was found relevant by the Lords, to liberate the defender from all action of spuilzie, and to assoilzie him therefrom simpliciter, notwithstanding of the reply, that the pursuer offered to prove, that any alleged disposition that she had made of any of the goods, whereupon the defender excepted, was only of a brewing caldron which she had only set out to one for hyre, viz. of so much money to be weekly paid therefor, and upon bond to deliver the same again to the pursuer, after the time of hyring convened upon; by the which deed the excipient's case, and the disposition made to him, was no ways prejudged, and he could not allege, nor condescend upon any other of the goods libelled, to have been disposed by her, and this [2118] was lawful for her to do; neither could the exception be sustained upon that disposition made to him for his relief, to give him power at his own hand, without authority of any Judge or Magistrate, to meddle with the same goods, specially seeing the same was made for his relief, and before his distress, he could never have intromitted; likewise he was never distrest, nor yet is distrest therefor, nor able to show any distress, and of law *qui rem, quamvis suam, non jure occupat, puniatur ut invasor, et cadit a jure, quod in re habet*; and the pursuer having sundry gentlemen's sons in boarding, by this malicious meddling with her whole gear, and plenishing of her house, and leaving nothing therein for her use, they had deserted her, she having nothing left but the bare walls, which has redacted her to great misery; which reply was rejected, and the exception sustained, albeit there was no distress alleged.

Durie, pp. 686, 695.

No. 48. KINCAID v. LECKIE. February 7, 1665.

Found in conformity with No. 43, p. 2115.

In an action pursued at the instance of ——— Kincaid v. the Lairds of Leckie and Boquchan, it was found, that where, in a bond bearing annualrent, the principal debtor was only obliged to pay the annualrent (and not the cau-[2119]-tioner) during the not payment of the said principal sum; yet one of the cautioners being distrest, and the other cautioners being obliged to relieve him *pro rata* of all cost, skaith, and

damage, they are liable to the cautioner who was distrest, for payment of annualrent since his distress and payment; and also found, that the cautioner being assigned may seek payment of the hail sum, except his own proportion; just as the principal creditor might do, though the cautioners be obliged to relieve others *pro rata* only. See *SOLIDUM et PRO RATA*. *Gilmour*, No. 124, p. 91.

No. 79. [2154] ROBERT M'KINLAY v. WILLIAM EWING. February 14, 1781.

The act 1695, introducing the septennial prescription of cautionary obligations does not apply to cautionary obligations in suspensions.

In a process of suspension, of a charge, at the instance of *Ewing v. James Macadam*, John Macadam was offered as cautioner to the clerks of the bills, who consented to receive him, upon having put into their hands the following letter, addressed by M'Kinlay to the suspender's agent: "8th August 1771. I understand John Macadam, tenant in Stockrodgeart, has become cautioner for James Macadam, tenant in Bellock, in the suspension at his instance, against Robert Ewing of Lochend, and that he is refused at the Bill Chamber; I therefore hereby attest, that the said John Macadam is a sufficient cautioner in said suspension, and is able to pay the sums charged for."

This missive was subscribed by M'Kinlay; but was not holograph; nor was the subscription attested by witnesses. The subscription, however, was judicially acknowledged.

In 1779, Ewing having previously discussed both the suspender and cautioner, raised an action against M'Kinlay, as attester of the sufficiency of the latter.

Pleaded by the defender: In the first place, the letter founded on by the pursuer contains nothing farther than a declaration, that the cautioner was sufficient at the time. It by no means imports any obligation upon the defender to become liable, *subsidiarie*, in the event of his future insufficiency. In order to produce this obligation, the form prescribed by act of sederunt, 27th December 1709, would have been requisite, by which "attesters of cautioners are to be taken bound as fully as the cautioners themselves." Secondly, The missive is defective in the statutory solemnities. And, thirdly, Though it were valid, both in substance and form, it would fall under the septennial prescription of cautionary engagements, introduced by act 1695, cap. 5, which, from its spirit and design, should be interpreted to extend equally to all cautioners, whether judicial or extrajudicial. Nay, if even the strict letter of the statute be adopted, the former, as well as the latter, may be said "to be bound and engaged in bonds or contracts for sums."

Answered by the pursuer, to the first defence: The nature of the obligation incurred by the defender appears from the circumstances of the case, from the whole strain of the letter, and especially from the words, "I hereby attest, &c."

To the second: The judicial acknowledgement of subscription saves from any legal nullity supposed to arise even from the statute 1681, Fountainhall, v. 1, p. 692, 26th December 1695, *Beatie contra Lambie*, *voce* WRIT; but especially [2155] in the case of missive letters; Kilkerran, p. 605, *Crawford contra Wight*, 16th January 1739, *voce* WRIT; Kilkerran, p. 609, *Foggo contra Milligan*, 20th December 1746, *voce* WRIT; Kilkerran, p. 612, *Neil contra Andrew*, 8th June 1748, *voce* WRIT. And, indeed, in all cases where writing is not essential to an obligation, it would seem that such an acknowledgment ought to have that effect; since, at first, nothing more would have been necessary to constitute the obligation.

Answered to the third defence: The principle of the septennial limitation is none of the presumptions on which prescription is founded. Hence the objection of *non valentia agendi*, is not applicable to this limitation. According to the defender's doctrine, then, were a litigation to be protracted during the whole of the seven years, at its termination, when only the bond could possibly become effectual, the cautioner would, *ipso jure*, be liberated. In this manner, judicial cautionry might be rendered a vain and useless ceremony. But, besides that this interpretation of the statute would, in its consequences, annihilate that security, it seems in itself

truly impracticable. Thus, the cautioner is bound, not only for the amount of the matter in dispute, but likewise for the expenses of the process. These, it is plain, increase gradually; and consequently, at a variety of successive periods, give rise to an equal variety of obligations. Is a new term of prescription then to commence with each of the obligations? Or, can they be understood as running a course of prescription before they shall have existed?

The Court desired to know the practice of the Bill Chamber, with respect to the form of attesting judicial cautioners; and the answer made by the clerks was, That, in order to render an attester liable *subsidiarie*, they were in use to require compliance with the form prescribed by the act of sederunt; and would not have considered the letter in question as sufficient for that purpose.

It was not necessary to give judgment with respect to the statutory solemnities. With regard to the other two particulars, the Lords found, "That the act 1695 does not apply to cautionary obligations in judicial proceedings in suspensions; but sustained the defence, that the attestation was irregular and invalid."

Lord Ordinary, WESTHALL.—Act. MORTHLAND.—Alt. M'CORMICK.—Clerk, MENZIES.

Fol. Dic. v. 3, p. 121. *Fac. Col.* No. 35, p. 63.

No. 86. [2163] GILLESPIE v. MAIN. June 26, 1747.

An attester of a cautioner in a suspension may be summarily charged with horning upon his obligation.

John Gillespie, drover in Abington, having obtained decret before the Sheriff of Edinburgh, against John Croll, fletcher there; it was suspended, and George Lesly, indweller in Edinburgh, became cautioner, who was attested by Andrew Main, taylor there, in these words, being the ordinary style of attestations, "I do hereby not only attest the sufficiency of the within-designed cautioner, but likewise bind and oblige me, my heirs, and executors, as cautioners for [2164] him, and for payment of the within sums of money, as fully in all respects as the cautioner himself, except as to the order of discussing; and consent thir presents be registrate with the within bond, that all execution pass thereon *subsidiarie* accordingly."

A bill of horning was presented against the attester, upon production of a registrate horning and denunciation against the suspender and cautioner; and the matter being reported, because the writers to the signet doubted whether an attester could be summarily charged with horning, they thinking that he was only liable to a process.

The Lords directed the Lord Ordinary to pass the bill.

Fol. Dic. v. 3, p. 122. *D. Falconer*, v. 1, No. 194, p. 259.

No. 6. [2171] OLIPHANT v. HAMILTON of Kilpoty. January 2, 1667.

A poinding of the ground is competent against an apparent heir, without a charge to enter.

William Oliphant having obtained a decret for poinding of the ground against Hamilton, he suspends on this reason, That he was neither decerned as heir, nor possessor, but as apparent heir to the heritor, and was never charged to enter heir.

The Lords repelled the reason, and found this action, being real, was competent against the apparent heir without a charge.

Fol. Dic. v. 1, p. 130. *Stair*, v. 1, p. 422.

No. 4. [2178] CRIGHTON *v.* Lord ROSSIE. March 6, 1573.

A decree pronounced against a pupil was reduced, because his tutors and curators were not called for their interest, although it was notour he had none.

Fol. Dic. v. 1, p. 132. *Maitland, MS.*

No. 9. [2180] E. KINGHORN *v.* COLLACE. March 8, 1626.

A father administrator, need not be specially cited ; it is sufficient that tutors and curators are cited in general.

In an action of removing of tenants defenders, pursued at the instance of the Earl of Kinghorn, from the lands and barony of Dods, wherein one called Robert Collace was convened ; who being minor the time of his citation, and then having his father living, who was administrator to him of the law ; The Lords sustained the process, and the summoning of the said minor, being summoned by the principal summons, and executions thereof, with his tutors and curators generally, and they being generally summoned, albeit that his father was not specially summoned by the execution, who was then living, whom the Lords found needed not to be specially summoned, as said is, seeing the tutors and curators were generally summoned.

Act. HOPE *et* ROLLOCK.—Alt. AITON *et* NAIRN.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 132. *Durie, p. 189.*

No. 12. [2181] L. CAIRNOUSSIE *v.* L. TECHMURIE. December 17, 1629.

In a declarator of redemption against a minor, the Lords found, that the tutors and curators need not generally be warned in the instrument of premonition, since they were specially and *nominatim* warned.

Cairnoussie after comprising of lands from L. Philorth, the legal being expired, pursuing a declarator of redemption against Techmurie, to whom the land was wadset before the comprising, by the forbears of him from whom the same was comprised, under reversion ; it was found, That the heir of him from whom it was comprised, being publicly infeft in the same lands, needed not to be summoned in this redemption, seeing in effect he was author to the comprising ; for having the right of his conventional reversion established in his [2182] person, by that comprising, which being a judicial assignation, it behoved to be alike, as if the debtor had made him assignee to that reversion, *quo casu* he needed not to have summoned his cedent. Item, It was found, That the redemption being against a minor, the tutors and curators needed not generally to be warned in the instrument of premonition, his tutors being specially warned *nominatim* ; but it was found, that the pursuer ought to instruct, that he was tutor, and prove the same *cum processu*.

Act. LAUTIE, DAVIDSON, *et* BAIRD.—Alt. NICOLSON *et* HAY.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 133. *Durie, p. 475.*

No. 16. [2184] DALGLEISH v. HAMILTON. Feb. 18 & June 26, 1752.

The Lords sustained the objection to a sale of a minor's lands, that the tutors and curators of the minor were not called, and found they could not be called by a diligence.

Dalgleish, as creditor to James Hamilton, late provost of Kinghorn, brought a process of sale against Hamilton his son and heir, of certain houses and tenements lying about Kinghorn; in which it was objected by the defender, that the process could not proceed, in respect the defender was a minor, and his tutors and curators were not called.

The pursuer having applied to the Ordinary, for a diligence to cite the tutors and curators, the Ordinary stated the case verbally to the Lords; and the Lords, in respect the defender was minor and not pupil, having advised the Ordinary to grant diligence, he granted it accordingly.

They considered the case of minor and pupil to be different. A tutor acts for the pupil who is himself considered nobody; whereas a minor acts with the curator; and as a husband may be called by a diligence, so a curator might.

But, upon advising petition and answers, the Lords "sustained the objection to the sale, that the tutors and curators of the minor were not called, and found they could not be called by a diligence.

Fol. Dic. v. 1, p. 129. Kilkerran (PROCESS), No. 13, p. 439.

No. 19. [2186] LORD NAPIER v. SIR WILLIAM NICOLSON. March 1684.

Found that a minor ought call his whole tutors or curators, either at the beginning or *cum processu*.

Found that a minor ought to call his whole tutors or curators, either at the beginning or *cum processu*, to the effect the defences of every one may be communicated to the benefit of all; though every one may be decerned in *solidum*, as was formerly found in the Lord Pitmedden's case; albeit the contrary was lately decided in Lockhart's case v. Mr. John Ellies, No. 13, p. 2183, where the tutor called was only allowed to intimate to the rest of the tutors who were not called. This was adhered to as to the Representatives of dead tutors; December 2, 1684: and the like was decided January 1685, Dalgerno *contra* Henderson. See TUTOR and PUPIL.

Fol. Dic. v. 1, p. 133. Harcarse (TUTORS and CURATORS), No. 981, p. 277.

No. 36. [2194] FORRESTER v. CLERK. March 10, 1627.

A special legatee cannot convene a debtor, without calling the executors of the defunct. They might allege reasons why the legacy ought not to be paid.

In an action betwixt Forrester and Clerk, for payment of a legacy of a sum specially debited by the defunct's debtor, designed in the legacy, the Lords found, That albeit the legacy was specified and designed certainly owing by such a special debtor, yet that the legatar could not convene the debtor therefor, except the executors of the defunct had been also convened in that pursuit; for [2195] they might have alleged some reasons why the legacy should not have been paid, as *quod debita excedunt bona*, or some other lawful defence, which makes them necessary parties to have been called; so that the process, without their citation or concurrence, could not be sustained.

Act. NAIRN.—Alt. HALIBURTON.

Fol. Dic. v. 1, p. 134. Durie, p. 288.

No. 45. [2198] Earl of MORAY v. The FEUARS of the Salmon-fishing of Ness.
November 8, 1677.

In a declarator that the Sheriff of Inverness had right to fish three days in the water of Ness, no necessity was found to call the town, or any but the possessors.

This is a declarator that the Earl, by his gift-right sheriffship of Inverness *ad vitam* has right to fish three days in the time called the summer-moon, conform to his possession. Alleged, The Sheriff and Town of Inverness are not called. Answered, He needs call none but the possessors, let them intimate the distress. The Lords repelled the allegiance. *Fol. Dic. v. 1, p. 135. Fountainhall, MS.*

No. 50. [2201] L. WARDIS v. TENANTS. February 9, 1628.

Found incompetent to pursue declarator of servitude against tenants, without calling the proprietor.

In an action by L. Wardis against the Tenants of the L. of Dunkintie, for doing of services to the pursuer's mill, as possessors of the land astricted thereto, [2202] wherein the L. of Dunkintie their master, who was not called in the process, compearing and admitted for his interest, alleged, That no process ought to be granted in this case, tending to constitute a servitude upon his ground, except he had been summoned to this pursuit. The Lords found no process therein, while the master be called; and this was found, albeit the master himself compeared for his interest, and proponed this exception himself, and not with the tenants.

Act. NICOLSON.—Alt. HOPE.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 136. Durie, p. 343.

No. 76. [2215] Lord BLANTYRE v. WALKINSHAW. July 2, 1667.

In reduction of a bond granted in minority, if the assignation be intimated, the assignee must be cited *inter annos utiles*, and not the cedent.

The Lord Blantyre pursues a reduction of a bond, as being granted in his minority. It was alleged for Walkinshaw, assignee to the bond, absolvitor, because there was no process intended against him *intra annos utiles*, till the pursuer was past twenty-five years. It was answered, That the defender's cedent was cited, to whom the bond was granted, and this defender's right will fall in consequence, and there was no necessity to cite him in the same way; that the service of an heir may be reduced without calling of his creditors, or those that are infeft by him.

The defender answered, That his assignation was intimated before the citation against his cedent, which cannot be miskenned by the pursuer, to whom the intimation was made, after which the cedent had no right, and any citation against him was of no moment; neither is the case alike to the reduction of a retour, wherein the reducer doth neither know, nor is obliged to know, the creditors' rights.

The Lords found that the assignee, after the intimation, behoved to be cited *intra annos utiles*, but they sustained improbation against the citation, made against the assignee by way of defence. In this case it was not urged, whether the intimation was personal to the pursuer, or only at his dwelling-house; or whether it was recent before the citation; for, if it were not personal, or recent, it were hard to oblige the pursuer to remember so transient an act, as an intimation.

It was further alleged by the defender, That there was no lesion, because he offered him to prove, that the sum was delivered to the minor's curators, at least

so the minor and his curators jointly, who being persons abundantly *solvendo*, and very provident, the minor could have no lesion, seeing they were comptable. It was answered, *non relevat*, unless it were alleged *positive*, that the sum were *utiliter impensum*, for the minor's profit; for, the minor has his option, either to pursue the curators, as intromitting, or to reduce his obligation, and [2216] the curators not being in this process, no probation of the delivery of money to them will bind them, but were there necessity, that they were both cited, and it instructed by writ.

The Lords repelled this defence, but severals inclined not to sustain process, till the curators were first discussed; and whether the minor was lesed or not.

Fol. Dic. v. 1, p. 138. Stair, v. 1, p. 468.

No. 130. [2247] HAMMERMEN in Glasgow *v.* CRAWFURD. March 5, 1628.

Action of proving the tenor cannot proceed against the heir of a defunct, without calling the executor.

In an action for proving of the tenor of a bond betwixt the Hammermen in Glasgow and Crawford, who was convened as heir to his father, for proving of the tenor of the bond made by his father to the pursuers, the Lords found, that no process ought to be granted for proving of such tenors of obligations, after the decease of the debtor, except the executors of the defunct were specially called to these pursuits; because the same tends to make up obligations, whereupon the executors may be distrest, either by the principal creditor, or by the debtor's heir who is convened; which heir thereupon might seek relief against [2248] the executors; and because this defender was convened, both as heir and executor to the defunct, and the defender condescended not that there were other executors, therefore the process was sustained. And, because it was found by the Lords, that this action to prove a tenor was of a dangerous consequence, to make up obligations after the decease of the debtor, the cause of amission not being clearly qualified, which was found necessary to be well-known and qualified, and also proven in these cases to make up obligations; neither were the articles libelled found sufficient to produce this action, which were only conceived upon probation by witnesses; therefore the Lords assoilzied from that action, in so far as it was of the nature of a cause to prove the tenor of a bond; but because the obligation desired to be proven was only of the sum of 100 pounds, therefore they suffered the pursuer to convert the pursuit, by this same summons, in an action to pay the debt against the defender; which decreet and action, so converted, the Lords found might be proven by witnesses, who saw the sum lent, and who knew that the defunct paid annualrent therefor; and found, that albeit the debt acclaimed extended to 100 pounds, yet seeing it exceeded not 100 pounds, that it might be proven by witnesses.

Act. LAWRIE.—Alt. MOWAT.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 143. Durie, p. 354.

No. 3. [2256] KEITH *v.* GRAHAME. January 25, 1668.

Two halves of a barony were disposed to different persons, one before the other; the first *cum moris et maresiis*, only in the tenenda, not in the dispositive clause. The property of the moss of the barony, was found to go with the second half.

In the case of Keith of Craigie, *contra* Grahame of Creichie, the Lords, upon probation in mutual declarators anent a moss, found, That the barony of Craigie having pertained to Straiton of Lauriston; and thereafter, a part of the same being disposed to Keith and his predecessors; and another part to the authors and predecessors of Grahame of Creichie, extending the saids two parts to the whole barony; that both

the saids parties had interest and right to the moss in question, as to commony as pasture, and casting peats and turf; but as to the property of the moss, they thought that it should belong to that parcel which was last disposed by the common authority seeing he disposed the other part only *cum moris et maresis* in the *tenendas* and executive clause; no mention of the moss being in the dispositive part; so that the property of the moss remained with himself annexed to the other parcel.

Fol. Dic. v. 1, p. 144. Dirleton, No. 149, p. 60.

No. 6. [2258] JA. BUCHAN of Ockhorne v. MARJORY JAMIESON. July 18, 1678.

A party being bound to obtain himself validly and sufficiently infeft, the Lords found this imported a public infeftment.

One being obliged by minute to infeft in lands, the Lords found it behoved to be a public infeftment, a base not securing against feudal delicts, and the mediate superior

Fol. Dic. v. 1, p. 144. Fountainhall, MS.

No. 11. [2262] DOUGLAS of Pumpharston v. LYNE. February 2, 1630.

An infeftment of four acres of land, found to be demonstrative and not taxative, and therefore was sustained against a process of removing, the pursuer craving the possessor to be removed from all that was above four acres.

In a removing, the defender defending with his infeftment of the miln libelled and four acres of land; and the pursuer passing from that, and desiring the defender to remove from all which should exceed four acres after metting,—The Lords found, That in the removing, the defender and his predecessors' immemorial possession of the land, which they bruiked at four acres of land without interruption, ought to defend against this removing, albeit the excrease of the land possessed should exceed four acres, and should be more than six or seven; whereanent in this removing the Lords would take no trial by metting.

Act. —.—Alt. CRAIG.

Fol. Dic. v. 1, p. 145. Durie, p. 489.

No. 12. MURRAY v. OLIPHANT's Wife. February 1, 1634.

If to an infeftment of lands, under a general denomination, be added a more particular description, expressing the names of the particular tenants possessing some of the lands only; this will be reckoned taxative, to limit the infeftment to the lands possessed by the particular tenants enumerated, though the rent of the parts be not sufficient to pay the sum, for the security of which the infeftment was granted.

Sir Patrick Murray having obtained decreet of removing against Mr. William Oliphant's wife, for removing from the lands of Middleton and Powflat, she suspends, that she is infeft in the lands and mains of Uphall in liferent (she being now divorced), of the which lands these are a part; and the party answering, That her infeftment, albeit bearing "the whole mains," cannot extend to those lands contained in his decreet, because the same bore, "her to be infeft in the whole mains, containing the lands underwritten, viz. (for these were the words of her infeftment), the lands possessed by particular tenants, specially enumerate and exprest in the said infeftment": And true it is, that these lands were not then, nor at any time before, pos-

possest by these tenants ; and so she canhot claim the same, seeing he offers to prove, that these lands were then possest by other tenants, viz. —And the suspender answering, That albeit some of the mains were possest by the tenants designed in her infettment, yet that was not enough to exclude her from the rest ; for that word (viz. possest by these several tenants) is not of that force to take away the right of the rest of the mains from her ; specially seeing, by her contract of marriage, she is ordered to be provided to the lands worth 20 chalders victual yearly ; and wanting these lands controverted, she will inlack three chalders victual thereof.—The Lords, in respect of the said infettment, bearing the foresaid clause, viz. possest by the tenants specially designed therein, found, That the suspender's liferent could [2263] extend to no more of the mains, but to so much thereof, as was then possest by the saids special tenants, and could not extend to these lands acclaimed, wherein this defender was infett, albeit after her contract of marriage ; and found these words (possest by these tenants), not to be demonstrative, but to be taxative, and to restrict her right to so much of the mains, as then was possest by them, and that she could have right to no more ; therefore admitted to the defender's probation, that these lands acclaimed were, at that time of the suspender's infettment, possest by other tenants condescended on ; and repelled the answer made by the suspender, bearing the same to be a part of the mains ; for albeit they were so, yet by the restriction of her infettment, she had no right thereto.

Clerk, Scot.

Fol. Dic. v. 1, p. 145. Durie, p. 699.

No. 29. [2274] Mrs. FRANCES KER v. JOHN YOUNG. February 19, 1745.

A contract, disposing to a wife the half of insight plenishing, household furniture, and other moveable goods, was found not to comprehend *nomina*.

Frances Ker, relict of William Lindsay of Wauchop, writer in Edinburgh, pursued John Young, writer there, her husband's executor and trustee, for that by their contract of marriage, he had dispoened to her, in case she survived him, "the just and equal half, and if there were no child of the marriage in life at his death, the whole of the insight plenishing and household furniture, and other moveable goods that should be in his possession, or in common betwixt them the time of his decease, if he should be the first decesaser."

The question was, Whether such *nomina* as fall under the communion between man and wife, were due to the pursuer in virtue of this clause ?

The Lords found *nomina* not comprehended.

Reporter, LORD MONZIE.—Act. A. MACDOWAL.—Alt. MONCRIEF.

D. Falconer, v. 1, p. 79.

No. 35. [2282] FARQUHAR v. M'KAIN. July 28, 1638.

Parties were bound "conjunctly and severally, ilk one for his own part." This was interpreted to mean, that each was liable only for a half.

One Patrick Farquhar having charged James M'Kain for £700, conform to his bond, of this tenor, viz. bearing, "That the said James M'Kain and John Gordon bind and oblige them, conjunctly and severally, to pay the said sum at the term contained in the bond, ilk one of them for their own part" ; these were the very words, in respect of the which clause, terminating the prior words of "conjunctly and severally," and resolving in payment, ilk one of them of their own parts ;—The Lords suspended the charges against M'Kain for the half of the sum, and found him only debtor of the one half thereof, and not of the whole.

Durie, p. 861.

No. 43. [2290] EMILIA and MARGARET FARQUHARSONS v. JAMES FARQUHARSON
March 2, 1756.

The words of a deed, disposing "all lands which should pertain to the granter at the time of his death, to his brother's heirs and assignees whatsoever," were not found to comprehend a subject to which the granter afterwards succeeded, the from circumstances appeared not to have been within the granter's intention.

The lands of Inverey and Tullich, holding of subjects superiors, belonged to John Farquharson. He had issue, by his first marriage, two sons, Patrick and Charles, by his second, James the defender.

The ancient destination of the lands aforesaid was to heirs-male; but the lands were evicted from John, and purchased by his son Patrick.

Patrick obtained charters of resignation from his superiors, and took the succession of the said lands, devised "to the heirs-male of his body; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever."

Patrick was married twice; by his first marriage he had issue, daughters only. In the 1714, by marriage-contract with his second wife, he provided the said lands "to the heir-male of that marriage; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever." This contract contains a procuratory of resignation in the terms above mentioned.

Of this marriage he had issue, two sons, Joseph and Benjamin, and two daughters, the pursuers.

In the 1737 Patrick died, and was succeeded by his son Joseph, who died also in the same year, without completing his titles. He was succeeded by his brother Benjamin, who, in 1738, made up titles to the lands of Inverey and Tullich; and dying soon after, was succeeded by his uncle Charles, brother-german of Patrick.

This Charles, in the 1721, executed a deed of the following tenor: "For certain reasonable causes, he sells, assigns, and disposes to, and in favour of Patrick his brother, his heirs and assignees whatsoever, all lands, heritages, tenements, annual-rents, debts, sums of money, heritable and moveable, and all goods [2291] whatsoever which shall happen to pertain to him at the time of his decease, whenever the same shall happen." This disposition is granted with the burden of all debts contracted, or to be contracted; reserves a power to alter even on deathbed; and contains a clause dispensing with delivery.

In 1739, Charles executed a procuratory for resigning the estate of Auchlossan, his own purchase, in favour of himself and the heirs-male of his body; whom failing, to his other heirs-male.

Afterwards, in the same year, Charles was served heir-male in general to his nephew Benjamin, the person last infeft, and also obtained precepts of *clare* for infeftment in Inverey and Tullich, as heir to him.

Upon the death of Charles, in the 1747, James, his brother consanguinean and heir-male, took possession of the estates of Inverey and Tullich, in virtue of the investitures to heirs-male.

Emilia and Margaret, the daughters of Patrick, insisted in an action against James, for having it declared that they, in virtue of the disposition in the 1721, had right to the lands of Inverey and Tullich, as heirs whatsoever of Charles, and that James should make up titles and denude himself in their favour.

Pleaded for the defender, The pursuers cannot take by the deed 1721; for that, 1mo, It being conceived in favour of Patrick first, and then of his children, can bestow no more on them than on him: Now, it could not mean to bestow on him the lands of Inverey and Tullich, which were already his property. Charles had in view the event of Patrick's succeeding to him, not the event of his succeeding to the estates of Patrick; as Charles had no expectation of this last event, he cannot have had any intention of providing for it; consequently the words heirs whatsoever, are words without intention, and as such ineffectual in law. But, independent of this, 2do, Although the expression heirs whatsoever, does, in the abstract, imply heirs of line; yet, when it is used in any particular deed, it must be explained according to the intention of the disponent, and the nature of the subject disposed. As in the 1721, the investitures of Inverey and Tullich were to the heirs-male of Patrick; the words heirs

whatsoever of Patrick, must be understood of heirs-male ; which character belongs to the defender. By that expression Charles could not have intended heirs of line ; for that, in the 1739, he devised Auchlossan to heirs-male : Now he never could have devised his conquest to heirs-male, and Inverey and Tullich, his paternal inheritance, to heirs of line.

Answered for the pursuers, He who grants a general disposition of whatever subjects shall belong to him at his death, has no special lands or moveables in view. Such disposition conveys not particular subjects, but the chance of succeeding to all subjects whereof the disponent shall die possessed ; the extent of what is conveyed will be ascertained from the condition of the disponent's estate at his death. Thus, in the present case, Charles, when he executed the deed 1721, had no view to Inverey and Tullich ; yet, as those estates devolved to him, they came under the description of " all lands belonging to him at the [2292] time of his death," and fall to the pursuers as heirs whatsoever of Patrick, called by the deed 1721. As Charles survived Patrick, he saw that event which is said to have been unforeseen ; yet did he not revoke the deed 1721, neither can the Court. The settlement of Auchlossan in the 1739, can have no further effect than as to the estate thereby settled.

2do, To the arguments from the supposed ambiguity of the expression heirs-male whatsoever, it is answered, That the expression is variously interpreted in purchases of rights, but not in settlements. When a purchaser is unwilling to communicate to the seller the nature of his family settlements, he takes his purchase to heirs whatsoever. This expression will, in law, be limited or extended according to the settlements ; but in the settlements themselves it has a determined technical meaning, and must imply heirs of line.

" The Lords found no action competent to the pursuers, in virtue of the deed 1721 against the defender, to oblige him to denude of the estates of Inverey and Tullich."

Act. MILLER, BROWN, *et* LOCKHART.—Alt. WEDDERBURN, GARDEN, *et* FERGUSON.—Clerk, KIRKPATRICK.

Fac. Col. No. 193, p. 285.

This cause was appealed.—The House of Lords Ordered and Adjudged, That the interlocutor complained of be affirmed.

No. 49. [2304] IRVINE *v.* IRVINES. December 15, 1744.

A son having granted a discharge of all claims against his father's estate, it was found that he was not prevented from bringing a reduction of a deed granted by his father on deathbed.

Patrick Irvine, eldest son of Patrick Irvine, merchant in Prestonpans, in his contract of marriage, in consideration of the settlements by his father therein [2305] upon him, accepted thereof, " in full contentation and satisfaction of all, or any thing, or claim, or interest that he could any ways ask or pretend from his said father, by virtue of his mother's contract of marriage, or any other manner of way, and in full of all interest, claim, or pretence he could pretend to, or claim of his said father's estate, personal or real after his death, excepting his said father's good will ; and discharged his said father for ever, excepting as said was." Old Patrick, on deathbed, disposed his real subjects to his younger children ; and, by his testament of the same date, left his son 800 merks, on the condition of his own surviving the deed 60 days, and no otherwise.

Patrick the son raised a reduction on the head of deathbed ; in which the Lords, 6th November 1744, " Sustained the defence founded on the pursuer's contract of marriage ; and therefore repelled the reason of reduction, and found, by reason of the said clause, that the pursuer had no right to heirship moveables.

Pleaded in a reclaiming bill, The law of deathbed, either introduced or confirmed by statute, W. I. c. 13, which is noticed in *Reg. Maj.* l. 2, c. 18, § 7 *et* 9, has hitherto

been held so strong as to get the better of rational provisions to children, Durie, p. 84; 1st July 1637, *Cranston v. Richardson*, voce DEATHBED; and Rem. Dec. v. 1, p. 8. July 1721, *Sir James Fowles v. his Sisters*, IBIDEM: But as the interlocutor complained against refers to, and is founded on, the clause in the pursuer's contract of marriage he contends that this clause cannot support it, because there is a great difference betwixt this case, and where a person disposes lands, reserving power to himself, burden upon deathbed; for there the donee having accepted the estate, with quality, cannot reprobate it: And besides, as he is not heir, he does not fall under the law of deathbed.

The clause would not have hindered the pursuer's legal succession to his father's heritage; and on deathbed, no deed can be granted in prejudice of the heir.

It does not bear to be a consent to a disposal on deathbed; and if it did, no consent has been found to be of no avail, 4th December 1733, *Inglis v. Hamilton*; and in a case precisely parallel to the present, 13th November 1728, *Reids v. Campbell*, both cited, voce DEATHBED.

Answered, The law of deathbed does not strike against deeds for true, just, and necessary causes; the *Reg. Maj.* generally makes use of the word *donare*; and hence this law does not strike against deeds in implement of a prior obligation, 19th July 1706, *Edmonston v. Edmonston*; nor does it import whether it be a civil or merely natural obligation; for Craig says, L. 1, *Dieg.* 13, *In lecto ægritudinis potest uxori usumfructum constituere*; and so it was found, 23d February 1665, *Jack v. Pollock*; 21st January 1668, *Shaw v. Calderwood*; and the Lady v. the Laird of Dunlop, marked by Hope, title TEINDS; and 25th July 1672, *Gray v. Gray*; and 16th June 1676, *Mitchell v. Littlejohn*; * and this doctrine will support the deeds in question, being [2306] only a provision to younger children, when the elder was formerly provided for.

But, 2do, Supposing the deeds reducible of their own nature, they must be supported from the pursuer's consent. The moment a man is on deathbed, there arise three several interests, which he cannot hurt, that of the heir, of the children, and of the relict: Now it has been many times determined, the relict and children's renunciations will bar them; and why ought not the heir's to have the same effect? There can no difference be conceived betwixt this case, and that of lands disposed to an heir, with a reserved faculty: The accepting of a provision in full of all pretensions, and then quarrelling this deed, is equally approbating and reprobating; and it cannot be denied to be a prejudice to the heir, to take that under a burden, which, had it not been for the deed on deathbed, he would have taken free.

It was disputed whether Patrick Irvine had heirship moveables, being only intitled in houses in Prestonpans.

The Lords, 4th December, sustained the reasons of reduction; and therefore reduced the dispositions libelled, and found the defunct had heirship moveables, and that the pursuer had a right to them: And this day they refused a reclaiming bill and adhered. See HEIRSHIP MOVEABLES.

Act. A. MACDOWAL.—Alt. G. BOWN.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 123. *D. Falconer*, v. 1, p. 27.

No. 54. [2312] JOHN MACLAUCHLAN of St. Coan's v. JOHN CAMPBELL.
January 12, 1757.

A disposition of a subject destined it in one clause to heirs-male, but in the rest of the clauses to heirs whatsoever. The Lords found, that the destination was to heirs-male, as heirs whatsoever comprehended heirs-male; but, the term heirs-male was exclusive of all others.

In 1660, John Macdougall of Dunnollie, granted a wadset-right of part of the lands of Ballemoir to Mr. John Maclauchlan, minister at Seal, his heirs-male and assignees, redeemable by payment of 3200 merks; upon which sasine followed.

* See all these cases voce DEATHBED.

In 1663, Dunnollie granted a second wadset-right to Mr. John Maclauchlan, minister at Kilnynver, the son of the first wadsetter, which was executed in the form of a mutual contract. It recited the first wadset to heirs-male; and in respect that Mr. John the younger had right to the 3200 merks, as heir to his father, and that he had advanced to Dunnollie another sum of 3000 merks, therefore, in security of both sums, extending to 6200 merks, Dunnollie of new sold and disposed to the said Mr. John, his heirs and assignees whatsoever, the whole six merk land of Ballemoir, &c.: but immediately after the dispositive clause followed an obligation to infeft the said Mr. John, his heirs-male and assignees whatsoever.—Most of the other clauses bore, in general, Mr. John and his foressaids; but in the clause of redemption, Mr. John obliged him, his heirs and assignees whomsoever, to grant a letter of reversion; and in case of redemption, Dunnollie became bound to pay the 6200 merks to Mr. John, his heirs, executors, or assignees whatsoever.

This contract did not contain a precept of sasine; but of the same date Dunnollie granted a charter, bearing to be in implement of and conform to the contract, which was there held as repeated; but nevertheless confirming the right to Mr. John, *hereditibus suis et assignatis quibuscunque*. Upon this charter Mr. John was infeft. He was succeeded by his eldest son John; who made up no titles, but possessed the lands till his death in the 1710, leaving only a daughter, Margaret; and thereupon the possession was assumed by the other younger sons of old Mr. John, and their sons, as heirs-male, but without making up titles.

In 1752, John Campbell, the son of Margaret the daughter, obtained himself served heir of line in special to Mr. John the original wadsetter; but his service was challenged in a reduction and declarator at the instance of Mr. John Maclauchlan of St. Coan's, the heir-male of the wadsetter.

Pleaded for the pursuer, The intention of the original wadsetter, to take the right to his heirs-male, and not to his heirs of line, is plain, not only from the conception of the first wadset-right, to which the second refers, but also from [2313] the obligation to infeft contained in the contract in question, which is taken expressly to heirs-male: and although, in the dispositive clause, the right is given to heirs and assignees whatsoever, yet that must be understood to mean heirs-male; because the term heirs-male has a certain and definite meaning, quite incompatible with a destination to heirs-female; but heirs and assignees whatsoever may, and often does, comprehend heirs-male. Had not heirs-male been intended to be preferred, they never would have been mentioned in any part of the deed. And as for the charter to heirs whatsoever, it cannot alter the case, seeing it refers to the contract, and is expressly meant to complete and confirm, not to alter it.—Besides, by the old Feudal law, rights taken to heirs whatsoever were constructed *male fees*; and to this day, in the Highlands of Scotland, where those lands lie, few estates are devised to heirs-female.

Answered for the defender, It is more reasonable to presume the wadsetter's intention to have been, that the right should go to heirs of line than to heirs-male. Heirs-male are only mentioned in one clause, which might be by mistake; whereas heirs whatsoever occur in different clauses. The charter is expressly so conceived, and infeftment followed upon that charter. It matters not what were the ancient rules of feudal succession, when military services and tenures were in use; for now it is established, that a destination to heirs whatsoever will carry an estate to a nearer heir-female, in preference to a remoter heir-male.

"The Lords sustained the reasons of reduction of the defender's service as heir of line, and decerned in the declarator at the instance of the heir-male."

Act. RAE, LOCKHART.—Alt. BURNETT.

D. R.

Fol. Dic. v. 3, p. 125. Fac. Col. No. 9, p. 16.

No. 56. [2315] ROBERT HAY v. Miss FRANCIS HAY. July 24, 1788.

The expression, lawful heirs-male, employed in certain parts of an entail, with the same meaning, so far as appeared, as that of heirs-male of the bodies of the substitutes, used in other places of the deed, was, nevertheless, strictly interpreted in conformity to the words.

Sir Robert Hay of Linplum executed a deed of settlement, by which he devised his estate to such of the younger sons of the family of Tweeddale as were then in existence, *nominatim et seriatim*, and the heirs-male of their bodies, "whom failing to Alexander Hay, second son to Alexander Hay of Drummelzier, and his lawful heirs-male;" and, after some other substitutions, "to the heirs-female of the body of John Marquis of Tweeddale." From the tenor of the deed, however, it appears highly probable, that the alteration of the expression "heirs-male of the bodies," as applied to the Tweeddale family, into "lawful heirs-male," employed with respect to that of Drummelzier, was not occasioned by any difference in the intention of the granter, but had crept in through the inaccuracy or want of skill of the writer, who was not a conveyancer by profession.

Alexander Hay died without issue; and the prior substitutes having failed, the succession was claimed by his brother, Robert Hay, as his heir. It was likewise claimed by Miss Hay, as heir-female of John Marquis of Tweeddale, the intermediate substitutes having also failed. In the competition of briefs which followed, it was

Pleaded for Miss Hay: When, in interpreting the settlement of an estate, a doubt arises with respect to any restriction or limitation of property, no latitude of construction ought to be allowed; but when the only question is, whether the granter has devised his succession to one heir or to another, the opposite principle prevails; and that construction is to be adopted which is best calculated to give effect to his will, *secundum id quod credibile est cogitatum*, l. 24, ff. *De Reb. dub. Voet. ad eund. tit. § 4.*; Blackstone's Commentaries, b. 2, c. 23. No doubt the term heirs-male commonly denotes heirs-male in general; yet it is capable of being limited to the heirs-male of the body, when from circumstances such is evinced to have been the will of the devisor. A similar interpretation of the parallel expression heirs-female has had repeatedly the sanction of the Court; No. 50, p. 2306, and No. 51, p. 2308. And in the civil law, the rule is established, l. 17, § 8, ff. *Ad senatusconsultum Trebell.*; *Manica, De conjecturis alt. volunt.* lib. 8, tit. 14, § 6. Even the statute of 1685 affords an instance of the limited interpretation of the word "heirs," it being there confined to de-[2316]-scendants alone. If, then, the expression in question can possibly be understood of the heirs-male of the body, and not the heirs-male in general, of Alexander Hay, that first construction should be admitted, as evidently more conformable to the views of the entailer.

Answered, There is no room here for a *quæstio voluntatis*, since the expression of the entailer is not ambiguous, but precise and definite; the term heirs-male having only one signification. The authority of the Roman law, or of civilians, however weighty in other matters, is but of little avail in questions of tailzied succession, which may relate to various heirs and substitutions unknown in that law. At the same time, unless the words *alieno hærede*, which occur in l. 17, § 8, *Ad SCtum Treb.* be converted into *sine hærede*, a change for which there is no authority, that text will not support the opposite argument. With regard to the supposed limited acceptance of the word "heirs" in the language of the act 1685, it is not the descendants alone of the person forfeiting that are there meant, but such of his heirs, whether of his body or not, as are called by the entail, in opposition to the person next in substitution and his heirs. The calling of persons and their heirs in general, though not usual in entails, is exemplified in the entail of Duff of Braco, Record of Tailzies, vol. 4, p. 340. It is only to be added, that the doctrine now maintained was strongly sanctioned by the judgment of the House of Lords, in the cases of Bailie *contra* Tenant, 17th June 1766, *voce* SUCCESSION; and of Edmonstone *contra* Edmonstone, 24th November 1769, *voce* TAILZIE.

The cause was reported on informations appointed by the Judges Assessors to the Macers, when

The Court considered themselves as bound to give judgment according to the

ignification of the term in question, it being by the majority deemed unambiguous ; notwithstanding that the probable intention of the entailor was admitted to be contrary.

The interlocutor of the Court was as follows : " The Lords find, That the claimant Robert Hay is preferable, and entitled to be served heir of tailzie and provision, under the settlement in question."

To this interlocutor they adhered, on advising a reclaiming petition with answers.

Reporter, LORD MONBODDO.—For Mr. Hay, WIGHT, ROLLAND.—Alt. LORD-ADVOCATE BLAIR.—Clerk, MENZIES.

Stewart.

Fol. Dic. v. 3, p. 124. Fac. Col. No. 38, p. 62.

This case was appealed.—April 7, 1789.—The House of Lords Ordered and Adjudged, That the appeal be dismissed, and the interlocutors complained of be affirmed.

No. 57. [2317] JAMES FAIRSERVICE v. JAMES WHYTE. June 17, 1789.

Destination of lands in a marriage-contract to heirs and bairns, was interpreted to belong to the eldest son only.

The father of James Fairservice, in his marriage-articles, disposed some lands of small value belonging to him, to the heirs and bairns of the marriage. The obligation to infest, the precept of sasine, and the assignation to the writs, as well as a clause respecting the conquest, were in favour of the children of the marriage.

Of this marriage there existed several children. James Fairservice, the eldest, after his father's death, obtained, from the superior of the lands, a charter, confirming the disposition from his father, and also containing a precept of *clare constat*, wherein, on the narrative of its being shown by authentic documents, and by the charter of confirmation, that the bearer thereof was nearest and lawful heir of the deceased, he granted warrant for infestment, &c.

James Fairservice being infest in virtue of this warrant, sold the lands to James White ; who being charged for payment of the price, preferred a bill of suspension, in which he contended, That the devise being to " heirs and bairns of the marriage," while all the subsequent clauses were in favour of the " children of the marriage," the lands sold to him did not belong to James Fairservice, but to the whole issue of the marriage equally ; and

Pleaded, Notwithstanding the favour which our law has shown to priority of birth, by interpreting the word " heirs," occurring in a settlement of land rights, as comprehending those persons, in their order, who are called to the intestate succession, yet where a testator has at the same time added other words which do not readily admit of such a construction, it has given way to a different rule. Thus, where the expression of " heirs and bairns of a marriage " has been employed, the practice has been, not only in the case of *feuda pecunia* and in that of burgage tenements, but also in the settlement of land estates, to admit, without distinction, all the children of the marriage. In circumstances like the present, such an interpretation seems peculiarly proper, the whole relative clauses respecting this insignificant piece of land, which the proprietor could have no intention of perpetuating in his family, being in favour of " the children of the marriage," which cannot be understood to give any more right to the eldest son than to his younger brothers and sisters. And, in another clause, that respecting the conquest, it will not be disputed, that the whole children of the marriage were meant, this having been determined in many instances, Dirleton, *voce* HEIRS OF PROVISION and SUBSTITUTION ; Stair, b. 3, tit. 5, § 52 ; Dict. *voce* PROVISIONS TO HEIRS and CHILDREN ; 17th February 1736, Rankine *contra* Rankines, C. Home, p. 39, *voce* SUCCESSION ; 13th June 1760, Scott *contra* Scotts, No. 100, p. 985.

Answered, Where, in marriage-settlements, sums of money are provided, it has been justly held, that if the destination is to the heirs and bairns of the marriage,

the children will succeed *per capita*, because this would be the rule of distribution if no settlement had been made. And the same thing is observ[2318]-ed in giving effect to clauses of conquest, because though the subjects acquired may consist of land, still these must have been purchased with money, which, as a moveable subject, descends to executors. From some peculiar ideas too respecting burgage-tenement it seems to be established in practice, that after conveying subjects of this sort in favour of the heirs and bairns, or heirs and children, of the marriage, the whole shall not belong to the eldest son, but shall be divided equally. But in the case of landed property, as the right of primogeniture has ever been firmly settled, so in marriage settlements respecting it, it seems reasonable, that under the word "heirs," the eldest son should have a preference, even although it should be coupled with others of a more doubtful signification. Accordingly, although some decisions, chiefly of an ancient date, may be referred to, which appear to have deviated from the principles just now stated, the more recent ones, without any regard to the value of the subjects, which would afford a very uncertain rule, seem to have uniformly given a different effect to settlements of this sort, Sir James Steuart, *voce* HEIRS OF PROVISION; *Id. voce* PROVISION IN FAVOUR OF BAIRNS; Bankt. b. 3, tit. 5, § 48; 13th February 1768, Kempt *contra* Russel; 23d November 1773, Home and Scott *contra* Murdoch and Miller; 18th November 1788, Jacobina Reid *contra* Catharine, &c., Woods, *voce* SERVICE OF HEIRS.

The Lords found, That James Fairservice, the eldest son of the marriage, was entitled to succeed to the lands in question.

Lord Reporter, JUSTICE-CLERK.—Act. CHA. BROWN.—Alt. GEO. FERGUSSON.—Clerk, SINCLAIR.

Fol. Dic. v. 3, p. 124. *Fac. Col.* No. 69, p. 125.

No. 58. The Trustees of JOHN BROWN v. His RELATIONS. August 3, 1762.

The trustees named by a defunct for managing his affairs, and paying off his legacies, &c., found to have a discretionary power of distributing a legacy, left to the testator's poorest friends and relations.

John Brown, feuer in Laswade, having no near relations, executed a settlement of his affairs in the form of a trust-disposition, whereby he vested his whole estate, real and personal, in certain trustees, with directions to dispose of his heritable estate, in the event of his death, in manner therein mentioned, and to make payment of a variety of legacies specially bequeathed; after which fol-[2319]-lows a general clause, in these words: "And the remainder of the proceeds of my said means and estate, after payment of the several legacies already bequeathed, or to be bequeathed by me at any time of my life, in manner foresaid, and of the payment of the expenses of executing this trust right, to be divided amongst my poorest friends and relations, whom I may have forgot herein, or in any other deed to be made by me, in relation hereto, at any time during my life."

Upon John Brown's death, the trustees entered upon the management of his affairs, and paid off the special legacies and donations; but the residue which remained to be divided, in terms of the above general clause, having turned out pretty considerable, they could not agree with the relations about the manner of distributing it; some of them insisting that this money should be divided equally among all who could prove propinquity to the defunct, though in the remotest degree, and though in the most opulent circumstances; others laying claim to the whole residue as nearest of kin to the defunct; and some few pretending an exclusive right to it as the poorest relations.

In these circumstances, the trustees brought a process of multiplepinding against the whole of the claimants, containing likewise a declaratory conclusion, for having it found and declared, That a discretionary power was lodged in the trustees of distributing this residue among such of the relations, and in such proportions as they

ould judge proper. In which process, compearance was made for two different sets of claimants, viz. 1mo, The nearest of kin upon the father's side, who insisted hat they alone were entitled to the whole residue, and, 2do, A number of the relations a the mother's side, who thought it for their interest to apply for an equal division f the money among all who were in the field, and could prove any degree of propinquity. Besides these two sets of kindred, there were a number of others who ad been called in the multiplepointing, but for whom no compearance was made, most of them being extremely poor, and some of them out of the country.

Pleaded for those relations who claimed the equal division: The testator plainly atended that this residue should be divided among his relations, of whatever degree, whom he had not otherwise taken care of; and his meaning was, that it should be equally divided. The clause will not bear any other interpretation; for the word divide always means a separation into equal parts, when nothing is added to signify a contrary intention. At any rate, the clause can never import, that these trustees were vested by the testator with a discretionary power of distributing according to their pleasure; nor does it appear proper or reasonable that they should have such a power, as the legacy might be thereby entirely frustrated; for, if they are at liberty to give each relation what share they think proper, it is obvious that, supposing they should give each of them a sixpence and no more, the relations must rest satisfied, and could have no redress.

[2320] Pleaded for the nearest of kin: 1mo, The whole clause is inexplicable, and ought to be held *pro non scripto*. The words poorest friends and relations are unintelligible; for either the particle and must be taken in a conjunctive sense, in which case it is only the poorest relations, who are likewise friends, that are entitled to the residue; or it must be considered as disjunctive, in which case his poorest friends, as well as his poorest relations, must come in for a share. In either case, the division could not be made without a proof of the propinquity, friendship, and circumstances of each claimant, which would be endless and inextricable. The clause, therefore, being altogether perplexed, the rule in the civil law ought to take place, and the legacy held *pro non scripto*; the consequence of which is, that it must fall to the nearest of kin of the testator, who would have been entitled to take it *ab intestato*.

2do, Supposing this clause were to have effect, still the remote relations could not profit by it; for the word relations, in a legal sense, means only the nearest of kin; and therefore, the residue must be divided among such of the nearest of kin as the testator had not otherwise provided, by any special legacy or donation. The commentators on the civil law lay it down as a rule, that, where a testator calls in general *consanguineos suos*, or *totam agnationem suam*, those only are supposed to be called who would have succeeded *ab intestato*; Voet. tit. de hæred. instit. § 19 and 20. The same is the rule in the English law; as appears from Peere Williams's Reports, vol. 1, p. 327, where it is mentioned as a settled point, "That, when one devises the rent of his personal estate among his relations, without saying what relations it shall go among, all such relations as are capable of taking within the statute of distributions; else it would be uncertain; for the relation may be infinite." And thus it was decided in chancery, in the case of a legacy left by a person among his kindred, according to their most need, 30 Car. II. 2 Chanc. Rep. p. 146.

Answered for the pursuers, to both sets of defenders: In claiming this power of distribution, the sole view of the trustees is to fulfil the will of the defunct, and do equal and impartial justice to all concerned. This power they apprehend to be vested in them by the will of the defunct, and from the nature of the thing. The whole effects are vested in them, in the first place; and they are appointed to divide the residue among the poorest friends and relations; they are therefore plainly intrusted by the defunct with this distribution. It could never be his intention, that an equal division should be made among all who could claim kindred or friendship to him, though ever so remote, and though in the most opulent circumstances; and nothing can be more rational, than to suppose, that he intended his trustees, whom he vested in the management and direction of his whole affairs after his death, should be at the trouble of making inquiry into this matter, and of determining according to circumstances the particular share that each should receive. The trustees are far from meaning, that they have thereby a power of acting arbitrarily, or of favouring any person improperly, or contrary to the intention of the defunct;

the word [2321] friends, they apprehend, in this case, to be synonymous with relations; and their design is, to make a distribution of the money among such of the relations as have been forgot by the testator, by giving some more and some less according to the necessities of each, and the degree of relation in which they stand to the defunct. It is understood, that they must execute this trust *secundum arbitrium boni viri*; and, if they are guilty of any abuse, or any improper partiality, they will be subject to correction, by an action at the instance of those who are fraudulently disappointed.

With regard to the claim of the nearest of kin, it is plainly adverse to the intention of the testator: Nothing is more obvious, than that the defunct meant, that this residue should be distributed among his poor relations in general; and, as the intention was most laudable, there is no reason why it should not have effect. The clause is abundantly intelligible, and can be extremely well carried into execution, by supposing a discretionary power to be vested in the trustees. As to the authorities which were adduced from the civil and the English laws, to prove, that by relations in general are meant, those who succeed *ab intestato*; in the first place, the Court of Session gave a contrary judgment in the late case of Edward Whary's settlement, 16th July 1760.* 2dly, Whatever may be the law where a legacy is left to relations or kindred, without any addition, which may denote what relation or kindred the testator meant, the present case is very different; for the testator has expressed himself in terms which plainly comprehend all the relations: The words of the clause, when taken together, plainly indicate an anxiety, that none of his relations, who stood in need of any assistance, should be omitted; it cannot therefore be maintained, that he meant to confine his bounty to any particular set of relations, far less to those who happened to be his heirs at law.

"The Lords found, that, by the trust-disposition executed by the deceased John Brown, his trustees are vested with a discretionary power to divide among the poorest friends and relations of the said John Brown, the remainder of his estate, after payment of his debts and legacies, and the expenses of executing the trust, and that without distinction, whether the said relations are connected by the father's or by the mother's side, and also without distinction of degree. And they ordain the said trustees, betwixt and the 16th of November next, to give into process a concordance of the names of the persons among whom, and the proportions according to which, they propose that the said division should be made; and remit to the Lord Ordinary to proceed accordingly."

For the Pursuers, ILAY CAMPBELL *et* DEAN OF FACULTY.—For the Nearest of Kin, DEWAR *et* RAE.—For the other Relations, WIGHT.

Fol. Dic. v. 3, p. 125. *Fac. Col.* No. 95, p. 213.

No. 66. [2333] JAMES BRUCE-CARSTAIRS of Kinross *v.* ROBERT GREIG and Others, his Vassals, in the Parish of Kinross. January 23, 1773.

A clause in a feu-right, relieving from public burdens, found not to free the vassals, from paying their proportions of the expense of a manse and offices for the minister of the parish.

The estate of Kinross, situated in the parishes of Kinross, Portmoag, and Orwell, had been mostly feued out many years ago; and, in particular, parts [2334] thereof to the defenders predecessors, about the middle of the last century, by tenures after expressed; and but an inconsiderable part of the property-lands remained with the family.

A new manse having been lately built for the minister of Kinross, a demand was made upon the defenders for payment of certain proportions of the expense thereof, according to the valuation of their respective lands; wherewith they meanwhile complied, and paid the money: And having been sued in the Sheriff-court for arrears

* *Voce IMPLIED WILL.*

of the feu-duty, they pleaded compensation of their feu-duties to the amount of what they had paid towards building the minister's manse of Kinross; for that the operation of the minister's manse was a public burden, of which, by their charters, they were entitled to be relieved, in whole or in part.

The Sheriff having given a decree against them for the sums sued for, reserving action to them against the pursuer with respect to the compensation pleaded by them in their defences, they removed this action from the Sheriff by a bill of advocacy, and also brought an action of repetition of the sums paid by them. These two actions having been conjoined, and the feu-rights of the defenders produced, they were conceived as follows:

Robert Greig is bound to pay a certain feu-duty, and perform certain services; and that for all other burden or exaction that may be required; and the superior binds himself, and his successors, "to relieve the said Robert Greig, and his above written, of all cess, and public burdens, minister's stipend and schoolmaster's-fees, payable forth of the lands in all time coming."

John Dempster is bound to pay a certain feu-duty, and perform certain services; and besides, to pay the third of all taxations and public burdens whatsoever, imposed, or to be imposed, on the said lands; and that for all other burden, exaction, question, demand, or secular service, that can anywise be exacted or demanded forth of the said lands, "for whatever occasion," or any other manner of way whatsoever.

James Beveridge is bound to pay a certain feu-duty, and to perform certain services; "and besides, to pay the third part of all taxations and public burdens whatsoever, imposed, or to be imposed, upon the said lands; and that for all other burden, exaction, question, demand, or secular service, that can be anywise exacted or required forth of the said third part of the said town and lands of Easter Tillochie, with the pertinents."

The charter of James Belfrage runs in the same style with that last mentioned.

James Stocks is bound to pay a certain feu-duty, and perform certain services; "and, in like manner, paying two parts of all taxations, public burdens, and impositions, imposed, or to be imposed, upon the said lands, and paying the schoolmaster's stipend of Kinross, upon their own proper expenses, and reporting acquittances thereof yearly; and also, paying all their duties willingly, without any process of law, and observing good neighbourhood, as becomes an honest man, for all other burden, exaction, question, demand, or [2335] secular service, which can anywise be exacted or required forth of the said lands, by any person whatsoever."

Michael Henderson is bound to pay a certain feu-duty, and two sheep and two lambs yearly, for said lands of Turf-hills; "and relieving me and my foresaids of the two parts of all public burdens, imposed, or to be imposed, upon the said lands; and for some other lands mentioned in his writs, he is bound to pay a certain feu-duty, and perform certain services; "and sicklike, to pay two parts of all public burdens, imposed, or to be imposed, upon the said lands of Bouton and Westmost-acre; and relieving me and my foresaids of the two parts of all public burdens, imposed, or to be imposed, on the saids lands of Turf-hills; and that for all other burden, exaction, or demand, which can be lawfully required forth of the said lands in time coming."

Robert Marshall is bound to pay a certain feu-duty, and perform certain services; "and these for all other burdens, exactions, questions, demands, or secular services, which can be anywise exacted or demanded forth of the said lands, with the pertinents, in time coming."

Although the expense of rebuilding the manse and offices was the only article presently in dispute, as the judgment of law behoved to be the same with respect to the expenses of rebuilding or repairing the church, it was understood, in the argument before the Lord Ordinary, that one determination should be given upon the whole; his Lordship pronounced this interlocutor: "Finds, that the defenders, in consequence of their rights, have no claim of relief for any part of the expenses laid out by them in either rebuilding or repairing the church, manse, and office-houses belonging to the parish of Kinross; therefore repels the defence founded on that claim."

Upon two successive reclaiming petitions and answers, "the Lords adhered to the Lord Ordinary's interlocutors"; not singly upon the import of the rights, but in respect of the instances that were given of the practice in the three several parishes over which the pursuer's right of vassalage extended, downward from the 1729, of

the vassals contributing their proportion of the expenses in question ; which the Court held to be explanatory of the meaning of parties in a doubtful contract, which several of the Judges thought this was ; and that, in any recent question upon the construction would rather have been with the defenders.

Act. DEAN OF FACULTY.—Alt. M'LAURIN.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 130. *Fac. Col.* No. 50, p. 131.

*** This cause was appealed :

November 24, 1775.—The House of Lords Ordered and Adjudged, That the interlocutors complained of be affirmed.

No. 69. [2340] NINIAN JAFFRAY and Others v. The Duke of ROXBURGH.
February 18, 1755.

A village was erected by a charter into a burgh of barony, with power to the baron to levy certain tolls, and apply them to the uses of the burgh. The tolls having been constantly levied, this was found to import an obligation to apply them ; although the clause had been omitted in the baron's charter for more than a century past. Reversed on appeal.

In the 1614, the Crown granted a charter of the barony of Halydean, comprehending the town of Kelso, to Robert Lord Roxburgh in liferent, and to William Ker his son in fee.

This charter erects the town of Kelso into a burgh of barony ; and contains the following clause : “ Cum plena potestate Willielmo Ker forum publicum hebdomadatim tenendi, et annuatim duas liberas nundinas, infra dictum burgum celebrandi, custumas et divorias earundem recipiendi et levandi, ac easdem ad commune bonum dicti burgi applicandi.”

In the 1634, the Crown granted a new charter to the same Robert Lord Roxburgh, wherein the clause aforesaid is repeated ; but, in a charter granted to him in the 1647, the customs are simply and absolutely granted ; and all the subsequent rights of the family of Roxburgh have been taken in terms of the charter 1647.

Jaffray and others, feuers and inhabitants of Kelso, raised a process of declarator against the Duke of Roxburgh ; concluding, that his Grace should, in terms of the charters 1614 and 1634, granted to his predecessors, apply the customs aforesaid for the common good of the burgh.

Objected for the Duke of Roxburgh ; 1mo, The pursuers could, at most, have had only a personal right of action on the charters 1614 and 1634 : now these charters have never, since the 1647, been a title of possession ; and, of consequence, no action can lie on them. Further, the family of Roxburgh has, by the positive prescription, acquired an absolute right to the customs under the charter 1647, and the subsequent charters and infeftments ; 2do, The terms of the charters 1614 and 1634, supposing them to be still in force, import not an obligation to apply, but only a faculty of applying ; and so have they been ex-[2341]-plained by immemorial possession ; for that the family of Roxburgh has been in the constant use of levying these customs, without rendering any account to the burgh of Kelso.

Answered for the Pursuers ; 1mo, The customs were, by the original grants, appropriated to the town of Kelso ; Lord Roxburgh, and his Representatives, were named by the Crown trustees for these uses ; the right of levying the customs was granted to them in that capacity, and every subsequent right must be deemed granted under the same condition ; as the customs have been levied by the family of Roxburgh in trust for the town of Kelso, possession by the family of Roxburgh must be held to be possession by the town of Kelso ; and therefore no prescription can be here pleaded ; 2do, Power granted by charter to do a thing for the use of a third party, or for the benefit of the public, imports an obligation to do it ; and, as the Duke of Roxburgh has levied the customs, he must also apply them in terms of the grant.

“The Lords repelled the whole defences offered for the Duke.”

The pursuers also set forth, That the burgesses and inhabitants of Kelso have been immemorially accustomed to wash and dry their linen on an island situated on the Tweed; and they concluded, that their right of continuing in possession of this island, for the purposes aforesaid, should be declared.

The defender objected, That he is proprietor of the ground on both sides of the river, and must therefore be held, in law, proprietor of the island also, unless the pursuers bring evidence that they have acquired right to it, either by grant or prescription. No servitude can, in this case, be pleaded; for that there are no lands granted to the incorporations, to which, as a *prædium dominans*, the servitude could belong.

Answered for the pursuers; The charter, erecting Kelso into a burgh of barony, bears, “Cum omnibus et singulis terris, et singulis suis pertinentiis”; as the burgesses and inhabitants of Kelso have immemorially possessed the island, the presumption in law is, that it was included in the charter.

“The Lords found it proven, That the burgesses, inhabitants of the burgh of Kelso, have been immemorially in the constant uninterrupted possession of whitening and drying their linen upon the island; and therefore find them entitled to continue their said possession of whitening and drying their linen there as formerly.”

Act. FERGUSON, A. PRINGLE.—Alt. BINNING, LOCKHART.—Clerk, MURRAY.

Fol. Dic. v. 3, p. 132. *Fac. Col.* No. 138, p. 207.

* * This cause was appealed:

The House of Lords ordered that the defence offered for the appellant, with respect to the customs and duties, and the little island called Ana, or the Sand-bed, be sustained; and that, as to the said customs and duties, and the said little island, the appellant be assoltied.

No. 70. [2342] Sir WILLIAM STIRLING v. THOMAS JOHNSTON. January 4, 1757.

A clause of pre-emption without an irritancy, in a vassal's charter, found to be ineffectual against a purchaser.

Linton feued to Miller a small tenement of £40 Scots of yearly rent. The charter contains a clause, “declaring, That it shall not be lawful to Miller to sell or dispone the said lands, without first making an offer of them to Linton at the price originally paid for them, and the value of improvements, &c.; and if he do in the contrary, such conveyances are declared to be null.”

Linton conveyed his right of superiority to Sir William Stirling; and Miller afterwards disposed the property to Johnston. This disposition was sought to be reduced by Sir William, as having been executed without any offer made to him, in terms of the clause of pre-emption.

Pleaded for Johnston, The clause in this feu-charter contains no irritancy of the vassal's right. The right of the feu must still remain with Miller the vassal; and it is inconsistent with the law of Scotland, and the nature of property, that while he remains proprietor of the lands, they should not be affectable by his debts or alienable by his deeds. The essence of property consists in the power of alienation, which cannot be taken from the proprietor but by divesting him of the property, and vesting it in the party to whose prejudice the alienation is made. This was the chief difficulty that occurred in the introduction of tailzies into this country; and the only remedy that could be devised to take it off was, to insert clauses forfeiting the heir's right in favour of the next substitute; and consequently nothing could be carried by his deeds, when he is divested of the property by the condition of his right: but if such irritating clause is omitted, debts and deeds are effectual, notwithstanding the strongest prohibitions. See March 11, 1707, Lady Redheugh, *voce* TAILZIE; 13th June 1712, Creditors of Riccartoun, *IBIDEM*.

Answered, Bargains may be made under any conditions. Where it is expressly stipulated, that the superior shall have a right of pre-emption, there can be no reason why such condition should not be effectual. The superior may reduce the sale, and make his own right of pre-emption effectual, though the vassal's feu was not forfeited. In the case of tacks secluding the assignees, the assignation is void; but it will not irritate the right of the cedent. And no argument can be drawn from tailzies, which derive their being from a statute, and can have no effect if the statute is not literally complied with, and unless the provision of the statute be strictly obeyed.

Replied, Tacks are merely personal, founded on an *electio personarum*, and exclude assignees, without any clause for that purpose; there needs therefore no forfeiture of the tack, in order to bar the power of assigning; because it is excluded from the nature of a tack: But, in a right of property, the principles are entirely different. The power of alienation is essentially inherent in it, and cannot be barred any other way than by divesting the disponent of his property.

[2343] "The Lords found, That the disposition by John Miller to Thomas Johnston was a valid and sufficient right, notwithstanding the prohibitory clause in the lease contract and charter."

Act. G. BROWN.—Alt. JOHNSTONE, FERGUSON.—Clerk, KIRKPATRICK.

Fol. Dic. v. 3, p. 131. *Fac. Col.* No. 4, p. 6.

No. 4.

[11] STEWART v. STEWARTS. May 21, 1802.

What is to be understood by the term "personal representatives" in the clause of a settlement?

John Stewart, victualler in London, in the year 1769, executed a settlement, leaving his effects in the first instance to his son; failing whom, one half [12] to be given to his wife and her relations, and the other to his brother James, or, in the event of his death, to his personal representatives.

John Stewart died about the year 1776, leaving a widow and one son. His brother James next died; thereafter John's son, without issue; and, last of all, his widow; so that the succession to one-half of his effects opened to the personal representatives of his brother James, by the terms of the settlement.

In the year 1795, about four years previous to his death, James Stewart executed a testament, by which, upon a narrative of his resolution "to settle his worldly affairs in his own lifetime, so as that all difference among his children, anent the succession to him in his means and effects, after his death, might be prevented, he nominated and appointed John Stewart, his eldest lawful son, to be his sole executor, and universal intromitter with his whole goods and gear, debts, sums of money, household furniture, and other moveables whatever, that might pertain or be owing to him at the time of his decease, in virtue of bonds, bills, or any other manner of way; together with the vouchers and instructions of the said debts," &c., "all which the testator thereby left and bequeathed to his son John, with power to give up inventory, confirm testament, and do every thing thereanent that any other executor can, or may do, by law; with and under the burdens, legacies, provisions, and reservations therein mentioned."

John Stewart, tenant in Fianich, the eldest son of James Stewart, conceiving himself to be the sole personal representative of his father, proceeded to take possession of the succession, devolving upon the family by his uncle's settlement. But doubts having arisen whether this succession belonged to him exclusively, or in common with his brothers and sisters, a process of multiplepoinding was brought, in which the elder brother pleaded:

By the term Personal Representatives, according to the law of England, where this settlement was framed, is to be understood those who represent a man after his death, or, in other words, those who succeed to his personal estate, either in terms of his latter will, or by law, if he should die intestate; Jacob's Law Dictionary,

abus PERSONAL REPRESENTATION. Executors are therefore synonymous with personal representatives; and as John Stewart was appointed by his father's settlement his sole executor, he is entitled to any legacy devised to his personal representatives.

Answered: The term personal Representatives, includes the whole children of James Stewart, who by law become successors to him in his moveable estate.

An executor is quite different from a representative, being a trustee for the management of the moveable estate of a person deceased, accountable to the creditors, legatees, and representatives of the testator; Act (preamble) 1617, c. 14; Gordon v. the Laird of Drum, Dec. 21, 1671, No. 86, p. 3894; Campbell v. Burdon, Dec. 1, 1791 (not reported). By the law of England, likewise, as illustrated by numerous decisions, representatives are clearly distinguished from executors; 3 Williams's Reports, 40; Godolphin Orph. [13] Leg. 259; Act 22 et 23 Car. II. c. 10; Jac. II. c. 17, § 7; Green *versus* Howard, Hilary Term, 1779; Pickering *versus* Hamford, August 2, 1797, Vesey Junior Reports. Farther, the settlement of James Stewart can only be understood to dispose of what was his own property; but the funds here *in medio* never were vested in him, and did not devolve upon his family till many years after his death. The terms of his will likewise shew, that he was disposing merely of his own effects, and had no contemplation of this eventual legacy. See PROVISION TO HEIRS AND CHILDREN, Sect. 5, *et seq.*

The Lord Ordinary reported the cause, and the Court unanimously sustained the claim of the younger children.

Lord Ordinary, METHVEN.—For Eldest Son, CONNELL.—Agent, JA. ROBERTSON, W.S.—Alt. WILLIAMSON.—Agent, GEO. ANDREW.—Clerk, GORDON.

J.

Fac. Col. No. 42, p. 86.

No. 2. [2349] WALLACE v. CUNNINGHAM. February 4, 1708.

Found that a master, who had given up working his coal, might reclaim his coaliers, when he began to work again after several years; they having left his service without a testimonial in terms of the act 1606.

Sir Thomas Wallace of Craigie, advocate, pursues William Cunningham of Brownhill, on the 11th act 1606, and 56th act 1661, for seducing and detaining eight or nine of his coaliers, that were born in his ground, and had wrought in his coal-heughs some years ago, and whom he had required from him by way of instrument; and he having refused to dismiss them, he claimed the penalty of the act of Parliament, being £100 Scots for every man so detained. Alleged, This was the only remaining vestige of slavery amongst us, and liberty being *juris naturalis*, it is as little to be inroached upon as may be; and the pursuer is noways within the case of the acts of Parliament cited, which are in favours of those who have a going coal-work, which Sir Thomas has not had these seven or eight years past; and so having no employment for them, it was insnaring and invidious to require them back. 2do, The act has an exception, unless they had been year and day out of their master's service; for then law presumes he has derelinqished his right, by his supine negligence, in suffering another man to possess them for year and day; and Sir Thomas can pretend no damage, seeing he had no use for them all that time; and though of late he has put down a coal-sink, yet not having required them back within year and day of their deserting his service, and of their working at his coal-heugh, he cannot claim them now. Answered, Liberty is indeed favourable; but what is the odds, whether they be slaves to Cunningham or him? yea, he has the better claim, being originally in his ground, and continue there still, not only *ratione nativitatis*, but *domicilii*; and though he had no work for them for some [2350] years past, yet by law, he was impowered to lend them, or sell them; and this property is founded on good reason, for coal being a great casualty in Scotland, our law wisely considered that rent could never be secured without such a severity; none being capable of learning that art,

but such as are trained up to it from their infancy ; and the act of Parliament perverted, when it is interpreted, that the requisition must be within year and day from their leaving of my work, and their being in my actual possession and service for then it were easy for coaliers to shake themselves loose of their true masters and owners, by absconding for a year, and running to the Newcastle coal-works, and then returning from the Keels after the year is run out ; but the law has better provided, that I must require them before you have prescribed a right to them, by annual possession without interruption ; but *ita est*, I required them long before they had been a year in your service, which is all the act requires. The Lords found That coaliers could not be hired without a testimonial from their former masters and that Sir Thomas having now a going coal, he might very well require them before to his service ; and though they were several years away from him, yet they as having been a year in Brownhill's work, the requisition was good, and he must rest contented with them.

By this instance, and some others that have occurred this session, such as the expounding our laws anent winter herding, cautioners being free after seven years butchers not being grasiers, &c., it appears, what latitude Judges have in the interpretation of laws, sometimes by an extensive interpretation, ampliating them beyond what the words carry ; and at other times, by a restrictive sense, limiting them from equity and circumstances appended thereto. So the Orator's opinion as observed was true, that laws in process of time *sub judicium potestate cadunt* by the several ways of expounding and applying them. See p. 2020.

Fol. Dic. v. 1, p. 148. Fountainhall, v. 2, p. 426.

No. 4. [2351] ANDERSON and Others, Suspenders v. Sir JAMES WEMYSS of Bogie, Charger. June 22, 1743.

It was the opinion of the Court at passing a bill of suspension, That where a coal fails, the coaliers are not cessible to another coal-master : And the like was [2352] said to have been found some years ago between Mr. James Smith and certain coaliers ordered by the Laird of Arnot to work at Mr. Smith's coal.

Kilkerran (COALIERs), No. 1, p. 122.

No. 5. The BURGESSES of Rutherglen v. ANDREW LEITCH, Provost. January 16, 1747.

Coaliers found capable of voting at an election in a burgh.

A number of coaliers belonging to a coalery in the neighbourhood of the town of Rutherglen, whereof Provost Leitch was tacksman, having been admitted burgesses, the incorporated burgesses, who looked on this as an indignity to the town, and a project to carry an approaching election of Magistrates, procured a suspension against the coaliers, who, notwithstanding, voted at the leasing of the eight unincorporated burgesses, out of whom, by the set of the burgh, four counsellors are chosen by the Provost and Bailies.

The election of the said four counsellors being challenged by summary complaint, the grounds the complainers insisted on were, That coaliers were incapable to vote ; that as they were by statute bound to work six days in the week, it therefore depended on their masters, whether they should be permitted to attend the meeting or not ; and if so, it no less depended on him for whom they should vote, and it was inconsistent that any one should have a right to vote who had not his personal liberty : The case of town-pensioners and beedmen was also appealed to, who were not allowed to vote ; and the objection to coaliers was said to be stronger.

It was answered, That where one has a right to vote as a burgess, or any other

right, it did not appear why he should forfeit that right by becoming a coalier, more than by becoming a soldier, who is as much bound to obey the command of his superior officer, as a coalier is bound to obey his master ; and men's natural rights are not to be taken from them, because of the possibility that another may abuse his power and influence over them.

The Lords found, " That coaliers who are burgesses were not to be debarred from voting at the leeting of the unincorporated burgesses."

On occasion of this suspension, an incidental complaint was given in by Andrew Leitch v. Robert Hall, notary, one of the unincorporated burgesses, setting furth, That he, as a writer, being employed to send for the said suspension, had, after the past bill, with a sist upon it, was returned to Rutherglen, containing the names of fifteen coaliers, with his own hand added the names of other three. In his answer, he admitted the fact, but excused himself on pretence of a mere error in judgment, as the three were in the same case with the others, and only not contained in the bill when it passed the Ordinary's hand, from the writer's not knowing their names, and that he had not done the thing in a hidden way, but openly, believing no harm in it, and by advice from the [2353] writer, who raised the suspension, as a thing usually practised : And further pleaded, that as these three, as well as all the others, had voted, notwithstanding the passed bill, no damage was sustained against them : And lastly, that as the three coaliers themselves were not complaining, it was not competent for any other to complain.

The Lords had no regard to these answers, and found, " That the filling up the names of three persons more than were contained in the bill, was a practice illegal and unwarrantable, and highly dangerous to the public ; and therefore found him incapable of exercising the office of a notary-public, deprived him of the said office, ordered the clerk to the admission of notaries to call in his protocol, and decerned him in the expenses of the complaint, and in forty shillings to the poor ; and granted warrant to macers and messengers to apprehend and imprison him, ay and while he should pay the above sums." See No. 7, p. 1841. See PUBLIC OFFICER.

Kilkerran (COALIERS), No. 2, p. 123.

No. 7. [2355] THOMAS DUNDAS, Esquire v. Mr. JOHN MACLEOD, Advocate.
November 19, 1754.

The proprietor of a coalier had a *rei vindicatio* at common law, though more than year and day had elapsed, since the coalier had left his service.

Robert Simpson, a collier, belonging to the coal-work of Quarrel, having differed with the tacksman of the coal, deserted the work in the year 1737, and went to Mr. John Macleod's coal-work at Bowhouse.

Mr. Dundas afterwards purchased the lands and coal of Quarrel, and got an assignation to the coaliers, and, among others, to Robert Simpson ; whereupon he brought a process against Mr. Macleod, concluding for the delivery of the said Robert Simpson.

Pleaded for the defender ; That Robert Simpson had been away several years from the coal-work of Quarrel, and had been several years at the defender's coal-works without interruption, and without being redemanded by his former master ; and therefore the defender was not obliged to restore him ; for, by a coalier's being absent above the space of one year from his master, the master loses his property in him ; and if the coalier has wrought during the space of one year at another work, he becomes a bound coalier to that work. And that such is the common law with respect to coaliers, appears from the 11th act of parliament 1606 ; whereby it is enacted, " That in case any receive or entertain coaliers, salters, or coal-bearers, without a sufficient testimonial of their master whom they last served, the master from whom they came, challenging their servants within year and day, that the party whom frae they are challenged, shall deliver them back again within twenty-four hours, under the pain of one hundred pound Scots, to be paid to the persons whom frae they passed."

From which act, it is to be observed, 1mo, That possession gives the right to the

coaliers ; for they are to be restored to the master whom they last served, and not to him to whom they first belonged ; 2do, That their former master loses his right to them, he do not redemand them within year and day after their leaving his service ; and the order for restoring them is only in case requisition be made within year and day of their leaving their service. It cannot be alleged, That the statute only meant the the penalty of £100 Scots could not be claimed, if requisition be not made within year and day ; for the statute has made no provision for restoring coaliers after their being year and day absent from their former master ; which it surely would have done, if the property of them remained with him after the year.

Answered for the pursuer ; That no law has introduced so short a negative or positive prescription of the right to coaliers as is contended for by the defender ; and no such prescriptions are either enacted, or supposed, by the statute 1606. That act has declared it to be unlawful to receive or entertain another man's coaliers, without testimonial from the master whom they last served, or at least an attestation of reasonable cause of their removing, subscribed by a [2356] magistrate ; and a coal master receiving a coalier without such testimonial or attestation, is guilty of a direct transgression of the law ; and therefore a possession so unlawfully attained can never entitle the offender to the property of the coalier.

The remedy introduced by the statute is a summary and possessory one, in favour of him who had the recent possession of the coalier, against the unlawful receiver and detainer, in case requisition be made within year and day ; but if requisition be not made within that space, the master does not thereby lose his property in the coalier, but may recover him by an action at common law. Thus, though the action of spuilzie be limited by statute to three years, yet this prescription of the summary and penal remedy does not give the spoliator a right of property in the goods spuilzied after the three years ; but an action for restitution and damages is competent against him at any time within forty years.

"The Lords found, That the pursuer had right to the property of the coalier."

Reporter, DRUMMORE.—Act. LOCKHART *et* BRUCE.—Alt. THO. HAY *et* A. PRINGLE—Clerk, FORBES.

Fol. Dic. v. 3, p. 136. *Fac. Col.* No. 117, p. 174.

No. 9. [2359] THOMAS DUNDAS of Quarrole, Esq. v. JOHN KIRK, Overseer of the Coal-works at Grange. January 22, 1761.

The proprietor of a coal-work, in possession of a coalier for year and day, could reclaim such coalier, and recover the penalty of the statute 1606 from any third party, to whose coal-work he had betaken himself.

Mr. Dundas, in the beginning of 1760, brought an action against John Kirk upon the statute 1606, for the re-delivery of some coaliers, who, he alleged, had been enticed away from his coal-works, at Quarrole, by the defender ; as also, for the statutory penalty of £100 Scots, for having detained each of the said coaliers, after having been legally required by the pursuer to deliver them up.

James Brown, one of these coaliers, had worked in the Grange coalery from September 1756, to October 1757 ; and, in November 1757, he began to work in Quarrole coal-work, belonging to Mr. Dundas, and continued to work there pretty regularly till the end of March 1759, when he returned to Grange works.

[2360] Henry Love had been employed in Quarrole coalery from August 1755 to April 1758 ; but from that period, till February 1759, he had not worked in Quarrole coalery ; and, before the end of the year 1759, he went to work at the Grange coalery.

David Frew had never worked a year at Quarrole coal.

Observed from the Bench ; That where the proprietor of a coal-work had been in possession of a coalier for year and day, it gave him such a right, as entitled him to reclaim the coalier from any third party, to whose work he had betaken himself.

The Lords found, "That James Brown had been year and day in the possession

Mr Dundas, and that the defender was liable to the pursuer in the penalty of 100 Scots; but, in respect the pursuer had not proved that Henry Love and David Hew had been year and day in his possession, they assoilzied the defender from the process, so far as concerned them."

Act. GARDEN.—Alt. LOCKHART.

J. M.

Fol. Dic. v. 3, p. 136. Fac. Col. No. 9, p. 16.

to. 10. ROBERT SPENCE of Stonelaw v. JAMES SCOTT Weaver, in Rutherglen.
January 24, 1764.

coaliers, working at a coal during a lease, became bound to the coal, not to the lessee.

In 1739, coal having been discovered in some grounds belonging to the town of Rutherglen, and Robert Spence; James Scott obtained leases from the town and Mr. Spence, and began a coal-work, which he continued till 1755, when he gave it up, and wrought a coal, in the lands of Corsehill, which he had purchased.

James Scott, during his lease, engaged a number of grown-up coaliers, and trained up several from their infancy. He wrought the coal in the lands belonging to the town of Rutherglen, as well as in those belonging to Mr. Spence, but chiefly that in the latter.

In 1760, Mr. Spence having resolved to carry on the coal-work at Rutherglen, which James Scott had left, insisted that he had right to all the coaliers that had wrought at the coal in his grounds during James Scott's lease.

This gave rise to mutual processes between him and Scott, concerning 13 coaliers, before the Sheriff of Lanarkshire. Scott claimed from Spence some coaliers that had gone back from his coal at Corsehill to the Rutherglen coal; and Spence claimed from Scott some coaliers, whom, though acquired by him during his lease, he still detained at Corsehill. The town of Rutherglen did not claim any of these coaliers; nor did any of them assert their freedom.

The Sheriff, after a proof had been led in Mr. Spence's process against Scott, found it proved, "That William Love, &c., did work as coaliers at the pursuer's [2361] coal of Stonelaw, which is his property, before they wrought at the defender's coal of Corsehill; and, therefore, that they belonged to the pursuer Spence, in property; and ordains the defender, James Scott, to deliver up the foresaid coaliers." And, upon advising the counter process at James Scott's instance against Spence, the Sheriff assoilzied the defender, "in respect that the pursuer was only tacksman of the Rutherglen and Spence's coals, which can give him no right to the coaliers; and in respect it appears from the evidence, that the coaliers so acclaimed by him, and that wrought at his property-coal of Corsehill, had, before that time, been working coaliers, bearers, and gatesmen, or winsmen, in the coal which was the property of the defender, Spence, or his predecessors."

Scott having brought the cause, by advocacy, before the Court of Session, the Lord Ordinary took it to report.

Pleaded for Spence; That, by the law of this country, a coalier is not bound to a person, but to a coal, being *quasi adscriptus glebæ*, by the act of the law, for the sake of public utility; consequently, a lessee can have no right to him after his lease expires.

If a lessee could transport a coalier from one coal to another, that might be hard upon the coalier, as some coals are more easily and profitably wrought than others; and it would be hard upon the coal-master, as a coal-work might be ruined by having the coaliers suddenly withdrawn from it, which was the very thing the law meant to prevent, by introducing the bondage of coaliers.

Pleaded for Scott; Coaliers are not *adscripti glebæ*, or slaves, but servants, bound to serve their master as long as he has work at coal to give them: There was neither coal-work nor coalier in Mr. Spence's ground in 1739. The coaliers were all acquired

during Scott's lease ; and he has as good right to them as to the engines he erected or instruments he provided.

The interlocutor of the Lords was, " Conjoin the two processes, and find the coalier not bound to the tacksman, but to the coal in which they wrought during the currency of the tack ; and remit to the Lord Ordinary to proceed accordingly."

For Spence, MONTGOMERY.—Alt. LOCKHART.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 135. *Fac. Col.* No. 128, p. 303.

No. 11. Sir JAMES CLARK v. KER and PENMAN. December 5, 1764.

What made a coalier a bondsman.

A boy who enters into a coal-work where his father is a bondsman, becomes a slave, not by consent, but from the nature of the slavery, which extends from father to son ; and from which rule practice has introduced an exception with respect to children that abstain from working.

[2362] The coal-work to which Ker and Penman, two lads under age, were bound with their fathers, being wrought out, these lads took employment in a neighbouring coal-work belonging to Sir James Clark, but without binding themselves as slaves. Having afterwards left the work, Sir James claimed them in a process as his bondsmen ; and they were assoilzied upon the following medium, that if a man of full age, whether a freeman, or bound to another coal, enter into a coal-work without any paction of slavery, his working for whatever time will not make him a bondsman ; and that the argument concludes *a fortiori* in favour of the defenders, who are under age.

Sel. Dec. No. 227, p. 297.

No. 12. CLARK and Others v. HOPE. February 11, 1769.

Coaliers might be employed at any coal possessed by their master.

Mr. Archibald Hope, proprietor of the coal of Harrylaw, was lessee of the coals of Edmonstone, Monkton, and Woolmet, all belonging to different proprietors. And the question came to trial, in an action at the instance of some of the coaliers bound to these coals, whether they could be compelled to work at a coal different from that to which they were respectively bound ? Or if, upon the work being stopped, they were entitled to an attestation of a reasonable cause of removing, in terms of the act 1606, c. 11 ?

Pleaded for the pursuer ; Coaliers are *adscriptitii glebæ*, bound to a particular coal ; and, therefore, not transferable to another. So they are considered by Sir George Mackenzie, Obs. 1606, c. 11, and by Bankton, l. 2, 82. When a coalier consents to become bound to a particular coal, he considers the circumstances of it, its situation, its air, its easiness in working ; and he cannot, without injustice, be carried from a coal where he can earn large wages, with ease to himself, and safety to his health, to another coal, where less is to be earned, where, perhaps, there is scarce room to work, or where the air is pestilential and noxious.

When the coal is wrought out, the coalier is free ; but, if he can be carried to a different coal, though belonging to a different proprietor, his bondage must be perpetual. And it makes no difference that Mr. Hope is lessee of all these coals. With respect to each of them, he must be considered as in the place of the different proprietors ; and, as the proprietor of Edmonstone could not send one of his coaliers to work at the coal of Woolmet, so neither can the tacksman of both carry the coaliers of the one to the coal of the other.

Answered ; The situation of coaliers is not to be determined by the strict principles which apply to the *adscriptitii glebæ* of the Romans, or *homines proprii* of Germany.

coaliers are bound to their master, and so they are considered in the statutes 1606, 11, and 1661, c. 56. They are obliged to serve him [2363] in the work of coal, unless they can obtain a testimonial from him, or an attestation from a magistrate, that he has no work to give them.

The doctrine pleaded for the pursuers would go so far as to prove, that coaliers could only be employed at the individual coal to which they entered; that they could not be carried to a different coal in the same estate; nay, that they could not even be carried to a different seam, in an edge coal, where there are great variations in the space of a few yards.

But this doctrine has not been received by the Court. On the contrary, in February 1762, the Marquis of Lothian, having purchased a coal, was found entitled to carry his coaliers upon it to another coal belonging to him, at the distance of two miles. And a similar judgment was pronounced in 1763, in a question between Wemyss of Littlehill, and some of his coaliers.

As, therefore, the proprietor of a coal is entitled to remove his coaliers to any coal where he has work for them, the tacksman must be in the same situation; and, during the course of his tack, have the same power over the coaliers as the proprietor would have had, if he had kept the coal in his natural possession.

"The Lords sustained the defences, and assoilzied."

Reporter, PITFOUR.—Act. MACLAURIN.—Alt. SOLICITOR DUNDAS.

G. Ferguson.

Fol. Dic. v. 3, p. 135. Fac. Col. No. 86, p. 337.

No. 1. [2365] ANDREW LAW v. ALEXANDER LAW. July 13, 1553.

The heir can have no part of the moveables (excepting heirship), unless he be willing to collate.

Anent the action pursued be A. v. R. Law, his brother and his heirs for intromitting and taking ane bairnes part of gear in hurt of the rest of the bairnes, he beand air and receivand his father's heritage, together with airship, without he had casten in his airship, with the rest of the bairnes' guidis to be parted equally betwixt the bairnes. It was excepted be the said Robert, that he might justly have his bairnes part of guidis, notwithstanding his airship; because, after his father's decease, there was an elder brother than he who was air to his father, and sua he fell his bairnes part of the guidis be that reason. It was replyt againe be the said Alexander, That the elder brother died soon after his father's deceise, and was never servit nor enterit air to his father, nor never gat sasine of his lands nor receivit no airship, but died before ever the guidis were divydit, and sua the said Robert was heir to his father and received his airship; whilk reply was admittit and given to the said Alexander's prooffe, notwithstanding the said Robert his allegiance.

April 24, 1554. — Ane burgess dieand and leivand behinde him sundrie sones, the eldest dieand unenterd to his father's lands, the nixt sone entrand as air to his father shall have no bairns part of goods and his father's lands baith, notwithstanding he hade ane elder brother the time of his father's decease, whilk died non enterit as said is, whilk was practised betwixt Alexander Law and Robert Law.

Maitland, MS. pp. 16, 17.

* * Balfour reports the same case :

Na persoun succeidand as air to his father or predecessouris landis and airschip guidis, aucht and sould have ony part of ony remanent movabill guidis or geir quhilk pertentit to his father, or predecessour, the time of his deceis, except he wald cast in and confer his haill airschip guidis, with the rest of the said haill movabill guidis and geir altogidder, that equal partage might be maid thairof, betwix him and the rest of the bairnis.

Fol. Dic. v. 1, p. 149. *Balfour (AIR)*, p. 233.

No. 2. [2366] ROSS v. KELLIE. February 27, 1627.

Collation takes place only among brothers and sisters, and not when they compete with the relict.

Janet Ross, daughter to Archibald Ross, baxter in Edinburgh, pursues Marie Kelly, relict of the said Archibald, as executrix and universal legatrix left by him to make payment to him of her bairns-part of gear, viz. the third of the whole gear contained in the defunct's testament confirmed, seeing she was the only bairn of the said umquhile Archibald her father; in this process the Lords sustained the pursuer's action, for her third part of the saids goods confirmed, albeit the defunct had confirmed the testament wherein the goods was parted, only by a twofold division, viz. betwixt the relict for her own half, and the defunct's half; and found, that albeit this testament so authorized, with this division done by a Judge, was a decree which was alleged could not be taken away by this manner of process without reduction, yet that the pursuer needed not to reduce, but the pursuit might come in *ordine* without reduction, seeing she was not called to the confirmation; and also found, that albeit the pursuer was married by the defunct her father, in his own time and tochered by him, yet thereby she was not secluded from the legitim portion which fell to her by her father's decease, the same not being discharged the time of her contract and tocher; for albeit that might have been a cause to have debarred her from her legitim as thereby being forisfiliate, if there had been any more bairns unprovided, yet there being no bairns but herself, it was found no cause to exclude her from that portion against the relict, but that the testament ought to have a threefold division; neither was it found, that the pursuer ought to offer, and give in the tocher received, with the rest of the goods confirmed, to be divided therewith; but it being alleged, that the goods confirmed were exhausted by decreets, obtained by the defunct's creditors. This allegiance was sustained, to exclude the third, so far as the debts should defalk; but it is here to be considered, that the special reason of this division was, because the pursuer's contract of marriage, whereby the father had given her a tocher, bore, "That the father gave that sum to her, for satisfying her of her right, which she had to her mother's goods, the first wife of her father, to whom he acknowledged, that she was executrix": And so the tocher was not given *ex patrimonio patris*.

Act. NICOLSON & LAWRIE.—Alt. STUART & MOWAT.—Clerk, HAY.

Durie, p. 282.

* * Spottiswood reports the same case :

In the action betwixt Ross and Lilly, the one being her father's only child, pursued the other that was relict for the dead's third, and her own likewise. Alleged, The testament was divided only in two parts, likeas it could not be otherwise, because the pursuer was tochered in her father's time, and so forisfiliate. It was found, That notwithstanding of the tocher, she had not [2367] renounced the benefit of her legitim, which was due unto her after her father's decease, especially there being no other child. And where it was alleged, that she behaved then to confer, it was thought that collation should only be among brethren or sisters, and not betwixt these parties.

Fol. Dic. v. 1, p. 149. *Spottiswood*, p. 133.

lo. 4. CORSAN v. CORSAN. February 19, 1631.

Collation takes no place where it is prohibited ; as, for example, where a father, in his daughter's contract of marriage, besides her tocher, made this provision, "that she should have an equal proportion of his goods at his death with his other children."

This cause being mentioned the 9th of February 1631,* and it being further alleged by the defender, That the pursuer, by virtue of the clause libelled in the contract,† would have right to no more, but to her part of the dead's part of his goods and gear, and could not acclaim a portion natural thereof, with these two daughters defenders ; for albeit by that contract, she might have right to her equal part of all, both for bairns-part, and for the dead's part, with her two sisters named in that contract, now deceased, yet that might lawfully have holden, where both she and these two sisters were all forisfamiliar, before this contract ; but it is not alike, for these two defenders who are begotten since, and have received no part of their father's goods, and who want their portion natural, so that of reason they ought to have their portion natural, as the pursuer got, and as the two defunct sisters got ; and after that, the pursuer might be partner of the rest ; otherwise if she acclaimed to be portioner of all the defunct's goods, she ought to confer with the defenders, that portion she got from her father before. This allegiance was repelled, and the Lords found, that the pursuer ought to have her equal part of the defunct's goods, with these defenders, without any collation of that which she received before, to which the Lords found, that she could not be compelled. *Fol. Dic. v. 1, p. 149. Durie, p. 573.*

No. 5. DUMBAR of Hemprigs v. Lady FRAZER. February 18, 1663.

An only child being forisfamiliar by marriage, and having got a tocher, but not bearing "in satisfaction of children's part," was found notwithstanding obliged to collate that tocher with the relict, before she could have access to draw her third share of the defunct's moveables.

My Lady Frazer, being first married to Sir John Sinclair of Dumbeath, next to the Lord Arbuthnot, and last to the Lord Frazer, Dumbar of Hemprigs, as executor confirmed to Dumbeath, pursues her, and the Lord Frazer her husband, for his interest, for delivery, or payment of the moveables of Dumbeath, intromitted with by her. It was answered, That she had right to the half of Dumbeath's moveables, as his relict, and her intromission was within that half. It was replied, That she had only right to a third ; because Dumbeath had a bairn of the former marriage, who survived him, and so the executry must be imparted. It [2368] was duplied, That that bairn was forisfamiliar, married, and provided before her father's death, and so was not in familia ; and albeit, if there had been any other bairns in the family, that bairn's part would have accresced to them ; yet being no other, it accresced to the man and wife ; and the executry is bipartite.

The Lords found the defence and duply relevant, albeit it was not alleged, that the tocher was accepted in satisfaction of the bairn's part of gear ; unless those who have right would offer to confer, and bring in the tocher received ; in which case, they might crave a third, if the same were not renounced, or the tocher accepted instead thereof.

It was further alleged for the Lord Frazer, That he could not be liable as husband ; because his Lady being formerly married to the Lord Arbuthnot, he got the moveables, and his successors should be liable, at least in the first place.

* The case alluded to is, M'Millan, &c. v. Corsans, Durie, p. 566, *voce* PROVISIONS to HEIRS and CHILDREN.

† The terms of the contract are stated on the margin above.

The Lords repelled the allegiance, but prejudice to the Lord Frazer to punish the successors of the former husband, for repetition as accords.

Fol. Dic. v. 1, p. 149. Stair, v. 1, p. 181.

No. 6.

JACK v. JACKS. December 20, 1673.

There is no collation in our law but in the case of succession in moveables, and therefore not among heirs portioners, whatever separate provisions any of them may have got, by contract of marriage or otherwise.

Patrick Jack did, by contract of marriage betwixt John Douglas and Margaret Jack his daughter, dispone in name of tocher, a fishing and some tenements, and thereafter having left three other daughters, there was a decret arbitral amongst them for division of their father's estate, which being under reduction upon lesion, and an auditor appointed to state the interest of the parties, and what the defunct's estate was before the arbitrement; this question occurred before the auditor, whether the said Margaret Jack, to whom a part of her father's estate was disposed by her contract of marriage, would fall an equal share in the rest of his heritage, as heir portioner with the rest of the daughters, unless she would confer and bring in what she had received before by her contract *per collationem bonorum*.

The Lords found that there was no collation to be made by the law of Scotland but only in the case of moveables, and not amongst heirs portioners.

Fol. Dic. v. 1, p. 148. Stair, v. 2, p. 244.

* * Gosford reports the same case :

In the reduction of a contract of division betwixt the said sisters, there being count and reckoning ordained, to the effect it might be known how far any of the sisters, as creditors, might charge their father's estate, and [2369] have satisfaction out of the whole before any division betwixt them, as heirs or portioners to their father. It was alleged for the said Margaret, That by her contract of marriage, her father being obliged to dispone to her, and her heirs, the half of his salmon fishing upon the water of Dae, with the sum of 2000 merks to be paid after his decease, she ought to be first satisfied of that debt, and have a right made to her by her two sisters, in so far as she might be secured in the half of the salmon fishing; and, thereafter, have the just third part of the whole remainder of the estate, as one of the three heirs portioners with them. It was answered, That the said Margaret being provided and forisfiliate, ought to have no share of the remainder of their father's estate, unless she were willing to collate and bring in what she was provided to by her contract; as was clear where heirs-female, being provided and forisfiliate, could crave no part of the moveable estate belonging to their father, unless they would collate with their sisters, who remained *in familia*; especially there being no provision in the contract, whereby she was to come in and have an equal share of the remainder of the estate beside the tocher. The Lords did find, that the eldest sister, besides the provision in her contract of marriage, ought to have an equal share with her two sisters, who were not forisfiliate as to all lands and heritages; and that there was not, by our law, any necessity to offer to collate, as in succession to moveables, the elder sister not being secluded, nor her tocher declared to be in full satisfaction of all that she could ask or claim; and that notwithstanding that reason seems alike in both, and that there hath been no practise in the contrary. But it being looked upon as a constitute custom, without all controversy or debate, they did decern as said is. *Gosford, MS. No. 656, p. 384.*

No. 8. Duke and Duchess of BUCCLEUGH v. The Earl of TWEEDDALE. February 14, 1677.

A second son insisting for his legitim, was not obliged to collate a provision of land which he got from his father ; for collation is introduced to keep equality among the children, only as to the moveables ; and since the moveables suffered no diminution, by giving a provision of land to the second son, there could be no reason for the collation.

There was an agreement betwixt the Duke and Dutchess of Buccleugh and the Earl of Tweeddale, by interposition of the King, whereby the Duke and Dutchess "renounced to the Earl a wadset of his lands for £44,000, and certain bygone annualrents, and the Earl gave a bond to them of £15,000, and discharged all right his Lady had as executrix to David her brother, who was one of the four children of Buccleugh, beside the heir ; the inventory of the testament being £188,000 ; and did likewise dispoise the right of Bassenden, unto which he had an ancient claim reserved by interruptions, being worth 3000 merks yearly, and the expence of reducing the Dutchess's eldest sister's contract of marriage with the E. of Tarras, and two London voyages." This agreement was made in the Duke and Dutchess's minority, and the King took burden to cause them ratify ; but the Duke and Dutchess do now pursue reduction of this agreement upon minority and lesion ; and condescend, that the [2370] pursuers having renounced a clear liquid and established right of wadset, cled with possession, for illiquid and uncertain pretences, which had never been claimed for 20 years and above.—It was answered, That it is not every lesion that is sufficient to reduce an agreement or contract engaged in by minors, but it must be enorm, and exorbitant lesion ; and therefore quitting a decreet, or bond having ready execution for a clear sum, for a debt due to a defunct, upon which no decreet followed, or of intromissions with rents, sums, or goods, if the matter could be instructed to be proportionable without enorm lesion, was never, nor can be sustained, as a cause of reduction, much less so solemn a transaction as this by arbitrimet, the King having interposed, and become obliged for the minors' performance. — The Lords found the reasons of reduction, as thus qualified, not relevant, if by the event of this process, the right communicated by the defenders, were now liquidated, and imported not enorm lesion in the matter.—The pursuers then insisted, That there was enorm lesion in the matter, because all that was given to the pursuer for so considerable a right of wadset, was but the Countess of Tweeddale's interest in her brother David's share of his father's executry, as being the fourth bairn, beside the heir, and as having a fourth part of his sister Lady Mary's fourth part, who died unmarried, and the right of Bassenden, which were all of no moment ; for as for David's share of his father's executry, he could pretend nothing either for his portion natural, as being his share of dead's part, or for his bairn's part, because the defunct did infeft David in fee in the lands of Cannobie, worth £5 or £6000 a-year, which was a competent provision ; and though it bore, "not to be a portion natural, or provision, or in satisfaction of the bairn's part," yet being so considerable, it must be presumed to have been given in satisfaction. 2do, David in his life never claimed any part of the executry, nor would he have obtained any share of it, *nisi per collationem*, by conferring and communicating the right of the lands he had gotten from his father, to the rest of the bairns, that so they might all be equal, which is ever presumed to be the mind of the father, unless the contrary appear by his express deed ; and by our known custom, bairns married, and provided with portions, if it be not expressly in satisfaction of their portion natural, and bairn's part, they may claim a share, *ad supplementum legitimæ*, to make up what they had received already, equivalent to the rest of the children un-forisfamiliate ; but here David's provision is much more considerable than any the rest of the children.—It was answered, That David was never forisfamiliate, or married, but remained as a bairn of the family till his father's death ; and if there had been no more bairns, he would have had right to the whole bairn's part ; neither was he, nor any representing him, obliged to confer the lands his father infeft him in, because, whatever was the course of the Roman law, where there was no distinction of heritable and moveable rights, the feudal law, and our customs, have differenced the succession of moveables and heritables altogether ; and though our custom allows collation, or imputation of bonds of provision, or tochers

granted to bairns, as a part of their [2371] share ; yet lands were never, by our custom brought in by collation, but only sums of money, as having been employed out of the moveable estate, and so did diminish the same, and therefore ought to be accounted in the division thereof.—It was replied, That it is beyond question, that though by law the heir hath no share of the moveables, yet, if he pleases to communicate his heritable rights of lands, or others, with the other children, they will all get equal shares and therefore, *a pari*, if a brother provided to land craved a share of the moveables with the rest of the bairns, he behoved to communicate the right of these lands, that might be equal ; which David did not, and the Dutchess, who is his heir, will not.

The Lords found, That the lands provided to David, not bearing “to be for his portion or provision, or in satisfaction thereof ;” did not exclude him from his share of the moveables, and that he had no necessity to confer or communicate the right of the lands ; and that the Countess of Tweeddale, as executrix to David, had right to his share of his father’s moveables.

The pursuer further alleged, That my Lady Tweeddale, as executrix to David, had no right to any part of Lady Mary’s share, because there is no testament of Lady Mary confirmed, which is the only way to establish what right was in her person ; for her share by her death could not accresce to the remanent children, seeing thereby they would not represent her passive in her debts, and therefore her goods could only belong to an executor, that represented her both active and passive ; for it is a common rule in law, *hereditas non addita non transmittitur* ; and therefore in heritage, there must be a service, which, if omitted, the apparent heir hath no right, and his creditors will have no access against the estate ; but there is place for the next apparent heir passing by the former ; and the like must be in succession of moveables, for the executor is *hæres in mobilibus*, and for the most part, is *hæres fidei-commissarius*, who, whether he be executor nominate or dative, he is obliged to restore to the wife her part, to the bairns their part, and to the nearest of kin their part ; and any of all these have interest to procure an executor dative confirmed, which is *additio hereditatis mobilium* for them all, which is suitable to the act of Parliament 1617, making executors comptable for the nearest of kin ; so that if there be no executor confirmed, the nearest of kin have no interest, and such nearest of kin have only interest, who are alive the time of the confirmation, and for whom *hereditas est addita* by the executor. It is true, the right of the relict, and the bairn’s part, are rather rights of division *jus proprio*, than of succession ; and therefore, though a bairn die before confirmation, the bairn’s part is transmitted ; but the *jus agnationis* of the nearest of kin, is merely a succession, *quæ non addita non transfertur*, and belongs only to the nearest of kin who are in being the time of the confirmation. This does also agree with the decision of the Lords in the case of Bell and Wilkie,* where the three sisters of Patrick Bell being confirmed executors to their brother, one of them dying before the execution of the testament, the other two were found comptable for her share to her children, [2372] as executors confirmed to her.—It was answered, That the right of blood ought not to be diminished by forms, and the act of Parliament bears expressly, That it is against law, equity, and conscience, to exclude the nearest of kin from their share ; and therefore, if any of the nearest of kin should die before they can confirm, there were no reason to exclude their children.—It was replied, That the nearest of kin can never suffer but by their own negligence ; for they may, immediately after the defunct’s death, publish edicts, and obtain confirmation, and the law never provideth for such extraordinary cases, such as the dying before confirmation can be ; for seeing the nearest of kin transmit their share by naked confirmation, there is no necessity of executing the testament, as some time the custom was, which required a very long time.

The Lords found, That David having died before Lady Mary’s testament was confirmed, no part of her share did accresce to him, nor did belong to the Countess, as executrix ; and if she should enter executrix to Lady Mary, she is excluded by her contract of marriage, “renouncing all right she can have to Lady Mary’s share.”—The defender further alleged, That the pursuers had homologated this transaction, by requiring their commissioners to call for payment of the £15,000 bond, which was a part of the defender’s obligation by the transaction ; and likewise, that the Duke’s commissioners had demanded the money from the defender : 2do, In a pur-

* Stair, v. 1, p. 96, 12th February 1662, voce NEAREST of KIN.

it against the Dutchess, at the instance of Scott of Bassenden, to denude herself of these lands in favour of him, conform to a back-bond granted by the Dutchess's redecessor, a defence was proponed after minority upon Tweeddale's right to Bassenden, as belonging to the Dutchess, which was a part of the said transaction.—It was answered, That the calling for the money, *non relevat*, because they might, and did *fuse re integra*, before it was received; and as to the proponing upon Tweeddale's right of Bassenden, it was but of course, by a procurator, without special mandate, and was not sustained, nor did the pursuers obtain any benefit thereby.—The Lords spelled both these defences. See NEAREST of KIN.—PRESUMPTION.

Fol. Dic. v. 1, p. 148. Stair, v. 2, p. 504.

to. 9.

MURRAY v. MURRAY. July 16, 1678.

The heir collating his heritage, has a title to a share of the children's part.

Umquhile Thomas Murray, bailie of Edinburgh, having children of two marriages, did marry all the children of the first marriage, and gave them tochers, in full satisfaction of their portions-natural, and bairns part; he did also give bonds of provision to the bairns of the second marriage, wherein the sums were all equal, bearing "to be for their better provision": And at last, by his testament, has appointed, "That after payment of his debts, and bonds of provision to his bairns, that all his bairns, of the first and second marriage, should have equal share of his goods and gear;" and, in an account amongst the bairns, those of the second marriage craved their bonds of provision as debt, which [2373] affect the whole executry, before any division; and that what were free, over and above the bonds of provision and debts, should be divided in two, the one half falling to them as bairns un-forisfamiliate, and the other half being as dead's part, by his universal legacy, should be divided equally amongst all his bairns of the first and second marriage. It was alleged for the bairns of the first marriage, that the bairns of the second marriage could not both have their bonds of provision, and also their bairns part, unless their father, by their bonds of provision, had declared, "that these bonds should be but prejudice of their bairns part," which he doth not. But, on the contrary, the bonds bear, "To be for their better provision"; and such bonds neither bearing in satisfaction of their portion-natural, nor by and attour the same, the intent thereof has ever been sustained, that the father would secure these bairns in these provisions *in omnem eventum*, but not that he should give them their provisions and bairns part also, and thereby restrict his own power of legating, which cannot reach the bairns part; so that the children, so provided, may either hold to their bonds of provision as creditors, or may reject them, and take their share of the bairns part, if it be better; in which case, the executry will be the greater, and the wife will have the larger share, and the dead's part, disposed of by legacies, will be the larger. Likeas, by the ancient Roman law, which our customs follow, all tochers, and other donations to children, were accounted as parts of their legitim, and if they had received the same, they behoved to confer and bring it back to the heritage; and if it were resting, it behoved to be imputed a part of their legitim, and that such collations were not to the children only, to make them equal in their legitim, but to their whole succession; and therefore the Lords, in the case of the Lady Dunbeath, 18th February 1663, No. 5, p. 2367, where Dunbeath having one daughter married and tochered, but not in satisfaction of her bairns part, she was admitted to the third of the executry as her bairns part, she always collating her tocher, whereof a third accresced to the wife, and a third to the dead's part; and therefore such collations are not only to equalize the bairns part, their being no bairns in that family but one. It was answered, That bonds of provision to children, made and delivered in *liege pousitie*, have all the effects of other debts, and come off the executry before any division, and yet do not exclude the bairns from their bairns parts of what is free, debts deducted, and in that they differ from bonds granted on deathbed, which affect only the dead's part as legacies. It is true, that when the bairns part comes to be divided, or even the dead's part, if not exhausted by legacies, that the parity of natural affection hath made both the Roman law and ours to equalize

the children, so that as much must be laid by to the rest as to make them equal to the bonds of provision ; but then, what is over, is equally divided amongst them all, in case some of the bairns have greater provisions than others, which takes place here, because all the bonds of provision are equal. It is true, that if there be but one bairn, the bond of provision, or tocher thereof, must be collated or imputed whereby the wife's part, and dead's part, would be increased, [2374] because in the case there are no more children to whom it might accresce ; and therefore it accresces to the whole executry ; but if there were more children, it would accresce to them.

The Lords found, that the bonds of provision to the children of the second marriage, not bearing in satisfaction of their bairns part, were to be taken off the whole executry, before the division, and that the half of the free gear, after deduction of these and other debts, did belong to the bairns of the second marriage only, and that the bairns of the first marriage were excluded by their contracts of marriage ; but found that the other half, by the father's legacy, belongs to bairns of both marriages equally.

In this process the heir offered to confer his heritage, and craved a share in the bairns part, because the only reason the heir is excluded to share in *mobilibus*, is because he has the sole succession and heritable rights, which is ordinarily better than his share in the moveables ; but if he will collate his heritage, he is always admitted to share in the moveables.

The Lords admitted the heir collating the heritage, and all to be equal sharers in the whole bairns part, with the succession of the heritage.

Fol. Dic. v. 1, p. 149. *Stair*, v. 2, p. 635.

No. 10.

MURRAY v. MURRAY. July 23, 1678.

The heir collating his heritage, has a title to a share of the children's part, but is obliged to collate whatever is derived to him from his father, whether by disposition or representation.

In the count and reckoning of the executry of Bailie Murray, decided the 16th, the eldest son, as heir, offered to communicate the heritage to which he should succeed, and desired to be sharer with the bairns, who alleged, that the heir behoved not only to communicate what he should succeed to, but a tenement disposed to him by his father, which communication ought to be in and to the whole moveable heritage, whereby the legatars would have a share, as well as the bairns. It was answered, That the heir had unquestionable right to come in with other children, either in case there were no heritable right, but all the succession were moveable, or in case he would communicate the heritable succession falling to him ; but there was neither law nor custom for communicating what he got from his father by donation. And it was found, in the case Dutchess of Buccleugh and Earl of Tweeddale, No. 8, p. 2369, that David Scot had a share of the bairns part of his father's gear, without communicating the right of a considerable estate of land which he had from his father by disposition. It was answered, That the cases were not alike, for David Scot was a bairn in the family, *et proprio jure* had a share in the bairns part, without communicating of what land he had got, that having done no prejudice to the bairns, nor abated any part of the moveable estate ; but the only ground of the heirs being admitted to a share of the moveable estate, is, that law allows him to be in no worse condition than other children ; so that, if either by succession or [2375] disposition, he be as well as they, that ground ceaseth ; and, therefore, he must communicate both, if he crave a share in the moveable estate ; for it is ordinary for fathers, in their sons' contract of marriage, to infeft them in their whole heritable estate, whereby there remained no heritable succession, and yet they were never admitted to partake of the moveables, but were excluded as heirs *per perceptionem hæreditatis* ; and there is no reason that an inconsiderable remnant of an heritage should, by communication thereof, admit heirs to the moveables, when perhaps the far greater part were enjoyed by them, by their father's disposition.

The Lords admitted the heir to a share with the other bairns, providing that

he communicate all that he had of the heritable estate, by disposition or succession, by being infeft as heir, and disponing to the children an equal share with himself of the said heritable estate, with the burden of an equal share of the heritable debt. But the Lords did not determine, whether the communication should be only to the bairns part, or also to the dead's part, but were clear that he was not to communicate to the relict's part, seeing there were other bairns in the family, and the relict would neither have benefit nor loss by any thing the husband, nor any, could do, as to her share.

Fol. Dic. v. 1, p. 149. Stair, v. 2, p. 640.

No. 11. JAMES BROWN v. His MOTHER and TUTORS. July 21, 1680.

By contract of marriage, the lands being provided to the heir by the first clause, and the conquest to the bairns in a subsequent clause; The Lords found the heir had a share in the conquest (though it was most part executry), without collation, because he was also a bairn.

Fol. Dic. v. 1, p. 148. Fountainhall, MS.

No. 12. TROTTER v. ROCHEAD. January 12, 1681.

There being only one child, who was both heir and executor, he was found to have the whole children's part, without collating the heritage with the relict.

In an action of count and reckoning between Catharine Trotter, Lady Craigleith, and Rothead, Lady Prestongrange, younger, her daughter; the auditor reported the points following; *Imprimis*, The Lady Craigleith, by her contract of marriage, is provided to ——— chalders of victual yearly, out of the lands of Craigleith, to be uplifted yearly between Yule and Candlemas; and her husband having died after Martinmas, but before Candlemas, she claims that year's annuity.—It was alleged for the heir her daughter, That she being both heir and executor, the whole year in which her father died belongs to her, as executrix, according to the known custom between executors and liferenters or heirs, wherein the legal terms of Whitsunday and Martinmas are only respected as the rule for division; so that if the defunct die after Whitsunday, his executor hath the [2376] half of the crop that is payable at Candlemas thereafter; and if he die after Martinmas, though before Candlemas, the executor is to have that whole crop.—It was answered, That though this hold in infeftments of property, or in annualrents payable at Whitsunday and Martinmas, yet this annualrent is only payable once in the year, at Candlemas.—It was replied, That whatever might have been pretended, if this annualrent had been constituted to be payable at two precise terms, Candlemas and Lammas; yet here it being constituted payable between Yule and Candlemas, the ordinary time of payment of farms, the division with the defunct's executor must be according to the division of farms.—The Lords found, That the executor had right to the whole year's farm, her father having died after Martinmas, albeit before Candlemas, and that the liferenter had right to no part thereof.—The relict did also insist for the half of her husband's moveables, there being no children but one, who is heir, who cannot crave a bairn's part, unless she would confer the benefit of the heritage.—It was answered, That the heir is excluded from a share of the bairn's part, unless the heir confer; but this confers nothing to the relict's part, who can have only a third, if there be bairns one or more; and the one bairn will be both heir and executor, and have the bairn's part without collation.—The Lords found, That the heir had the whole bairn's part, without collation, there being no more bairns, and that she was not obliged to confer to increase the relict's share.—The relict did also insist for a legacy of 6000 merks, left her by the defunct.—It was answered, That she cannot both claim the legacy and her third, because *debitor non præsuntur donare*; and legacies are ordinarily understood to be in satisfaction of the legatar's interest, as where the law provides the executor to a third part of the dead's part for executing the testament; yet if there be a legacy, the executor cannot claim both; and here the legacy is left with-

out prejudice of her contract, but doth not bear "without prejudice of her third" and therefore the defunct's mind hath been to give her this legacy in place of her third.—It was answered, That legacies in our law is ever understood to be out of the dead's part; and albeit where the law gives a third to strangers executors, having no obligation to execute the testament, wherein legacies left to the executors are accounted in satisfaction, that is by an express provision in the statute, and cannot be drawn to this case, but the defunct must be understood to leave out of his own share 6000 merks to his relict; for if he had only intended to make up her third 6000 merks, it had been easily so exprest.

The Lords found the legacy due out of the dead's part, and no part of it out of her own third, but that she had right both to it and the legacy.

Fol. Dic. v. 1, p. 149. Stair, v. 2, p. 831.

No. 15. [2378] *RICCART v. RICCARTS.* November 19, 1720.

In drawing a share of the moveables, an heir portioner is not bound to collate with her sisters, an estate disposed to her by her father.

Riccart having tailzied the far greatest part of his estate, in favours of himself and the heirs of his body, which failing, to the eldest heir-female without division; and having only three daughters, the eldest daughter and her husband pursue a declarator against her two sisters, That she had right not only to the tailzied estate, but likewise to a third share of an untailzied heritable estate, as heir portioner with the defenders; as likewise, that she had an equal interest in her father's moveables, as one of his nearest of kin.

The Lords made no difficulty as to the pursuer's equal share in the untailzied estate: But as to the executry,

It was alleged, That the pursuer being heir of tailzie, had no interest in the moveables, from which the heir is always excluded, unless he collate; and albeit in this case there be an untailzied estate of small value, yet the bulk of the estate being tailzied, the pursuer's interest in the moveables is in point of law the same, as if there had been no untailzied estate; in which case, the succession of moveables would belong to the younger sisters, excluding the eldest as heir of tailzie; otherwise there would be a very notable disproportion betwixt the succession of the pursuer and defenders, whose relations to the defunct are equal: And in this case, the value of the tailzied estate is so great, that she would not collate, nor could she by the quality of the tailzie.

It was answered, That the succession to heritage and moveables generally descends in different channels: The law prefers a son or heir-male to females in the same degree of relation, in the succession of heritage, and prefers the younger sons and daughters equally to moveables and executry; which are not presumed to be so valuable as heritage: But when it happens otherwise, that the heir reckons his share of the moveables better, he has access to a share of the executry, on condition that he collate his heritage with the executors. But in this case, where the nearest degree are all females, there is no preference, but the law brings them all in equally, both as to heritage and moveables *ab intestato*; but in so far as the father, by a tailzie, has preferred one of the daughters, she succeeds in that estate by the will of the father, who was pleased to exclude heirs portioners; and as to the rest of his estate, it descends *tantum ab intestato*, and is devolved equally to all the daughters; and there is no different channel of succession among daughters, either as to heritage or moveables, and consequently no seclusion of an heir, because there is no privilege to elder or younger daughters as to heritage; and the seclusion of the heir from the moveables is properly *ab intestato*, where the heir-male is preferred in the heritage to the younger sons or daughters. It is true, if a tailzie were made in favours of the heirs-male, who would have the preference *ab intestato*, the express will of the father would not alter the destination of law as to the moveables, which was left to the legal succession: But suppose a father should tailzie his heritable estate to a second or third son not *alioqui successurus*,

such an heir of tailzie, would not be excluded from his share of the moveables, as nearest of kin.

"The Lords found, That the pursuer and defenders being equally entitled to the succession of heritage and moveables *ab intestato*, the tailzie did not exclude the pursuer from her legal claim to the executry."

Fol. Dic. v. 1, p. 149. *Rem. Dec.* v. 1, No. 20, p. 42.

No. 19. [2383] JAMES DREW M'Caw v. MARY and ANNE M'CAWS.
November 28, 1787.

An heir cannot insist for collation, if he be not at the same time one of the nearest in kin.

After the death of David M'Caw, his heritage, consisting of a small house, descended to James Drew M'Caw, his nephew by a brother deceased; while his executry, or moveable estate, which was of much greater value, devolved to Mary and Anne M'CAWS, his sisters and nearest in kin.

James Drew M'Caw, the heir, insisted in an action for having it found, that he was entitled, upon collating the heritage, to draw a rateable proportion of the whole effects which had belonged to the deceased. In support of this action, he

Pleaded, The right of collation is inseparable from the character of heir. Whenever the person on whom, as the *persona predilecta*, our law has conferred the right of succeeding to the heritage, finds it more advantageous to claim a share of the moveable effects, he is at liberty to do so. This is the opinion of Mr. Erskine; and it seems to have met with the approbation of the Court, in a case collected by Lord Fountainhall; although there, on account of specialties, the right of the heir was held to be barred. Other lawyers of eminence, it is true, have adopted a different sentiment. But this apparent inconsistency may be easily removed, by confining the doctrine last stated to another case of collation, occurring between children laying claim to the legitim, which stands on a footing altogether different from that of which we are now speaking; the legitim being due to descendants, and those in the first degree only, and the right to collate, as applicable to it, suffering a corresponding limitation; Erskine, b. 3, tit. 9, § 3; Fountainhall, v. 1, p. 825, 16th February 1698, Dick of Grange *contra* Dicks, *voce* SUCCESSION.

[2384] Answered; It has been established in Scotland, as well as in other countries in which the feudal system prevails, that where there are two or more in the same degree of propinquity to a person deceased, the landed property, or those effects which are held to be of an analogous nature, descend in succession to men in preference to women; and to the eldest among the males in exclusion of the younger male relations. In order, likewise, that this privilege may not, in any instance, prove hurtful to the person in whose favour it was introduced, it has been farther established, that he may renounce the exclusive character of heir, and, betaking himself to the common one of nearest in kin, receive an equal proportion of the whole funds. But for entitling any person to the benefit of this alternative, it is not enough that he is called to the succession as heir. He must also, on renouncing this succession, be in such a situation as enables him to claim, as executor, or nearest in kin, to a share of the moveable effects which belonged to the ancestor. This is laid down by all our lawyers, Mr. Erskine alone excepted, who rather delivers what he says in the way of doubt than as his fixed opinion. The decision observed by Lord Fountainhall does not support the contrary argument. The question which occurs, was indeed agitated; but, as on the opening of the succession, the heir, who was also one of the nearest in kin, had been required to collate, it was most justly found, that whether such a privilege existed or not, his son, afterwards succeeding, could not lay claim to it; Balfour's Practices, *voce* HEIRS AND SUCCESSORS, p. 233; Stair, b. 3, tit. 8, § 26, 43; Bankton, b. 2, tit. 3, § 28, 16th July 1678, Murray, No. 9, p. 2372.

The Lords, "unanimously assolvied the defenders, and found the pursuer liable in expenses."

Reporter, LORD HENDERLAND.—Act. GEO. FERGUSON.—Alt. LORD ADVOCATE.—Clerk, ORME.

C.

Fol. Dic. v. 3, p. 134. *Fac. Co* No. 7, p. 12.

No. 20. *Mrs. RAE CRAWFURD v. Sir JOHN STEWART and Mrs. STIRLING.*
December 3, 1794.

An heir of entail who is one of the nearest in kin, and not the heir *alioqui successurus*, is entitled to a share of the moveable succession without collating.

Francis Stewart Crawford died intestate and a bachelor.

Sir John Stewart, his only brother, was his heir at law, and his two sisters, Mrs. Rae Crawford and Mrs. Stirling, his executors.

The property of Mr. Crawford at his death, consisted, 1mo, Of some heritage of little value descendible to the heir of line ; 2do, Of Milton, an estate of considerable value which he held under a strict entail, and to which his eldest sister Mrs. Rae Crawford succeeded as nearest substitute ; 3tio, Of arrears of rent and other moveables, worth above £1200 Sterling.

Sir John Stewart having found it for his interest to collate, he and his youngest sister, Mrs. Stirling, claimed the whole unentailed succession, to the exclusion of Mrs. Rae Crawford, unless she would collate the estate of Milton, while she, [2385] on the other hand, contended, that this was rendered impracticable by the entail, but that she was nevertheless entitled to a share of the moveable succession, as one of the nearest in kin.

In order to try the question, a multiplepinding was brought, in name of the tenants and others, who held moveable funds belonging to Mr. Crawford, in their hands ; and, in support of the claim of Mrs. Rae Crawford, it was

Pleaded ; 1mo, The law of collation applies only to the heir of line, and not to heirs of entail, or of provision ; Balfour's Practices, p. 233 ; Stair, b. 3, tit. 8, § 48 ; Dirleton, *voce* HEIRS OF TAILZIE ; Macdowall, vol. 2, p. 385 ; Erskine, b. 3, tit. 9, § 3 ; 19th November 1720, Riccart v. Riccart, No. 15, p. 2378. Indeed, if the latter were bound to collate, a double collation would frequently take place ; a thing never supposed by our lawyers, who speak of the privilege of the heir in this case, thereby meaning the heir of line, in contradistinction to successors by tailzie and provision, who, in comparison with him, are considered as strangers ; Craig, lib. 2, di. 17, § 19 ; Dirleton, *voce* HEIRS OF TAILZIE ; Stair, b. 3, tit. 5, § 8.

Collation is a privilege competent to the heir at law, whereby the general rule excluding him from the whole intestate moveable succession, is limited, and himself admitted to a share, upon his collating the heritage and heirship moveables. As, however, it is only to a share of the moveable intestate succession to which he is admitted, there is no reason why he should contribute the heritage he takes by deed. To be admitted to the legal succession of one kind, it is enough that he renounces the legal succession of another.

2do, The limitations in the entail render it impossible for Mrs. Rae Crawford to collate ; and it would be repugnant to the idea of collation that she should on that account be excluded, as it always supposes an option in the heir to use his privilege or not, as he shall think best. Such exclusion would also be attended with obvious injustice, wherever the entailed property was of small value, in proportion to the moveable succession.

Answered ; In all cases where the law either grants any privilege to heirs, or imposes any obligation on them, heirs of provision, if not specially excepted, are understood to be precisely in *pari casu* with the heir of line. As to collation in particular, there is no reason why the former should be more favoured than the latter ; for although a person may chuse to regulate his succession by settlements, it does not follow, that he means in other respects to dispense with the reciprocal obligations thence arising in the ordinary course of law between heir and executor ; Macdowall, b. 3, tit. 8, § 100 ; 15th November 1787, Balfour and others v. Scott, No. 18, p. 2379.

2do, If it be impossible for an heir of entail to collate, it must be equally impossible for him to take any share of the moveables ; for no person can claim a privilege, without fulfilling the condition on which it is granted. But it is a mistake to suppose, that heirs, under the strictest entail, cannot collate ; they may [2386] at least collate the rents and profits of the estate during their lives, and even the estimated value of the fee.

The Lord Ordinary, " in respect that Mrs. Rae Crawford was not heir of line, but

only heir of provision in a particular estate, which she takes under a deed of entail, and that she is entitled to take a share of the executry alongst with her brother and sister, without collating the tailzied estate."

On advising a reclaiming petition and answers, it was

Observed on the Bench, Mrs. Rae Crawford is a stranger to her brother's heritable succession, being neither his heir-at-law, nor taking any thing under any deed of his, and therefore the law of collation cannot in any shape apply to her; she succeeds to the state of Milton under a strict entail, executed by their common ancestor, and not as representing her deceased brother, who himself was only an heir of entail: And it is no reason for excluding her from a share of his moveables, that she takes an estate to which, in consequence of the destination of the tailzie, he was a prior substitute to her.

The Court, with only one dissenting voice, "adhered."

Lord Ordinary, JUSTICE-CLERK.—For Mrs. Rae Crawford, M. ROSS.—Alt. C. HOPE.—Clerk, HOME.

R. D.

Fol. Dic. v. 3, p. 134. *Fac. Col.* No. 138, p. 314.

No. 8. [2402] COLLEGE of JUSTICE v. The TOWN of EDINBURGH. February 1687.

Declarator of the privileges of the College of Justice; of which see an abstract in the Synopsis.

The Town of Edinburgh having charged and poulded several of the members of the College of Justice, for an annuity of six of the hundred of their houses' rents, possess by them within the town of Edinburgh, more than the rent they pay to the heritors of the houses; and likewise, they being troubled and molested in several other of their privileges, the College of Justice did raise a suspension of the annuity, and declarator, for declaring, not only that they should be free of their annuity, but for declaring all their other privileges and immunities, and particularly, that they may be free of watching and warding, and of all the town's impositions; and that they may employ unfreemen within the town to work to them any work they have to do; and that they might be exeemed from the jurisdiction of the Magistrates of Edinburgh, both civil and criminal, to work in their own houses. And the declarator was founded upon the common law, and particularly, Cod. Lib. 2, tit. 8, De Advocatis diversorum judicum; and the laws and customs of all other nations, by which the Judges, Advocates, and others that attend upon the courts of justice, are free of all taxations and impositions, and enjoy many other great privileges. And by the foundation of the College of Justice, by King James the V. and confirmed by the Pope's Bull in the year 1534, the members thereof are declared to be free and exeemed from all ordinary jurisdiction, contribution of teinds, charitable subsidies, ordinary or extraordinary, albeit imposed by the apostolic authority, or at the King's instance, or for any war against the Turk or infidels, or for whatsoever cause imposed, or to be imposed. And the Pope receives into his protection all the advocates, clerks, and scribes appointed for the said exercise, and all the remanent members for the said Senate and officials; which Bull is recorded by Serholme, General Auditor and Judge of the Apostolic Chamber at Rome, and recorded in the books of Sederunt of Session in the year 1537, and ratified by the 1st act, Parliament 7th, James V., and by an act of Sederunt in the year 1543. The privilege of the Lords of Session being free of all taxes, and impositions, and contributions, is extended to advocates' clerks, and remanent members of the College of Justice; and by the only act of Queen Mary, 2d Parliament, holden in the year 1543, the institution of the College of Justice, in all the privileges, freedoms, and liberties, given and granted to the same, are ratified. And by the 174th act, 13th Ja. VI., the privileges granted to the Senators of the College of Justice, and members thereof, are ratified, notwithstanding of any act or statute, special or general on the contrary. And the privileges are further ratified, act 211th, Parliament 14th; act 279th, Parliament 15th, James VI.; and the hail members of

the College of Justice are exeemed from the taxations imposed for his Majesty ; and that expressly, in regard of their privileges, whereunto the King and [2403] Parliament declare they will in noways derogate in any thing. And by the 155th act, Parliament 12th, and 279th act, Parliament 15th, James VI., the burghs are empowered to lay taxes, stents, and taxations upon the inhabitants, and to cause them watch and ward and to contribute for the poor ; and to burden all indwellers, with the rest of the inhabitants, for the advancement of the glory of God, His Majesty's service, and the weil of the burghs, without respect to any privilege, discharge, or exception, granted or to be granted, to the King, or his successors, to whatsoever person, or for whatsoever cause ; providing always, that the said act should not be prejudicial to the members of the College of Justice, and to their privileges and immunities, nor extend to them. And the 111th act, Parliament 7th, James V., anent conduction of craftsmen, which bears, because it was heavily murmured that all craftsmen within the realm, and especially within burghs, use such extortion upon others, to the King's lieges, by reason of their crafts and privy acts made among themselves, contrary to the common weil, and in great hurt and prejudice of the lieges ; therefore it is statute, that it shall be leisome to all the King's lieges that has any biggings or reparations to be made for making policy, either to burgh or land, to chuse good craftsmen, freemen, or others, as he thinks expedient, for ordering, bigging, and mending such works ; and that no impediment be made to such craftsmen using their crafts as said is, by any other of the said crafts within the kingdom, under the pain of tines of their freedom, and breaking of the acts of Parliament ; and that the Provost and Bailies of all burghs take inquisition thereupon, and put this act in execution in all points ; and which is ratified and confirmed by the 4th act, Parliament 19th, King James VI., ordaining the foresaid act to have effect and to be put in execution, notwithstanding of whatsoever act or state made in the contrair thereof since syna. And by the 39th act of Parliament 6th Queen Mary, by the which the causes of the members of the College of Justice are ordained to be advocate from the Judge Ordinary ; so that they are not subject either to the criminal or civil jurisdiction of the town. And act 23d, Parliament Charles I. and act 23d, Parliament, 1st session, Charles II., which bears, that the King and Parliament considering that nothing is more necessary and of more universal concernment, than the administration of justice, and in order thereto, that the Judges, Advocates, clerks, and others, members of the Supreme Judicatory, should be faithful, able, and qualified persons ; and for their encouragement for serving the country in their respective stations and places, and to undergo the trouble, toil, and great expense of time, and otherways, for enabling them, for and during their service therein, it has been the wisdom and practice of all princes and nations, and in special of his Majesty's Royal Progenitors, to grant them diverse liberties and privileges, as is evident by many acts of Parliament, concerning the privileges and immunities of the College of Justice, and members thereof, granted, renewed, and ratified, from time to time ; therefore the King and Estates of Parliament [2404] ratify and approve all, and whatsoever privileges and immunities, granted by his Majesty's Royal Predecessors, to and in favours of the College of Justice, and of the Senators, Advocates, Writers to the Signet, and remanent members of the same, or whereof they have been in use and possession in any time bygone, together with all laws, acts of Parliament, statutes and constitutions, made and conceived in their favours ; and declares the whole privileges, liberties, and immunities foresaid, granted and belonging to the ordinary Lords and Senators of the College of Justice, shall be extended, belong, and appertain to, and enjoyed by the Advocates, Clerks, and Writers to the Signet, and remanent members of the College of Justice in all time coming, notwithstanding of whatsoever act, custom, or practice to the contrair.

As also, such of the College of Justice as are heritors within the town, being charged for payment of their proportion of the King's cess, they gave in a bill of suspension upon these reasons, That there was a greater cess imposed upon the town of Edinburgh, than was allowed by the act of Parliament, and consequently there was a greater proportion imposed upon the suspenders, than in law they were obliged to pay, in so far as the Town of Edinburgh's proportion of the eight months' cess yearly, being £32,000, the Canongate and suburbs of Leith pays a third part thereof ; and yet the whole £32,000 is imposed upon the Town alone, so that there being a third part more imposed on the Town, their proportion of the cess is consequently an third

part more on the suspenders than is allowed by law ; and, as there is a greater proportion imposed as to the quota, so there are many persons whose trade and land is exempted from payment, who ought to be liable for their proportions, which makes a greater burden to be laid upon the suspenders, in so far as the present Magistrates and old Magistrates, the stent-masters both of Leith and Edinburgh, and lands belonging to the Town in property, which are all free of the cess and not stented, whereas they should bear an equal proportion of burden with the rest of the lands in the Town, and most of all the heritors of the burgh except those of the College of Justice, have great ease and abatement of their rents in the stent, some a fourth and some a third part, some more and some less ; and yet, such of the College of Justice as are heritors within the burgh, are stented to the full, without any ease or abatement, so that the stent, as to them, is most unequal ; as also, by an act of the Town Council in May 1674, which is ratified by act of Privy Council, it is declared, that any heritor within the burgh that shall build and repair their houses with stone and lime, that was formerly built with timber, shall be free of all stents, taxations, and public burdens, whereunto the heritors or tenants within burgh are liable, and that for the space of seventeen years after building and repairing of the same ; and albeit, several of the College of Justice that are heritors within the burgh, have built and repaired their houses with stone and lime, upon the faith of the said act ; yet notwithstanding, they are stented to the full, without regard thereto. [2405] Answered for the Town, That the College of Justice ought to be liable for the annuity, because the Town having given in an draught of an act to have been passed in the Parliament 1633, for laying on 12,000 merks upon the inhabitants of the burgh, according to the proportion of the house-mails they pay, for maintaining six ministers, the Parliament remitted the consideration of the said act to the Privy Council, to do therein as they should think fit, and ordained the Council's determination to have the strength of an act of Parliament ; and the Council, by an act in March 1634, did approve of the foresaid act, given in to the Parliament by the Town, appointing all the inhabitants to pay annuity, except the Lords of Privy Council and Session ; and the advocates, clerks, and writers to the signet, did homologate the act and consented thereto, in so far as it appears by an act of sederunt in the session in July 1637, relative to said act of Privy Council, that they compared before the Lords and offered them, and their successors to them in their places and office, to pay for the maintenance of six ministers, eleven pennies for every twenty shillings of mail which should be paid by them for their houses, and were content that an act of sederunt should be made thereupon, binding them and their successors for payment thereof, and that horning, poinding, and warding should follow thereupon without suspension ; and, that none should thereafter be admitted or reputed members of the College of Justice, but such as should ratify and approve the said act and give obedience thereto ; and, by the 10th act of the Parliament in the year 1649, an annuity of six merks is imposed upon every 100 merks of the hail mails of the houses of Edinburgh, for the maintenance of the ministers, without any exception of any person of whatsoever quality, degree, or place, upon any privilege or pretence whatsoever, so that the hail members of the College of Justice by that act are liable for the annuity ; and the Town, in the year 1661, obtained a new act of Parliament for the said annuity to be paid by all the inhabitants without exception or privilege, and since that time, the members of the College of Justice have homologated the said acts, by their acquiescence, and making payment conform thereunto. And the said annuity being destinate for the provisions of the six ministers, there was compearance made for the ministers. For them it was alleged, That it is a principle in the common law, that *decimalis et trienalis possessio in ecclesiasticis habetur pro titulo*. And they and their predecessors have not only been in possession of the said annuities these thirteen years, but above forty years, and particularly the annuity has been uplifted from several members of the College of Justice ; and albeit the ministers' possession for so long a time, is sufficient to give them a right, much more where they not only have possession, but instruct their right ; and, seeing several members of the College of Justice have purchased good fortunes within the Town, it is just and reasonable that they should help and assist the Town in their burdens, and particularly in so good a work as the payment of the ministers' stipend. And albeit of old, the advocates and other members of the College of Justice, were free [2406] of public burdens and impositions within the Town, when they were but few, and their proportion would have been but incon-

siderable ; but now, when they are grown so numerous, and upon that consideration are found liable to pay the King's cess, they ought likewise to bear a proportion of the burdens and impositions, that properly belong to the Town ; and all the acts of Parliament and acts of sederunt by which the members of the College of Justice were declared free, are abrogate by the foresaid posterior laws ; and the College of Justice, especially the advocates, writers, and other members, ought not to be excoemed from the jurisdiction of the Town, neither civil nor criminal ; because they, by their charters of erection, have power of jurisdiction, as also being Justices of Peace within themselves, all persons dwelling within their liberties and privileges, ought to be liable to their jurisdiction, and there is no law excoeming the College of Justice from the jurisdiction ; and albeit any member of the College of Justice may raise an advocacy upon their privileges, yet that does not excoem them from the Town's jurisdiction, but their magistrates may proceed to judge in all causes concerning the members of the College of Justice, unless there be advocacy raised and produced, and the act of Parliament of Queen Mary, allowing members of the College of Justice to raise an advocacy upon their privileges, can only be understood of civil causes, but not of the criminal jurisdiction, to cognosce of riots and other crimes, to which the Town, by the law, are judges competent, and are summarily in use to proceed for punishing of delinquents and securing the peace of the burgh ; and the members of the College of Justice ought not to have the liberty to employ unfreemen to work in their houses, because that is contrary to the privileges of the several trades and their seals of cause, which are ratified by several acts of Parliament, by which no unfreeman is allowed to work within the burgh. And, as to the reasons of suspension relating to the cess, it was answered, That it was denied that there was a greater cess imposed upon the Town than was allowed by the law, as will appear by the stent-books, and if there be any more than the quota, it is only for clerk and collector's fees and other incident charges, which are allowed by the act of Parliament. And if there was any more imposed, than the quota of the cess appointed by act of Parliament, it was for payment and defraying the charges of Captain Graham's company that guards the Town ; and there is no more imposed upon the suspenders than their just proportions with other lands within the burgh, nor were there any person free from payment of the cess, but only the present Magistrates, who, by the sett, are excoemed from all public burdens during the time they are in office, and the stent-masters are not liable for the cess, because there are none in use to be appointed stent-masters that are heritors, and the trades-lands are not free, and as to the lands belonging to the Town in property, these being a part of the Town's common good, are not liable to pay cess more than any other part of the common good. And the act of the Town Council in favours of those heritors that should build and repair the fronts [2407] of their houses with stone and lime, was only as to the freeing of them from the impositions that properly concern the burgh, but not of the King's cess, of which the Town neither did nor could free them. Replied, That the act of Privy Council in the year 1634, being only founded upon the reference of Parliament proceeding upon the Town of Edinburgh's petition, cannot prejudice the members of the College of Justice of their privileges, because the act of Privy Council could have no more effect than if there had been an act of Parliament. But this being but a private act, obtained *parte inaudita*, falls under the act *salvo jure*, and cannot prejudice private parties of their privileges, much less the rights and privileges of the College of Justice, which were granted to them by the foundation of the Judicatory, and confirmed by many laws and acts of Parliament ; and, by the said act of Council, the Lords of Session are excoemed ; and the act of Parliament in the year 1661, in favours of the College of Justice, all privileges and immunities granted to the Lords of Session by any former laws are extended to advocates, writers, and other members of the College of Justice, so that if they had been liable by the foresaid act of Privy Council, it is rescinded and taken away by the act of Parliament 1661 ; and the act of sederunt in the year 1637, which is alleged to have proceeded upon the consent of the College of Justice, cannot be obligatory, because it does not appear that there was any subscribed consent, and the extract of an act proceeding upon a pretended judicial consent, will not oblige the party, unless the consent which was the warrant of the act, had been subscribed by the party, or by the Judge, if he could not write, as was decided in the case of an judicial reference, 24th July 1661, Buchanan *contra* Osburne.* And albeit the consent had

* Stair, v. 1, p. 53, voce PROOF.

been signed, yet it could only oblige the subscribers, and no others ; and, albeit the consent had been subscribed by all the College of Justice, yet that could only oblige themselves during their own lifetime, but cannot oblige their successors ; and, as an evidence that the College of Justice did never consent to any such act, the Magistrates of Edinburgh, in the year 1643, having given in a petition to the Lords of Session, founded upon the said act of sederunt, for putting it in execution ; there is a petition given by the advocates, writers, and other members, for rescinding of the said act, as having been passed without their knowledge or consent, and that it being but the assertion of their clerk, bearing them to be compearing, and consenting to the payment of the annuities, it could not oblige them, unless their consent had been subscribed ; which petition being given up to the Town to see, and in answer thereto, the Town gave in an act of the Town Council, restricting the endurance of the annuity for seven years, and that thereafter it should cease and expire in all time coming ; and albeit, the foresaid act was obligatory, as it is not, it is taken away by the act of Parliament in favours of the College of Justice in the year 1661 ; and the act of Parliament in the year 1649, is of no effect, because all the acts of that Parliament are rescinded ; and the act in favours of the town in the year 1661, making all persons liable [2408] for the annuity without exception, being but a private and unprinted act ; cannot prejudice a public act past in the same Parliament, in favours of the College of Justice ; and the advocates and other members did never homologate any acts ordaining them to pay the annuity, nor did they acquiesce to the same, as appears by the petition given in to the Lords, by the advocates and other members in the year 1643, disclaiming their consent to the act of sederunt in the 1637, and craving that it might be rescinded ; and, by several acts of the Town Council of Edinburgh, and particularly 5th April 1637, the 8th April 1642, the 20th October 1648, and the 10th August 1649, which bear, that notwithstanding of all the endeavours the town had taken to draw the College of Justice to have paid the annuities, yet the town could affect nothing, and any payment made by any of the members of the annuity, was upon distress by horning and poinding, and so can be no homologation ; and, albeit, any of them had made voluntar payment, however these persons that has payed it, cannot repeal the same, yet that cannot prejudice the College of Justice of their privileges, nor hinder the rest of the members, nor the persons that has paid the annuity themselves, from pursuing a declarator, and to be free of the annuity : And the ministers were never in use to receive the annuity themselves ; but those that were liable in payment thereof paid it into the town, and the town paid it to the ministers ; and albeit, the annuity had been paid to the ministers, and that they had been above 13 years in possession thereof, in the which case, by common law, *ecclesiastici non tenentur docere de titulo*, in things relating to their benefice, yet that is only to be understood in *causa dubia* ; and the possession gives only the ecclesiastic person a presumptive right ; but that rule does not hold when the ecclesiastic person's title is condescended upon, and found to be null and invalid in law, as was decided, 11th July 1676, the Bishop of Dumblane v. Kinloch : * And the number of advocates and writers, and other members of the College of Justice, are not so numerous as is pretended, seeing of all, beside the Lords of Session, who never paid annuity, they will not be above 200 ; and, the one half of these are but young men who have not families, so that the number of these who pay house-rent are but few, and their annuities will be but inconsiderable ; and, the more numerous the College of Justice are, it is the better for the town ; and seeing the town has so great benefit and advantage by the College of Justice, which is the principal thing that enriches the town, and made it so considerable as it now is, they ought not to contravert their privileges ; and the advocates, writers, and other members of the College of Justice, being always obliged to attend upon the Lords, they ought not to be liable to the jurisdiction of the town, neither civil nor criminal ; and it is clear, by the act of Parliament of Queen Mary, That the members of the College of Justice may advocate causes from all inferior judges ; so that the very proponing this declinator defence, that they are members of the College of Justice, ought to liberate them from the town's jurisdiction, without putting the members of the [2409] College of Justice to the trouble of raising an advocacy ; and the members of the College of Justice has always been in use to employ unfreemen to work in their houses, and

* Stair, v. 2, p. 444, voce KIRK PATRIMONY.

what privileges they have been in the possession of at any time, are confirmed by the act of Parliament in their favours in the year 1661 : And they have not only liberty to employ unfreemen, as being a particular privilege competent to them, but as a thing competent to any of his Majesty's lieges dwelling within burgh, as is clear by the said act of Parliament anent the conduction of craftsmen ; and any privilege granted to any trade or incorporation within burgh by their seal of cause, cannot be sustained in prejudice of the public laws, which allow his Majesty's lieges to employ any tradesman they please to work to them within burgh. And as to the cess, the stent-books are opposed, by which it appears, that there is a third part, which is 11,500 lib., imposed more upon the town and suburbs, than the quota appointed by the act of Parliament ; and albeit, the law allows somewhat more to be imposed for collector's and clerk's fees, yet it is but inconsiderable, and will not extend to a third part of the whole quota ; and the town cannot impose any thing by way of cess for payment of Captain Graham's company, but it ought to be paid out of the common good, or by those who are liable for watching and warding, who are free from that trouble, by that company that is entertained for guarding of the town. But neither the members of the College of Justice, nor any other person that is not obliged for watching and warding, can be liable for any thing that is imposed for the paying and defraying of the charges of that company ; and the present Magistrates ought not to be exeemed by virtue of the sett, because the sett is only as to the stent and contributions that particularly concern Edinburgh, and not as to the King's cess ; and there was no cess then upon the country when the sett was made, so that the sett and contributions mentioned in the sett, cannot be extended to comprehend the King's cess ; and albeit it should, yet the Magistrates ought not to be exeemed, because it is expressly provided, by the act of Parliament imposing the cess, that none should be exeemed but colleges and hospitals, *et exceptio firmat regulam in non exceptis*. And as the members of the College of Justice, albeit they be declared free of all public burdens by former acts of Parliament, yet they are now made liable by the foresaid act imposing the cess, so, by the same reason, the present Magistrate ought not to be free : And, as magistrates in the country, such as sheriffs, baillies of regalities, stewartries, and others in public office, are not exeemed from the cess, neither ought magistrates of burghs to be free ; and albeit, they are at some pains in managing the affairs of the burgh during the time they are in office, yet they have always their own advantages, which will be more than compensate their care and pains in the burgh affairs : and if the present magistrates of burghs were to be free, yet their proportion ought not to be laid upon other heritors and landlords within the town, but should be paid out of the common good ; for their being *quæsitum* to every heritor by the law, that he cannot be farther liable but for his just proportion, his neighbour's [2410] proportion cannot be laid upon him ; and if the proportion of cess due by the Lords of Session is not laid upon the rest of the shire where they are heritors, but is allowed, upon the King's account, in the fore end of the quota payable by the shire ; so, by that same reason, and much more, ought the proportion of the cess, due by the present magistrates (if they should be exeemed), be paid out of the common good, and not to be laid upon the rest of the heritors and landlords of the burgh ; especially seeing those that are magistrates have ordinarily great rents and trading in the town, who will be liable for a great part of the cess ; and there is no reason that their proportion should be laid upon their neighbours : And, as to the stent-masters, albeit, ordinarily they are not heritors, yet they are merchants and tradesmen, and so ought to be stented according to their trade, which always diminishes the proportion of the cess laid upon their neighbours ; and the trades-lands are not stented, as appears by the stent-books, and the lands belonging in property to the town, ought to be stented, as well as the lands belonging to private persons ; because, as to their property, they are in the case of private persons, and as their lands in the country, albeit, they be a part of the common good, do bear a part of the cess, where they ly, with other heritors ; so, by that same reason, the lands and others belonging to them within burgh, ought to bear a proportion of the cess with the burgh : And, also, it appears by the stent-books, that there are a number of other persons free of the cess, which bears some to be exeemed for reasons, but without condescending upon the reasons, and others are exeemed without any reasons at all ; and, the stent is unequally laid on, there being more imposed upon some and less upon others ; albeit, they have double their rent, as appears by a particular account and

ondescendence given in, taken out of the stent-books ; and seeing the act of the Town council, made for the encouraging of building, bears expressly, that those that shall build conform to the act, shall be free and excoemed from all stents, taxations, and other public burdens, whereunto the heritors of tenements within burgh are, or shall be, liable, must be understood not only of public burdens that concern the burgh, but likewise of the King's cess ; and therefore, the stent ought to be rectified, both as to the quota imposed, and inequality of the same, that every person may bear a just proportion : And, for that effect, that the Lords may ordain a new stent to be made, and appoint new stent-masters, whereof the one half to be chosen by the magistrates, and the other half by the College of Justice, for making up an exact stent, as was decided the day of December 1681, in the case of the Magistrates of Banff *contra Russell* ; * where Russell being stented by the Magistrates in a certain sum, as his proportion of the cess, and he having suspended upon the reason, that he was unjustly and exorbitantly stented, the Lords granted commission to four men within the burgh, two to be chosen by the Magistrates, and two by the suspender, to revise the stent and make report to the Lords ; and was likewise decided in the case of Forbes *contra Town of Inverness*, No. 37, p. 1895. The Lords having considered the summons of declarator raised at the [2411] instance of the members of the College of Justice, of their privileges against the Town of Edinburgh, the suspension raised by them of the charges given at the instance of the Town for payment of the annuity ; and, the bill of suspension given in, of the charges for their proportions of his Majesty's supply, the answers made thereto for the Town, and whole disputes proponed for either party, with the acts of Parliament, and other acts and writs founded on, *hinc inde*, in the debate, they sustain the foresaid declarator, as to the members of the College of Justice their immunity and exemption from payment of the annuity for the ministers' stipend ; and decern ; and declare them free thereof, both as to bygones and in time coming, and suspend the letters simpliciter for the same ; and, likewise, sustain the declarator, as to their immunity from watching or warding, and any impositions for the same ; and, from payment of any customs, causey mails, shore dues, and other impositions laid on their provisions, of meat and drink, for their families, and their other goods carried to or from the Town, and collected at the ports or other places within the liberties of the Town : And, declare, that the producing a certificate, subscribed by a member of the College of Justice, bearing, that the provisions, or goods, do properly belong to him, shall be sufficient for freeing them from paying the said customs and impositions, the certificate being renewed once in the half-year at least ; and sustain the declarator, as to the pursuers' exemption from the civil jurisdiction of the Magistrates of Edinburgh ; and declare, that upon their proponing declinator thereof, the Magistrates ought to desist from any procedure against them, without necessity of advocacy ; and, before answer, as to the criminal jurisdiction, and to that point of the declarator, concerning the pursuers' employing unfreemen within the Town, the Lords declare, they will take trial what has been the former custom, as to both these points ; and, particularly what was done in the case mentioned in the debate : And, the Lords ordain, that where a taxation, or cess, is imposed by the acts of Parliament, or convention of estates, to which the members of the College of Justice are, or shall be, liable, that there be a special and distinct stent made upon the Town and suburbs, for the quota imposed ; and, so much more only as may defray the incident charges of collecting the same, wherein no exemption of the same shall be given to Magistrates, stent-masters, or other persons ; but that they be stented for their proportions of these impositions, as well as other inhabitants : And, likewise, that the tenements belonging to trades be stented, and the Town's common good, where the same consist in land or feu duties, and does not bear burden with the shire, but prejudice to the Town of Edinburgh, if they think fit to lay on the proportions of those who have been in use to be exempted upon their neighbours, but not upon any members of the College of Justice, and to the end these impositions, warranted by public authority, may be equally laid on ; and those who are heritors, being of the College of Justice, not burdened beyond their just proportions ; The Lords declare, they will, from time to time, nominate an advocate and a writer to the signet for each [2412] quarter of the Town, to meet with the stent-masters, who shall be appointed by the Magistrates at their taking of the survey, and valuation

* See PUBLIC BURDEN.

of the whole tenements within the burgh and suburbs, and of the trade of the burgh, which is in use to be stented, and to bear a part of the burden of the cess, and to be present at all their meetings for imposing of the stent, and to see that the valuation be justly and equally made, and the stent laid on accordingly. And, for that effect, appoint the Magistrates to make intimation of the time of the master's meeting, to the Lord President of the Session, the Dean of Faculty, and Keeper of the signet, ten days of before in time of Session, and twenty days in time of vacance; and appoint this method of stenting to begin and take effect for that term of his Majesty's supply due and payable at Martinmas next 1687 years; but prejudice to the Town of Edinburgh to use execution for that term's supply, which was payable at Martinmas last 1686 years, and the Whitsunday term now ensuing, according to the stent already imposed for these two terms: And the Lords do declare, the persons following to be members of the College of Justice, who are to enjoy the privileges above mentioned; viz. the Lords of Session; Advocates; Clerks of Session; the Clerks of the Bills; the Writers to the Signet; the Deputes of the Clerks of Session, who serve in the outer-house, and three substitutes for registrations, being one in each clerk's office; the three Deputes of the clerks of the bills; the Clerks of Exchequer; the Directors of the Chancery; their depute, and two clerks thereof; the Writer to the privy seal, and his depute; the Clerks of the General Register of sealings and hornings; the macers of the session, the keeper of the minute book; the keeper of the rolls of inner and outer houses. And the Lords do extend the privileges foresaid to the persons following, viz. one actual servant of each Lord of the Session; one servant of each advocate; four extractors in each of the three clerks' offices of the session; two servants employed by the clerk of register in keeping the public registers; the keeper of the Session house; and the keeper of the advocates' library. It is always hereby declared, that if any of these servants, and others, to whom the foresaid privileges are extended, shall keep merchants' shops, taverns, or ale-houses, or exercise any other trade within the burgh, they shall not enjoy any of the privileges above mentioned. And ordain this act to be printed and recorded in the books of sederunt.

Fol. Dic. v. 1, p. 150. Sir Patrick Home, v. 2, No. 898.

No. 15. [2416] ANGUS CHRISTIAN v. JOHN SYME. June 16, 1779.

The Lords found, that a member of the College of Justice, residing in Canongate, was not entitled to an immunity from payment of the annuity for support of a minister, on the score of the privileges of the College of Justice.

The Magistrates of the Canongate are entitled, by an act of Parliament in 1663, to exact an annuity for the maintenance of a minister from the possessors within that burgh. John Syme, writer to the signet, possessor of a house in the Canongate, having refused to submit to this exaction, the collector of the fund pursued him before the Bailies of the Canongate for payment of the annuity.

In defence, Mr. Syme contended, That he was excoemed from this taxation by his privilege as a member of the College of Justice. The Bailie pronounced the following interlocutor: "Having considered the libel and defence, with the act of Parliament imposing the annuity in question, in respect the said act imposes the said annuity, without exception of any person or persons, of whatever degree, quality, or place, upon pretence of any privilege or pretext whatever, repell the defence, and decern." The defender afterwards brought the cause into this Court by advocacy, and

[2417] Pleaded in support of his defence, The act 1537, c. 68, gives an express exemption to the Lords of Session "fra all paying of taxes, contributions, and uther extraordinar charges to be uplifted in ony time coming." This privilege was extended to the whole College of Justice, by act 1661, c. 23; and the act mentions the reason to have been, "because the saids persons must wait daily upon our said Session, except at feriate times, and therefore should be privileged."

These statutes seem to import an exemption to the privileged persons from such assessments in every part of the kingdom. But, at least, they give an exemption from

the taxes of the place where the Court is held, and where the members daily attending reside.

The Canongate is the residence of many of those members who attend the business of Court. As, therefore, the inductive cause of granting the exemption applies not merely to Edinburgh, but likewise to the Canongate, those members of the Court who reside in either of these places, are equally entitled to the privilege. Accordingly, the Magistrates of the Canongate have never pretended to exact the impost exigible on wines and other liquors, from members of the College of Justice residing there.

Answered for the pursuer, The exemption from taxes given to the College of Justice, is regulated, as to its extent, by the immemorial usage. It is now explained by that practice, to be nothing more than an immunity from all annuities and taxations due to the town of Edinburgh.

Impost is not exacted from the members of the Court residing in the Canongate, because it is levied by the Magistrates of that burgh, not for their own use, but for the use of the town of Edinburgh, to the Magistrates of which they are, by statute, accountable. But the annuity in question is levied for purposes within the burgh of Canongate, and has been constantly exacted from every member of the Court residing there, without any opposition, till now.

At any rate, whatever interpretation is put on the ancient statutes conferring this privilege, the act 1663 derogated from these statutes, and, so far as concerns the annuity in question, bars any plea founded upon them. The words of the act imposing the annuity are explicit: "Without exception or exemption of any house, of whatsoever nature or holding the same be of, or of any person or persons, of whatsoever degree, quality, or place, upon pretence of any privilege or pretext whatsoever."

The Court "remitted the cause to the Bailies simpliciter."

Lord Ordinary, STONEFIELD.—Act. RAE.—Alt. DALZIEL.—Clerk, MENZIES.

Fol. Dic. v. 3, p. 135. Fac. Col. No. 77, p. 149.

No. 16. [2418] Sir WILLIAM ERSKINE v. ROBERT and HENRY DRUMMOND.
June 28, 1787.

In an action, in which the nephews by affinity of the Lord President were defenders, his Lordship declined judging. The Court unanimously repelled the declinature, and ordered their determination to be marked in the books of Sederunt.

In the action depending between these parties, the Lord President suggested a doubt, how far he was at liberty to vote, on account of his connection with Mr. Henry Drummond, who was married to his brother's daughter.

This declinator was unanimously repelled, and the determination was ordered to be marked in the books of Sederunt.

The statute 1594, c. 212, prohibited judges from voting where their father, or brother, or son, was a party. By act 1681, c. 13, this prohibition was extended to all relations in the first degree, whether by consanguinity or affinity; and it was further provided, "That no judge should sit or vote in any cause where he is uncle or nephew to the pursuer or defender." But as the latter part of the act did not, like the former, particularly exclude uncles or nephews by affinity, it had been found, That a judge might vote in the cause of one who was married to his niece, unless where the niece was the proper party, and the husband only called for his interest; 31st January 1712, *Calder contra Ogilvie*, No. 12, p. 197.

Nota, About the same period, Lord Alva refused to decide as an Ordinary, in a question in which Mr. Carruthers of Holmains was a party. This gentleman was his nephew by affinity; and his daughter was married to his Lordship's son. But the Court altered the judgment, and remitted the cause to the Lord Ordinary.

C.

Fol. Dic. v. 3, p. 135. Fac. Col. No. 337, p. 518.

No. 17. The LORD PROVOST and MAGISTRATES of EDINBURGH v. The FACULTY ADVOCATES, and the SOCIETY of WRITERS to the SIGNET, in behalf of the COLLEGE of JUSTICE. January 29, 1788.

The College of Justice found exempted from the payment of poor's-money, and other taxations imposed by the Magistrates of Edinburgh.

The College of Justice was instituted at first anno 1532, in the minority of James V. and during the regency of the Duke of Albany. For the purpose of obtaining a fund for its establishment, not less than from reverence to the Holy See, the government of Scotland had recourse to the authority of the Roman Pontiff; and Bulls were issued by Clement VII. and by his successor Paul III. ratifying the institution, and allotting for its support a portion of the revenues of the church. An exemption from taxes was likewise in the number of its destined advantages. The letters patent issued by the government, which were confirmed by the sanction of the last-mentioned Pope, declare an immunity "ab omni decima contributione, collecta, exactione, oneribusque ordinariis et extraordinariis."

[2419] In 1537, on occasion of the King's majority, an act of Parliament was passed in ratification and confirmation of the previous establishment of the College of Justice, the Judges of which consisted partly of churchmen; and it contains the following enactment: "Attour, because the said persons maun await daily upon our said Sennet except at feriate times, and should be therefore privileged above others, herefore we have exeemed, and by the tenor hereof exeem them, and every one of them, both spiritual and temporal, from all paying of taxes, contributions, and other extraordinary charges to be uplifted in any times coming, and from the bearing of any office or charge within burgh or outwith, but if it be their own free will and consent."

In 1540, when the King had attained "the perfect age of twenty-five years," another statute was made, "again approving and ratifying all the privileges granted to the College of Justice." And in 1543, after the accession of Queen Mary, the Parliament enacted a similar ratification.

Meanwhile, as the religious houses afforded maintenance to the poor, every species of taxation for their support was unknown. Afterwards, when, upon the Reformation, the ample possessions of the church were wrested from it, the reformed clergy remonstrated against the now helpless condition of the poor, and insisted on a certain share of the ecclesiastical patrimony being appropriated for their benefit.

These circumstances gave occasion to the act of Parliament of 1579, cap. 74, which still continues the basis of the poor-laws of Scotland. This statute authorises the Provost and Bailies of burghs, and in landward parishes, certain judges appointed by the King, "to tax and stent the whole inhabitants within the parish, according to the estimation of their substance, without exception of persons, to such weekly charge and contribution as shall be thought expedient and sufficient to sustain the said poor people."

As the members of the College of Justice were not subject to be convened before any inferior jurisdiction, it is remarkable that the prescribed mode of enforcing this act, was "to call such obstinate and wilful persons as refused to contribute to the relief of the poor, before the said Provost and Bailies, and judges in landward districts."

There exists no evidence of the manner or extent in which this tax was levied; and of course none that the College of Justice was subjected to the payment of it.

In 1592, another act was passed, cap. 155, "anent the taxation of burghs, watching and warding," which was qualified with a caveat, "that this act be not prejudicial to the members of the College of Justice, and to their privileges and immunities granted unto them, or whereof they have been in use in times bygone."

In 1593, another statute again ratified every prior enactment in favour of the College of Justice, "without any manner of diminution or derogation of the [2420] same in any sort, by whatsoever other act or statute that may or can be extended or interpreted in the contrary, either special or general."

The important statute of 1597, cap. 279, followed. It is entitled, "Of persons dwelling within burgh, subject to the help of the poor, to watching or warding"; and after setting forth that many of the inhabitants of burghs of reasonable substance had refused to contribute for the entertainment of the poor, watching and warding within

burgh, it enacts, "That all such as have their residence and dwelling within the said burghs, and may spend £100 of yearly rent within the same, or stented by the discreet neighbours to be worth 2000 merks in free goods, shall be subject to be burdened with the rest of the inhabitants, for the advancement of the glory of God, his Majesty's service, and well of the burgh where they dwell ; providing always, that this act be no way extended to such as are exeemed for his Majesty's service, as one of ilk occupation for that cause ; neither to any persons that are members of the College of Justice, and admitted by the Lords of Session."

In the same year another act passed, imposing a general taxation, and expressly annulling all privileges and immunities tending to an exemption from it ; but under the exception of those of the College of Justice.

From that period downward to the close of the following century, there is no evidence of any assessment having been laid by the Magistrates of Edinburgh on the College of Justice, for the maintenance of the poor. But in the mean time their privileges were repeatedly ratified by acts 1633, cap. 23 ; 1661, cap. 23 ; 1670, cap. 8 ; and 1685, cap. 19.

Two different taxations had, in the interval, been obtained by the Magistrates of Edinburgh ; one, an annual assessment for the provision of the ministers of the town, called annuity, and the other, a duty under the name of impost on liquors imported into town. In 1678, the Magistrates charged some of the members of the College of Justice for payment of these taxes, which produced an action declaratory of their privileges, in which the Court in 1687 gave judgment, "declaring them free from the payment of these taxes" ; and this decree afterwards passed into an act of sederunt. But in this process nothing was agitated with respect to the poors-money.

In 1686, an Act of Parliament passed, authorising the Lords of Session, with the consent of the Magistrates of Edinburgh, "to impose such taxes on all the inhabitants, as should be found necessary for cleaning the streets, and purging them of beggars." By an act of sederunt, accordingly, the Court empowered the Magistrates to levy £500 per annum for three years ; and in this act it is specially set forth, that the College of Justice had voluntarily submitted to this exaction ; to which is added a salvo of "their privilege of being free from all stents and impositions within the town of Edinburgh."

In 1692, the Lords of Session gave their authority to another assessment for three years, on all the inhabitants, including the College of Justice, without any express salvo. And, in 1694, a similar assessment was imposed.

[2421] In 1693, the Privy-council of King William issued a proclamation, requiring all the Magistrates of the kingdom, particularly those of Edinburgh, "to execute effectually the several statutes relative to the poor." On this occasion, the compulsory of pointing was employed against some members of the College of Justice ; but a bill of suspension being presented, 1st March 1695, it was immediately departed from. A few months afterwards, the statute 1695, cap. 43, was passed, "ordaining the acts relative to the poor to be put to vigorous execution" : But still the Magistrates continued to desist from their proceedings against the members of the College of Justice.

In the beginning of the following century, however, the Magistrates again attempted, as before, to point the effects of some individuals of that body ; not however, it seemed, so much under the authority of the proclamation in 1693, or of any laws or statutes, as of the act of sederunt 1687, though expired. The bill of suspension formerly preferred was now passed (1710) ; but the question was not brought to any decision.

For the two years, from 1712 to 1714, an assessment was laid by the Lords of Session, in virtue of the act 1686, on the members of the College of Justice, of two per cent. upon their house rents ; but this was done with the express consent of that body.

Again, a voluntary contribution took place for three years, from 1731 to 1734.

In 1749, seven years after the charity work-house of Edinburgh was established, a new scheme being projected for a poors-rate, the Magistrates, in several papers published by them on that occasion, acknowledged the exemption of the College of Justice.

At length, in 1787, a bill was brought into Parliament, for the direct purpose of subjecting the members of that body to the assessments imposed by the Magis-

trates. The bill meeting with opposition on the ground of private right, was thrown out; and the Magistrates, in order that the question of law might be brought to determination, again employed the compulsory of poinding, which was followed by suspensions in the name of different classes of the members of the College of Justice, and so the question came under the consideration of the Court.

Pleaded for the suspenders; By the act of Parliament in 1537, framed in conformity to the letters-patent, and the papal bulls, on which the constitution of the College of Justice was originally founded, there is an express exemption in its favor of all taxations whatsoever to be levied in time to come; an immunity repeatedly re-enacted or confirmed by the series of statutes enumerated above, and prior to 1579.

Until that year no tax had been imposed for the maintenance of the poor; and it is true, in the statute that was then passed, the general expression "of all inhabitants in the parish, without exception of persons," might seem at first view to comprehend the members of the College of Justice; but, when more closely examined, it will receive an opposite construction. 1mo, They are to [2422] be understood not as stated inhabitants in the sense of the statute, but as attendants on the Court, whose residence is in consequence occasional and transient. 2do, Those declared liable to the taxation, were persons subject to inferior jurisdictions, which they are not. 3tio, No privilege or right once granted, is to be resumed without a special enactment: *Speciali non derogatur generalibus*; and where the *salvo jure* is not expressed, it is always understood. 4to, There is not any evidence, that in fact the assessment by this statute was ever laid on the members of the College of Justice.

Accordingly, the statute of 1597, cap. 279, which was preceded by several other enactments, recognising the immunities of the College of Justice, after subjecting in comprehensive terms, all persons of a certain extent of substance, residing in burghs to the support of the poor, subjoins an explicit exemption of that body. In the following statutes, down to the end of the last century, their privileges were ratified from time to time, while they themselves continued free from the corresponding burdens to which the other inhabitants were subject.

In this situation, the acquiescence of the Magistrates of Edinburgh demonstrated their consciousness of the validity of those claims which are now called into question. Nor was their silence with regard to the exaction of poor's-money in that process of declarator which terminated in 1686 by so ample a recognition, in other respects, of the privileges of the College of Justice, to be otherwise accounted for, than by the notoriety of the exemption from that particular imposition; for this, it is evident, was at least as favourable a claim as those relative to impost and annuity, and, so far as it was founded on the express enactment of 1597, more clearly unexceptionable.

Thus, among the privileges of the College of Justice, originally founded on special statutes coeval with the constitution of the Court, and frequently renovated by succeeding grants, the exemption from any poor's rate imposed by the Magistrates of Edinburgh, appears supported by constant immemorial usage, uncontradicted by any record or tradition; to which is to be added, the explicit acknowledgment of the community itself; and all this even strengthened by the consideration of those other immunities being relinquished, or lost by disuse; while the desultory attempts to impede that uninterrupted possession, serve only to show it was not from negligence, but conviction of the right, that the Magistrates did not bring the question to a final issue.

Answered; The statute of 1579 formed at first, as it still forms, the basis of the poor's laws of Scotland. In clear and explicit terms, it subjects, without exception of persons, all inhabitants of parishes to taxation for the maintenance of the poor. To deny the appellation of inhabitants to persons inhabiting a town, merely because they are members of the College of Justice, seems a singular absurdity, and is inconsistent with the *salvo* in the acts of Parliament in 1592 and 1597 now founded on by the suspenders; because these plainly suppose, that the term inhabitants would have comprehended them, as otherwise the exception must have been superfluous and nugatory. The same proper application of the term to the members of the College of Justice, occurs in the statute of 1690, respecting hearth-money; in 5th Geo. I. or the riot act; and in the statutes imposing a tax levied in Edinburgh, for keeping the highways in repair.

Neither is the inference just, that the suspenders draw from the clause nominating a particular jurisdiction for enforcing the assessment. Wherever a statutory

jurisdiction has been created, the members of the College of Justice are comprehended, not specially excepted ; as, for example, the jurisdiction conferred on Justices of the Peace in offences against the revenue laws. But even their not being comprehended, would not debar the levying of an assessment from that body, to which the enactment of that clause was not essential ; as it might be rendered effectual, like any other civil obligation, by the Court of Session. Accordingly, no such plea has ever been maintained by members of the College of Justice residing in other burghs, though they are equally entitled to decline inferior jurisdictions.

With regard to the idea of a general enactment not being competent to undo a special privilege, it is contradicted by the practice of introducing saving clauses ; and, when those are omitted, the privilege falls. Thus, to take a strong example from the case in hand, the act 1537 exempted the Lords of Session from bearing any share in extraordinary supplies imposed by Parliament for the support of government ; and in every supply or land-tax act down to 1670, a special salvo of that privilege was carefully engrossed ; but at length the privilege being to be discontinued, all that was necessary for effecting this, was to leave out that special exception ; and, upon this footing alone are the members of the College of Justice at the present day liable to pay land-tax.

The other acts of Parliament, relative to the poor, are comparatively of little importance, and require no particular observation. With respect to the statute of 1537, which exempts the College of Justice "from taxes, contributions, and other extraordinary charges," these were no other than the national taxes or supplies, which were properly termed extraordinary charges, as in those days they were seldom imposed by Parliament, and only upon very urgent occasions. For as to the ordinary established revenue of the Crown, which, besides the rents of the King's patrimony, consisted chiefly of the feudal casualties exigible from the Crown vassals, and of certain customs upon goods imported and exported, it never was supposed that any members of the College of Justice were entitled to an exemption.

Still less was it imagined, that the exemption of this statute had the effect to relieve that body in whole or in part from the ordinary burdens imposed upon property, either by the common or statute law, for special purposes ; such as parochial assessments for building and repairing kirks, for establishing schools, for keeping in repair highways, for the maintenance of the poor, or for other purposes of a similar nature. A proof of this is the fact, that through all the rest of Scotland, except Edinburgh, the College of Justice have uniformly sub-[2424]-mitted to such burdens ; whereas the exemption, if at all applicable to assessments of this kind, must have had an universal operation in every county, burgh, and parish of the kingdom. Indeed equity requires, that the object of such exemptions should be only national taxes, that the corresponding increase of public burdens may fall equally on the people at large, and not on any particular description of individuals, as the inhabitants of a burgh or of a parish. The subsequent statutes preceding 1579, it is evident, though they ratify, do not extend the privileges bestowed by that of 1537.

The statute of 1592 relates to such burdens as are peculiar to burghesses. As to that of 1597, although the entertainment of the poor is mentioned in its preamble, it could not be intended to establish any system for that purpose, which was already effectually served by the statute of 1579. Its object, in all probability, was, to subject the inhabitants described in it, though not burghesses, to the burden of watching and warding, which is expressly mentioned in the preamble ; and likewise to those rents and assessments which the Magistrates of royal burghs were understood to have a right of imposing *virtute officii* for the utility of the burgh, of which an example occurs in the case of the Town of Aberdeen *contra* Lesk and others, No. 16, p. 1866. In this view, a salvo of the privileges of the College of Justice may be esteemed very natural and proper. But, at any rate, the legal effect of a saving clause or exception from a statute, in favour of any person or persons, can go no farther than to save from the operation of that particular statute alone in which it is inserted ; and the chargers are not founding their claim on act 1597, more than if it had never existed.

With regard to the alleged immemorial possession, of this there is no evidence. On the contrary, the College of Justice was repeatedly assessed by the Lords of Session under the authority of act 1686 ; and the salvo inserted on two of those occasions, without creating any new privileges, could only preserve such as already belonged to that body.

In point of law, no disuse of payment could establish an exemption for the future prescription having no operation against any public burden created by statute. Though a particular estate had been overlooked in levying the land-tax, or it had been omitted to collect duties or customs within a certain district, such omission could never prevent the due execution of the law in time coming. On this ground was decided a question respecting the non-payment of cess for time immemorial. *Fountainhall, v. 2, p. 590, 21st July 1710, Town of Paisley contra their Vassals, re PRESCRIPTION.*

The Lord Ordinary reported the cause, when

The Court unanimously suspended the letters, and assoilzied from the declarator.

Reporter, LORD BRAXFIELD.—For the Chargers, LORD ADVOCATE, BLAIR, *et Alii*.—Alt. DEAN OF FACULTY, *et Alii*.—Clerk, SINCLAIR.

S.

Fac. Col. App. No. 1, p. 1.

[2425] *.* On an appeal, The House of Lords, 25th March 1790, ordered that the appeal be dismissed, and the interlocutors complained of be affirmed.

No. 6. [2449] Lady MARGARET CUNNINGHAM *v.* The Lady CARDROSS. July 21, 1680.

The eldest heir portioner has the custody of the writs, and must give transumps to a younger sister, upon the equal expenses of both.

Lady Margaret Cunningham, the only daughter of — Stuart, who was one of the two daughters of Stuart of Kirkhill, and sisters to Sir William Stuart his son, pursues the Lady Cardross, the other daughter of Sir James, and sister to Sir William, for exhibition and delivery of the whole writs and evidents of the estate of Sir James and Sir William, both heritable and moveable, to the said Margaret Cunningham, as heir portioner served and retoured to Sir James and Sir William, and as representing the eldest heir portioner, thereby having the prerogative of the custody of the writs. The Lady Cardross compearing, produced several writs, and alleged, that she was not obliged to deliver any of these writs to the pursuer, she having equal interest, and being in possession of the writs. "The Lords repelled the defence, and found that the eldest heir-portioner ought to have the custody of the writs, and to give transumps to the defender as younger heir-portioner, upon the equal expenses of both." It was further alleged for the Lady Cardross, Absolvitor from the delivery of the evidents of Kirkhill and Strabrock, because she produceth a disposition granted by Sir James Stuart her father in favours of Sir William her brother, and the heirs of his body; which failing, to the heir-male of his eldest daughter; which failing, to the younger daughter, the Lady Cardross, &c.; upon which disposition Sir William was infeft, and in respect there were no heirs of his body, nor heirs-male of his eldest sister's, therefore the Lady Cardross is infeft as heir of tailzie to him, and so excludes Lady Margaret Cunningham from any interest in these writs. It was answered for Lady Margaret, That if the Lady Cardross accept-[2450]-ed the disposition of her father to her brother, and claimed the delivery thereof, it ought to be with express declaration, that she should pay and satisfy Sir James Stuart's whole debts, conform to a clause in that disposition, bearing, that Sir William, by acceptance thereof, should be obliged to pay Sir James's whole debts, and perform his whole obligations, contracted or to be contracted, as if he were his heir, or as Sir James himself would have been obliged to pay or perform the same; and especially the Lady Cardross ought to pay and satisfy Sir James's debts produced, and thereby to free the un-tailzied heritable estate, that Lady Margaret might enjoy the half thereof without burden. The defender replied, That she was willing to take up her father's disposition to her brother in the terms it stood, but it was not *hujus loci* to dispute the extent and import of that clause. The pursuer duplied, That she could not claim the rights of the tailzied estate, but in the terms of the tailzie, the import whereof might very justly and fitly be declared to prevent pleas between so near relations; especially seeing the pursuer had raised a declarator for that effect, which now she repeated by

way of reply ; albeit, without it, the Lords might justly declare the import of the clause, seeing delivery of writs is founded upon the point of right to the things disposed by these rights ; and, when that right is qualified, the quality ought to be declared and cleared before delivery. The defender triplied, That the declarator was not seen and returned, and behoved to abide the course of the roll. The pursuer quadruplied, That this cause having been formerly reported, " The Lords sustained the declarator as an incident process, and gave the defender a week to see it, which was done accordingly " ; and it is most ordinary that the Lords do receive all incident processes repeated by exception or reply, without abiding the course of the roll ; as exhibitions of writs necessary for the cause, either for the pursuer or defender ; which exhibitions being most frequently incident in processes, are therefore called ordinarily incidents ; and, likewise in suspensions, commonly reductions are received summarily ; and in possessory actions, when the point of possession is dubious, petitory actions are received, and in all cases, reductions and declarators. The defender quintuplied, That incident processes are never received upon mere contingency of the matter, but only when they afford a relevant defence, reply, or duply, in the principal cause, wherein they are craved to be admitted *incidenter*, otherwise the roll would become elusory, and upon pretence of contingency no man would be secure when to attend or have the benefit of the *inducias legales* by the roll. The pursuer sextuplied, That the declarator here afforded a reply in the process of delivery, viz. " the defender cannot be assoilized from the delivery of the evidents of the tailzied estate, unless it were declared in the terms of the foresaid clause, according to the true meaning and import thereof, as the Lords shall find the same just. " " The Lords sustained the reply, and admitted the declarator, and found that the Lady Cardross, as heir of tailzie to Sir William, ought to have the writs of the tailzied estate delivered solely to her, upon the terms exprest in Sir James's disposition to Sir William, the import whereof the [2451] Lords would now declare. " The defender then alleged, That the import of this clause could only be, that Sir James Stuart, his eldest son, being weak, did dispoise his estate to his second son, under this obligement, that by acceptance of that disposition, his son should be obliged to pay all his father's debts, contracted or to be contracted, which was just and rational for him to provide in favour of his creditors, who could not reach Sir William for Sir James's debts contracted after the disposition, neither even as to the anterior debts, he being the second son, and not *alioqui successurus*, and therefore they could only reduce the disposition as fraudulent *sine causa onerosa*, which no just man would put his creditors to ; but Sir James never dreamed to exhaust the estate he had disposed to his son for preserving of his family and memory, and to lay all the debt thereupon, and to free his other whole estate, even his moveables, to his wife and legatars, and his entailed estate ; and, therefore, the meaning of that clause can only be, that Sir William should be personally liable for his debt as if he were his heir, which must be understood, as if this disposition had been a bond of tailzie, obliging Sir James and his heirs to resign his estate in favours of himself, and after his decease to Sir William his son, and his heirs of tailzie, exprest in the disposition ; so that if Sir William were heir of tailzie, he could be only liable to his father's creditors *suo ordine*, after the executors and heirs of line were discust, and the estate competent to them were exhausted, upon which terms the Lady Cardross is content the clause be declared. It was answered for the pursuer, Imo, That albeit there were here a direct tailzie, and that Sir William had been heir of tailzie to his father, he would have had *beneficium ordinis* even against the creditors, who behoved first to be discust, and exhaust the executry and the untailzied estate, unless the tailzie itself had born simply an obligement to pay the debt, as in this case ; for thereby *provisione hominis tollitur provisio legis*, and the heir of tailzie is liable in the first place, seeing it is in the option of the defunct what heir to burden ; and though all representing him would be liable, yet he can change the order, which hath been frequently done, and sustained ; as when parties oblige themselves, and their heirs succeeding in a tailzied estate, even by bonds and obligations a-part, the heir of tailzie would be liable in the first place, but much more here where Sir William was never heir of tailzie, but had only a singular title by a disposition, which disposition makes that estate tailzied as to Sir William's heirs, who neither are nor can be heirs to Sir James ; and if Sir James his creditors were pursuing them, it could not be as heir to Sir James in this tailzied estate, but as heirs to Sir William, who by this clause was obliged to pay Sir James his debt ; and if the creditors were pursuing the

Lady Cardross, she could not except, and say, no process, unless the executors and heirs of line of Sir James were first discuss, which would necessarily follow, if the interpretation hold; but the creditors would exclude that exception, seeing the defender is not heir of tailzie to Sir James, but liable by an obligation in the disposition to Sir William; and, if the case were now to be debated, as it was [2452] when this disposition was contrived, would it not be evident that Sir James his eldest son who had no provision but the untailzied estate, could not be exhausted and rendered miserable, either by the course of law, or by the design of the father, who might have tailzied his whole heritable estate, by leaving out a considerable part thereof, and obliging his son to pay his whole debts, not in *subsidiu*m after exhausting his moveables and untailzied estate, which certainly he would have express if he had so meant, but nature and duty would infer, that his meaning was to leave his untailzied estate to his eldest son, who had not one sixpence of provision beside; and though the eldest son died before his disposition was perfected, yet the nature and design of it must have been still the same. The defender replied, That whatever might be pretended in the case of Sir James his immediate heir, as if his eldest son had lived, yet there is no other subsequent successor can pretend the like interest or right; for Sir William by the disposition, becoming debtor in this clause, the creditor thereby was his father's heir of line, viz. his brother; but his brother dying, he himself became his father's heir of line, and so became both debtor and creditor, *et confusione tollitur obligatio*: therefore this pursuer can never claim Sir James his untailzied estate to be made free, because Sir William was actually served heir to Sir James, and so the pursuer cannot be served heir to Sir James, but Sir William; and it is certain, that the confusion is *modus tollendi obligationis*, as effectual as solution, compensation, or discharge; and the obligation being once extinct in Sir William's person, it can never revive more than Sir William as heir of line had renounced that clause, and declared his untailzied estate liable as this estate for his and his father's debts. It was duplicated for the pursuer, That confusion was an absolute extinction, while heirs did succeed in *universum jus quod defunctus habuit* both active and passive; but now when there are distinct heirs and kinds of succession, executors in moveables, heirs of line, and heirs of tailzie and provision, the nature of tailzies over-rules the succession and terms of investiture, so that when provisions and obligations are put upon heirs of tailzie, either in favours of creditors, or of heirs of line, these take ever place when different persons fall to be heirs of tailzie and heirs of line; and the pretence of extinction by that concurrence, doth make only a suspension of these obligations, and not an confusion or extinction, or otherwise such clauses in tailzies would be evacuated and elusory; and here it is clear, that Sir William and all his heirs of tailzie were obliged to pay all his father's debt, and could never object to his father's creditors the benefit of discussion of the executors and heirs of line, but behaved simply to pay, and the law gives them no recourse against the heirs of line; and albeit the pursuer be not immediate heir of line to Sir James, yet she is heir by progress to him, and he that provides for his heirs, is never understood to provide only for his immediate heirs, but for all his subsequent heirs in general; and in this case, Sir William was only heir in general to his father, but his father had considerable rights undisposed, whereupon infetment followed, and wherein the pursuer will be Sir James his immediate [2453] heir of line; and if Sir James had foreseen the case as it now stands, that the second daughter would succeed to the bulk of his estate, worth £10,000 yearly, and married to another family not of his name, and that his eldest daughter, or her daughter, should, by this order of discussion, be excluded from all benefit of his succession, it could not be presumed he would have so ordered, but rather that his younger daughter should have paid his debt out of the tailzied estate, being but a small burden out of such an estate, and so she should have the remainder of the tailzied estate, and the equal half of the untailzied estate, free of burden, and that the pursuer his oye by his eldest daughter with the Earl of Glencairn, should have the half of his untailzied estate free of burden also.

The Lords found the Lady Cardross as heir of tailzie to Sir William her brother, to be liable to pay all the debts in the foresaid clause in the disposition by her father to her brother simply, without the benefit of the order of discussion, and without affecting or exhausting the untailzied heritable estate. See TAILZIE.

No. 1. [2459] The Laird of HAINING v. The TOWN of SELKIRK. February 15, 1668.

Common pasturage in a commonty of a barony of the King's property, was found constituted by a feu *cum pertinentibus, et cum pascuis et pasturis*. It was not necessary that the muir should be particularly specified, being the commonty of a barony.

There being mutual pursuits betwixt the Town of Selkirk and the Laird of Haining, the Town pursuing a declarator of the right of property of the commonty of Selkirk, and Haining pursuing a declarator of his right of pasturage in the said commonty, by virtue of his infeftments of the lands of Haining, which lands are a part of the King's property of the barony of Selkirk; and that this common is the commonty of the said barony, possess by all the adjacent feuars of the barony, and whereof they have been in the immemorial possession;

The Lords did, before answer, ordain both parties to produce all rights, writs, or evidents they would make use of in the cause, and also to adduce witnesses, *hinc inde*, of both their possessions, and interrupting others.

Haining produced a charter by the King, in anno 1505, of the lands of Haining, being a part of the King's property, bearing *cum partibus et pertinentibus, cum pascuis et pasturis*, but not bearing in *communi pastura*, or *cum communiis*, generally or particularly in the common of Selkirk; he did also produce posterior charters of the same lands, bearing *cum communi pastura*, and did adduce several witnesses, proving 40 years continual possession; but some of his witnesses proved interruptions by the town of Selkirk's cutting of divots, cast by him and his predecessors upon the muir.—The town of Selkirk produced their charter of the burgh, posterior to Haining's first charter, bearing that their ancient evidents were burnt by the English, and therefore the King gives them the privilege of the burgh of Selkirk, with the burgage lands thereof, *cum communiis ad dictum burgum spectantibus*, which the King confirms by a posterior charter, giving the town warrant to ryve out 1000 acres of land of the common; they did also produce several instruments of interruption, not only by cutting of the feal and divots, cast by Haining or his tenants, but by turning their cattle off the muir, as proper to themselves, and turning off all the heritors' cattle they found thereupon, and by yearly riding about the whole marches of [2460] the muir. They did also produce a decret, at the Town's instance, against the tenants of Haining, decerning them to desist and cease from the muir; in which decret, Haining's predecessor was Provost of Selkirk, and is pursuer of the cause. They also produced two missives, written by Umquhile Haining, acknowledging that the town had cut his divots, casten upon the head room, and making apology for casting of the same, denying it to be by his warrant or knowledge. They did also produce two acts of the town court, bearing Haining to have desired liberty to draw stones off the common to build a park-dyke, and to cast some divots for his tenants' houses. They did also adduce several witnesses, proving their continual and uninterrupted possession of the muir for 40 years and more; which proved also frequent interruptions against Haining, especially by cutting of divots, and also by turning off his cattle; upon which probation it was alleged for the Town, That they had instructed sufficient right to the property of this muir, and that they had debarred the Laird of Haining and his tenants therefrom, whenever they heard they came upon the same.—It was answered for Haining, That he did not deny the town of Selkirk's right of pasturage in the muir, but did deny they had right of property therein; but that the property did yet remain in the King, as part of the barony of Selkirk, being of the King's annexed property; but that the said property (as to the muir) was now burdened with a common pasturage, belonging to the town of Selkirk, and also belonging to the Laird of Haining, and the other feuars of the barony of Selkirk; and therefore alleged that his charter, in the year of God 1507, being long before any charter, granted by the King to the town, did feu to his predecessors, the lands of Haining, *cum pertinentibus, cum pascuis et pasturis*; and this common being the commonty of the barony of Selkirk, the King feuing a part of the barony, *cum pertinentibus, et pascuis*, did certainly thereby grant all that belonged to these lands, as pertinents thereof, as it was the time of the feu, being then possessed by the King's farmorers; but that they had common pasturage in the muir of Selkirk, is not only presumed

(because it is the common of the whole barony, and possess by all the adjacent feuars thereof), but also by their continual possession since ; for possession 40 years is sufficient to prove all bygone possession, since the right capable of that possession, it being impossible to adduce witnesses to prove possession eight score years since otherways ; and therefore, as in the case of the Lord Borthwick and William Borthwick, decided the 14th of this instant ; * the Lord Borthwick's minute, disposing the lands *cum pertinentibus*, without any word of pasturage, was found to carry common pasturage in the muir of Borthwick, as being a pertinent of the lands disposed the time of the minute, and not reserved ; much more the King disposing the lands of Haining, not only *cum pertinentibus*, but *cum pascuis, et pasturis*, did carry to Haining the right of common pasturage in the common of Selkirk, being the common of the barony ; so that any interruptions done since, cannot take away the right of common pasturage once constituted by the King. And albeit the King had unquestionably granted [2461] a right of property to the town thereafter, yet that could not prejudice the common pasturage of another constituted before ; for if Haining claimed this common pasturage only by possession and prescription, interruptions might be sustained to exclude the same, but he claims it chiefly by virtue of his infeftment, as having right thereto the first day he was infeft ; so that his possession since, albeit troubled by this commonalty, yet preserves his right, that the town cannot allege a total and complete possession, excluding him, and thereby taking away his right by prescription in their favour ; and as to the town's charter *cum communiis*, it contains nothing *per expressum* of this muir, or pasturage therein, nor gives any thing *de novo*, but bears *cum communiis ad burgum spectantibus*, which the King might have given, though there had not been a commonalty within 40 miles ; in the same manner, as the common clauses in all charters, bearing coal and chalk, cuningars or ducats, whether there be any or not ; and the most the town can pretend by their charter, is, that they being a burgh, erected within the barony of Selkirk, *cum communiis*, may therefore claim pasturage with the rest of the feuars of the barony, but cannot exclude them as to the liberty granted by the King, to ryve out a 1000 acres ; it clearly evinceth that they had not the property before ; neither did that take any effect, nor could it, because the common pasturage (constituted to the feuars before) would have hindered any posterior power of tillage. As to the decret against the tenants of Haining, it is in absence, the heritor for the time not being called ; and albeit it bears Haining's predecessor, as Provost, to be present, that will neither import his consent nor knowledge ; country gentlemen being then ordinarily Provosts of towns, who lived not with them ; their affairs at law were managed by their town clerk and Bailies, though the Provost's name behoved to be insert ; neither did this decret take effect, for Haining's tenants never ceased to pasture. As to the letters, they do only acknowledge the town's head rooms ; because, in great communities, it is ordinary for several proprietors to have peculiar places, most convenient for them where they law their cattle, and cast feal and divot, and which doth sufficiently consist with the commonty. As for the acts of court, they can prove nothing against Haining.

The Lords found, That the town of Selkirk had undoubted right of pasturage, fuel, feal, and divot in this commonty, and that they had immemorial possession thereof, without any interruption ; and found that Haining had no right by virtue of possession and prescription ; but found, that by virtue of his charter, anterior to the town's right, he had right to common pasturage in this muir, it being the common muir of the barony : But seeing he did not sufficiently prove possession of feal and divot, but was therein continually interrupted, much more than in the pasturage, and that nothing appeared, that in the time of his original right, the feuars had privilege of feal and divot ; therefore the Lords found that he had no right thereto, albeit common pasturage doth ordinarily carry therewith feal and divot ; yet they found that it was a several servi-[2462]-tude, separable therefrom either by consent or custom, and found that the town should enjoy their head rooms, excluding Haining therefrom.

Stair, v. 1. p. 524.

* Stair, v. 1, p. 523, *voce* PART AND PERTINENT.

No. 15. [2481] ROBERT JOHNSTON, JAMES BEVERIDGE, and JOHN GIBB v. The Duke of HAMILTON. July 30, 1768.

Possession of an uncultivated commonty by pasturage and casting feal and divot, upon a title of part and pertinent, infers a right of common property.

The barony of Kerse, including the muirs of Reddingrig and Whitesiderig, belonged antiently to the abbacy of Holyroodhouse. Prior to 1552, several farms of this barony had been feued out by the abbacy, with part and pertinent. In that year, the remainder were feued to the family of Hamilton, who having afterwards acquired the superiority, again feued out some of them, likewise with part and pertinent.

Robert Johnston, and others, held their rights in this way, partly derived from the abbacy, partly from the family of Hamilton. In a process of division of those muirs at their instance, it appeared, that the possessors of their lands had immemorially pastured their cattle, and cast feal and divot upon the muirs: And that the Duke, besides possessing in the same way by his tenants, had wrought coal in the commonty. The question came to be, Whether the pursuers had a right of servitude or common property?

It was pleaded for the Duke, That he is proprietor of these muirs, except in as far as his right is limited by those of the pursuers. What was conveyed to them as part and pertinent can only be known from their possession; and, as [2482] their possession goes no farther than to pasturage, feal, and divot, their right of course resolves into a servitude for these purposes. It is every where laid down in our law-books, that a servitude of pasturage, feal, and divot, may be acquired by prescription; but, how can this be done but by possession such as that of the pursuers.

It is a rule in such cases, "that, if one of the parties has exercised all the acts of property of which the subject is capable, while the possession of the other has been confined to particular and inferior acts, as to pasturage only, or to casting feal and divot, the first is to be deemed sole proprietor, and the other to have merely a right of servitude"; Erskine, b. 2, tit. 6. By this rule, the Duke's having wrought the coal, seems decisive in his favour. Indeed, in the case of common property, it seems impossible that any one can have a right to work coal; for, as all have a right, *pro indiviso*, to each part of the common subject, no one can exercise his property in such a way as to consume the subject.

Answered for the pursuers; A right of servitude over the property of another is not to be presumed. Where there is no limitation in the grant, the possession of any particular subject, as part and pertinent of another, must be attributed to a title of property, provided the possession has been such as is consistent with the idea of a right property.

The meaning of the rule laid down by Mr. Erskine is this; that, where one has had full possession of the subject, and the possession of another has been limited to particular acts which fall short of the common and ordinary use of the subject, then the last is presumed to have only a right of servitude; and justly, because such possession is in some measure inconsistent with the idea of property. But the subject in question being wild and uncultivated, and no part of it having ever been ploughed by any person interested, the pursuers, while they pastured their cattle and cast feal and divot upon it, exercised all the common and ordinary acts of possession incident to property of that kind. That being the case, they must be understood to have a right of property; and it cannot have the effect to deprive them of this right, either that they themselves have not exercised it in every possible way which they might have done, or that some extraordinary acts of possession have been exercised by others.

It does not follow from this, that a servitude of pasturage, or of feal and divot, may not be acquired by prescription upon a clause of part and pertinent; for, wherever the acts of possession have been so limited in their nature, as not to amount to the common and ordinary use of the subject, there the right will be construed to be a servitude only.

The Duke likewise contended, That, supposing the pursuers should be understood to have a right of property, yet that ought to be with exception of the coal,

upon this ground, that their rights being established merely by possession, they could not acquire a right to the coal, which they never possessed.

[2483] Answered ; Supposing the pursuers were here founding upon a prescriptive right, they would notwithstanding have a right to the coal. Where one has acquired a prescriptive right to the property of land, he, of course, acquires a right to the coal and all minerals, though none of these may have been sought for during the current of the prescription.

But the pursuers do not found upon a prescriptive right ; their rights flow *a vero domino*. The possession, which is proved to have been immemorial, and which of course, presumes *retro* to the date of the original grants, is only founded on, to show what was conveyed by those grants. This, it has been shown, was a right of property, which must also imply a right to the coal. It is of no consequence that the family of Hamilton have wrought coal. Since the possession of the pursuers has been such as both to prove and preserve a right of property, it cannot alter the nature of their right, that another having interest in the commonty has exercised more acts of possession than they.

"The Lords found, That Robert Johnston, James Beveridge, and John Gibb and their predecessors and authors, had immemorially possessed the said muirs a part and pertinent of their lands ; and therefore found, that they had a right of common property in said muirs, and were entitled to a share in the division, effecting to the valued rent of their respective lands ; and found, that, after the division, they should, in all time coming, have the sole and exclusive right of working coal within the limits of the shares of the muir to be set off to them ; and that the Duke should have no power of working coal, or other minerals therein."

Act. M'QUEEN.—Alt. SIR A. FERGUSON.

A. R.

Fol. Dic. v. 3, p. 138. Fac. Col. No. 80, p. 142.

No. 18. [2486] HUGH MILLIGAN v. ALEXANDER BARNHILL. February 8, 1782.

Found, that a brewhouse, with the utensils, of which the half had been sold *pro indiviso*, was such a subject, as that the action *de communi dividendo* was applicable to it. No person can be compelled to remain longer in *communione* than he chooses.

Barnhill was proprietor of a brewhouse, with the brewing utensils, and accessory subjects ; of which he sold one half, *pro indiviso*, to Milligan, who accordingly entered into partnership with him in that trade.

On the dissolution of the co-partnery, Milligan raised an action for compelling Barnhill to comply with one or other of the following alternatives ; either to sell to him at a certain rate his own share, or at the same rate to purchase his share ; or else to concur in exposing the whole to public roup, so that the price might be divided.

Pleaded for the defender, No man can lawfully be deprived of his property without his consent or delict ; nor can he be obliged to part with it, though full value should be offered to him. Only the public benefit of the community could render such an act just ; and even in that situation it must be enforced by a special interposition of the legislature. Hence, a common proprietor, *pro indiviso*, is not to be compelled either to sell his own share, or to purchase that of another. A particular statute, indeed, has authorised the division of commonities ; but, from this enactment, the contrary determination of the common law with respect to that subject, though in its nature divisible, is apparent. By it no such compulsory division is permitted ; except, perhaps, in the single instance of joint property in a ship, on account of the peculiarly hazardous and perishable nature of that interest.

Pleaded for the pursuer, When a subject is in itself indivisible, and when the use or exercise of it, as in the present case, is likewise indivisible, the different interests of joint proprietors can only be rendered effectual by the methods now proposed. The common law, therefore, will authorise such a mode of separating the interests of

parties. If, indeed, the subject may be possessed in common, or prior to any division, though with less advantage than after a separation, it does not seem that, at common law, this can be enforced; and, for that reason, the statute 1695 was necessary for authorising the division of commonities. But, otherwise, the common law would have given a sufficient sanction; as is laid down both by Lord Stair, b. 1, tit. 7, § 15, and by Lord Bankton, b. 1, tit. 8, § 40: For when the last-mentioned author takes notice of the case of ships, it is as an example of this general rule; not, according to the defender's observation, as an exception from a supposed contrary one. The same principle obtained in the Roman law; l. 55, ff. *De famul. erciscund*; l. 1, 3, *Cod. Comm. divid.*; Voet, ad tit. ff. *De fam. ercisc.* No. 2.

[2487] In the action *pro socio*, had the division now claimed been sued for in that process, the defender would have had no plea.

Observed on the Bench, No person, in such a case as the present, is to be compelled to remain longer in *communione* than he chuses. Long before the act 1695, the brief of division was known respecting property in lands. That statute, with a few to the improvement of agriculture, refers to the peculiar nature of commonities, and does not relate to common property in general. With regard to this, as in the case of heirs portioners, such remedies as those here proposed, must always have been competent.

This case was reported by Lord Kames; and afterwards, on a hearing in presence. "The Lords repelled the defence." See COMMON INTEREST.

Act. MACLAURIN.—Alt. WIGHT.—Clerk, MENZIES.

S.

Fol. Dic. v. 3, p. 139. Fac. Col. No. 30, p. 51.

No. 3. [2496] The ARCHBISHOP of ST. ANDREWS v. The MAGISTRATES of GLASGOW.
November 24, 1685.

A burgh attempted reduction of a deed of their Magistrates, alleging a burgh was on the footing of a minor. This found irrelevant, but action reserved against the Magistrates.

The Archbishop of St. Andrews having charged the Magistrates of Glasgow, upon a bond of 20,000 merks, granted to him when he was Archbishop of Glasgow, by their predecessors Magistrates; they suspended, upon these reasons, 1mo, It was acknowledged that the bond was granted for a tack of the teinds of Glasgow; and the town being minors, they ought to be reponed, in so far as they were prejudged and leased by the deed of the Magistrates; and that, true it was, they were prejudged by the granting of this bond, because the teinds set were not of an adequate value to the sum contained in the bond; 2do, That the tack was no sufficient security, it being set by the bishop, by way of anticipation, before the expiring of the old tack: As also, that the entry of the tack was *collatum in indebitum tempus*, viz. at Michaelmas 1684; whereas the present bishop's *conge de Eslire* came down before that time, so that the charger was no more bishop there. It was answered for the bishop, That there was no lesion in the tack, being of a far greater value than the sum in the bond. But, 2do, It was not relevant, the transaction being betwixt him and the Magistrates, who were *majores & scientes*, and denied that the town was in the case of minors. And, 3tio, That the nullities of the tack were not competent to be proponed by the Magistrates, there being no eviction or distress, and that they could not quarrel their own right.—The Lords repelled the first reason, reserving action to them against the Magistrates for the time; they repelled likewise the second reason, the tack not being yet quarrelled nor reduced: And also, in regard they would not allow them to quarrel their own tack.

Fol. Dic. v. 1, p. 156. Pres. Falconer, No. 104, p. 73.

No. 4. The MAGISTRATES of EDINBURGH v. JOHN PATERSON. February 1, 1690.

Magistrates had granted a tack for two 19 years. This was contrary to act 36th Parl 1491. But there had been a practice of obtaining the consent of the Convention of Burghs to such tacks, which it was said validated them. The Court, in reduction, allowed, before answer, a proof of the custom. The pursuer had likewise alleged, that the subject was let at an under-value. A proof of the value was ordered.

Arbruchell reported the Magistrates of Edinburgh v. John Paterson, for reduction of a feu, granted to him by the Town in 1684, of a piece of [2497] ground in the links of Leith, whereon he has built sundry houses, and pays five merks of yearly feu-duty, besides stent and excise; as also, for reduction of a tack then set to him, of Leith links, for two 19 years, for 300 merks by year. The reasons of reduction were, 1mo, The tack is *ipso jure* null, for it wants the act of Council, its warrant. 2do, By the 36th act of Parliament 1491, the royal burghs may not set tacks longer than three years of any part of their common good, or town rents, without they be ratified and approved by the convention of burghs. 3tio, It is set with evident lesion, for the links are worth 900 merks yearly; and, at a roup, Archibald Johnston bade 550 merks for them, and yet Paterson, the defender, has them for 300. Answered to the 1st, The warrant is standing in the town's books, and by a diligence he will recover it from their clerk. To the 2nd, The act of Parliament is in desuetude; and though acts of convention are produced, ratifying such tacks, yet they are ancient and of an old date, and every day the Town Council of Edinburgh are setting tacks for longer space than three years, as the shops about St. Giles's church, the burgh-loch, &c. To the 3d, Johnston's offer was but *in emulationem*, and when he was put to it he resiled; so it was just the defender should have the benefit of the first tack, especially seeing, at the ish of the tack, the town were to have the houses he had built; and if they were not satisfied, he was content to renounce, on their refunding his expenses and meliorations. Replied, A two 19 years' tack was *species alienationis*, which should not be allowed to administrators, who are but as tutors and curators to the burgh; and *esto* Johnston resiled from his offer, it was a malversation in the Magistrates to set it cheaper than the roup. Some of the Lords were for trying the value of the links before answer, that if there was a great disproportion between his tack-duty, and what it might really give at that time, the Lords might cognosce if there was lesion. But the plurality repelled the reasons of reduction, and sustained both the feu and tack.

The Lords afterwards allowed the value of the links to be tried before answer, and the custom of the convention of burghs ratifying tacks.

Fol. Dic. v. 1, p. 156. *Fountainhall*, v. 1, p. 818.

No. 7. [2499] ROSS v. The MAGISTRATES of TAYNE. February 13, 1711.

By statute, magistrates who grant bonds *virtute officii* without the warrant of a previous act of council, are bound to relieve the town, without prejudice to the right of the creditor. A bond by magistrates to the provost, without the warrant, found not actionable, until proof shown of the onerous cause.

Walter Ross being provost in 1694, he gets a bond from them for £602 Scots. Elisabeth Ross his daughter confirms this sum, and with concurrence of her husband, pursues the present magistrates for payment. Alleged, 1mo, The bond is null, because not only by acts of the convention of the royal burghs, but also by the 28th act of Parliament 1693, all things relating to the alienation of their common good, or contracting debts (which may be a ground to affect them by diligence), must be done in a full convention of the town council, both ordinary and extraordinary, with their deacons of crafts, and a previous act made, bearing the causes and uses for which it is borrowed; but so it is, this bond is not signed by the whole council in a

all convention ; nor is there any previous warrant ; and which is the more necessary, that it was done in favours of one who was actually provost and chief magistrate at the time. Answered, This bond is signed by nine of the town council, which is the plurality, the whole consisting but of fifteen ; and the certification of the act of Parliament is not the nullity of the deed, but that the subscribers shall be personally liable for the debt themselves, but prejudice of the creditor's right. Alleged, 2do, This bond is still null ; for the narrative and the obligatory part are wholly discrepant and contradictory. The narrative bears, that the town was owing 700 merks to one Hew Bayne, whose right Provost Ross had acquired ; and yet the bond is granted for £602, being 200 merks more. Answered, This is a pure mistake in the writer, by not mentioning the annualrents, which truly made up the £602. Alleged 3tio, We must have compensation ; for the Provost, while [2500] in office, intromitted with more of the town's money than this came to ; and craved a diligence to prove this reason, being *in facto*. Answered, Ought to be repelled, as not instantly verified, as the act of Parliament, 1592, requires. Replied, This does not hold in administrators ; as for instance, tutors and curators cannot pursue their pupils for any debt owing them till they count ; so no more can a magistrate *ante redditas rationes* : and though, in large burghs, the town-treasurer intromits, yet in petty burghs, the provost is the main administrator, manager, and intromitter. The Lords thought there was a great difference betwixt a bond granted by a town to an extraneous person, and to one actually in office at the time, who should have been more exact in seeing the same legally done ; and therefore found the Provost's daughter, now pursuer, must yet prove the onerous cause of contracting that debt, and that it was *in rem versum*, and converted to the town's utility and profit : For law had restrained them from gratifying their magistrates by unnecessary donations beyond their expenses in managing their business ; otherwise it might encourage them to mispend the town's common good in taverns, or other extravagant compliments : And thought that the certification of the act of Parliament, reaching the granters of such bonds more than the receivers, took not place here ; because he was upon the matter one of the granters himself, being provost at the time, and so both debtor and creditor ; and the onerous cause behoved to be instructed : And were of opinion, if he had any intromission with the town's common good, the same might be taken in here, to found a compensation, and would not put the town to seek it by way of action. For *quod statim potest liquidari pro jam liquido habetur*.

Fol. Dic. v. 1, p. 156. Fountainhall, v. 2, p. 636.

No. 8. [2501] M'GHIE and Others v. MAGISTRATES and TOWN COUNCIL of EDINBURGH. December 16, 1735.

In a reduction of a tack of the town's impost duty, set by the magistrates or town council of Edinburgh, upon this ground, that it was for an undervalue without a public roup ; the Lords found, that the magistrates were not obliged to set the tack by way of public roup ; and found, that the tacksmen having taken the tack from the magistrates, who had power to set the same to them, the reasons of reduction were not relevant against them, and therefore repelled the same, and assoilzied the tacksmen ; reserving to the pursuer to insist against the magistrates for mal-administration as accords.

Fol. Dic. v. 1, p. 156.

No. 13. [2509] L. DRUMLANRIG v. BAILIES of HAWICK. January 15, 1624.

Magistrates of a burgh against whom a decree is taken as representing the town, cease to be liable after expiring of their office, but diligence may be followed forth against the succeeding magistrates, the same way as if the decree had been taken personally against them.

The Laird of Drumlanrig having obtained decret before the Secret Council v. the Bailies of Hawick, then being in office, and the clerk, decerning them as having

no right by virtue of their infeftment, to impose any taxes upon their neighbours by their acts of court, to desist from doing of the same in time coming; and the decret being transferred in the Laird of Drumlanrig's person, as succeeding to his right, who recovered the sentence; charges the Bailies, against whom the decret was first given, after the expiring of their office, and after that new Bailies were placed and their clerk, to obey the decret, which was suspended. In the discussing of the which suspension, The Lords found, that the said decret of Secret Council might have execution, seeing the same was transferred as said is, by letters of hornings and summary charges, without any other transferring, or longer process against the Bailies, and next succeeding magistrates, or any others bearing office before them, they being an university, and the first sentence being given against the defender therein as Bailies; for albeit their office ceased by the new yearly election, whereby they could not be further charged as representing the body of the town, yet it was not reason that the execution and force of their sentence should be frustrated; but the Lords found the succeeding magistrates stand subject to obey the same, and that the said sentence ought also to have execution against the same persons against whom it was first given or transferred, *ad hunc effectum*, viz. to cause themselves desist and obey the sentence, but not to take the burden for the body of the town; and also found, that the clerk was not a member, to be reputed of the council, or as a magistrate, against whom any charges could be execute upon such decreets given against the magistrates; and therefore suspended the letters and charges executed against him; and in respect the said decret was given by the Lords of Secret Council against the party then compearing; the Lords of Session would not discuss the nullity, alleged against the same by way of sus-[2510]-pension, viz. that it was given by the Lords Secret Council, who were not judges competent thereto. See SUMMAR DILIGENCE.

Clerk, SCOTT.

Fol. Dic. v. 1, p. 157. Durie, p. 97.

No. 20. [2515] PROVOST and MAGISTRATES of GLASGOW v. JOHN BARNS, late Provost there. March 3, 1685.

Magistrates cannot alienate the common good gratuitously.

In a pursuit at the instance of the Magistrates of Glasgow v. John Barns, their late Provost, for payment of £1700 he was owing to the town per bond.

Alleged for the defender, 1mo, He is discharged of the said bond by an act of Council, and *par in parem non habet imperium*; 2do, The discharge was granted for the onerous cause of good services done to the town; and it is ordinary to gratify the good services of Magistrates.

Answered, Magistrates are but administrators of the town's common good, and cannot, more than curators, gift away any part on't gratuitously; and if there be any such custom, it is but *vetustas erroris*.

The Lords decerned against the Provost.

Fol. Dic. v. 1, p. 157. Harcarse (MAGISTRATES), No. 683, p. 193.

No. 24. [2525] M'DOWAL of Castlesemple v. MAGISTRATES of GLASGOW.
November 18, 1768.

The magistrates of a burgh have a power to alienate the town's property.

In the year 1668, the Magistrates and Town Council of Glasgow purchased the lands of Provan, and were infeft holding of the crown. The charter contains a clause,

annexing and incorporating the said lands into the burgh of Glasgow, to remain inseparably therewith in all time coming. These lands were all feued out from time to time; and at last the town being oppressed with debt, sold the whole feu-duties to M'Dowal of Castlesemple, at a price above 40 years purchase. The purchaser, doubtful of his title, brought the cause into the Court of Session by suspension, insisting that magistrates and a town council have no power to alien the common good of their town. And in particular, that the Magistrates and Town Council of Glasgow, stand prohibited by the charter above mentioned to alien the estate of Provan.

With respect to the first point, a royal burgh is a legal corporation that can buy and sell land. The common good is the property of the burgh; and was so from the beginning, even when the property of other feudal holdings remained with the superior, and the vassal had only the usufruct. A charter to a corporation, perpetual *sua natura*, transfers the property entire: A charter to a family transferred only the usufruct; because originally upon extinction of the family the superior's property became unlimited. And that the full property belongs to the town, is vouched; for the royal burghs have all along been in the use of granting feus, which an *usufructuarius* cannot do. And their power of contracting debt, which is acknowledged by statute, implies power to alien. It was never doubted that a town's common good can be adjudged for debt due by the town; and it would be singular indeed if legal diligence could not be prevented by selling land to the creditor. It is true that magistrates who act for the town, are in the common case of tutors, curators, or other administrators: They are trustees only; and if they betray their trust, they are subjected to the controul of a court of law; and to that controul they cheerfully submit.

As to the particular objection with respect to the lands of Provan, we are to consider whether the annexing clause be the deed of the King granting the charter, or of the magistrates. In an original grant of land, it would be held the deed of the superior; which the town, accepting the grant upon that condition, is bound to submit to. But in the present case, it was a charter of resignation only, which the superior could not limit. Therefore it was a limitation proceeding from the town itself; and as no obligation is created by it to any third party, it is no more but a resolution, which is alterable at pleasure.

The Magistrates did not pretend that they were subject to no controul in alienating the town's property. They were willing and desirous to justify their proceedings to the Court of Session, by showing that the sale in question was beneficial to the town, and were willing at the sight of the Ordinary to apply the price for payment of debt.

[2526] "The Lords having advised the memorials, and additional memorials, and having heard parties, they found, That the lands of Provan, purchased by the town in 1668, are alienable by the Magistrates and Town Council; and remitted to the Ordinary to see the price applied for payment of debts."

Fol. Dic. v. 3, p. 140. Sel. Dec. No. 263, p. 336.

No. 25. [2527] **MAGISTRATES and TOWN COUNCIL of the Burgh of PITTENWEEM v. ROBERT and WILLIAM ALEXANDERS, THOMAS MARTIN, and Others.** July 15, 1774.

A bond granted by magistrates in office, for a sum to defray the expense of their own defence against a complaint upon the head of bribery and corruption (in which the complainers prevailed) to the person employed by them to conduct that defence, and by him assigned to the person whose political agent he was, and where the principal was in the knowledge of corrupt stipulations made on his behalf with those magistrates, on which the complaint was founded, was found not binding as a debt upon the burgh.

Upon the death of Sir Harry Erskine, Baronet, previous to Michaelmas 1765, a competition arose for the district of burghs, of which Pittenweem is one, Sir John

Anstruther, Baronet, and Mr. Robert Alexander, assisted by his brother and partner William, having severally declared themselves candidates to represent that district in Parliament; on which occasion, John Borthwick, merchant in Edinburgh, was constituted by Messrs. Alexanders their political agent for the burgh of Pittenweem.

The election of Magistrates and Council in the Burgh of Pittenweem, at Michaelmas 1765, being over, a complaint was brought before this Court, upon the statute 16th of his late Majesty, and also an ordinary action of reduction at common law, at the instance of Peter Ramsay and Andrew Wilson, constituent members of the Michaelmas meeting, and certain other burgesses and inhabitants, concluding to void that election, upon the ground of bribery and corruption practised on the council by Messrs. Alexander and their agents; and, in particular, that these gentlemen had entered into a formal agreement with Bailie Martin, the eldest magistrate, for himself, and authorised by his brethren of the magistracy and council, to pay off the debt of the burgh, amounting to about £400, besides other stipulations; and that, on the other hand, Bailie Martin engaged, in behalf of his brethren, that the council should be modelled according to Mr. Alexander's pleasure at the ensuing election, and that they should support the interest of Robert Alexander, who was the real candidate, and vote for him to be their representative in Parliament.

After the summons was executed, the magistracy and council, called as defenders, assembled themselves, and resolved, by a majority of votes, to defend against the same, though Peter Ramsay for himself, and all such as should adhere to him, protested that there should be no defence; and they chose the foresaid John Borthwick for their agent, by an act of council 9th December 1765, empowering him to choose advocates to defend the town in the above [2528] processes, and, if thought necessary, to appeal to the Parliament for redress; and the Bailies and Treasurer to give security to such as shall advance money for the above purpose, and for defending themselves and the town council.

Peter Ramsay protested against borrowing any money, on the town's credit, to defend in the aforesaid process.

Pending the said process, to which there was superadded a complaint against the election 1766, the answers whereto were in the name of both the Messrs. Alexanders, as parties to the cause, and other members of council, an act of council was made in October 1766, purporting, that there was laid before the council an account due to John Borthwick, agent appointed by the magistrates and town council of this burgh on the 9th December last, being the expense laid out by him hitherto, in defending against the reduction and complaint, &c., which account the council had examined, and find the amount to be £477, 10s. 4d. Sterling, and that the same is a just debt affecting the community and common good of the burgh; and, in respect the town has not ready money to pay the said account immediately, the magistrates and council unanimously empowered Thomas Martin, &c., three of the present bailies, James Martin, the present treasurer, and Alexander Hamilton, one of the present councillors of the burgh, to grant a bond in common form, binding themselves and their successors in office, and the community of the said burgh, and common good thereof, to pay the said sum to Borthwick, his heirs or assignees, against Candlemas then next, and interest from this date. And, in consequence of this act of council, Bailie Martin, &c., did execute a bond to Borthwick in the above terms, 16th October 1766.

The bond was conveyed by Borthwick to Mr. Robert Alexander, by assignation, bearing date the 11th November 1766, upon the narrative, that Mr. Alexander had then instantly made payment to him of a certain sum of money equal to the sum thereby assigned.

The cause having at length come to be advised, the Court "found the complaint competent and relevant; and found, that the election of the magistrates and council of the burgh of Pittenweem, made by the respondents on the 10th September 1765, was brought about by means of bribery and corruption, and therefore found the same null and void, and reduced," &c. And, with regard to the other complaint respecting the election 1766, the Court, of same date, pronounced another interlocutor, sustaining the reasons of reduction of that election; which judgments were both affirmed in the House of Lords.

Upon application to the King, in Council, warrant was granted for electing a new magistracy and council by a poll of the heritors and resident burgesses: Accord-

ingly, an election was made in this manner ; and this new magistracy insisted in the present action against Mr. Borthwick, Messrs. Alexanders, Mr. Martin, and the other subscribers, concluding for reduction of said bond, and the acts of council in virtue of which it was granted.

[2529] The pursuers laid their challenge, first, upon the circumstances of the case, and the very consequence in point of precedent, if it shall be understood henceforth to be a rule, that a corrupted set of magistracy, in connivance with the corrupters, may defend every challenge, and maintain themselves in possession, right or wrong, at the expense of the burgh. 2dly, That even if Mr. Robert Alexander could be considered as a third party, unconnected with the burgh, the power of magistrates to borrow money, or to lay it out for the community, of which they are no more than administrators, is limited by the nature of the thing, and by express statute, act 28th Parliament 1693.

At advising the cause, the two points stirred were, 1mo, Whether it was proved that Robert Alexander was in the knowledge of the stipulation that was made on his behalf ? And, 2do, Supposing that he was in the knowledge of it, whether that was sufficient in law to reduce the bond ?

The Court were satisfied upon the first point, that there was no full evidence of Mr. Alexander's being in the knowledge of the said stipulation, and likewise of the conclusions against the signers of the bond, when he advanced the money, for the special purpose of defending them, and not the burgh ; and, upon all these grounds,

“ Found, That the community was not liable for the contents of the bond in question, and reduced the same, so far as relates to the community ; and found the defenders liable in full expenses ; reserving to Robert Alexander action against the signers of said bond, and to them their defences, as accords.”

Act. ILAY CAMPBELL.—Alt. M'LAURIN.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 140. Fac. Col. No. 127, p. 339.

No. 7. [2550] Sir WILLIAM MAXWELL of Monreith v. Creditors of Sir GODFREY M'CULLOCH. November 15, 1738.

Found, that a creditor in more debts than one, has the option to use either he chuses, in compensation.

In a question of compensation and recompensation, the Lords abstracted from the specialties that were pleaded in the case ; and the dispute turned upon the general point, Whether compensation was the operation of the law or of the Judge ? Some of the Lords were for the first, that it operated *ipso jure, eo ipso*, that the parties became mutual creditors ; and appealed to Stair, who lays down the rules for compensation and recompensation, as received with us, from the civil law. Others maintained, that compensation had no effect till it was proponed and applied by the Judge ; that when compensation is sustained, our law, upon principles of equity, gives it an operation *retro* to stop the course of annualrent, and in that sense only is the common maxim to be understood, that compensation operates *retro et ipso jure*. Upon these principles, it was urged to be optional to the party to propone it or not, or to propone it upon one or other debt ; and supposing one debt better secured than another, why should he not be entitled to compensate upon the debt least secure ? The vote was stated in these precise words, “ Whether, to the party creditor in more debts, it was optional which of them to make use of by way of compensation ? ” and it carried in the affirmative.

Fol. Dic. v. 4, p. 158.

* * Kilkerran observes the same case thus :

It had been generally held, that how soon parties became mutual creditors, compensation did that moment take place *retro et ipso jure* ; in other words, that it was the operation of the law : And such had been Lord Stair's notion of it, appears from

his having laid down the rules for compensation and recompensation as received with us from the civil law.

But, upon a more mature consideration of the nature of compensation, and the reason of the thing, in this case, a very different notion prevailed; namely, that compensation is not the operation of the law, but of the Judge; and that it has no effect till it is applied by the Judge: That it is true, when it is applied, the law, upon principles of equity, gives it effect *retro* to stop the course of annualrent; and that in that sense only, is the common maxim to be understood, that compen-[2551]-sation operates *retro et ipso jure*; and this being so, that it is optional to the party to plead it or not, or, if he be creditor in more debts, to plead it on which of them he pleases: And that, as this was agreeable to principles, it was just in the reason of the thing: for, where one lends his money to his creditor, and for which the creditor, in place of applying it in payment, has agreed to give his bond for it, why should the law put it out of his power to pay what he owes, and continue his money so lent in his former creditor's hand, where he thinks it a good security? Or, where one is creditor in more debts, why should he not have it in his power to compensate upon the debt which is least secure?

And, accordingly, in this case, where the last happened to be the point in dispute, the abstract point was determined, that a party, creditor in more debts, has it in his option which of them he shall make use of by way of compensation.

Kilkerran (COMPENSATION), No. 1, p. 133.

No. 23. [2566] JOHN SETON v. —. November 22, 1683.

In a pursuit on a liquid bond, compensation was pleaded on a charter party betwixt the pursuer and the defender's husband. The Lords decerned for payment of the bond, but superceded extract for 3 or 4 months, that the defender might have an opportunity to liquidate her ground of compensation, by proving, that her husband had performed the voyage.

John Seton in Aberdeen, charges the relict of —, on a clear bond; alleged, her husband, by a charter party with the said John, was creditor to him for the freight, because he had plied the voyages. Answered, This was not *compensatio de liquido in liquidum*, because his plying the voyages abode probation; which answer, the Lords having sustained, they offered to prove the plying the voyages by the charger's oath, which is an instant verification; and the act being thus extracted, yet the Lords on a new bill, allowed it to be proven *prout de jure*; seeing *quod mox potest liquidari habetur pro jam liquido*; they only decerned, superseding extract for three or four months, that if the debt be liquidate betwixt and that time, then the compensation was to be received; which was reversing the act, stopping a liquid debt upon an illiquid compensation; and allowing a term to liquidate it, which is *agere id indirecte quod directo fieri prohibetur*; and though it be materially just, yet it is a great relaxation of our antient form. See the contrary decided in *Durie*, 1st December 1626, *Balbegno*, No. 20, p. 2564; and 6th December 1622, *Campbell*, No. 21, p. 2565.

Fol. Dic. v. 1, p. 160. *Fountainhall*, v. 1, p. 244.

No. 24. JAMES BROWN v. Mr. JOHN ELIES. January 14, 1686.

Compensation being proponed against a charge of a liquid debt, on the pursuer's father's intromission with a sum of money belonging to the suspender, the Lords allowed the suspender 5 weeks to prove his ground of compensation.

Mr. John being charged on a clear liquid bond granted by him to umquhile William Brown, and assigned by him to his son James; he craved compensation, because

William Brown the cedent was debtor to him, in so far as Elieston entrusted his name in an assignation of a debt owing him by Gordon of Buckie, and Macintosh of Borlam, and which trust did appear from his own compt-books, and an oath he had given in another process; and it was offered to be proven, that by virtue of this trust he had uplifted and intromitted with sums of money equivalent to this charged for. Answered, That compensations by the 143d act, Parl. 1592, must be *de liquido in liquidum*, and instantly verified, which this was not; and therefore the letters behoved to be found orderly proceeded, and his compensation reserved to him as accords. Replied, That brocard of the instant verification of compensations is not to be understood in *rigore Judaico*, but *cum aliquo temperamento*; lawyers laying down this for a principle, that *quod statim vel intra breve tempus illiquidari potest habetur pro jam liquido*; as *cigendus pro cincto*; *et dies inchoatus pro completo in favorabilibus*; and that *Menochius*, lib. 2, centur. 1, casu 14, debating how long time ought to be granted for liquidating a debt whereon compensation is craved, tells, that *Bartolus ad l. 46, § 4, D. de jure fisci*, allows two months; but he places it in *arbitrio judicis*; and the Lords, in the case of Seton, No. 23, allowed three months; and though this pursuer be an assignee, yet the compensation must meet him, whe-[2567]-ther the assignation to his son be gratuitous, or onerous, for relief of cautionries; it being undoubted law, that *exceptio quæ obstat cedenti obstat et cessionario*; the reason whereof is, *quia exceptio compensationis non coheret personæ sed rei*, and so extinguishes the debt *pro tanto, et transit etiam in singulares successores*. The Lords, on this debate being reported, would not tie Elieston to prove instantly his ground of compensation, though it was his reason of suspension; but being *in facto*, allowed him till the first of February to liquidate the same. And on a bill they prorogated it to the 20th of March.

November 20.—Mr. John Elies, in his cause with Brown, mentioned 14th January 1686, gets a new diligence against M'Intosh of Borlam, to produce the writs for proving the compensation, though the day was elapsed, and that to the 10th of January; because lying in the Highlands, he did not obtemper the laws. I think it were a just certification to force witnesses to compear, and discover the truth (which is a duty introduced in societies *jure gentium*) and for parties to produce writs, that if they do not, they shall be liable for the debt, and damages to the party.

Fol. Dic. v. 1, p. 160. Fountainhall, v. 1, pp. 391, 429.

No. 25. MUIR and MULLIKEN v. KENNEDY. December 8, 1697.

A minor who was the heir of a cautioner, being pursued, and getting a day to prove payment, and then also proponing compensation of a sum not liquidated, the Lords in this favourable case, and because the pursuer was delayed however, allowed the minor a term to prove his compensation.

Kennedy of Kilkenzie being pursued by Muir and Mulliken for a sum contained in his father's bond; this exception was proponed, that he being minor, and only the heir of a cautioner, he offered to prove payment made by the principal or cautioners, and a term is assigned him to that effect; now he craves compensation on an aliment, that Muir staid several years in his father's house. Answered, This is not liquid, as all compensations ought to be. Replied, By the 143d act 1592, compensations verified before giving of decreet are allowed; *ita est*, he will liquidate this compensation before sentence; neither does this delay, because I have got a term however to prove payment; and Stair, I. 18, of liberation from obligations, is clear, that if a compensation be instructed, though by witnesses, before the other probation can be closed, that it ought to be received. The Lords, considering the favour of this case, being a minor and the heir of a cautioner, and the pursuer delayed however, they gave him a term to prove his compensations, seeing *quod statim potest liquidari habetur pro jam liquido*; yea, the Lords have allowed this without these favourable circumstances.

Fol. Dic. v. 1, p. 161. Fountainhall, v. 1, p. 800.

No. 28. [2569] The Earl of NORTHESK v. The TUTORS of GAIRNS, and DUNGLAS and REIDCASTLE, his Cautioners. February 5, 1670.

A tutor and his cautioner being charged for payment of a bond granted by them, with relation to the pupil's affairs, were allowed to compensate upon a debt due to the pupil by the charger.

Northesk, as heir to his father, pursuing upon a bond granted by the Tutor of Gairns as principal, and Dunglass and Reidcastle as cautioners, for the sum of 10,000 merks; it was alleged for the defenders, That the bond, which was the ground of the pursuit, was given in place of another bond of 12,000 merks, granted to his father the Earl of Ethie, and which was satisfied by the sale of the lands of Bygaves, it being accounted as part of the price, as might appear by a discharge of all debts due by the old Laird of Gairns, of the date of the new bond granted to the pursuer; and by the disposition of the lands of Bygaves, bearing, £6000 to be retained in Northesk's hands, which he declared he would allow in the first end of the old bond. As, likewise, it being alleged, that the defenders ought to have compensation of the said sum of £6000, retained as a part of the price, notwithstanding whereof, this new bond pursued upon was granted; it was answered, That compensation was not liquid, as not being *inter easdem personas*; seeing the Laird of Gairns could not pursue for repetition in case he had made twice payment, both by giving bond and allowing so much in the first end of the price of the lands; seeing this bond was not granted by the Laird of Gairns, but by the Tutor and his cautioners *propriis nominibus*: Likewise, the pursuer did declare, that he did insist against the cautioners only and not the principal, who was Tutor of Gairns; and albeit he should insist against the Tutor, yet that he could not compensate for a debt due to his pupil. The Lords were clear to find, that the cautioners of the Tutor might compensate upon any ground in law that was competent to the principal; and that a tutor, having power to uplift his pupil's moneys, might thereupon compensate. But because the grounds of the compensation, and the trial of the transaction, required a further consideration, and that witnesses *ex officio* behoved to be examined; therefore to this effect that Northesk might come in, *pari passu*, with several comprisers who had comprised near a year since, they did decree for payment, but ordained suspension to be granted without caution or consignment, wherein the allegiance of compensation upon the grounds foresaid might be further cleared.

Fol. Dic. v. 1, p. 161. Gosford, MS. No. 247, p. 102.

No. 30. [2570] TOWN of ABERDEEN v. Mr. PATRICK STRACHAN. July 1, 1709.

A debtor who was cautioner for his creditor, found entitled to retain; and this found pleadable by the cautioner's creditor.

Mr. Patrick Strachan being infett in the lands of Ruthrieston, and pursuing for mails and duties, compearance is made, and preference craved for the Town of Aberdeen, and master of their mortifications, who had also right to the same lands, wherein these points came to be decided. The first was, a debtor being cautioner for the creditor in another sum, if his creditor crave payment, law gives him retention *quoad concurrentem quantitatem*, aye, till he be relieved, because, on the faith of that debt I became cautioner, otherwise I would not have bound for you; but the strait here was, that the retention was craved by a creditor of that cautioner, who had not affected the relief *specialitum*, and directly. But the Lords found it was transmissible and competent to the cautioner's creditor, as well as to himself; though the Town alleged, retention was a weaker and more personal right than compensation, because the last *ipso jure* extinguishes; whereas the first is only *exceptio doli, quæ soli personæ coheret et non rei*; which the Lords repelled, seeing law says, *etiam ob chirographariam pecuniam pignus retineri posse*. The second point was, Whether retention, on the head of my being cautioner, may be proponed against the creditor himself, but likewise against his singular successor for an onerous cause; which the Lords also sustained, seeing

personal exceptions against the cedent, when proven by writ, are also competent against the assignee, as was found, 18th February 1662, Lord Balmerino *contra* Earl of Bedford, *voce* MUTUAL CONTRACT. The third question was, Whether the cautioner's creditor, who has right to the retention and relief, may not, by inhibition, hinder his debtor to renounce his relief of that debt, or to grant a new corroborative security to a singular successor? And it was urged for the Town, that however backbonds, arrestments, and other personal diligences can affect personal rights; yet the Town being infeft, none of these can affect their real right; and for this they cited 25th March 1629, Earl of Buccleugh, and Young (No. 55, p. 2204, *et infra h. t.*). But the Lords also repelled this, and after some reclaiming bills, having adhered, the Town of Aberdeen, who are a wealthy flourishing corporation, gave in an appeal and protestation for remeid of law to the Parliament. See APPENDIX.

Fol. Dic. v. 1, p. 161. Fountainhall, v. 2, p. 509.

No. 31. [2571] Mr. JOHN HAY, Son to the late Parson of Peebles *v.* ARCHIBALD CRAWFORD of Ardmillan. February 20, 1712.

An heir, pursued for his predecessor's debt, was allowed to compensate it with a debt owing by the creditor to the defunct, though that being a moveable debt, belonged to his executors, and not to the heir who proponed compensation.

In the action at the instance of Mr. John Hay, as having right by progress to several bonds granted by old James Crawford of Ardmillan to his creditors *v.* Archibald Crawford as heir to the granter; the defender proponed compensation upon the pursuer's author's intromission with moveables and other effects belonging to James Crawford the debtor, to the value of the sums pursued.

Answered for the pursuer, The defender, who is heir to Ardmillan the debtor, cannot propone compensation upon the moveables and effects aforesaid; because these belong to Ardmillan's executors to whom the intrommitter is liable; and no person can compensate a debt with a subject he hath no right to; for compensation operates only extinction *ipso jure si applicetur*: And a man cannot apply a debt he hath no right to, for compensating what he owes to the debtor, more than he can exact another man's money to pay his own debt.

The Lords found, That the compensation that was competent to the deceased James Crawford of Ardmillan, is competent to his heir.

Fol. Dic. v. 1, p. 161. Forbes, p. 591.

No. 32. RAE and FERGUSON *v.* CLERK of Glendorch. June 30, 1738.

In a competition, compensation was sustained against an adjudger, upon a debt due by him to the common debtor, although the common debtor himself could not have pleaded it, not having proponed it in the process of constitution against him.

In a competition among creditors, compensation was sustained against an adjudger, upon a debt due by him to the common debtor, though it would not have been competent to the common debtor himself, who neglected to propone it in the process of constitution carried on against him by the adjudger; it being urged for the other creditors, That they were entitled to propone this compensation during the said process of constitution, and they could not be cut out of their interest by the decree in which they were not made parties; though here, it was answered for the adjudger, That to allow creditors to propone compensation after the debtor's privilege is at an end, in whose name only they can plead, would be the same as allowing a creditor to reduce upon minority and lesion, after the lapse of the *quadriennium utile*.

Fol. Dic. v. 1, p. 161.

* * Kilkerran reports the same case :

July 28, 1738.—William Murray of Hydwood, after he was bankrupt, having taken from John Murray of Townhead, his debtor, a bond for the debt, in name of James Murray his son ; after William's death, Clerk of Glendorch, [2572] one of his creditors, confirmed the same as *in bonis* of William the father ; and, upon that title obtained decree, finding that James was under pupillarity, and *in familia* with his father at the time of granting the bond, and that the sums therein contained were *in bonis defuncti* ; and therefore reducing the said bond granted by John to James Murray, and declaring the same to belong to Clerk the pursuer, as executor-creditor confirmed to William Murray the father, and decerning John Murray to make payment to the pursuer of the sums contained in the said bond.

Upon that decree, Clerk having led an adjudication against John Murray, of his lands of Townhead, and thereupon brought an action of mails and duties, and reduction of a prior adjudication, led at the instance of John Rae, and from him acquired by James Fergusson, now-designed of Townhead, it was objected by Rae and Fergusson, the defenders, that the debt, which was the ground of the pursuer's adjudication, was extinguished by compensation, in so far as, at the time that John Murray of Townhead was prevailed upon to grant the bond to James Murray the son, for the sum he owed to William the father, the said William was owing to John a greater sum ; and though it was true, that John, by granting his bond to James for the debt he owed to William, did thereby renounce the compensation, yet now, that the said bond is reduced, and the sum therein contained declared to be *in bonis* of William the defunct, the compensation must again revive ; otherways this absurdity would follow, that *uno spiritu* the debt should, in consequence of that reduction, be considered as *in bonis* of the father in favour of the pursuer, and, at the same time, in prejudice of the defenders, be considered as belonging to the son.

Answered for the pursuer, 1mo, That the compensation not having been pleaded in the process at Glendorch's instance, it was not now competent after decree. 2do, That the compensation cannot revive ; for, though that bond was reduced at the instance of Glendorch, yet, still, it was a subsisting bond to James against every other person than the reducer, who had affected the subject by his confirmation.

The Lords " found it competent to the anterior creditor of John Murray to propound compensation, notwithstanding of the decree against the said John, to which he had not been party ; but found that the debt due by John to James Murray, as it stood in Glendorch's person, was not compensable by the debt due by William Murray to John."

Such is the nature of all reductions on the act 1621, as to be profitable only to the reducer, and even to him only where he has affected the subject ; the nullity introduced by the statute, being not a simple nullity, which, particularly in such a case as the present, should void the only subsisting instrument of debt, but only a nullity to the effect of giving access to the creditor-reducer to affect the subject. See BANKRUPT.

Kilkerran (BANKRUPT), No. 1, p. 47.

No. 33. [2573] MIDDLETON v. The Earl of STRATHMORE. February 26, 1743.

Compensation found pleadable by a person who had no right to the debt upon which it was founded.

It has been frequently found, that compensation might be pleaded by a person who had no right to the debt upon which the compensation was founded : Thus an heir, pursued for his predecessor's debt, has been allowed to plead compensation upon a debt due to his predecessor, though that debt was moveable, and belonged not to him the heir, but to the executor, *Hay contra Crawford*, No. 31, p. 2511 : And, upon the same principles, we see compensation every day sustained in a competition of creditors, upon a creditor's objecting to the interest of another creditor, that his debt is compensated by the like debt due by him to the common debtor.

The like question having now occurred in the case of an heir pleading compensa-

tion upon a moveable debt ; The Lords gave the like judgment, and “ sustained the compensation.”

N.B. It is not quite clear that this practice is agreeable to the principles of law : For though compensation operates *ipso jure et retro*, yet that is only when it is applied, and it is not the operation of the law, but of the judge upon the application of the party ; which it is much doubted that any should be allowed to make, but the person who has right to the debt upon which it is founded.

Fol. Dic. v. 3, p. 143. *Kilkerran* (COMPENSATION), No. 3, p. 134.

No. 34. Creditors of *GLENDINNING v. MONTGOMERY* of Magbiehill. June 8, 1745.

A man obtaining possession *bona fide* of his debtor's effects, though by an informal pointing, found entitled to retain them till he should obtain payment of his debt. Compensation may be proposed, even after a decree, by way of retention, where the party has no other means of obtaining payment.

Montgomery of Magbiehill, factor for the Earl of March, took a bill from Robert Glendinning one of the tenants, for his arrears, being £1265 Scots. A few days before elapsing of the six months, Magbiehill sent this bill to a notary to be protested. A regular protest was returned, upon which a pointing ensued of Glendinning's stock of sheep. Glendinning becoming insolvent, his creditors arrested in Magbiehill's hands, pursued a furthcoming, and repeated a reduction of the pointing ; upon this ground, that, notwithstanding the instrument of protest, there was no protest taken, but that the instrument was made up in the notary's dwelling-house, without taking any of those steps which are necessary in protesting a bill. And accordingly it came out, upon proof, by the depositions of the witnesses insert in the instrument of protest, that none of the solemnities were used that are mentioned in the instrument.

The question was, What should be the effect of this null protest ? Magbiehill insisted, that as he was *in optima fide* to point by virtue of a protest, which he had reason to believe unexceptionable, he was not bound to restore the goods to the common debtor, without getting payment of the debt ; and as little to [2574] the arresting creditors. The question being reported to the Court ; Elchies observed, that if the execution be informal, as proceeding upon a bill not duly protested, or rather not at all protested, the pointing cannot have the effect to transfer the property ; *ergo*, the sheep, as Glendinning's property, are regularly attached by the arrestment laid in Magbiehill's hands ; which being followed by a decree of forthcoming, must transfer the property from the common debtor to the arresters ; whereby there is no place for pleading compensation or retention. Arniston gave his opinion, that arrestment being only a prohibitory execution, and not making a *nexus realis*, Magbiehill may lawfully retain the goods, which had thus come innocently into his possession, till he get payment of the debt upon which the pointing proceeded ; and that he has this equitable privilege of retention against arresting creditors, as well as against the common debtor. He observed that the difficulty would be greater, had the creditors attempted to point the sheep in Magbiehill's possession. Drummore said, that it is not unusual to give retention, even where the intromission proceeds upon the authority of an informal execution ; witness an adjudication, which though often annulled in a competition with other creditors, yet has always been sustained to save from repetition of sums or subjects intromitted with in virtue of it ; so much weight is laid upon the *bona fides* of the intromitter.

“ The Lords sustained the defence, that Magbiehill, as creditor to Glendinning, having *bona fide* pointed his debtor's sheep, is not bound to restore the sheep, or to hold count for the price or value of them, till payment be made of the debts on which the execution proceeded.”

This judgment is solidly founded on the nature of an arrestment, which can have no other effect than to oblige the arrestee to pay or to deliver to the arrester, what he was bound to pay or deliver to the common debtor. Now Magbiehill having got into his possession the goods of the common debtor, though by an informal execution,

even Elchies yielded, that in equity he was not bound to restore the same to the common debtor, without getting payment of his debt. If so, the arrestment cannot bind him to restore these goods to the creditors, but in the same terms; as an arrestment can have no further effect than to transfer the obligation from the common debtor to the creditor; and by no means to afford a stronger claim to the arrestment than to the common debtor. And as compensation is good against an arrester, retention ought equally to be sustained where the common debtor is bankrupt; it being an established point in equity, that though compensation cannot be proposed by decree, it may be proposed by way of retention, where the party has no other chance of obtaining payment. See No. 51, p. 1449.

Fol. Dic. v. 3, p. 143. Rem. Dec. v. 2, No. 66, p. 102.

No. 36. [2575] WILLIAM MACKIE v. JOHN M'DOWAL and Others. November 22, 1774.

In an action for payment of co-partnership-debts, due from one company to another, compensation or retention is not pleadable on account of debts owing by the company suing, to a partner in the company sued.

Mackie, as factor appointed by the Court upon the sequestrated estate of Ebenezer M'Culloch and Company, brought an action against John M'Dowal [2576] merchant in Glasgow, as an individual, for payment of the balance of an account current with M'Culloch and Company; and against William Donald and Company, merchants in Greenock, and Donald and M'Dowal, merchants in Glasgow, for payment of the price of goods furnished by M'Culloch and Company to these companies respectively, in which he obtained decree for the sums due by each of them; and upon this decree they were charged.

Mr. M'Dowal being a partner in the two companies above named, a suspension of the charge was brought in their names and in his own, founding chiefly upon Mr. M'Dowal's right to retain, not only the sum due by himself to M'Culloch and Company, but also the sums due by William Donald and Company, and Donald and M'Dowal, of both which companies he was a partner, until he should be fully paid and relieved of an engagement which he, and Alexander Gray, writer to the signet, were under for Ebenezer M'Culloch and Company, in a letter of guarantee to Malcolm Hamilton and Company, merchants in London, for £5000 Sterling, as well as paid of the debt due by Ebenezer M'Culloch and Company to himself.

Objected for the factor; It is admitted that neither William Donald and Company, nor Donald and M'Dowal, have any defence against payment, in their own names, or on their own accounts, but a defence is raised up in the name, or on the account of one of their partners, Mr. M'Dowal, as an individual, upon a transaction with which these companies have no manner of concern; which cannot be sustained in law.

Retention, as well as compensation, does certainly require that the same person should be both debtor and creditor. One party can neither plead compensation nor retention for another party's debt. Mr. M'Dowal is not the same party with Donald and M'Dowal, nor with William Donald and Company, though he may be an individual in these companies. The charge is not against him, but against the companies, and the sum charged for will be paid not by him, but out of the company funds, which are not in his possession, but in the possession of the company; and, therefore, he cannot plead compensation or retention against payment of their debts; and as little can these companies plead compensation or retention in his name, when they themselves have no ground of compensation. This point received a solemn decision last session, in the case of Galdie v. Gray (June 16), which renders more argument upon the general point unnecessary in the present case. (*voce SOCIETY.*)

More especially would this plea of retention be dangerous where the company creditor is bankrupt; for there it is evident that the sole effect and intention of it is

to give a preference to every individual of the company-debtor who may happen, *privato nomine*, to be creditor to the bankrupt.

Lastly : Neither is there room for a plea, that Mr. M'Dowal ought at least to be entitled to retain what effeirs to his share of interest in the companies, because each partner of a company is liable, *in solidum*, for all the debts of the company, and that these companies might have happened to be bankrupt. The two companies in question are going on, and they will fall to make payment out of the [2577] company's funds, not out of the estate of Mr. M'Dowal ; and what precise amount of the company's effects may in the end belong to Mr. M'Dowal, it is impossible to ascertain till the company itself is dissolved.

The Court, by two consecutive interlocutors, " adhered to the Lord Ordinary's, which had found, That the suspenders Donald and Company, merchants in Greenock, and Donald and M'Dowal, merchants in Glasgow, cannot plead compensation or retention of the sums due by them to Ebenezer M'Culloch and Company, on account of any debt which Ebenezer M'Culloch and Company may be due the suspender John M'Dowal, or which the said Ebenezer M'Culloch may be due to him ; and, therefore, repels the reasons of suspension pleaded for the respective companies, and found the letters orderly proceeded against them."

Act. ILAY CAMPBELL.—Alt. WIGHT.—Clerk, TAIT.

Fol. Dic. v. 3, p. 143. Fac. Col. No. 142, p. 372.

No. 38. [2580] CAMPBELL *v.* CAMPBELL. December 11, 1781.

A trustee found not entitled to retain money belonging to his constituent, in payment of a debt due to himself, having received the money *qua* trustee.

Ashnish and Silvercraigs, trustees for Campbell of Danna, sold the estate of the latter, which was burdened with certain annuities ; and, Silvercraigs being himself a creditor to Danna, prevailed on the purchaser to pay to him and Ashnish that part of the price which he might have retained as the stock corresponding to the annuities, they granting him a bond, obliging themselves to indemnify him from these annuities. On the death of one of the annuitants, a creditor of Danna having arrested in the hands of the trustees, a competition took place in a multiplepounding betwixt this creditor and Silvercraigs, who insisted, that he was entitled to retain the stock of the annuity, that had fallen, for payment of the debt due to himself.

The Lords found, that the money was in Silvercraigs' hands merely in the character of trustee to Danna, and that he had no right of retention therein. See APPENDIX.

Fol. Dic. v. 3, p. 145.

No. 40. [2581] The Trustees for the Creditors of WILLIAM BOGLE *v.* JOHN BALLANTYNE. July 8, 1793.

Two surviving and solvent partners of a dissolved company being sued for payment of a company-debt, at the instance of trustees for the creditors of a bankrupt to whom it was due, it was found competent for one of the defenders to plead compensation to the full amount upon a private debt due to him by the bankrupt.

In the year 1777, William Bogle, Thomas Blane, John Ballantyne, William Wilson, and William Ballantyne, engaged in a joint adventure, under the firm of Ballantyne, Wilson, and Company, for the purpose of exporting goods to New York.

By their agreement, it was provided, that if any of the partners died. or became

insolvent, before the sale of the goods, their heirs or creditors should draw out, with either profit or loss, the sums which such partner had advanced.

The affairs of William Bogle having gone into disorder, he, in the year 1788, disposed his estate to trustees for his creditors.

[2582] Mr. Bogle had advanced £300 in the concern of Ballantyne, Wilson, and Company, which, as the sale of their goods was not finished when he became insolvent, his creditors, in terms of the contract, had a right to draw out. The other partners accordingly granted a missive, binding themselves to pay the £300 by certain instalments to Mr. Bogle's trustees, who, on the other hand, obliged themselves to answer over Mr. Bogle's share in the concern to the other partners.

When this transaction took place, John Ballantyne was a private creditor to Mr. Bogle in a bill for £333, 15s.

While the partnership subsisted, Wilson, another of the partners, became bankrupt, and William Ballantyne died.

In 1788, after the concern was supposed to be at an end, Mr. Bogle's trustees brought an action, concluding, "That John Ballantyne and Thomas Blane, surviving partners of the said Company of Ballantyne, Wilson, and Company, ought and should be decerned and ordained, conjunctly and severally, to repeat and pay back to the pursuers the foresaid sum of £300 Sterling paid in to the said Company by the said William Bogle."

In this action, although Blane was solvent, appearance was made only for Ballantyne, who contended, that he was entitled to compensate the claim brought against him and the other defender, as the existing partners of Ballantyne, Wilson, and Company, with the private debt of £333, 15s. due to himself by Bogle, and

Pleaded; In the eye of law, a co-partnery, and the individuals of whom it is composed, are distinct from each other. The individual partners are not even proprietors of the Company estate, but merely creditors upon it, in proportion to their original shares, Erskine, b. 3, tit. 3, § 24. Hence the creditors of a partner may arrest what is due to him in the hands of the Company, but cannot attach the Company estate; and, for the same reason, upon the death of a partner, no part of the estate is transmitted to his representatives, but merely a claim against the Company, which must be carried by confirmation, even where the Company estate is heritable.

Each partner is, nevertheless, liable for the whole Company debts. But since the Company and the individual partners are distinct, it follows as a necessary consequence, that he can be liable for these debts only in the character of guarantee or cautioner for the Company. Accordingly, he is entitled to an assignment from the Company creditor, in order to operate his relief against the Company; and even without such assignment, he has a total right of relief against the Company, of precisely the same nature with that which a proper cautioner has against the principal debtor; and upon the very same principle, he is entitled to a proportional relief from the other partners, as being co-cautioners along with him for the Company. But as he is universally liable to the Company creditors, when he is sued for payment of any such debt, he must, [2583] whatever be the situation of the Company, like any other obligant, be entitled to plead compensation upon a debt due to himself by the creditor pursuing.

If indeed an action were brought by a Company for payment of a debt due to the partnership, it is plain they could not be obliged to allow compensation upon a debt due to the defender by an individual partner, for this obvious reason, that they are in no shape liable for his private debts, and compensation can be pleaded only where payment could be demanded; and, upon the same principle, it might be admitted, that were an action brought against a subsisting Company *qua* such for payment of a Company debt, they could not set off against the demand a debt due by the pursuer to an individual partner, to which they had acquired no right; but, in the present case, the partnership is at an end, and the demand is made against each of the two defenders individually, as liable *in solidum* for the debt.

Answered: Although each partner in a Company has both a private and a social character, which are distinct, and which produce the difference between his private and his co-partnery debts; yet still a Company and its partners are one and the same, and of consequence each partner is bound, not as cautioner, but as co-principal for the debts of the Company. Indeed, the idea of their being cautioners only, is unintelligible, as in that case there would be no principal debtor. It is also a quality

of the Company debts, arising both from the nature of co-partnership and from expediency, that they cannot be compensated with, but, on the contrary, must in all cases be kept entirely distinct from the debts and obligations of the individual partners; *Voet de Compensationibus*, § 10, 16th June 1774, *Galdie v. Gray*, *voce SOCIETY*; 29th November 1774, *Mackie v. Macdowall and others*, No. 36, p. 2575; 18th June 1783, *Cauvine v. Robertson*, No. 39, p. 2581.

Besides, the defender acknowledges, that when the action proceeds solely against a Company, compensation cannot be pleaded upon a debt due to an individual partner. But it is not easy to conceive, in what other manner a decree could be obtained against a Company, than by calling all the existing partners, and concluding against them, conjunctly and severally, in that character, which is precisely the mode the pursuers have followed. A summons brought in this form is, in the strictest sense, a summons brought against the Company; and consequently, no compensation upon a private debt can be pleaded in bar of a decree following upon it against the Company. In all events, therefore, decree should proceed in the present action. If diligence shall afterward be used upon it personally against Mr. Ballantyne, it will then be time enough to try the question, whether a partner can set off his own private debt against that of the Company. At present, the pursuers only ask a decree against the Company, i.e. against the partners conjunctly and severally, as representing the Company, which, when obtained, will enable them to make their payment effectual from either or both of the defenders, or perhaps to attach the effects of the Company, if they can find them.

[2584] The Lord Ordinary repelled the defence, and decerned against Messrs. Ballantyne and Blane, in terms of the libel. A petition for Ballantyne, reclaiming against this interlocutor, was refused. But, on advising a second, the Court "sustained Mr. Ballantyne's defence." On advising a reclaiming petition for the pursuers, the Lords "altered their interlocutor, and repelled Mr. Ballantyne's plea of compensation." Mr. Ballantyne having again reclaimed, the Court once more sustained his defence. Upon which Bogle's Trustees having reclaimed, the Court, considering the point of law to be attended with difficulty, and that there was a diversity of opinion on the Bench with regard to it, ordered a hearing in presence. When the cause came to be advised, the Court still continued to be divided in their sentiments.

Some of the Judges were of opinion, that as there were no visible funds of the Company extant, and as no business had been done for many years under the Company firm, the partnership was to be considered as at an end; and that the debt owing to Bogle's trustees was now in reality due by Ballantyne and Blane as *correi debendi*. In this situation, however, it was observed, no more than one half of the sum was the proper debt of Ballantyne, and therefore he was only entitled to compensate to that extent. Blane himself was solvent and in the field. The pursuers were therefore entitled to a decree against him for the other half, as he surely had no right to plead compensation on a private debt due to the other defender. If indeed Bogle's private debt had been due to both defenders, compensation might have been pleaded upon it to its full amount. But as the doctrine of compensation had been introduced solely from considerations of expediency, and was not founded in strict law, it ought never to be stretched beyond the limits of material justice, which required, that each of the two *correi debendi* should himself specifically fulfil his own part of the obligation. Blane was therefore bound to pay down his half of the £300. It was true indeed, that Ballantyne, before Bogle's bankruptcy, might, by a transaction with the other defender, have taken his share of the debt entirely upon himself *delegatione*, and then he might have pleaded compensation to the whole extent; but no such transaction could now take place, as, by Bogle's insolvency, his creditors had a *jus quæsitum* in the debt as it then stood. The general rule of law certainly was, that a Company debt would not be set off against a private debt, nor *vice versa*; and in the present case, the defenders were called *socio nomine* not to pay a private, but a Company debt; but supposing this rule could be got over, on account of the dissolved state of the Company (which one Judge maintained it could not), it still remained a clear proposition, that Mr. Ballantyne was only to pay out of his private pocket one half of the sum demanded; and therefore he had no legal interest or title to insist, that his private debt should be set off against it to a greater amount. His desiring more was for the purpose of obtaining, by the acquiescence of his partner, a partial preference for his whole private debt, over the other creditors of Bogle the bankrupt.

[2585] A majority of the Judges, on the other hand, thought that compensation was pleadable by Mr. Ballantyne in its fullest latitude. That in determining the question, there was no occasion to inquire whether the Company was solvent or insolvent, dissolved or not dissolved, for in all these situations the same rule would hold: That when a creditor pursues a Company for payment, he cannot prevent any one partner from standing forward, and discharging the debt, although out of his private funds. That, on the other hand, a creditor has it in his power to demand payment *in solidum* from any individual partner, without discussing the Company. And as every partner therefore may not only make an ultroneous offer, but may also be compelled to pay, so he also must be entitled to plead compensation, it being a general rule, that the obligation to pay always implies a right to compensate. It is true indeed, that the Company may, in certain situations, object to an individual partner being allowed to discharge their debt; but if they do not, such objection is *ius tertii* to the creditor. Thus, in the present case, had Blane been a private creditor of Bogle, he might have himself insisted on compensating his own half of the debt; but if he did not, the pursuers, even in that case, could not have opposed the extinction of the whole claim, by the compensation pleaded by Ballantyne.

The Court adhered to their last interlocutor, sustaining the defence of compensation. See SOCIETY. See Sec. 15, *h. t.*

Lord Ordinary, JUSTICE-CLERK.—Act. MACONOCHIE, M. ROSS.—Alt. ROLLAND, G. FERGUSSON, CATHCART.—Clerk, SINCLAIR.

Fol. Dic. v. 3, p. 144. *Fac. Col.* No. 69, p. 148.

No. 41. The Creditors of JOHN BROUGH v. JAMES JOLLIE. November 26, 1793.

A person purchasing a subject for another, in consequence of a commission from him, and, with his consent, taking the rights to it in his own name, is entitled to retain it, in competition with the other creditors of his constituent, till he is relieved of all cautionary obligations which he has undertaken for him.

In 1786, James Jollie, writer to the signet, in virtue of a verbal mandate from John Brough, purchased for him, at a public auction, an area at the price of £2200. The enactment of roup was, with Brough's consent, made out in Jollie's name, who became personally bound to pay the price, and fulfil the conditions of the sale.

Brough soon after paid the price of the area, and erected a large building on it.

In 1784, Jollie became cautioner for Brough, to the extent of £500; and in 1787, for £500 more.

Brough having become bankrupt in 1788, Jollie contended, That he was entitled to retain the area, and building erected upon it, till he should be relieved of both these cautionary engagements. His right to do so was disputed by Brough's other creditors, who

[2586] Pledged; As Mr. Jollie holds the subject merely as mandatary for Brough, he is bound to restore it free from all incumbrances, except those flowing directly from the commission under which he acted, such as the expense of management. That commission was precise in its terms, and limited in its object; and as it also implied exuberant confidence, retention can be no more pleaded, in consequence of it, than it could against the *actio depositi*; *voce* COMPENSATION; *voce* BILL of EXCHANGE; Stair, b. 1, tit. 18, § 6; 10th December 1760, Competition of Appin's Creditors, No. 79, p. 749.

In the case, Harper v. Faulds, *infra h. t.*, it was determined that goods put into the hands of an artisan, in order to be manufactured, cannot be retained by him for any other debt, except the expense of the operation. It would be singular there-

re, if, in the contract of mandate, which implies a greater degree of trust than the *calio conductio operarum*, the mandatary should be so far entitled to invert the nature of his possession, as to retain the subject he was employed to purchase, till he should be relieved of all the separate obligations in which he was either previously bound, or which he should afterwards come under on his account.

Answered : When a person is disabled by bankruptcy from discharging the obligations he owes to another, he cannot demand performance of what that other owes to him ; and the solvent party is entitled to retain, for his security, any effects of the bankrupt he may have got into his possession, especially if he is cautioner for the bankrupt, because he is at all times entitled to insist on being relieved from his obligation, even although he has not been distressed for payment of the debt ; Erskine, b. 3, tit. 4, § 20 and 21 ; Macdowal, b. 1, tit. 24, § 34 ; 18th February 1662, Earl Bedford v. Lord Balmerinock, *voce* MUTUAL CONTRACT ; *Voet. de Institor. Act.* lib. 14, tit. 3, § 9 ; Kames' Principles of Equity, 3d edit. vol. 2, p. 102. Neither does it make any difference whether the cautionary obligation has been undertaken by him before or after his obtaining the subject over which he claims a right of retention ; Fountainhall, v. 2, p. 657, 10th July 1711, Irving v. Menzies, *infra* l. t., June 1710, Martin v. the Creditors of Archibald ; * 19th June 1744, Murray v. Chalmers, No. 82, p. 2626.

Besides, from the great length of time during which Brough allowed the property to continue in the defender's name, it is evident that it came into his hands not in consequence of a simple mandate, but that Mr. Brough must have intended it to remain with him in trust, for his relief of all obligations in which he might be engaged for him.

Replied : Retention has never been sustained for relief of cautionary obligations, unless on the footing of previous consent between the parties, either direct or implied, of which, in the present case, there is no evidence ; 1st July 1709, Strachan v. the Town of Aberdeen, No. 30, p. 2570 ; 24th December 1746, Balfour v. Lazini, No. 35, p. 2575.

[2587] The Lord Ordinary reported the cause on informations.

The Court, 5th June 1793, sustained the claim of retention.

On advising a reclaiming petition and answers, it was

Observed on the Bench ; Mr. Jollie, whether considered as a mandatary or trustee, is not bound to denude till relieved of his cautionary obligations. In the case, Harper v. Faulds, the goods were put into the hands of an artificer, merely to perform a certain operation upon them, under an implied obligation to restore them whenever it was finished, upon receiving the price of his labour. It was therefore thought, that he could not be entitled to hold them as a pledge or security for debt in general ; but it was admitted, that cautioners, factors, or trustees, stood upon a different footing.

The Court unanimously “ adhered to the interlocutor reclaimed against, in so far as it sustained the claim of retention maintained for James Jollie, reserving to the parties to be heard how far individual tradesmen, creditors of the said John Brough, had a right to insist against Mr. Jollie for payment of work done, or materials furnished by them to the subjects in question, and also reserving to the creditors at large to insist against him for repayment of the original purchase-money of the area, without prejudice to any defences competent to him against these claims.”

Lord Ordinary, DREGHORN.—For the Objectors, SOLICITOR-GENERAL BLAIR, PATISON.

—For Jollie, DEAN OF FACULTY ERSKINE, CULLEN.—Clerk, MITCHELSON.

R. D.

Fol. Dic. v. 3, p. 143. *Fac. Col.* No. 75, p. 166.

* Examine General List of Names.

No. 43. [2589] WILLIAM CURTIS and Others, Assignees under the Commission Bankruptcy of GIBSON and JOHNSON v. EDWARD CHIPPENDALE, Trustee on the Sequestrated Estate of WILLIAM M'ALPINE and Company. December 9, 1794.

The creditors of A, a bankrupt, claimed on the bankrupt estate of B, for the amount of certain bills accepted by him, in A's possession at his bankruptcy. Found incompetent for the creditors of B to plead retention against this claim, on account of B's having indorsed bills accepted by A, the holders of which last bills drawn a dividend out of the estate of A, and were likewise claiming upon the estate of B.

William M'Alpine and Company, Livesay, Hargrave, and Company, and Lewis and Potter agreed, that an exchange of bills should take place among them, with a view to support each other's credit.

Bills accordingly were delivered to Livesay, Hargrave, and Company and Lewis and Potter, by M'Alpine and Company, to a very large amount, drawn by them, and accepted, partly by other houses with whom they were connected, and partly by Barr and Maddox, a fictitious firm assumed by themselves.

Many of the bills thus obtained, were indorsed by Livesay and Company, and Lewis and Company, to their bankers Gibson and Johnson, in security of advances which they had made for them.

On the other hand, M'Alpine and Company received bills to a large amount from Livesay and Company, and Lewis and Potter, which were drawn by them, chiefly on their own agents, and accepted by Gibson and Johnson.

In May 1788, M'Alpine, and Company, Livesay, Hargrave, and Company, Lewis and Potter, and Gibson and Johnson, became bankrupt.

Bills accepted, drawn, or indorsed, by M'Alpine and Company, to the extent of £25,801, 4s. 10d., were then in the hands of Gibson and Johnson.

The assignees under the commission of bankruptcy awarded against them, entered a claim for this sum, upon the sequestrated estate of M'Alpine and Company.

The trustee objected to the claim, That bills accepted by Gibson and Johnson, to the amount of £22,513, 14s. 5d., had been put into the hands of M'Alpine and Company, which they had indorsed, and which not having been retired by the acceptors, were now ranked on the estate of M'Alpine and Company, and that therefore, that amount fell to be deducted from the claim of Gibson and Johnson, who could only rank for the balance, being £3287, 10s. 5d.

It appeared, that the holders of the bills accepted by Gibson and Johnson, had likewise claimed on their estate, and had drawn a dividend of 5s. 8d. in the pound. The estate of M'Alpine and Company had at this time paid nothing, but it was stated as pretty clear, that it would afford their creditors a dividend of 2s. 6d. in the pound.

So matters stood when the question came before the Court, when, in support of the objection, it was

Pleaded, No person can demand payment or performance from another, till he have answered any claim which that other has against him. Hence, although M'Alpine and Company are not in possession of the bills accepted by Gibson and Johnson, yet being, in consequence of their indorsing them, liable for their [2590] payment, they are entitled to retain what they owe to Gibson and Johnson for their relief. In order to found a right of retention, it is not necessary that the party pleading it, should hold a voucher of debt, of which he can instantly demand payment; it is enough that he can show, that at some future period, he may be distressed for a debt for which his creditor is primarily liable. Thus a cautioner can plead retention against the principal debtor, till relieved of his engagement; Stair, b. 1, tit. 18, § 7; M'Dowal, b. 1, tit. 24, § 34; Erskine, b. 3, tit. 4, § 20; Fountainhall, v. 2, p. 657, 10th July 1711, Irvine v. Menzies, *infra* h. t.; Rem. Dec. v. 2, p. 82, 1744, Murray v. Chalmers, No. 82, p. 2626. Even compensation may in particular cases be pleaded, where the party founding on it, is not in the right of the debt; thus, a cautioner may plead it on a debt due to the principal debtor, 1st July 1709, Strachan v. the Town of Aberdeen, No. 30, p. 2570.

Answered, If M'Alpine and Company had still been possessed of the bills of Gibson and Johnson, they would no doubt have been entitled to plead compensation against

the present claim. But by indorsing them for value, they have transferred their right in them to the present holders, who accordingly have been ranked for them on Gibson and Johnson's estate, and drawn a considerable dividend.

If, in this situation, M'Alpine and Company were entitled to plead retention, it would produce the utmost inequality and embarrassment in the division of bankrupt estates.

Bills being substitutes for cash, must necessarily pass through the hands of many indorsers, all of whom, if they happened to be debtors to the acceptor, would have a right of retention; and in this way sums might be withheld from the estate of the acceptor to ten, twenty, or thirty times the amount of the bills due by him.

Suppose that a bill of £1000, of which A is acceptor, pass through ten different hands, all of whom owe him £1000, and that afterwards they all become bankrupt, and pay only 2s. in the pound; suppose also, the estate of A to be bankrupt, and that it likewise yields a dividend of 2s.: If each of these indorsers were entitled to retain the dividend due on A's debt, the result would be, that A's bill of £1000 would be fully paid, while all his other creditors, equally onerous with those claiming under it, would draw a dividend of 2s. only. Ten different parties would thus virtually rank on the same estate for the same debt, which would be contrary both to justice, and to the intention of the bankrupt statutes, the great object of which is to effect a rateable distribution of the bankrupt's estate.

Even in the present case, as the holders of Gibson and Johnson's bills have drawn a dividend of 5s. 8d. in the pound from their estate, if the objector were to prevail, a further dividend would virtually be paid on them, corresponding to the dividend which Gibson and Johnson would otherwise be entitled to draw from the estate of M'Alpine and Company, for the bills on which they now claim. [2591] And were this to turn out no more than 2s. 6d. still the bills of Gibson and Johnson indorsed by M'Alpine and Company, would be drawing nearly a third more than their other debts, i.e. 8s. 2d. and the others only 5s. 8d.

Besides, M'Alpine and Company, by indorsing the bills of Gibson and Johnson, came under an implied warrandice, that they would do nothing to the prejudice of their indorsee. But were they to prevail in this question, they would be guilty of a breach of it, by diminishing the funds divisible among Gibson and Johnson's creditors, of which their own indorsees will receive a proportional share.

It is also to be considered, that, on the principle pleaded by the objectors, retention would be competent not merely to the holder of the bill, but to every indorsee, against the drawer and preceding indorsers; and as a bill may circulate over all the trading world, the claims competent to the holders or posterior indorsees against prior indorsees, might be infinitely diversified; and the ranking of creditors thus rendered inextricable.

The municipal law of this country, with respect to retention, when applied to cautioners, cannot affect this case. As it arises from bills of exchange, and may therefore, as a precedent, affect the interest of strangers, it must be determined on those established principles of mercantile law, which, from views of expediency and justice, regulate the transactions of merchants in other trading countries; M'Kenzie's Obs. on 1681, c. 20, p. 466. In England, where these principles are better understood, from being more frequently resorted to, the identical point at issue has more than once occurred, and has been uniformly decided in favour of the claimants; 5th November 1792, Gibson and Johnson v. Edenson's Assignees, determined by the Commissioners for the custody of the Great Seal; King's Bench, Term. Reports, v. 4, No. 714, 13th June 1792, Howis v. Wiggins.* Other reasons also concur for the law of that country being adopted in the decision of the present question. It was the *locus contractus*, the *locus solutioni destinatus*; it is of importance, that in mercantile questions there should be an uniformity in the law of the two countries, and no opposite judgment has yet been given in our own Courts, none of the decisions quoted by the other party having been pronounced between merchant and merchant; indeed, all of them at a period when there was little trade in this country.

Replied, The objector does not argue, that one document of debt can in any case draw more than full payment, but merely, that where the creditor of a bankrupt is debtor to him to an equal amount, he will be secured by the right of retention from

* See APPENDIX.

suffering by his insolvency. The inequality and hardship figured by the claimant is what must occur in every case of mutual debts, where either party becomes bankrupt. Let it be supposed, that A becomes bankrupt, indebted to B and C in £1000 each, and pays only 2s. in the pound, and that B owes him nothing, but that C owes him £1000, the consequence will be, that C, by pleading compensation, will lose nothing while B will only [2592] draw 2s. in the pound. In like manner, if C were creditor for A for £1000, he would, by pleading retention till relieved, be freed from any loss on A's bankruptcy. And on the very same principle, if C, being creditor in a bill for £1000 to A, indorse it for value, he is entitled to retain till relieved of his subsidiary obligation as indorser. Neither would more than full payment be drawn for the bill, although it should pass through ten different hands, each of them his debtor. If the creditors of A found it for their interest, they might pay the whole contents of the bill to the holder, and thus at once put an end to all claims of retention by prior indorsees: And on the same principle, whenever the bill was fully paid out of A's estate, either by actual dividends, or by the operation of retention, each indorser would be obliged to pay what he owed to the bankrupt. The plea of the other party seems to be, that whenever the principal debtor becomes bankrupt, all claims of retention, and in short all preferable securities, should cease, although it is only in cases of insolvency that they can be of any use.

Even if the law of England were evidence of the law-mercantile, which it is not, it could have no effect on the present question, as both are equally inapplicable. For although bills arise from commerce, and owe their validity to the common consent of nations, yet it is only with regard to their constitution and mode of transference that the law-mercantile has place. But in whatever country a bill may have been granted or negotiated, the mode of recovering payment of it, and the pleas of retention or compensation competent on it, must be regulated by the law of the country where payment is demanded.

The Lord Ordinary took the cause to report on informations.

The Court "found, That to the amount of the acceptances due by Gibson and Johnson, the plea of retention is well founded, and that till relief is given to that amount, the assignees under the commission of bankruptcy awarded against Gibson and Johnson, are not entitled to be ranked upon the sequestrated estate of M'Alpine and Company; and, in so far sustained the objection in question."

On considering a reclaiming petition and answers, the Court being of opinion, that the case was attended with very great difficulty, a hearing in presence was ordered, and after that memorials.

When the cause came again to be advised, several of the Judges thought there were no *termini habiles* for retention. Although (it was observed) the exceptions of compensation and retention, while founded on principles of equality, are attended with beneficial effects to both parties in saving counter actions, and on that account entitled to the favour of the law; yet in this case retention ought not to be admitted, because, when the situation of the parties, and the effect of their transactions, are thoroughly considered, it will be found, that to sustain M'Alpine and Company's plea of retention would be attended with great injustice to the creditors of Gibson and Johnson. If both parties had continued solvent, the question would have been of no importance, or even although one [2593] or both had become bankrupt, if both sets of bills had remained in their hands, the one set might have been fairly set off against the other, although the dividends had been unequal. But the case here is quite different; Gibson and Johnson have indeed kept the bills of M'Alpine and Company in their own hands, but M'Alpine and Company have indorsed the bills of Gibson and Johnson for value. Their indorsees are entitled to rank on both estates, and have accordingly done so. From that of Gibson and Johnson they have drawn a dividend of 5s. 8d. They will likewise draw from that of M'Alpine and Company a dividend of 2s. 6d. If these estates should afford no further dividends, the indorsees will draw only 8s. 2d. in the pound, but M'Alpine and Company, the indorsers, have already got a great deal more; for having indorsed the bills of Gibson and Johnson for full value, and only repaid 2s. 6d., they have gained 17s. 6d. in the pound by the transaction; while, on the other hand, those of Gibson and Johnson must at all events be losers by it. For the bills of M'Alpine and Company, which still remain in their hands, they had accepted bills which have drawn from their estates at the rate of 5s. 8d. in the pound, so that even should they be allowed to rank on the estate of

'Alpine and Company, if it yield only 2s. 6d. they will still lose 3s. 2d. in the pound : as result, therefore, of the whole transaction is, that while the creditors of Gibson and Johnson are losers to this extent, the creditors of M'Alpine and Company, even for paying a dividend of 2s. 6d. not only on their own acceptances, but also on those of Gibson and Johnson which they indorsed, will be gainers to the extent of 1s. in the pound.

On the other hand, a majority of the Court still remained of opinion, that as Gibson and Johnson were claiming to be ranked on the effects of Scotch bankrupts situated in this country, their right must be determined by the law and practice of Scotland, in which no principle is better established, than that a person may plead retention, till a creditor claiming a debt of any sort from him relieve him of all obligations for which that creditor is primarily liable. See No. 179, p. 1620.

The Court "adhered."

Ordinary, HENDERLAND.—For the Claimants, ROLLAND, GEO. FERGUSSON, J. GRANT.—For the Objectors, DEAN OF FACULTY ERSKINE, HONYMAN, CHA. ROSS.—Clerk, SINCLAIR.

R. D.

Fol. Dic. v. 3, p. 145. Fac. Col. No. 140, p. 318.

. This case was appealed :

February 23, 1797.—The House of Lords Ordered and Adjudged, That the several interlocutors complained of be reversed ; and it is further Ordered, That the said case be remitted back to the Court of Session in Scotland, to rank the appellants pursuant to their claim, to the amount of £25,801, 4s. 10d., and to proceed further in the cause, according to justice.

No. 44. [2594] MANSFIELD, RAMSAY, and Company, and BAILLIE, POCCOCK, and Company v. SMITH, WRIGHT, and GRAY. June 17, 1795.

The clerk of a Company, which was insolvent, but not legally bankrupt, having sold their effects and put the price into the hands of a banker, in consequence of a previous concert with him, on an account in his own name, "for the creditors of the Company," the banker was found entitled to retain, for a debt due to himself, such a portion of the fund *in medio* as would have fallen to his share, if it had been divided among the whole creditors of the Company, in proportion to the amount of their debts ; but other creditors were preferred according to the priority of their diligences.

James King, Joseph King, and Anthony Charleton, were engaged in a pottery at Newcastle, under the firm of James King and Company. They had likewise a warehouse at Leith, which was managed by a clerk.

In 1786 the Company became insolvent ; and commissions of bankruptcy were issued against the Messrs. Kings as individuals, but none against Charleton, or against the Company.

Upon this their manager at Leith, finding it impossible to carry on the business of the Company, applied for advice to Mansfield, Ramsay, and Company, bankers in Edinburgh, who were creditors of the Company to a large amount. By their advice he sold the goods on hand, and lodged the price (amounting to above £200) with them, upon an account, in his own name, "for the creditors of James King, and Company."

In 1789, some English creditors of the Company raised a multiplepounding, in the name of Mansfield, Ramsay, and Company, for the distribution of the sum in their hands. Appearance was made for the assignee under the commission of bankruptcy, and for various other creditors.

Smith, Wright, and Gray, Bankers in London, were creditors of the Company, in a bill for £120. In September 1790 they executed a summons for payment of this

bill; and, upon its dependence, used an arrestment in the hands of Mansfield, Ramsay, and Company. They then produced the summons and arrestment as an interest in the multiplepounding.

The summons of constitution was never called in Court.

In January 1791 they obtained an interlocutor of the Lord Ordinary, preferring them on the fund *in medio*. Some further litigation ensued; but a decree of preference, in their favour, was extracted in 1792.

Having then applied for payment to Mansfield, Ramsay, and Company, for which no claim had been entered in the multiplepounding, the latter brought a suspension and reduction of the decree of preference. Upon which Baillie, Pocock, and Company, likewise creditors of James King and Company, for whom no appearance had been made in the multiplepounding, after using an arrestment *jurisdictionis fundandæ gratia*, executed a summons of constitution (which was called in Court, and a decree in absence was obtained on it within a year from its date); and upon its dependence an arrestment in the hands of the pursuers of reduction; and upon this interest claim to be preferred on the fund *in medio*.

In support of this claim, they, along with Mansfield, Ramsay, and Company, [2595] Pleaded, 1mo, James King and Company, having neither residence nor landed property in Scotland, the summons of constitution executed against them out of the kingdom, by Smith, Wright, and Gray, and the interest founded on it, void, as no arrestment *jurisdictionis fundandæ gratia* was previously executed against them.

2do, The sole object of an arrestment upon a depending action, is to keep the subject *in medio* until it can be attached by diligence on the decree afterwards obtained in the action, upon dependence of which it was founded. As, however, the summons in the present case was not called in Court within year and day from execution, no decree can ever be pronounced on it; and consequently, the arrestment of the defenders is ineffectual. And although an arrestment is competent upon a liquid ground of debt, without a depending action, the arrester is in no case entitled to a decree of preference or of forthcoming, until his document of debt be supported either by a previous decree of constitution, or at least of registration; Stair, b. 1, tit. 1, § 36.

Mansfield, Ramsay, and Company

Pleaded, 3tio, If the fund *in medio* had been deposited with the pursuers, without any qualification as to the terms on which they were to hold it, they would have been entitled to retain the whole in extinction of the debt due to themselves. The Company, though insolvent, were not made legally bankrupt; and the transaction would not have been impeachable on the acts 1621 and 1696; and still less on the head of actual fraud. Since, therefore, the qualification, in the terms of deposition, is the circumstance which gives the other creditors of the Company any right to claim, all, they must allow it to be carried into full effect; and the pursuers, if not entitled to hold the money in their hands, as trustees for the whole creditors, must at least be entitled to retain, for their own debt, the sum which would have fallen to their share, had all parties concerned been in the field. Their not being allowed to do so would be unreasonable, as they could not attach, by diligence, a fund in their own possession.

Answered, 1mo, The sole object of an arrestment *jurisdictionis fundandæ gratia* is to insure that the judgment pronounced in the subsequent action shall not be nugatory. It is, therefore, never required where the defender has a landed estate in Scotland. For the same reason, it was unnecessary in the present case, where the multiplepounding, by placing the fund *in medio* under the jurisdiction of the Court, had anticipated its effect.

2do, Where the purpose of executing a summons is merely to produce it as an interest in a ranking of creditors, the production of it in the ranking is equivalent to its being called in Court. Besides, the arrestment might have proceeded on the bill itself, without a previous action; and it would be hard that a precaution, which was not essential, should be fatal to the diligence.

It is a mistake to suppose, that a decree of constitution was at all necessary in the present case. The production of an executed summons and arrestment [2596] gives a legal title to compete in a multiplepounding. There all parties interested are in the field, and have an opportunity of canvassing the justice of the claims pro-

duced. The decree of preference is, therefore, to be considered as a general decree of constitution for all concerned. To oblige each creditor to constitute his debt apart, would be multiplying judicial procedure to no purpose.

3tio. It is admitted, that the Company was notoriously insolvent, and even that commissions of bankruptcy had been issued against two of the partners, before the fund *in medio* was lodged with the pursuers. It was therefore the duty of the Company to have kept their property in their own possession, subject to the diligence of their creditors, leaving it to them to acquire preferences, according to their activity. No trust-right granted by the Company would have been effectual against non-acceding creditors; and the powers of their clerk were still more limited. If he found it necessary to dispose of the goods on hand, he ought to have lodged the price with a neutral banker. Since his acting otherwise was owing to the advice of Mansfield, Ramsay, and Company, they are not entitled, without having done any diligence to attach the subject, to retain any part of it for their own debt; and still less, by considering themselves as trustees for all concerned, to put the most supine on a footing with the most active creditor. If there is any hardship in their situation, they have themselves to blame for it. If it was incompetent for them to have arrested the funds in their own name, they might have assigned their grounds of debt to a friend, who might have done so for their behoof.

The Lord Ordinary found the expense of raising the original process, and extracting the decree in it, a preferable burden on the fund *in medio*; “preferred Messrs. Smith, Wright, and Gray, *secundo loco*, upon the funds *in medio*, for payment to them of the two sums of £120, and £25 Sterling,* with interest, in terms of the decree charged upon: Preferred William Crumlington and Company, Messrs. Walkers, Fishwick, and Company, *tertio loco*, upon the funds *in medio*, for payment to them of the sums contained in the accounts produced for them.† And preferred Baillie, Pocock, and Company, *quarto loco*, for payment to them of the sums contained in the decret produced for them.”

Upon advising a reclaiming petition, with answers,

The Court were unanimously of opinion, that the process of multiplepounding superseded the necessity of an arrestment *jurisdictionis fundandæ gratia*, and that the decree of preference, produced by the defenders, rendered it unnecessary either to call the summons in Court, or to take a decree of constitution upon it; but the Company not having been legally bankrupt at the time the money was lodged, and the transaction being fair and reasonable, it was thought that Messrs. Mansfield, Ramsay, and Company, were entitled to a rateable proportion of the fund *in medio*.

[2597] The Lords found, “That Messrs. Mansfield, Ramsay, and Company, are entitled to retain, out of the fund in their hands, a proportion thereof, corresponding to their own debt, *in computo* with the debts due to the whole other creditors of the bankrupts: preferred Baillie, Pocock, and Company, *tertio loco*, according to the date of the arrestments: Found Messrs. Crumlington and Company, and Messrs. Walkers, Fishwick, and Company, are only entitled to be ranked on the remainder of the funds *pari passu* with Mansfield, Ramsay, and Company, for the balance of their debt, and any other creditors of the bankrupt who have used no arrestments: And, with these variations, adhered to the interlocutor reclaimed against, and refused the desire of the petition; and remitted to the Lord Justice-Clerk Ordinary to apply this interlocutor, so far as to ascertain the amount of the proper debts due to Messrs. Mansfield, Ramsay, and Company, and the amount of the debts due to the whole other creditors of the bankrupts.” See FORUM COMPETENS.—PROCESS.

Lord Ordinary, JUSTICE-CLERK.—Act. DEAN OF FACULTY ERSKINE.—Alt. SOLICITOR-GENERAL BLAIR, D. DOUGLAS.—Clerk, GORDON.

D. D.

Fol. Dic. v. 3, p. 146. Fac. Col. No. 177, p. 419.

* This last sum was the amount of the expenses awarded them in the original action.

† These two Companies were ranked in the same order in the decree of multiplepounding, upon production of accounts against the Company; but they had done no diligence against the subject.

No. 50. [2601] PATON v. BARCLAY. January 11, 1627.

A master being pursued by a tenant's onerous assignee, his compensation was sustained, though upon a decree against the cedent posterior to the assignation, decree being for bygone farms, long before the assignation.

In a suspension betwixt Paton and Barclay, wherein Paton being charged to 300 merks, conform to his bond, whereto Barclay was made assignee by the cedent to whom the bond was made ; the reason was, that the cedent being this suspender tenant, in some lands occupied by him, for the which he was debtor to the suspender in as many farms as, being liquidate, extended to the sum contained in the said bond and which farms were owing to him at the time of the making of the said assignation likeas, since that assignation, he hath recovered decreet against the cedent, his tenant for paying of the same, and liquidating the prices thereof, which ought to compensate against the assignee, as it would have compensated against the cedent's self if he had been charger.—The Lords found this compensation relevant against the assignee as well as against the cedent ; albeit the decreet against the cedent, which both for the cedent his debtor, and also liquidate the debt, was posterior to the assignation made to this charger, who was a true creditor to the cedent, and that it was not for satisfying of his just debt ; and albeit the assignation preceded the said decreet seeing the decreet was obtained by the master against his tenant for the farm of ground, which was a debt for some years duties preceding the assignation made by the charger, owing to the master, albeit the same was not decerned before the assignation, but thereafter, which was sustained, seeing nothing was alleged against the debt owing by the cedent to the suspender, contained in the said decreet.

Act. MOWAT.—Alt. LAWTRIE.—Clerk, HAY.

Fol. Dic. v. 1, p. 161. Durie, p. 255.

No. 60. [2609] Mr. PATRICK STRACHAN, Servant to Sir Francis Grant, Advocate of the MAGISTRATES of ABERDEEN. February 14, 1708.

Andrew Skeen of Rutherstane granted to James Skeen his brother, a bond for £1000, dated 1st July 1671 ; and the 11th of November thereafter became cautioner for him to the town of Aberdeen for a year's tack-duty of the excise, at £53 Sterling monthly ; for security whereof, upon distress in December 1672, he granted a disposition of his lands to the town. In May 1672, James Skeen assigned the £1000 bond to his brother-in-law, Alexander King, who in June 1673, transferred it to James Lumsden, James Skeen's relict, who, in April 1674, got from Andrew Skeen an heritable bond of corroboration, and her right is conveyed to the town of Aberdeen. But prior to the said bond of corroboration, Mr. Patrick Strachan's father being creditor to Andrew Skeen, did both inhibit him in August 1673, and get an heritable security for £2784 out of his lands in March 1674, made public by infeftment. Mr. Patrick as heir to his father, pursued a mails and duties of these lands of Rutherstane, wherein comparance was made for the town of Aberdeen, who claimed preference upon the £1000 debt, to which they had right by progress.

Alleged for the pursuer : The town can found no preference on the £1000 bond because compensated while it stood in the person of James Skeen ; in so far as, Andrew Skeen being engaged as his brother's cautioner for the tack-duty, and distressed by granting an infeftment in his lands for the same to the town, who are paid by their intromissions with the rents, the pursuer, as creditor to Andrew Skeen by a real right in these lands, doth justly found upon compensation, or retention of the £1000, as the common debtor might have done against the town's authors for relief of the said tack-duty.

Answered for the defenders : By the common law, *jus retentionis* was indeed

competent even against singular successors, of species and things in the custody of others than the proprietor, for what had been necessarily expended upon the account thereof: But retention was never allowed to a debtor in a liquid sum, against an assignee upon the account of some other deed performable by the ce-[2610]-dent, which came not under the precise terms of compensation. *Ex equitate*, the exception of retention may sometimes be competent against a liquid debt; as to a cautioner pursued by the principal debtor for a liquid debt due by him to the principal, though he cannot formally compensate, he being debtor to pay a sum, and the other only obliged *ad factum præstandum*, viz. to relieve the cautioner; which debts are not commensurable *de liquido in liquidum*. But then this exception is only competent against the creditor himself, and not against an assignee for an onerous cause: Because, it is a simple personal exception, that doth not extinguish the debt, arising from the creditor's dole in seeking payment from his cautioner, before he relieve him of his engagement for the principal. 2do, *Esto* retention had been competent, it was past from by Andrew Skeen's granting the bond of corroboration in April 1674, long after the engagement of cautionry. 3tio, James Skeen was denuded of the bond before the term of payment of the tack-duty, and so before Andrew was or could be distressed as cautioner, or any debt liquidated against him upon that head; consequently the assignee cannot be concerned therewith.

Replied for the pursuer: Albeit the tack-duty had not been liquid, retention was competent to Andrew Skeen for security of his relief, and consequently is competent to his creditor Mr. Patrick Strachan: But *ita est*, that by the heritable security granted to the town of Aberdeen in December 1672, Andrew Skeen was distressed, and the tack-duty therein liquidated to £53 Sterling monthly for one year, which liquid debt must be drawn back to the date of the tack of the excise. 2do, Prior to the bond of corroboration, Mr. Strachan had both inhibited Andrew Skeen, and got infeftment in his lands, which *jus quæsitum* could not be prejudiced by Andrew's granting a posterior corroboration. 3tio, Though at the date of the assignation by James Skeen to Alexander King, the term of payment of a part of the tack-duty was not come, that could not hinder retention; because, 1mo, *dies cesserat, licet non venerat*, and a debt *in diem* is due from the date, though execution for payment be superseded to a day. True, a cautionry may be thought an obligation *in pendenti* for a time, when the existence of the principal obligation depends upon the elapsing of terms; as in the case of a cautioner for a liferent, where *non constat* if the liferenter will outlive subsequent terms, or a cautioner in a tack for more years than one, which commonly goes not to heirs and assignees, unless expressly conceived in their favours. But Andrew Skeen was cautioner for one year's tack-duty, which tack would have subsisted whether the tacksman had lived or not; and the obligation of cautionry was the same thing upon the matter, as if a liquid bond for a sum equivalent to the tack-duty payable at several terms had been granted; in which case, the cautioner would certainly have had retention till he were relieved of moieties due before, though payable after assignation of the cautioner's bond; because, in personal rights, all exceptions competent against the cedent, are competent against his assignee, except as to probation by the cedent's oath. And where a man has a right in his person to another's be-[2611]-hoof, whatever he expends or obligeth himself for that other, is a real burden upon the subject affecting singular successors, as presumed to be undertaken upon the faith thereof, Earl of Bedford v. Lord Balmerinoch; *voce* MUTUAL CONTRACT; just as when one having another's money in his hand, becomes cautioner for that other in contemplation thereof. Besides, one of the reasons why our custom allows retention in a man's own hand, to have the same effect with arrestment of a subject in the hands of another, is, for that a person cannot affect, directly by arrestment or otherways, money in his own hand, and *pro facto habetur, per quem non stetit quo minus fieret*. The Lords have also frequently so decided, even in the case where there was no distress at the time of the principal's assigning his cautioner's bond.

Duplied for the defender: If one to whom compensation is competent, corroborate the bond in favours of the assignee, the benefit of objecting compensation against the assignee, is lost; seeing compensation not applied operates nothing: And it will not be pretended, that a right of retention is better than compensation. Inhibition may indeed stop the conveyance of heritage, but it was never heard to discharge an exception arising upon a personal deed, such as the obligation of relief: And though the infeftment in the lands, would be a ground to reduce posterior rights on these

lands ; what doth that signify to hinder the discharge of an extrinsic personal ception, when Andrew Skeen was of entire credit ? 2do, It is true in the case betwixt the Lords Ballantyne and Sinclair, retention was allowed to my Lord Sinclair in relief of his cautionry for Sir James Cockburn : But then this was carried very narrow, and the point was not fully heard in presence. Besides, there was a specialty in Lord Sinclair's case ; for Sir James Cockburn was broken and fled before the assignment in the Lord Sinclair's hands, so that in effect the cautioner was under distress, whereas James Skeen was solvent and in good condition when he assigned the lands to Alexander King. See MUTUAL CONTRACT.

The Lords found that Andrew Skeen being engaged as cautioner for his brother James in the tack of the excise, before he assigned the £1000 bond founded on by Alexander King, had thereby right of retention of the sums contained in the bond due by him to James, till he were relieved of his cautionry. And found said defence competent to Mr. Patrick Strachan the pursuer in this competition of the mails and duties of Andrew Skeen's lands, whereon the pursuer is a real creditor and used inhibition against Andrew before he granted the bond of corroboration to the town of Aberdeen's cedent. And therefore preferred Mr. Strachan's right to the town's claim upon the said bond of £1000, and diligence done thereon. INHIBITION. See No. 30, p. 2570. *Fol. Dic. v. 1, p. 162. Forbes, p. 240.*

No. 80. [2625] PEARSON v. Sir ROBERT CRICHTON, *alias* MURRAY. November 1672.

A factor cannot retain or compensate his intromissions, by any of his constituent's debts, assigned to him after his intromissions.

Pearson having charged Sir Robert Murray for payment of a bond, he suspected and alleges compensation ; and that Pearson, having been chamberlain to the Earl of Annandale in Ireland, and after his decease, being continued by Sir Robert to whom the Earl, according to the law of Ireland, had disposed his estate by testament for payment of his debt, that the charger had intromitted with certain rents of these lands, which he referred to his oath, and craved compensation ; who deposed and acknowledged his intromission, but alleged he ought to retain these rents, and have compensation in his own hand, by certain bonds due by the said Earl to John Greg, whereupon he is assignee ; and the said Sir Robert being, by the disposition, liable to the Earl's debt, ought to allow the same.—It was answered, That the debts were not liquid by any sentence, and that no chamberlain, nor any other servant or depository, could take assignation to his constituent's debts, and crave compensation thereupon ; because the chamberlain being a servant, the property of his intromission remained in his master, and he could not refuse to deliver the same, whensoever demanded.

The Lords found that the chamberlain could not retain or compensate his intromission, by any of his constituent's debts, assigned to him after his intromission.

Fol. Dic. v. 1, p. 163. Stair, v. 2, p. 115.

No. 82. [2626] Creditors of Mr. HUGH MURRAY v. ANDREW CHALMER. June 1744.

When money is put into the hands of a mandatary, to be applied for a certain purpose, the death of the mandant, before the application, entitles the mandatary to retain the money in compensation of debt due to him by the mandant.

Hugh Murray, advocate, executor nominate by Sir James Rothead's will, confirmed the moveables and executed the testament. In March 1741, being about to leave the town of Edinburgh, and apprehending a demand from Sir James Rothead's

next-of-kin of the balance in his hand, for which they had obtained a decree against him as Sir James's executor, he lodged in the hand of Andrew Chalmer, his clerk and ordinary doer, a sum to answer the said demand, and took from him a declaration in the following terms: "I Andrew Chalmer, writer in Edinburgh, grant that Mr. Hugh Murray advocate, has given me in cash £135 Sterling, with which I am to pay the sum he is decreed to pay to the nearest of kin of Sir James Rothead, and to report him their discharge." The next-of-kin not having made a demand, the money remained with Chalmer till Mr. Murray died insolvent, when his creditors attached the same by a confirmation as executors-creditors. Chalmer brought a multipole-pounding, and claimed retention of this sum for relief of certain debts wherein he was cautioner for Mr. Murray. The creditors opposed this demand, insisting, in terms of the statute, That compensation is confined to actions of debt, and does not take place in an *actio mandati*; that a person employed as a hand, is limited to act like a hand, by delivering the subject as directed; and that Chalmer can no more withhold Mr. Murray's cash from his creditors, than he could from Mr. Murray himself. Chalmer on the other hand admitted, That being employed only as a hand, it became his duty to pay the sum to Sir James Rothead's executors, or to redeliver the same to Mr. Murray himself, if demanded; and that in either of these cases he had no ground of compensation or retention. But he insisted, That the case was altered by Mr. Murray's death, which put an end to the mandate; after which he, Chalmer, could not lawfully pay the money to Sir James's next-of-kin, which therefore remained in his hand as a proper debt due to Mr. Murray's representatives, subjected to compensation and retention.

The creditors acknowledged the mandate to be so far at an end by Mr. Murray's death, that Chalmer could not lawfully thereafter pay the money to Sir James's next-of-kin; but insisted, That one branch of the mandate remained entire, which is, to redeliver the money to Mr. Murray's representatives. They put the case, that Mr. Murray, finding use for the money, had changed his mind, and recalled the commission; Chalmer must instantly have restored the money, and would not have been allowed to retain the same upon any ground whatever; and yet, by alteration of will, the mandate was as much at an end as it could be by Mr. Murray's death.

Chalmer answered, That there is a wide difference betwixt the putting an end to the mandate by Mr. Murray's death and by his alteration of will; that, during Mr. Murray's life, there were no *termini habiles* for compensation or retention, in respect that Chalmer, if he did not restore the money to his constituent, stood bound to pay it to Sir James Rothead's next-of-kin; but that Mr. Murray's death having put an end to the latter branch of the obligation, nothing remained but a simple claim of restitution, which may be subjected to compensation or retention; and he added, that the same exception would have been competent against Mr. Murray himself, had Sir James's executors been *aliunde* satisfied of their claim against Mr. Murray.

"Found, That the contract betwixt Mr. Hugh Murray and Andrew Chalmer, was a mandate which expired and became ineffectual by Mr. Murray's death; and that thereby Andrew Chalmer was in the common case of one having his debtor's money in his hand, for which he was obliged to account; and that therefore retention is competent to him until he be relieved of his cautionary engagements."

Fol. Dic. v. 3, p. 149. Rem. Dec. v. 2, No. 54, p. 82.

No. 84. [2628] Sir FRANCIS SCOT of Thirlestane, and JAMES SCOT of Bristo v. Scot of Hartwood-myres. February 23, 1697.

A party obtained assignation to an adjudication, and gave back-bond to pay or denude. He attempted to retain till paid a debt due to him by the cedent. Being a trust, or deposit, compensation found not competent or receivable.

Arniston reported Sir Francis Scot of Thirlestane, and James Scot of Bristo, who had led an adjudication against Scot of Hartwood-myres, for debts owing [2629] to

himself, and likewise on bonds due to James Scot of Bowhill, and others, to whom he gave back-bonds declaring the trust, and obliging himself to hold compt, reckon, and payment for what he should recover, or denude. Bowhill having assigned Francis to Bristo's back-bond, and he craving him to denude; he alleged, upon compensation, that Bowhill was owing him as much by clear liquid bonds, and which he advanced him on the faith of the trust he had of Hartwood-myres' adjudication, and that he would retain till he were paid.—Answered for Sir Francis, I mo, This is a liquid, neither being *inter eosdem*, nor a compensible sum, but only an obligation to denude, which is the prestation of a fact.—Replied, That it was an alternative obligation, either to pay or denude, in all which cases *electio est debitoris*; and if elect to pay, then compensation is in construction of law equivalent thereto. Yet the Lords considered this was a trust, and that *reddere depositum*, was *juris gentium*, and compensation was neither competent nor receivable against a *depositum*; and Francis being an assignee for an onerous cause, they repelled the compensation in far as proponed on Bowhill's debts against him. Yet Bowhill's discharge would have precluded Sir Francis; and it has been oft found, that back-bonds qualify and affect not only personal rights, but even apprisings and other real rights, till either instrument be taken upon them, or the legal be expired; and even against singular successors and third parties, whereof there is an eminent case, 5th February 1678, Mr. Robert M'Kenzie v. Watson. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1, p. 164. Fountainhall, v. 1, p. 770.

No. 85. The Executors-Creditors of JOHN STUART, Merchant in Edinburgh v. Mr. ROBERT STUART, Professor of Philosophy in the College of Edinburgh. July 10, 1709.

A legacy being left to two brothers, the share of one of them, who had died, was deposited in the hands of the other. Found, that he could not retain for a debt due to himself, in competition with other creditors of the defunct.

James Stuart, advocate, one of the town clerks of Edinburgh, having, before his decease in January 1704, disposed and made over all his means and effects in trust to Sir James Stuart of Goodtrees, his uncle, and Sir Hugh Cunninghame of Craigend, his father-in-law, for the ends mentioned in the disposition; with a clause ordaining what remained of his estate, after payment of his debts and legacies, to be made furthcoming to his two brothers, John and Robert Stuarts, equally betwixt them; and John Stuart chancing to die a little after James, before the trustees had executed his will; they, the trustees, the 25th March 1705, ordered £6029, the superplus balance of James's free gear, to be put in Mr. Robert's hands, to be kept and made furthcoming by him, to such as should be found to have best right. John Stuart's creditors confirmed his share of the money as executors-creditors to him, and pursued Mr. Robert for payment.

[2630] Alleged for the defender; He being creditor to his brother John in a liquid bond of £730 of principal, and some bygone annualrents, ought to have retention in his own hands for his payment; especially considering, that the share of James Stuart's estate falling to his brother John, was never *in bonis* of John, but in the person of the trustees, who had the absolute disposal thereof after John's death, and were only liable to an action of trust at the instance of his creditors or representatives. And these trustees having put the money in the defender's hands, to be furthcoming to John's creditors, he might justly pay himself in the first place, by virtue of the delegation; as well as the trustees might have immediately paid the creditors with the money, as far as it would go, without necessity of confirmation.

Replied for the pursuers; Their debtor's share of his brother's means, was *in bonis* of the debtor, at his decease, and not then in the defender's hands; so that whatever way thereafter he attained possession, he could not retain for his own payment, without establishing a title, by confirming himself executor-creditor. Creditors cannot, by any indirect means, prefer themselves to other creditors, doing diligence

after the common debtor's decease, 8th February 1662, Crawford *contra* Earl of Murray, No. 63, p. 2613; and 14th February 1662, the Children of Mouswell *contra* Laurie, No. 64, p. 2614. And the trustees could not transmit any title to John Stuart's effects, from whom they had no trust or powers to pay his debt. Besides, whether the right of John's share was *in bonis ejus*, or in the person of the trustees, they could never evacuate the trust, by giving his share, after his death, to any person wanting a title.

Duplied for the defender; Creditors cannot, indeed, by indirect means prefer themselves to others, and it is certainly a most indirect method, for a debtor to take an assignation to his deceased creditor's debts, in order to compense against the defunct's other creditors doing diligence, which is the case of the cited decisions; seeing this course would open a door to any creditor to operate his own preference, by colluding with a debtor. But here there is no such practice; on the contrary, the defender got the money fairly in his hands by the trustees, who had the only right thereto, and did truly apply it for the use they received it; 2dly, Suppose John Stuart had lodged in Mr. Robert's hands, a sum to be expended by him, in paying John's creditors, is it to be imagined that Mr. Robert could not in that case have paid himself, after the debtor's decease, without confirmation? seeing, *qui suum recipit, condictione non tenetur*; much more must retention be allowed in this case, where in effect the money was never *in bonis defuncti*, but the trust flowed from others. Again, as, had the money been put by the trustees in Mr. Robert's hand, while John was alive, he, Mr. Robert, would have good right of retention; so he must be allowed the like *jus retentionis* against John's executors-creditors.

Triplied for the pursuers; The disparity is manifest; for putting the money in Mr. Robert's hand in John's lifetime, would, *ipso facto*, have made an ex-[2631]-tinguishing *concursus debiti et crediti*, which could not happen by his getting the money after John's decease, which nothing but a legally established title could effect.

The Lords found, That Mr. Robert Stuart had no right of retention for his own payment; and that the Creditors of John Stuart ought to be preferred to his share of the deposited money, according to the diligence used by them to affect the same.

Fol. Dic. v. 1, p. 164. Forbes, p. 348.

No. 102.

[2640] WRIGHT v. SHEILL. July 25, 1676.

Compensation not receivable against a decree in absence, unless where made null and turned into a libel.

William Wright, as assignee by John Sheill, in Carlourie, to several bonds ad-debted to John Sheill in Leith, obtained decret before the Sheriff of Edinburgh in anno 1662, against George Sheill, brother and heir to John Sheill, wherein he appriseth certain tenements in Leith, and now pursues for mails and duties thereof. The defender alleged, That he had raised reduction of the Sheriff's decret upon compensation, by a debt due by John Sheill in Carlourie, the pursuer's cedent, to John Sheill in Leith, and takes the same away by compensation, so that the ground of the apprising being extinct, it falls in consequence; likeas, shortly after the apprising decret is obtained, establishing the debt both active and passive, whereupon compensation is founded, albeit the very concurrence of the two sums *ab initio inter eandem personas* was sufficient for compensation when proponed. The pursuer answered, That the allegiance of compensation ought to be repelled, because it was not proponed *ante sententiam*, conform to the act of Parliament 1592, cap. 143. It was replied, That that act was only to be understood of decreets *in foro*, against which, by the course of process then allowed, competent and omitted was not relevant against suspensions or reductions; but that whatever was omitted in the first instance, might have been proponed in the second by suspension or reduction, which the foresaid act only obviates as to compensation, that it shall not be received in the second instance, which doth import that compensation is only excluded against a decret *in foro*, unless it be proponed before sentence; but the decret in question is a decret

in absence, and accordingly *de consuetudine* compensation hath been ordinarily admitted by way of suspension; and if it were otherways, great inconveniences would arise, for parties might obtain decreets, stolen through clandestinely by citation at dwelling-houses, carrying away the copies, or against parties out of the country and in this case, the defender offers to depone upon his oath, that he never knew the citation whereupon this decreet proceeded. The pursuer duplied, That he opposed the clear act of Parliament relating to all Judges within the realm, who are to admit compensation by way of exception, but the same is never to be admitted, after the decreet is given, by suspension or reduction, nor is there any ground to limit the decreet *in foro*, upon pretence of competent and omitted, whereof there is no mention in the statute; and if the decreet itself had been *in foro*, nothing then competent was receivable afterward by suspension or reduction, by law or custom ancient or recent; but when the defender was absent in the principal decreet, if he compared the second instance by suspension, and insisted on any reason, one or more, though he succumbed therein, yet he might raise a suspension on other reasons, and the decreet of suspension *in foro* did not exclude the same in subsequent suspension as competent and omitted in the decreet of suspension *in foro*; but if the principal decreet was *in foro*, competent [2641] and omitted was always sufficient against a suspension or reduction thereof; and therefore the common course was to be absent in the first decreet, and to suspend as oft as particular reasons could be founded on to the great vexation of the people, and delay of justice, which therefore is well remedied by the late act of regulation, declaring, That whatsoever was competent and omitted against any decreet principal, or decreet of suspension *in foro*, shall not be received thereafter; and therefore the excluding of compensation *post sententiam* by this statute, is chiefly in relation to decreets in absence, for if the decreet was *in foro*, the common exception of competent and omitted, which was always in vigour against the first decreet, would have excluded compensation, yea payment itself, and so the statute was needless, unless it had been to exclude compensation against decreets in absence.

The Lords found that compensation was not receivable against decreets in absence by the foresaid statute, unless the decreet were made null, and turned into a libel by improbation of the executions, or by fraudulent and clandestine taking away of the executions, or any other nullity. *Fol. Dic. v. 1, p. 165. Stair, v. 2, p. 456.*

No. 106. [2642] HUGH CORBET of Hardgray v. WILLIAM HAMILTON of Wishaw.
March 20, 1707.

Compensation being proponed after a decree in absence, the decree being against the party among many others, the Lords found, that a decree in absence against debtors excludes not compensation.

Hardgray, as assignee to a decreet of the Commissaries of Glasgow, against Wishaw for 400 merks, contained in a ticket granted by him to the deceased William Anderson, Provost of Glasgow, pursued Wishaw for payment.

Alleged for the defender; Absolvitor, because, 1mo, The decreet was in absence, and intrinsically null for being pronounced in vacation time without a dispensation, by a commissary who is not competent to judge in actions above £40 Scots, except where the libel is referred to oath, and the ticket was prescribed. 2do, Compensation upon a bill drawn by Patrick Murray, clerk to the Fishery company upon Provost Anderson for 1200 merks payable to Wishaw, which the Provost, by a letter under his hand to Wishaw, acknowledged and promised to pay.

Replied for the pursuer; Compensation upon the bill and letters cannot be sustained, because both being holograph were prescribed by the elapsing of 20 [2643] years before any diligence done thereon. 2do, A decreet having followed upon the ticket; no compensation can be sustained thereafter. 3tio, There is no compensation in this case, because the bill on Provost Anderson was to have been allowed to him upon producing the possessor's receipt of payment in the first end of what he owed to the company: And Wishaw having neglected for 20 years to present the bill, or to offer

a receipt in the terms thereof, Provost Anderson neither did nor could get allowance of the sum in the bill from the company.

Duplied for the defender ; The bill and missive letter could not prescribe, because *eo momento* that they did exist, they *ipso jure* extinguished Wishaw's obligation ; it being the nature and effect of compensation, to extinguish the concurring debts ; and after extinction, it is absurd to talk of prescription by course of time ; 2do, Wishaw had no reason to pursue them upon the accepted bill, for that he knew it compensated by his ticket ; but now that he is pursued upon the ticket, he cannot be debarred from proponing compensation upon the bill ; because, *quod est temporale in actione, in exceptione est perpetuum* ; and in conformity with this brocard, the Lords decided in the cases of Gordon of Park *contra* Hay of Ranis, 1702 ; and Hay of Lochcoat *contra* Bonhard, 1703, see PROCESS ; 3tio, The act of Parliament excluding compensation after sentence, is only to be understood of decreets *in foro*, whereas the decret founded on was in absence, pronounced by a Commissary, who was not a competent judge. Now Wishaw cannot be blamed for not compearing to propone his compensation, where he was not bound to appear ; besides, the Lords have sometimes sustained compensation in a suspension, or by way of defence, even after a decret *in foro*, where there was any probable cause for not proponing the same *in prima instantia*, as in the case of Earl of Marshall *contra* Brag, No. 101, p. 2639, observed by Gilmour ; 4to, Suppose Provost Anderson had never got allowance of the sum due by him to the Company, what is that to Wishaw, who hath his liquid acceptance and obligement to pay the bill, which, at the very date thereof, did concur with, and extinguish Wishaw's ticket for the equivalent sum ? And if the Provost neglected to ask a receipt (which Wishaw never refused), *sibi imputet*.

Duplied for the pursuer ; The act of Parliament doth not distinguish betwixt decreets in absence and decreets *in foro*, in the matter of repelling compensation after sentence ; and it had been needless to make any such act concerning decreets *in foro*, which were sufficiently secured by the regulation act concerning competent and omitted ; therefore the statute excluding compensation after sentence, should only be understood to relate to decreets in absence, as was decided 25th July 1676, Wright *contra* Shiell, No. 102, p. 2640.

The Lords repelled the reasons of prescription of the ticket pursued on, in respect of the decret ; but found, That the decret being in absence, and against debtors, it doth not exclude the defence of compensation in the second [2644] instance ; and found, That the compensation being proponed by exception, doth not prescribe ; and therefore sustained the compensation founded on the precept and letter produced, and assoilzied.

Fol. Dic. v. 1, p. 165. Forbes, p. 158.

No. 118. [2651] HODGE v. BROWN. February 13, 1664.

Compensation upon a debt due by a tacksman to his sub-tenant, was found competent to be proponed against the master ; compensation being payment in law.

Mr. Robert Hodge pursues Robert Brown, merchant, for certain duties of land in Leith, possessed by the defender belonging to the pursuer. It was alleged, That the defender ought to have allowance of certain profitable expenses, wared out by him upon the house. It was answered, That the defender possessed the house as succeeding in the vice and place of Andrew Brysson, to whom the pursuer by tack set the houses for a duty simply, without respect to any charges to be wared out by the tacksman ; so that what the tacksman built or repaired, it was on his own hazard and charge, there being nothing conditioned therefor. It was replied, That the defender was only convened as possessor ; and, as possessor, he ought to have allowance of what he profitably bestowed. It was duplied, That what he bestowed without warrant of the master, and being in vice of the tacksman, he can be in no better case than the tacks-[2652]-man, who, during his tack, if he had built never so much, it would have accresced to the heritor, without remedy or recovery of the expenses.

The Lords found no allowance should be granted.

In this same process, it was alleged, The defender ought to have compensation

for such debts as were owing to him by the said Andrew Brysson, setter of the house to him. It was answered, That the pursuer being heritor and master, ought to have his duty fully paid to him, without respect to any debt owing to the defender by Brysson. It was replied, That the tacksman being the setter of the houses to the defender, he was the defender's master, to whom, if the defender had made former payment, he would have been assoilzied ; now, compensation is payment by the husband or the equivalent.

The Lords allowed compensation, the debt being proven.

Fol. Dic. v. 1, p. 166. Gilmour, No. 97, p. 74.

No. 126. [2657] WILLIAM ALISON v. JOHN DUNCAN. January 23, 1711.

A party assigned a debt to his son-in-law. The debtor suspended on compensation having acquired right to a debt due by the cedent. The cedent had been denuded, and the assignation intimated, before the suspender acquired right on the ground of compensation. Found, the compensation could not meet the assignee, but without prejudice to reduction on the act 1621.

John Duncan, late Provost in Dundee, being debtor to Robert Christie by bond, Christie assigns it to William Alison, his son-in-law, who charging Duncan, he suspends and craves compensation, on this ground, that Christie the cedent was owing to Hunter of Baldivie a greater sum, whereunto he has right as executor-creditor confirmed to Hunter. Answered, The compensation never met nor concurred betwixt the two, because Christie was denuded by the assignation, and the same duly intimated to Duncan, before he had established the right of the debt due by Christie to Hunter in his person as executor-creditor ; so there was never a *concursus debiti et crediti* betwixt Christie and Duncan. It is confessed, if Duncan had purchased the debt due by Christie to Hunter in his person, before Christie assigned Duncan's bond to Alison, or even before it was intimated, then the compensation would have met ; but Christie being totally denuded by an intimated assignation before ever Duncan had right by his confirmation to Christie's bond to Hunter, it is impossible that can be a ground of compensation, but only for an action against Christie, and cannot meet his assignee. Replied, If the assignation had been for an onerous cause, then it is [2658] acknowledged it would have excluded the compensation ; but being from a father-in-law to his goodson, it does not prove its own narrative, but is presumed gratuitous, unless the onerous cause were *aliunde* instructed, and so is reducible on the act of Parl. 1621 ; and as such rights *inter conjunctos* do not debar from the cedent's oath, so neither can they exclude compensation against the cedent, no more than if the assignation had been in trust upon a backbond, as was found, 28th January 1676, Crocket *contra* Ramsay, No. 120, p. 2652. Duplied, *Non refert*, what be the cause of the assignation ; for *esto* it were a donation, and duly intimated, before you acquire in a debt of the cedent's, you are no more his debtor but the assignee's, and can never obtrude the cedent's debt purchased in *ex post facto* against him ; for that were to elude my assignation ; whereas, *factum cuique suum non adversario nocere debet* ; and an executor, taking assignation to some of the defunct's debts after his own confirmation, will neither get retention nor compensation thereon against the defunct's other creditors. Next, the assignation, *esto* it were gratuitous, can never be quarrelled, unless they prove the granter was insolvent at the time he gave it, as has been found, 6th March 1632, Garthland *contra* Ker, No. 45, p. 915 ; 30th June 1675, Clark *contra* Stewart, No. 46, p. 917 ; 11th December 1679, Creditors of Monswell, No. 60, p. 934 ; and 10th November 1680, M'Kell *contra* Jamieson and Wilson, No. 47, p. 920. Though some thought it hard to put creditors to expiscate their debtor's means and effects, and whether solvent or not, it was more reasonable that the debtor's relations should lose than they. However, in this cause, the Lords found the compensation did not meet the assignee, but prejudice of reducing the assignation on the act of Parliament 1621, as accords.

Fol. Dic. v. 1, p. 167. Fountainhall, v. 2, p. 629.

to. 127. ADAM ELLIOT, Eldest Son to Walter Elliot of Arkletoun v. WILLIAM and NICOL ELLIOTS, his Younger Sons. June 29, 1711.

Compensation of a bond for money borrowed was refused to be sustained to the granters, upon a debt due by the creditor to their pupil, which they had no right to ; although they offered to prove, by his oath, that they borrowed the money from him, upon the pupil's account, who, now major, was willing to apply her debt to extinguish the bond.

William and Nicol Elliots being charged, at the instance of Adam Elliot, to pay 70 Sterling, and annualrent thereof, contained in their bond granted to William Elliot their father, and assigned by him to the charger, they suspended, upon this reason, that they offered to prove, by the charger's oath of knowledge, that they truly borrowed the money charged for upon the account of Margaret Elliot their pupil, and that the cedent was debtor to the pupil in more, which she, now major, was content to apply towards the extinction of that debt.—The Lords repelled the allegance of compensation, in respect no debt due to Margaret Elliot, by the charger's cedent, can meet the suspender's bond, having no relation to Margaret ; seeing they have no assignation thereto [2659] from her. The charger is not concerned whose use the money was applied to ; but the suspenders must satisfy their bond to the charger, and seek relief from their pupil as accords.

Fol. Dic. v. 1, p. 167. Forbes, p. 514.

No. 139. [2677] Sir JAMES CARMICHAEL of Bonington v. CARMICHAEL of Mauldsly. July 1719.

Compensation found not proponable upon a debt sopped by the forty years' prescription ; and this though there was a *concursum debiti et crediti* long before the running of prescription.

Sir James Carmichael pursues Mauldsly upon several grounds of debt, owing by Mauldsly's predecessors to his predecessors ; Mauldsly propones compensation upon greater sums due by the pursuer's grandfather to his predecessor, as executor confirmed in a testament made by Captain John Carmichael, anno 1644, wherein he nominates his two brothers, Sir Daniel and Sir James Carmichaels, predecessors to the parties in this process, his executors, and wherein Sir James, the pursuer's predecessor, was the sole intromitter. It was objected for the pursuer, That this reciprocal claim founded on the testament, was prescribed by the lapse of forty years, no document having been taken thereon ; and being thereby extinguished, it could neither be the foundation of an action or exception.

It was answered for the defender, That the nature of compensation is such, that where there is a concurrence betwixt two debts, there necessarily must arise a mutual extinction ; and if once there be an extinction, then without doubt, [2678] the allegance that the debt pursued on is extinguished, must be competent to the defender at any time when that extinguished debt comes to be pursued upon ; or any other way brought in judgment against him : It is very true, that where there is a mutual concurrence of debts, there is a double effect ; each party, if he pleases, may pursue upon his own debt, and oblige the other either to pay, or to take the benefit of the compensation ; and that other has it again in his option, whether he will make use of the benefit of the compensation, and propose the extinction, or if he will neglect it, and pay the debt pursued for : But then he cannot do this without the other's consent, because that other, if he will, may force an extinction, by insisting to have it declared, That from the time of the concurrence, the debts were mutually satisfied ; the force of which conclusion the other party cannot evade. But if both parties expressly, or tacitly, agree, That the debts shall not mutually extinguish one another, then indeed the concurrence has not its legal effect : But still it is plain, there is really an

extinction *ipso jure*. In the same manner the exception of payment itself may be passed from, where both parties agree to it, and where there is no *medium impedimentum*, or damage arising to a third party : So if a discharge be granted, that discharge may be passed from and delivered up, and the debt continue a good debt ; and, of late years it was found, that where there was a renunciation granted of an infestment, that renunciation might warrantably be given up, and the old infestment take place, there being no *medium impedimentum*, or after creditor prejudged. All this is to prevent an objection, as if compensation could not operate *ipso jure*, because it may be passed from ; for so may any other instruction of payment. Nor is there any inconsistency in what is commonly said, That compensation must be proposed, otherwise it has no place ; for it must be proposed, not in order to make the extinction, but as the lawyers express it, *ad manifestandum*, and, in order to have the extinction, which had before taken place, ascertained by a legal sentence ; and so the matter is very well explained by the learned Voet, *tit. de Compensationibus*, num. 2. This then being the nature of compensation, it is not conceivable how the prescription of any one of the concurring debts, should take away the benefit of the exception from the creditor, since at proposing the exception, he does not found upon the debt as a subsisting debt, but as a document of the extinction of the other debt.

It was replied for the pursuer, That in our law, compensation operates not *ipso jure* upon the mutual existence and concurrence of the debts, until the ground of compensation be proposed and applied ; then indeed it operates *retro* : But till proposing, the mutual debts remain unextinguished. For the more full understanding of this scheme, it is to be observed, compensation is not by our law allowed in the same extent that it was in the later times of the Roman law. The learned Vinnius observes, in his Commentary upon the Institutes, *tit. Action*, § 30, That the privilege of compensation was at first only introduced in *bonæ fidei judiciis*, *ex bono et æquo* ; thereafter, by the constitution of *Divus Marcus* allowed in *stricti juris judiciis*, *opposita doli mali excep-tione* ; and lastly by Justinian, introduced in all cases *ipso jure*. It is adopted by us in the middle way, *opposita exceptione* ; which the statute Ja. VI. Parl. 12, c. 143, in terms bears, " That any debt *de liquido in liquidum*, before giving decret, be admitted by all judges within this realm by way of exception ; but not after the giving thereof in the suspension, or in the reduction of the same decret : " And so indeed is introduced no otherwise but as a reconvention privileged to be proposed by way of exception ; for of its proper nature it is not even an exception, as Lord Stair observes, where he says, " It is neither payment formally nor materially " : For when a creditor borroweth from his debtor, and obliges himself to pay at a day, a mutual credit arising from the nature of the thing, affords no exception against payment, but each party must insist for his own claim. Accordingly compensation has place only in those countries where it is introduced by statute, or where the Roman law prevails, and had no place with us before the act 1592 ; and established by positive law, for utility's sake alone, to shun multiplicity of pleas, upon the principle, *Frustra petit quod mox est restitutus*. Hence it is that the effects of compensation are not so full in our law, as with the Romans ; for among them it was competent after sentence, l. 2, *Cod. Compensat.* not so with us : When one paid who had a ground of compensation, he had a *condictio indebiti* ; which would not obtain with us : Horning is not taken away by compensation, by a sum due to the party denounced, equal to that in the horning, not being actually applied by process or contract, as Lord Stair observes, l. 3, t. 3, § 12, which yet it would, did compensation extinguish *ipso jure*. And indeed the rule is general, that where a debt is not taken away *ipso jure*, but only *ope exceptionis*, the debt still remains unextinguished till the exception be proposed ; and at the time of proposing, the validity of the exception is to be considered.

Duplied for the defender, To hold that compensation operates not *ipso jure*, is to go against a principle ; for, if it has no effect before it be proposed, how could it stop the course of interest ? Relieve a cautioner ? Be good against an assignee even for an onerous cause ? Or against an arrester arresting after the concurrence ! These are all *media impedimenta*, such as would hinder the proposing of compensation, if it was to take effect only from the time of proposing, and not from the time of the concurrence. Nor is the observation of any use, that by express statute, compensation is not admitted after decret : An act of Parliament might have appointed that a discharge should not be received after a decret, and might have left the party discharged, to his action of repetition *indebiti condicione* ; but that would not have

altered the nature of payment, or hindered it to be an *ipso jure* extinction. No more does the statute founded on alter the nature of compensation ; it bars indeed the proponing of it after sentence ; and so in that case, the act of Parliament has the same effect, that the mutual consent of parties renouncing or passing from the compensation would have : But still the nature of the exception remains the same, and when warrantably proponed, must operate *ipso jure*, so as to extinguish from the time of the concurrence.

[2680] Triplied for the pursuer, Though compensation is proponable against assignees, voluntary and legal, and that *retro* the *cursus usurarum* is stopped ; that is no proof of its operating *ipso jure* before proponing : For, as to the first, it arises from another rule, viz. *Quisque utitur jure auctoris* ; what is competent against the cedent, is competent against the assignee, because assignees and arresters are only mandataries *in rem suam* ; they act in their author's name, and upon his right, and must consequently sustain all objections competent against him. *Vide* Stewart and Nisbet, *voce* EXCEPTION. And the other of operating *retro*, is *ex officio judicis* from the equity of the thing, and not at all *ipso jure*.

Quadrupled, Though the old style of assignations run as they were only mandates, yet in our present practice, assignation with intimation is looked upon as a complete conveyance *funditus* denuding the cedent ; the assignee accordingly can act in his own name, and the cedent must be reinstated in his former right, upon the medium of a new conveyance from the assignee ; which are each of them demonstrations, that an assignation is somewhat beyond a mandate, and no less than a complete conveyance.

There was a separate ground insisted on for the pursuer, in this shape, That allowing compensation operates *ipso jure*, yet the testament pretended to compensate on, being prescribed *quoad modum probandi* by the lapse of forty years, there was no legal evidence remaining, that ever there was such a debt, that ever there was a concurrence, or mutual extinction : For it was pleaded in general, That all obligatory writs prescribe, and are not *instrumenta probatoria* after forty years. To which it was answered, 1mo, The law has not said so. 2do, It is not conceivable how it can be so, That a writing completed with all solemnities that law requires, should be probative to-day, and not to-morrow. It does indeed sometimes happen by force of express statute, that a writ not having all the solemnities which law requires, should, after such a limited time, need to be further supported, as happens in the case of holograph writs ; but it never was heard, that a deed fully complete, with all its solemnities, should not be probative after currency of whatever number of years. See PRESCRIPTION.

“ The Lords found, That compensation cannot be proponed upon a debt after running of the forty years prescription.”

Fol. Dic. v. 1, p. 165. *Rem. Dec.* v. 2, No. 17, p. 35.

No. 141. [2681] BALMERINO v. Sir WILLIAM DICK's Creditors. July 14, 1664.

Before litiscontestation or decree, the defender may pass from his defence of compensation, so as to be at liberty to use the writ upon which he might compensate to any other purpose.

James Gilmor, for the use of the Lord Balmerino, being infeft in the lands of North Berwick, upon a right from Sir John Smith, who had right from Sir William Dick, pursues the tenants for mails and duties. Compareance is made for Sir William's other creditors, wadsetters and apprisers, who allege absolvitor, because the pursuer's right is extinct, in so far as Balmerino being debtor to Sir William Dick, and charged by him, had acquired this right from Sir John Smith, to compensate Sir William, and did actually compensate him, by alleging the same reason of compensation, producing the disposition then blank in the assignee's name ; whereupon the letters were suspended simpliciter, and my Lord assolizied ; and the disposition given up to Mr. Alexander Dick, which is instructed by the testimony of William Downie, clerk at that time. Balmerino answered, First, That William Downie's testimony could not make up a minute of decreet, where there were no process, nor adminicle to be seen.

2dly, Though the minute of the decret were lying before the Lords, not be-[2682]-extracted, the Lord Balmerino might pass from his reason of compensation, and take up his disposition, which is always permitted before litiscontestation, or decret and litiscontestation is never accounted until the act be extracted: So that there being no act of litiscontestation extracted in the said process, but only an alleged minute of a decret without an act, neither party might resile. 3dly, Though the suspender might not resile simpliciter, yet it is still competent to him, to propose a several reason of suspension before extract, being instantly verified; and now he propones this reason, that the debt owing by him to Sir William Dick, is a public debt, and the Parliament has suspended all execution thereupon, till the next Parliament; which by consequence liberates him from making use of, or instructing his reason of compensation. The creditors answered, It was most ordinary for the Lord to make up minutes by the testimonies of the clerks, when they were lost. So that William Downie being a famous clerk, his testimony must make up the minute after which the Lord Balmerino cannot resile from his reason of compensation, or take back the disposition, seeing it was his own fault he did not extract it, and cannot make use now of a supervenient exception, that was not at that time competent, in prejudice of their creditors, Balmerino being now in a much worse condition.

The Lords found, That the Lord Balmerino might now propound a reason of suspension emergent on the late act of Parliament, and pass from his reason of compensation, and take up his disposition, seeing it did not appear that the process was miscarried through Balmerino's fault, or that the disposition was delivered to Sir William Dick, neither of which did appear by William Downie's testimony.

Fol. Dic. v. 1, p. 168. Stair, v. 1, p. 214.

No. 142. CLELAND v. STEVENSON. February 5, 1669.

Compensation being sustained upon a decree, liquidating a quantity of victual, due by the charger to the suspender, the same was found to operate from the time the victual became due, and was not restricted to the date of the decret.

William Cleland charges John Stevenson upon a bond of 400 merks, bearing annual rent. He suspends on this reason, That the charger was owing him more victual, being his tenant, which was now liquidated before this time, but after the date of this bond, and craved compensation thereupon, not only from the date of the liquidation, but from the time the victual-rent was due.

Which the Lords sustained. *Fol. Dic. v. 1, p. 167. Stair, v. 1, p. 598.*

No. 144. [2684] WATSON v. CUNNINGHAM. December 4, 1675.

It was found, that money may be compensated by debursments of money from the time of deburment, or intromission with money-rent, but not by victual or any prestation, until that be liquidated or reduced to money.

Watson of Glentop having charged Robert Cunningham upon a bond of borrowed money, which he suspends upon compensation of debursments by him for the charges in reducing an apprising, and several other affairs, and for allowances to his own servants of meat and drink that the charger got in his house, and for his own service which being referred by the charger to the suspender's own oath, he deponed; which being advised by the Lords, this question arose, *a quo tempore* the compensation should take effect, whether only from the date of the sentence, by which it is liquidated, or from the time the oath prove it was due; the ground of the doubt being, that compensation is only competent *de liquido in liquidum*, and therefore can have no effect till the liquidation, which was not till this sentence; for by our custom, no debt is

suspended liquid till it be determined by a sentence, and thereby have *paratam executionem*.

[2685] The Lords found, That liquidation requisite for compensation did only import that both debts were of the same kind, to be estimated as a fungible quantity, and therefore money may be compensated with debursements of money, from the time of deburserment or intromission with money-rent, but not with victual, or any restitution, until the same were liquidate or redacted into money; and therefore the Lords allowed the compensation of the suspender's debursements, from the time they were given out, but of the modification for his own service allenarly from the time of the decreet, liquidating the same.

Fol. Dic. v. 1, p. 167. Stair, v. 2, p. 375.

No. 147.

[2686] IRVINE v. MENZIES. July 10, 1711.

In a suspension of a charge on a bond, the suspender craved compensation of a sum due to him by the charger per bill. The charger proponed recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore must have retention of the sum in the bill till he be relieved, though the charger was not yet distressed. The Lords found, that the retention took place against the liquid compensation, and that he was not bound to let the debt be extinguished by compensation, till he was relieved of his cautionry.

Charles Menzies, writer to the signet, being debtor to Mr. Alexander Irvine of Saphock in £319, by bond, and charged thereon, suspends, that he must have compensation for £212, contained in a bill due by Irvine, to which he has right.—Answered, Your compensation cannot extinguish my debt; because I [2687] recompense you again, in so far as I am cautioner for you in a 3000 merks bond, whereof you are bound to relieve me; and so I must have retention of your £212, whereon you ground your compensation, till you relieve me of that debt.—Replied, There can neither be retention nor recompensation, unless you were distressed and had paid the debt. And seeing the concurrence of the two debts does, *ipso jure*, extinguish one another, no pretence of retention can make a debt extinct to revive; the bond of relief being only an obligation *ad factum præstandum*, and so illiquid.—Duplied, His claim of retention is founded both in the common law, in reason, and in the analogy of our municipal law; and first, the Roman law is plain, in *l. unica C. etiam ob chirograph. pecun. pignus retineri posse*; though you pay me the debt for which I had the pledge, yet I'll retain it if you owe me any sum, till that be likewise paid or secured. Next, this retention is founded in reason; for, if I have your effects in my hand, and you owe me money, you cannot draw them out till you pay; it being *tutius rei inhærere quam in personam agere*; 3tio, As to our own law, a creditor in relief cannot, by any diligence of arrestment or otherwise, affect the subject in his own hands, as if it were in another's; for supplying which difficulty, law has allowed retention; and was so found betwixt Ballenden and Sinclair,* and 14th February 1708, Mr. Patrick Strachan and the Town of Aberdeen, No. 60, p. 2609. And though he be not yet distressed, he knows not how soon he may be overtaken, the creditor having *paratam executionem* against him when he pleases; so that it is more than a mere *factum præstandum*.—The Lords found, That the retention took place against the liquid compensation, and that he was not bound to let this debt be extinguished by the compensation, till he was relieved of his cautionry.

Fol. Dic. v. 1, p. 168. Fountainhall, v. 2, p. 657.

* EXAMINE GENERAL LIST OF NAMES.

No. 148. ALEXANDER MURRAY of Brughtoun v. WILLIAM M'GUFFOG of Ruscoe.
November 23, 1711.

A man, for security of a sum due by heritable bond, getting a tack of some lands for a duty equal to the annualrent of the sums, at six per cent. and being besides obliged to pay yearly two wedders, and two stones of butter, during the 21 years that the tack was to last; and he never having paid these; in a declarator of extinction and payment, the Lords having first caused liquidate the prices of the wedders and butter, did then find that they could only compensate and impute from the time of the liquidation, and not yearly when they fell due.

Richard Murray of Brughtoun, debtor to the deceased William M'Guffog of Ruscoe, in 4000 merks, by an heritable bond dated in anno 1675, did, by a tack of the same date, narrating the bond, set to him the lands of Murraytoun and Cullindoch, for payment of 240 merks, two wedders and two stone of butter yearly; with this provision, "That the tacksman should retain in his own hands of the foresaid tack-duty, in so far as will compensate and satisfy his annualrents yearly and termly during the not payment of the principal sum." Alexander Murray, now of Burghtoun, heir to Richard his grandfather, pursued a reduction and declarator of extinction of the heritable bond, by Ruscoe the defender, and his predecessor's possession of the lands several years without paying any tack-duty; and contended, That the prices of the wedders and but-[2688]-ter, liquidated in this process, ought to be imputed in payment and satisfaction of Roscoe's principal sum, at the terms they fell due by the tack.

Answered for the defender; *Species* or *corpora* cannot compensate money till once they be liquidated, and then the compensation takes place only from the date of the liquidation, 4th December 1675, Watson v. Cunningham, No. 144, p. 2684; consequently the butter and wedders can compensate and extinguish the defender's principal sum only from the time of the liquidation.

Replied for the pursuer; Where a creditor intromits with goods and effects of his debtor, upon some extrinsic cause, the rules of compensation and liquidation ought to take place; but it is otherwise in the case of intromission with a subject given in security and payment; as here, where the tacksman was just in the case of an improper wadsetter, whose intromission with the rents doth still impute from the time they are uplifted; and in effect, this extinction doth not so much arise upon the ground of compensation, as of payment.

Duplied for the pursuer; It is frivolous to fancy Ruscoe in the case of an improper wadsetter, for he never entered to possession by virtue of the heritable bond (which was a transcendent heritable right upon Brughtoun's whole estate) but only by virtue of his tack; by which he had indeed power to retain the tack duty, in so far as would satisfy his annualrents, but not for payment of his principal sum.

The Lords found, That the compensation upon the butter and wedders, takes effect only from the time of the liquidation.

Fol. Dic. v. 1, p. 167. *Forbes*, p. 549.

No. 151. [2690] PATRICK HALDANE, Esq. v. ARCHIBALD Duke of Douglas.
July 31, 1753.

A debtor having lent money to his creditor on bond, and continued to pay the annual-rents of debts which he owed without deducting the interest of the sum he had lent, found, notwithstanding, entitled to plead compensation upon that sum, in a competition with creditors.

The Duke of Douglas was debtor to his sister Lady Jean Douglas, in the sum of 20,000 merks Scots, due by a bond of provision bearing annualrent, granted to Lady Jean by James Marquis of Douglas, her father.

The Duke, in March 1718, gave Lady Jean a further provision, by a bond for 30,000 merks Scots bearing annualrent, but revocable at pleasure.

In 1728 and 1731, Lady Jean borrowed from the Duke two sums, amounting

to £750 Sterling, for which she granted bonds in the usual form, bearing annualrent and penalty.

Notwithstanding of these bonds, the Duke continued to pay to Lady Jean the full annualrent of the said 20,000 and 30,000 merks Scots, and an additional annuity of £161 Sterling, provided to her, as marked in the case betwixt Mr. Haldane and the Duke, 15th February last (*voce Quod Potuit non Fecit.*) to Whitsunday 1749, when he stopped payment.

Lady Jean being debtor to Mr. Haldane in the sum of £500 Sterling, she assigned him to as much of the 20,000 merks bond as would pay that sum and annualrents thereof; and Mr. Haldane brought an action against the Duke for payment.

Pleaded for the Duke; That Lady Jean was debtor to him in the sum of £750 Sterling and annualrents thereof since 1731, which extinguished the said bond of 20,000 merks, and made a balance due by Lady Jean to the Duke.

Answered for Mr. Haldane; That, both by the civil and Scots law, compensation operates *ipso jure* from the date of the concurrence, at whatever time it be proponed; and therefore Lady Jean being first creditor to the Duke in 20,000 merks Scots, and in the 1731, becoming debtor to him in £750 Sterling, she from that period remained creditor to him only in £361, 2s. 2½d. Sterling, with the annualrent thereof. That such was the effect of compensation by the civil law, is certain from L. 21 ff. *de compensationibus*; and L. 4 *cod. eod.* which precisely determines the present question. The words are, “Si constat pecuniam invicem deberi, ipso jure pro soluto compensationem haberi oportet, ex [2691] eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates ejusque solius quod amplius apud alterum est usurae debentur.” It is true that the defender must propone compensation, otherwise the Judge cannot know it; and so far it is *facti*: yet being proponed, the law determines the effect of it, which is altogether *juris*. See *Perezus ad codicem, tit. de compensat. n. 5, et Voet. Dict. tit. ff. n. 2.* And that compensation has the same effect by the law of Scotland, is the opinion of Sir George Mackenzie, Inst. b. 3, tit. 4, and of Lord Stair, b. 1, tit. 18, § 6. His Lordship says, “Compensation is a kind of liberation, as being equivalent to payment; for thereby two liquid obligations do extinguish each other, *ipso jure*, and not only *ope exceptionis*; for albeit compensation cannot operate if it be not prepared, as neither can payment; yet both *perimunt obligationem ipso jure*, and therefore are not arbitrary to either party to propone or not propose as they please; but any third party having interest may propone the same, which they cannot hinder.” The law so standing, the payments made by the Duke to his sister *ex gratia* beyond what he was debtor for, cannot alter the case, nor can he now demand back, or plead upon these payments which he gave her, as they must be considered as gifted; but the pursuer, in her right, is entitled to demand from the Duke the £361 Sterling which, in 1731, his Grace owed to his sister Lady Jean, above the sum compensated by Lady Jean’s bonds, and the annualrent thereof since Whitsunday 1749, when the Duke stopped payment.

Replied for the Duke; That by the law of Scotland, as appears from act 143d Parl. 1592, compensation is a defence on exception, which a defender may propone or not as he thinks proper; and when he proposes it, it must be sustained in the manner he pleads it, and not according as the pursuer finds it most convenient for him. The concurrence of the debt due by Lady Jean to the Duke had no effect upon the bond of provision; both these debts subsisted; the Duke was debtor to her in 20,000 merks Scots, and she to him in £750 Sterling, and the Duke might have assigned away the £750; in which case he could not have pleaded compensation, but behaved to have paid the full 20,000 merks, after which Lady Jean behaved to have paid the £750 to the assignee. And seeing the Duke did not, till the commencement of this action, plead the compensation, but paid the full annualrent of the 20,000 merks, notwithstanding of Lady Jean’s being debtor to him in £750 Sterling, she and her assignee cannot now refuse to pay the sum in her bond and annualrents thereof, or to admit the compensation founded thereon.

“The Lords sustained the compensation proponed by the Duke of Douglas, upon the two bonds granted by Lady Jean to his Grace, both as to principal and interest due on the said bonds, to extinguish the bond in question for 20,000 merks and interest thereof.”

Act. ADVOCATUS.—Alt. R. CRAIGIE.—Clerk, KIRKPATRICK.

B.

Fol. Dic. v. 3, p. 151. Fac. Col. No. 85, p. 128.

No. 2. [2] ANDREW STEWART, Writer to the Signet v. JAMES BISSET, Merchant
Perth. February 16, 1770.

A creditor to whom a sum of money was sent by his debtor, and received, in order to be applied to a particular purpose, not allowed, upon the bankruptcy of the debtor, to plead retention of the money, or to apply it in compensation of his own debt.

John Macdonald, merchant in Inverness, was debtor to Stewart by a bill for £18, 10s. which he had accepted. When the bill became due, and a demand was made by Stewart's correspondent at Inverness, he was told by Macdonald that he had sent the contents to Bisset at Perth to be paid to the holder of the bill. This appeared to have been the fact, Bisset having acknowledged that the money was sent him for that purpose; but that having called at the house of Coutts & Co. at Edinburgh, he was told the bill had been sent to the North; and as he did not chuse to keep the money idle, he had given credit for it in his books to Macdonald, with whom he had transactions, and who at that time was in his debt.

Macdonald became bankrupt; and Stewart having made a demand upon Bisset for the money impressed into his hands to take up the bill, Bisset maintained his right to apply the same to his own debt, and that he had done so accordingly. The pursuer having brought an action against Bisset, the Lord Ordinary assolvied the defender; when in a reclaiming petition, it was

Pleaded for the pursuer:

1mo, Where one person delivered money to another to be paid to a third party, and the money was received on these terms, the receiver became bound [3] to the third party as his mandatary or *negotiorum gestor*; and an obligation was constituted between the receiver and the third party, which the receiver was bound to implement. When money accordingly was delivered and received expressly for behoof of a third party, it made no difference upon the receiver's obligation, that he was creditor to the person by whom the money was impressed. If the receiver indeed insisted for application of the money to his own debt, the transaction in favour of the third party would not take place; but if no such application was insisted on, the property of the money was transferred, and remained in the receiver's hands on account of him in whose name it was delivered; 9th February 1759, *Stalker v. Ayton*, No. 77, p. 745.

2do, If the pursuer had been debtor to Bisset at the time Macdonald delivered the money to him, it was clear that Bisset could not, in any other settlement betwixt him and Macdonald, as creditor to the pursuer, have retained the sum impressed, without suffering it to be applied to the payment of Macdonald's own debt. Of course it must be equally clear, that as the pursuer was not indebted to Bisset, he was entitled to draw the money from him; or, in other words, that as Bisset, had he been the creditor to the pursuer, could in that right have retained it in any question with Macdonald; so, in the present case, he was under the same obligation to restore it.

3tio, If Bisset, when the money was delivered to him, had granted an obligation to deliver it to the pursuer, and that such obligation had been transmitted to him, it could not be denied but that an obligation was thereby created in favour of the pursuer which Bisset was bound to fulfil. The present case was equally strong; for though no obligatory writing was given, it was acknowledged that Bisset agreed to receive it for the pursuer's behoof, and to apply it in payment of the bill that was due.

4to, The pursuer's demand was well founded in law; and in point of equity was still stronger. When Macdonald proposed to impress the money into Bisset's hands for the purpose of paying the pursuer's bill, had he declined to receive it on these terms, or insisted on applying it to his own payment, Macdonald would have remitted it through some other channel. Trusting also to the transaction that had taken place, the pursuer abstained from diligence; whereby he might, before Macdonald's bankruptcy, have recovered that money, which Bisset, by inverting the intended application, had turned to his own behoof.

Answered for the defender:

1mo, Without denying that there might be a *jus quæsitum tertio* by the stipulation of other parties without the third party's knowledge, it was evident that no circumstances of that kind occurred in the present instance. It was not the intention of

Macdonald and the defender to create a *jus quæsitum* to any person whatever ; they could have no particular person in view, as they could not know to whom the bill might be indorsed ; so that all that the defender and Macdonald meant, was to get a debt of Macdonald's paid, and to do him a service.

[4] 2do, Though a writing might have been so conceived as to operate a delegation, and make the defender *ex promisso*, and directly liable to Stewart, such a transaction bore no analogy to the present circumstances. But if in a writing the defender had been taken bound to Macdonald, and Stewart's payment only pointed out as the mode in which he was to discharge himself of the sum, the case to which assimilation was made, there could be no doubt that there was no obligation constituted in Stewart's favour, which could tie up the defender from making payment to any other creditor of Macdonald, who should insist for it in a legal mode.

3tio, The pursuer, it was admitted, made no demand upon the defender of the money till after Macdonald's bankruptcy ; and, as, prior to that event, the money, as Macdonald's property, might have been attached by whoever, as a creditor of Macdonald's, had an interest to do so, the supervening contingency necessarily rendered the right of the pursuer, or of any other creditor, ineffectual, and that of the defender's preferable to all. Whatever might have been the case before, the bankruptcy created a *medium impedimentum* to the defender's paying away the money. No debtor could be so hardy as to ask, nor any creditor so foolish as to agree, that he should give out of his hands a sum which belonged to his debtor after that debtor had become bankrupt : So that, upon that event, though he had not applied it before in payment of his own debt, which was the case, he was, both in law and equity, entitled to retain it.

It was the general opinion of the Court that the right to this money was vested in Stewart, and that Bisset could not invert the property either to another's or to his own behoof ; and it was farther observed, that as Bisset had undertaken a trust, he was guilty of a breach of it in not applying the money according to its original destination.

The Court accordingly altered the Ordinary's interlocutor ; and found " the defender James Bisset liable to the petitioner in the sum libelled, with the expense of extracting the decret."

Lord Ordinary, ELLIOCK.—For Stewart, COSMO GORDON.—Clerk, ROSS.—For Bisset, MACLAURIN.

R. H.

Fac. Col. No. 24, p. 58.

No. 38.

[2719] CUNNINGHAM v. AUSTIN. December 11, 1623.

In a removing this exception was found relevant, that the party was infeft upon a comprising ; and the Lords refused to oblige the defender to produce the comprising, to dispute its sufficiency *hoc loco*, though it was alleged to be led for an heritable sum, not made moveable by requisition or otherwise.

In an action of removing betwixt Cunningham and Austin, The Lords found an exception relevant, founded upon an heritable infeftment granted to the excipient of the lands libelled, proceeding upon a comprising ; and would not astrict the defender to produce the comprising to dispute thereupon in this judgment of removing ; but found the exception, bearing the defender to be heritably infeft, relevant ; albeit it was replied by the pursuer, that the comprising, which is the ground of the infeftment, will appear null, if the same were produced, seeing it is deduced upon an heritable bond, never made moveable by requisition or any preceding charge, whereas the comprising could not be deduced, except the sum had been first made moveable : Which reply the Lords would not discuss in that place, nor urge the defender to produce the comprising.

Act. CUNNINGHAM.—Alt. RUSSEL.—Clerk, —.

Fol. Dic. v. 1, p. 173. Durie, p. 90.

No. 57. [2729] SIMPSON v. L. BALGONY. February 16, 1627.

A minor was allowed to propone, by way of exception, that he having curators, he entered to his predecessor without their consent, although he qualified no less thereby sustained.

In a transferring at the instance of David Simpson, burgess of Dysart v. the Laird of Balgony, as heir to his father, the Lords found a service produced to verify the defender to be heir, to be sufficient, albeit it was not retoured to the chancery because it was used to prove passive; and also found the exception against the same to be relevant *hoc loco*, without reduction or any other process, but to be received as a nullity by way of exception, viz. that the same was null, being a service done in his minority, without consent of his curators, he then having curators; which nullity was received *ope exceptionis*, albeit it was alleged, that it was a sentence which ought not to be reduced, because it was done to his utility, and by his own personal comparement at the time of the service, which was repelled.

Act. —.—Alt. AYTON.—Clerk, HAY.

Fol. Dic. v. 1, p. 174. Durie, p. 277.

* * Spottiswood reports the same case :

David Simpson in Dysart having pursued a transferring against the Laird of Balgony, as heir served to his father; it was alleged, That his service was not lawfully as done by himself, having curators, without their consent. Replied, That he ought to qualify some prejudice he sustained by entering heir to his father.—The Lords found the exception relevant of itself, *quia* of himself, *non potuit damnosam adisse hereditatem*.
Spottiswood (HEIRS), p. 137.

* * Auchinleck reports the same case :

The Laird of Balgony being served heir to his father in his minority, without consent of his curators, the service was found null by way of exception, because it was passive.
Auchinleck, MS. p. 2.

No. 81. [2744] Mr. JAMES INGLIS v. Dame MARGARET CHARTERIS and Lord ALEXANDER HAY, her Husband. June 26, 1712.

It was objected against the proving of the tenor of a writ, that it was innovate and extinguished. The Lords repelled the objection *hoc loco*, reserving to the defender to be heard thereon in any action to be raised upon the decree of tenor, in case it should be obtained.

Mr. James Inglis of St. Leonards pursues a proving the tenor of some writs against Dame Margaret Charteris, and Lord Alexander Hay of Lawfield her husband. The writs were an instrument of sasine of one Mr. Patrick Kelly, taken on an heritable bond, granted by Mr. Cornelius Inglis of Eastbarns in 1660, for 4600 merks to be lifted out of that part of these lands called Purvesdale. Item, A precept of *clare constat*, granted by Mr. Patrick Inglis as superior, to Janet Kelly, daughter and heir to the said Mr. Patrick Kelly. Item, a sasine following thereon. For asstructing the tenor these adminicles are adduced: The extracts of the sasines out of the respective registers where they stand recorded; The heritable bond, their warrant: Item, A decret of pointing of the ground on these sasines; and a preference to the creditors of Eastbarns. Alleged, The documents were neither relevant, nor concluding; for, Imo, Though the principal sasines were produced, and on the clerk's table (whereas here be only extracts) they are nowise probative, being merely the assertions of a notar, in whose power law never put the making up of real rights to lands; likewise,

the precept of *clare constat* is null, not bearing the designation of the writer, though posterior to the 5th act 1681 ; for it only says, " Wrote by one, servant to Archibald Nisbet," without telling who this Nisbet was ; and to condescend now that it was (Archibald Nisbet) writer to Signet, cannot be received, it being declared a nullity unsuppliable by the foresaid act. 2do, The precept is given by Mr. Patrick Inglis the debtor's apparent heir, and so is a passive title. 3tio, It appears by Dr. Oswald's oath, taken in this process, that the grounds of this debt were in the common debtor Mr. Patrick's hands, and so *instrumentum apud debitorem* and presumed retired ; though by a contrivance betwixt him and this pursuer, his brother, it was resolved to be kept up and revived, to debar true and lawful creditors. Answered, The adminicles produced were incontestably pregnant ; for, though a sasine alone be not sufficient, yet, conjoined with other presumptions, it has been sustained as a good document. And as to the nullity in the *clare constat*, the designation seems abundantly to certify the writer ; and *esto* it did not, yet being only in a step of the progress, and connection of the title, it is no way material : And as to the granter's being apparent heir, and colluding fraudulently with his brother, it is evident he did it by a singular title, viz. a base infeftment clad with possession, preferable to the creditors' diligence : And it appears by a decision in Stair, Inglis *contra* the Tenants of Eastbarns, No. 54, p. 1324, that he was upon that right preferred to Mr. John Inglis of Cramond, an annualreuter infeft in these same lands : And though it was objected, that he was not the true superior to give any precepts, he being denuded by apprisings and adjudications, yet this was repelled, seeing they were expired, and [2745] he, within the legal, was not fully divested. but he might enter and receive the vassals.—The Lords found the tenor sufficiently made up by the writs produced ; yet so as he behoved to take it as it stood, with the pretended nullity in the *clare constat*. And found the objections on the collusion, and its being retired, not competent against the tenor ; but reserved them by way of reduction.

Fol. Dic. v. 1, p. 176. Fountainhall, v. 2, p. 744.

No. 82. The Creditors of JAMES HAMILTON, younger of Orbistoun v. JAMES HAMILTON of Dalziel. July 7, 1713.

Found as above.

In a process at the instance of the Creditors of young Orbistoun v. James Hamilton of Dalziel, and Others, for proving the tenor of a disposition granted by the deceased William Hamilton of Orbistoun, elder, to his only son ;—The Lords repelled the allegiance proponed for the defenders, That the disposition, whereof the tenor was craved to be proved, was innovated by contract entered into at Cramond, betwixt old and young Orbistouns, *hoc loco* ; reserving to the defenders to be heard thereon after the tenor is proved, and allowed them to give in a condescendence of the qualifications, that the disposition was cancelled and retired by old Orbistoun, and to prove the same before answer.

Albeit it was alleged for the defenders, That if the writ, whereof the tenor is offered to be made up, hath been innovated and altered, a proving the tenor cannot proceed. Because, then the pursuers have no interest, and a party having no interest cannot pursue ; action being *jus persequendi quod sibi debetur*, not competent vagrantly to every person having a mind to insist, but only to such as can shew their interest in what is acclaimed. Nor is there any difference in this matter betwixt a proving of the tenor and other actions ; on the contrary, proving of tenors being extraordinary remedies, are not to be admitted till every thing objected against the pursuer's interest be discussed. So in exhibitions *ad deliberandum* (which like this is a preparatory action for a separate process) it is a good defence, that the defunct was denuded, whereby the pursuer's interest ceased, and there can be no further step made till the import of that defence be tried. Every accessory process must be determined by the same rules as the principal process, if insisted in, would : *Finis dat formam negotio*, he that hath right to the end, hath right to the means that lead to it ; and *e contra*, one that hath no right to the end, ought not to be admitted to use the means to attain what is the right of another : Consequently, what is relevant against the principal conclusion, is relevant

against the accessory of proving the tenor. Were a renunciation of the disposition under young Orbistoun's hand produced, his creditors could not proceed in proving the tenor till the renunciation were discussed : Now, innovation hath the same effect in law, as a discharge or [2746] renunciation; and the Lords are always in use to restrain the humour of parties in putting others to unnecessary charges, by sustaining the common exception, *frustra probatur, &c.*

In respect, it was answered for the pursuer, That they are not obliged to plead the interest, or dispute the import of the pretended innovation, until their right instrument be complete, and in the field, which they are bringing in by proving the tenor ; this regularly should meet with no opposition, being of the nature of a transaction *in statu quo*, prejudicial to no party : For if the writ, whereof the tenor is testified, was good and effectual, the party leased by accident should have it redressed by the assistance of justice ; and if it was exceptionable, it will be so still after proving the tenor, and all defences against it entire. The instance of an exhibit *ad deliberandum*, is foreign to the purpose : For none can deliberate about a success where there is nothing to succeed to. Whereas a person may justly prove the tenor of a writ though innovated ; seeing innovated writs are not always extinct, but continue still good evidents with the burden of the innovation, February 5, 1675, Binnie contra Scot, *voce* INNOVATION. Again, a discharge or renunciation could not stop process of tenor ; because, the tenor of writs may be proved for other effects than for obtaining implement or performance. Besides, a discharge is not the same with an innovation, the first being a direct extinction of a right, and the other an extinction implied only. The Brocard, *frustra probatur, &c.*, is misapplied; for the pursuers, without any humour, decline to dispute the point of innovation, till they be *in pari casu* with the defender, by having their right complete in their hands, which they are prosecuting upon their own charges, without any trouble or expense to the other party.

Fol. Dic. v. 1, p. 176. Forbes, p. 696.

No. 95. [2755] ALEXANDER M'ADAM v. ALEXANDER Earl of Galloway.
January 17, 1766.

Found incompetent, by an action of mails and duties, to set aside the right of a person in immemorial possession, and producing a sasine. Reserved to insist in a reduction of the defender's rights.

In 1678, Alexander, then Earl of Galloway, granted an obligation to Henry Dun, binding himself to denude, in his favour, of a piece of land called Belscroft, upon payment of £400 Scots.

In 1763, John M'Adam, the great grandson of Henry Dun, granted bond to Alexander M'Adam, his son, who led an adjudication against him, as charged to enter heir in those lands to Henry Dun ; and, upon that title, pursued an action of mails and duties against the tenants.

Compareance was made for the Earl of Galloway, who produced a sasine in the lands of Belscroft, in 1684, proceeding on the precept of Henry Dun ; and contended, That, as he and his predecessors had possessed the lands immemorially, the process was incompetent, till his titles should be reduced in a proper action.

Answered for the pursuer : The adjudication is a sufficient title against the tenants, Stair, iv. 22, 7. They are the only defenders called. The compareance of the Earl, indeed, produces a competition, but it is a rule of law, that all competitions imply mutual reductions. Nor is the pursuer under any necessity of instructing the right of the predecessor, to whom his father was charged to enter. The only title produced by the Earl, is a sasine upon the precept of that very predecessor, whose right he cannot object to, without cutting the branch upon which he himself stands.

[2756] Had he produced a disposition indeed, from Henry Dun, he must have been preferred to the mails and duties ; but he produces no more than a sasine ; and a sasine, without its warrant, cannot avail in a competition of real rights ; Stair, ii. 3, 19.

Replied ; Upon the footing of the infeftment 1684, the Earl has the benefit of a necessary judgment, for which purpose, the production of a sasine is sufficient ; Air, iv. 26, 3, and 4 ; Bankton, ii. 1, 33, p. 512, and iv. 24, 49 ; Erskine, iv. 1, 50. And it makes no difference that the summons was executed against the tenants only. All the Earl was entitled to compear for his interest.

When a process of reduction is brought, it will be time to consider, whether the personal faculty of redemption granted to Henry Dun be not lost by prescription. “ The Lords sustained the defences, and assoilzied from the process of mails and ties, reserving to the pursuer to insist in a reduction of the defender’s rights, and the defender his defences, as accords.”

Act. M’QUEEN, CROSBIE.—Alt. LOCKHART.

G. F.

Fac. Col. No. 29, p. 247.

to. 12.

[2764] HUNTLY v. HUME. December 13, 1628.

Found in conformity with the above.

In a triple poinding, Huntly v. Hume and L. of Renton, the lands of the common debtor being comprised by a creditor, viz. Renton, and he being infeft thereupon before the term of Whitsunday, and before the comprising, another creditor having arrested upon his sentence, that term’s duty, owing by the tenant, possessor of the land, to the master, who was the common debtor, the arrestment being execute before that term of Whitsunday came, whereat the debtor was obliged to pay ; and, while the term was running, the arrestment was laid on, and, after the term came, he obtained sentence, decerning that term’s duty to be made furthcoming, whereon the question being drawn in by the tenant, if he should be subject to pay to the arrester or to the compriser ;—The Lords found, That the compriser being seased before that term, ought to have that term’s duty subsequent after the sasine, and not the arrester, albeit the arrestment was execute before the comprising, whereupon the sasine pro-[2765]-ceeded, seeing the heritor, who was debtor, being denuded lawfully of his right to the land before the term, by the said comprising and sasine, he had thereby right to the duties of the terms subsequent after his sasine, after the said term was come ; and, as the debtor from whom he comprised could not seek that term’s duty, no more could the arrester, who could not seek the same, but as the farm or duty owing to his debtor, who ceased to be heritor, he being denuded of his right by comprising before the term at which he might have craved the duty : For albeit the creditor might lawfully arrest before the term of payment came ; yet the arrestment affected not the same to the arrester, so that he might seek the same when the term came, except at that term, the right thereof then subsisted with him, for whose debt it was arrested ; as if the term’s duty of lands, liferented by any, were arrested for the liferenter’s debt, and that the liferenter should die before the term of payment of the arrested duty came, *quo casu* the arrester would get nothing, because the debtor’s right became extinct ; even so in this case, albeit there be great difference in these cases, yet so it was found, and for the same reason, another creditor claiming the same duty, by virtue of an assignation made to him by the debtor, divers years before the term controverted, and before all the other parties rights, in and to the duty of these lands, of certain years preceding that term, and divers years to run after that term, which assignation was intimate long before their rights ; and also the assignee divers years in possession thereof before the term controverted, and done for satisfying his just debt ; yet the compriser was preferred, for the assignation was not found a valid right against a singular successor : And it was found, that an assignation to the duty of a tack, set by the heritor, made to his creditor, would not work against a singular successor, in and to the setter’s heritable right ; but that either the compriser, or other acquirer thereof, or buyer, would have right to the tack-duty, notwithstanding of the preceding assignation, clad with possession.

Act. CRAIG.—Alt. LAWTRIE.—Clerk, HAY.

Fol. Dic. v. 1, p. 179. Durie, p. 408.

No. 14. [2766] LORD JUSTICE-CLERK v. MR. JOHN FAIRHOLM. February 23, 1671.

A decree of apprising is a complete diligence, as to mails and duties, being a judicial assignation, and needing no intimation; so that there can be no *mora*. On the principle, an appriser of an infeftment of annualrent was preferred to a posterior arrester, though the competition was nine years after the decree, and the appriser had done no diligence.

The Earl of Leven being debtor to Lamberton in 40,000 merks, and having infefted him in an annualrent out of his lands in security thereof, Mr. John Fairholm came upon a debt due by Lamberton, apprise the foresaid heritable bond and annualrent which was holden of the Earl of Leven himself, who was charged upon the appriser, but unwarrantably, to infeft Fairholm in the lands, whereas the annualrent only was appraised, and the charge should have been to infeft Fairholm in the annualrent; thereafter Fairholm did arrest the bygone annualrents in the Earl of Leven's hands, and after all did, upon a decreet against Lamberton, arrest the bygone rents in Leven's hands; and Lamberton's liferent of the annualrent having fallen, by his being year and day at the horn, the Justice Clerk, as donator to the liferent, and as arrester competing with Fairholm, did allege that Fairholm's apprising being an incomplete diligence, and no infeftment nor valid charge thereon, and having lain over so many years, the arrester must be preferred; for which he adduced a practice observed by Durie, 14th February 1623, Saltcoats *contra* Brown, No. 9, p. 2763, where it was so found; and albeit Fairholm be the prior arrester, yet he hath done no diligence upon his arrestment, whereas the Justice Clerk hath obtained decreet; and, as donator to the liferent escheat, he is preferable for years after the rebellion; because the liferent escheat falling before any infeftment, or charge on the apprising, which was not used within year and day, the liferent excludes the appriser.

The Lords found the apprising preferable to the posterior arrestment, though no legal diligence was done thereon for the space of nine years thereafter, in respect the apprising, being a judicial assignation, required no intimation, and being prior it is preferable; and they did not respect that single practice, the constant custom being contrary; but found the liferent escheat preferable to [2767] the anterior apprising, being without infeftment or charge as to the years after the rebellion, and preferred the appriser as to years preceding.

Fol. Dic. v. 1, p. 179. *Stair*, v. 1, p. 727.

No. 26. [2777] DAVID GIBSON v. RICHARD MURRAY. November 10, 1748.

A curator accepted a bill for an account furnished to his minor, bearing for that value. The creditor assigned it. Prior to the assignation, an arrestment had been laid in the hands of the minor himself. The arrester was preferred.

Dougal Murray, merchant in Inverary, had furnished goods to Colin Campbell of Kilberry, on account carried down to the year 1737; and having cleared with Captain Angus Campbell, Kilberry's curator and factor, adjected to the foot of the account a draught, 11th November 1739, for the balance, "value due by Kilberry, as per above," which Captain Campbell accepted; and Dougal Murray assigned it, 17th November 1745, to Sir Richard Murray, merchant in Edinburgh.

David Gibson, taylor in Inverary, creditor to Dougal Murray, had arrested the debt in Kilberry's hands, 1st June 1743; and a competition arising, the Lord Ordinary, 19th February 1747, "in respect the arrestments were laid on, not in Captain Campbell's hands, but in Campbell of Kilberry's, found these arrestments did not interpel the Captain from making payment of the sums due upon his bill." And, 8th December, "found the arrestments in Kilberry's hands could not compete with Sir Richard's assignation."

Pleaded in a reclaiming bill, The debt was originally Kilberry's, and he continued debtor, notwithstanding the draught, which being subjoined to his account, bore to be it, and was accepted by the Captain only as his factor and curator, who thereby did not bind himself, since a person contracting *factorio nomine* binds only his constituent; 17th February 1738, Ranken *contra* Mollison, *voce* FACTOR; but supposing him debtor, Kilberry was likewise; so they were *correi debendi*; and arrestment in the hand either must affect the debt.

Answered, The Captain was properly debtor; the title of the account was, "Account of Campbell of Kilberry, by desire of Captain Angus Campbell"; so that his faith was followed, and he gave a security for his own debt. If Kilberry originally was debtor, the taking the bill operated a discharge of the account; for which he could not afterwards be pursued. And it is evident the arrestment, when used, could not operate in the hand of a *correus debendi*, from this, that, at granting the bill, the account was near prescribed; was never interrupted against Kilberry, and was actually prescribed quoad him when the arrestment was used.

The Lords preferred the arrester.

For the Arrester, JO. CAMPBELL, SEN.—Alt. MAITLAND.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 151. *D. Falconer*, v. 2, No. 7, p. 8.

lo. 38. [2791] CARMICHAEL v. ANNA MOSMAN, Relict of HARDY. June 22, 1742.

The confirmation by an executor-creditor, completed before decree of furthcoming be obtained on a prior arrestment, is preferable to the arrestment.

Hardy assigned to the Treasurer of the Bank, a debt due to him by M'Kenzie of Rosend, in security of a debt he owed the Bank.

Robert Carmichael, another creditor of Hardy's, arrested in the hands of the Treasurer, and pursued a furthcoming; wherein the Treasurer declared that the Bank was noways debtor to Hardy, but was creditor to him in the sum of £30, 5s. Sterling per bill, in security whereof he had assigned to them a debt due to him by M'Kenzie of Rosend, which assignation bore this quality, That in case the Bank should recover more than what was due to them, they should [2792] be accountable to him for the same; and that no payment was yet recovered: After which the furthcoming lay over.

Meantime the Bank recovered payment of the debt due by Rosend, whereby they became debtors to the heirs of Hardy, now dead, in a balance, whereof the relict of Hardy getting notice, confirmed the same as executrix-creditrrix to him, and brought her action against the Bank for payment; whereupon Carmichael wakened his furthcoming, and insisted upon preference upon his arrestment. It was argued for the executrix-creditrrix, That the arrestment in the hands of the Bank could carry nothing, because the Bank was not debtor in any sort to Hardy at the date of the arrestment.

But the Lords found no occasion to give any judgment upon that point, having, upon the report, taken up the question upon a point that had not been pleaded for the party, viz. they found, "That the confirmation by the executrix-creditrrix being completed before the decree of furthcoming, the executrix-creditrrix was preferable; and preferred her accordingly."

It is likely, that the executrix would also have been preferred upon the above point pleaded for her, had the Lords proceeded on it, agreeably to what is to be seen *supra*, *voce* ARRESTMENT, Creditors of Gordon *contra* Sir Harry Innes, No. 51, p. 715. And as to the points upon which the Lords took up the case, the judgment now given was contrary to the former reported decisions, viz. Riddel *contra* Maxwell, No. 34, p. 2790, and No. 35, same page, both observed by Harcarse; for which reason, probably, it had not in this case been pleaded by the lawyers for the executrix. Yet the Lords, in a full Bench, were so unanimous that the other party did not reclaim.

Kilkerran (COMPETITION), No. 3, p. 137.

No. 41. [2795] PEREGRINE CUST v. FRANCIS GARBET and Company.
March 8, 1775.

A competition between an assignment intimated after the death of the cedent, and confirmation of an executor-creditor, expedite upon the same day, was found to be regulated by priority of the hour.

Upon the death of Ebenezer Roebuck, merchant in London, one of the partners of the Carron Company, which happened at Carron on the 9th of October 1771, a competition ensued respecting his share in the co-partnery stock of the Carron Company computed to be worth about £6000 Sterling.

Mr. Cust founded upon an assignment from the said Ebenezer Roebuck, dated the 16th May 1770, to his share of the stock in the above Company, subject to the proviso that the same should be redeemable upon payment of £3350 Sterling, and interest thereof, upon the 16th May 1771; but, if not paid before that time, the right was to be absolute. This assignment had not been intimated during the lifetime of Roebuck the cedent; but, after his decease, was intimated on the 29th day of October 1771 to two of the residing partners of the Carron Company at Carron. And, upon the 30th October, betwixt the hours of eight and nine in the morning, it was intimated by Mr. Cust's factor to Charles Gascoigne, for himself as a partner, and as acting manager for the Carron Company, within the Company's office at Carron; where he attended for that special purpose, in consequence of his own proposal to Mr. Cust's factor, and the notary, who were with him at his house at Carron-wharf, the preceding evening in order to have intimated the same to him then.

Francis Garbet and Company of Carron-wharf, being also creditors, did, upon the 17th day of the said month of October 1771, take out an edict from the commissaries of Edinburgh, for confirming themselves executors-creditors to the said Ebenezer Roebuck; and, after the preliminary steps, a confirmation was expedite in their favour bearing date the 30th day of October 1771, in which they gave up, for the particular subject of that confirmation, the sum of £6000 Sterling, as the supposed value of Ebenezer's share of the co-partnery stock of the Carron Company.

[2796] Garbet and Company maintained two different pleas. They insisted for a total preference in their favour upon the following grounds; 1st, That the assignment itself to Mr. Cust is intrinsically null and void, in respect of the irregular execution thereof; 2dly, in respect of alleged irregularities in the intimation of the assignment upon the 30th October: But there appeared to be no relevancy in either; and the counsel for Garbet and Company, after one judgment of the Court had gone against them, consented to restrict their plea to a *pari passu* preference with their competitor.

Argued on this head; That they do not dispute that principle of the Roman law, when kept within proper bounds, *quod vigilantibus non dormientibus, jura subveniunt*, but the propriety of the application of it to the case in hand.

As the genius of the law of this country, as of all other commercial states, founded upon principles of material justice and equity, favours an equal distribution of the effects of a bankrupt amongst his whole creditors; whatever shall be the judgment of the law upon the authority of former precedents and opinions, in a competition between assignees and arresters, specifying the precise hours when they were severally executed, or *in pœnam* of that party who neglected to specify the hour in his execution; an extension of these to the case of an executor-creditor, who has it not in his power to specify the hour of his confirmation, would be as adverse to the general principles of equity and justice, as it is unsupported either by precedents or authorities.

It is a known fact, that the usual and stated time for the meeting of the commissary court, is ten of the clock in the forenoon; and as no opposition was, or could be made to the confirmation as executors-creditors, their being deemed executors required no time; and as the subject meant to be confirmed was but one single article, viz. Ebenezer's share of the stock in the Carron Company, the confirmation might forthwith be expedite; and the presumption of law is, that every thing was regular and fair. So that, for any thing, that does or can appear, allowing the assignment to have been intimated at the hour of nine, which, at any rate, is doubtful and uncertain, and the confirmation to have been expedite after the hour of ten, or between ten and eleven, the bare possibility, or even probability of the one being an hour or thereby prior to the other, would be too

alender a ground upon which to establish the preference contended for by Mr. Cust, and to exclude the other party from a rateable proportion of the sole effects in this country, which they were *in cursu* of attaching, in the only method competent to them by law.

It is thought to be a clear case, that, as the law stood before the making of the statutes 1690, cap. 26, and 1693, discharging transferences active, a special assignation, not intimated in the cedent's lifetime, could have been no bar to any other creditor confirming that particular subject, as *in bonis* of the defunct at his death. The exemption granted by the first to such special assignee from the necessity of confirming after the death of the cedent, being qualified by the words immediately following, "Without prejudice always to the [2797] competition of creditors and others, and of their rights and diligences as formerly, before the making hereof," can be no bar to the confirmation of an executor-creditor, or any ground of preference to the assignee, in competition with such executor-creditor; and, therefore, as an unintimated special assignation, as the law formerly stood, gave no preference in competition with other creditors confirming the subjects assigned, which remained *in bonis* of the defunct, the concession made by the defenders (upon supposition of the assignment's being regularly intimated) that Mr. Cust should come *in pari passu* with them on Ebenezer's share of the stock of the Carron Company, was all that in equity he could demand, and more than by law he was entitled to.

But this is not the only ground upon which the defenders do maintain their plea to a *pari passu* preference.

It is a clear case, that the unintimated assignation did not denude Ebenezer Roebuck of his share in the stock of the Carron Company; so that, at the period of his death, it remained *in bonis* of him, attachable by his creditors. It is equally clear, that the only method known in the law by which it could be attached, was by confirmation as executor-creditor; so that, when the defenders were *in cursu diligentie*, and *in actu proximo* of having their confirmation expedite, before that Mr. Cust attempted to intimate his assignation, they were following out the only course that the law allowed to operate their paymen, by the attachment of that particular subject, which, therefore, could not be frustrated by intimating the assignation at that conjuncture.

Argued for Cust: In England, of which he is a native, and where he has resided all his life, the intimation of an assignation is unnecessary, and in fact is never practised. By the assignment, the equitable and substantial right was transferred to him; and, therefore, it would have been a hard case, if, through the neglect of a mere piece of form, and which Mr. Cust did not know to be necessary till after Ebenezer Roebuck's death, the competitors had carried off a debt of Ebenezer's, a subject to which they knew they had no right, but, on the other hand, knew perfectly well that, equitably and substantially, it belonged to Mr. Cust.

That a *pari passu* preference of creditors has any foundation in the common law of Scotland, is absolutely denied. This *pari passu* preference is entirely the creature of statute; and, therefore, it cannot be extended to cases not provided for by statute. The general rule of the law of Scotland is (and which must hold at this day in every case where the contrary is not expressly provided by statute), that *vigilantibus, &c.*, and that *prior tempore potior jure*.

With respect to the merits of the points at issue, it is a clear case, that it is the confirmation alone that vests the right. The serving the edict, and even the decreedative, vests no right whatever; so it was decided 23d January 1745, Carmichael *contra* Carmichael, *voce* SERVICE and CONFIRMATION; and, since that time, the point is understood to be fixed and established.

[2798] The assignment was granted in favours of the pursuer about 16 months before Mr. Roebuck's death. It is plain, that no step taken by any of his creditors could prevent the pursuer from going on and completing his right by intimation; and, therefore, the question comes to this, Whether there is satisfactory evidence, that the intimation which was made betwixt eight and nine o'clock in the morning of the 30th of October, was prior, in point of time, to the confirmation that was expedite that day before the Commissaries of Edinburgh?

But, even in the case of competition in arrestments, it is by no means sufficient to create a *pari passu* preference, that the steps of diligence of the respective creditors happened upon the same day. Where, indeed, both appear to have been done upon the same day, and where no mention is made of the time of the day, as to any of them, no

other rule of decision can be adopted but to prefer both *pari passu* ; but, where the time of the day is mentioned, the preference must be regulated accordingly.

It is likewise an established rule, that, where one makes mention of the hour of the day, and the other does not, that in a competition the creditor is preferable, the execution of whose diligence makes mention of the particular hour. And, indeed, the principle of law by which questions of this kind fall to be governed, does not require two hours, nor even one hour, or half an hour, in order to give a preference. A priority whatever is sufficient, if the judge shall be satisfied that there was a priority in point of time ; and if the fact be certain that there is a priority, a priority of ten minutes is just as good as a priority of ten hours. The intimation of the assignation did vest the right fully and absolutely in the person of the assignee. The subject did not thereafter remain *in bonis defuncti* ; and consequently, a confirmation expedited after the *hæreditas jacens* of the defunct was denuded by an intimated assignation could carry nothing : And it can make no difference whether the *hæreditas jacens* was denuded ten hours or ten minutes prior to the confirmation.

It is certain, however, that the usual time of meeting of the Commissary Court is not earlier than 11 o'clock ; yet, supposing it was ten, as the defenders have stated, it is perfectly clear that the confirmation was long subsequent to the intimation, and that in place of one or two hours, which has been found by the Court to give a preference many hours must have intervened in fact ; And, independently thereof, the pursuer behoved to be preferred upon the other ground above stated, viz. that the intimation makes mention of a particular hour, whereas the confirmation makes mention of no hour ; and in every such case it is held to be clear, that the former falls to be preferred.

The difference supposed betwixt the case of judicial proceedings, and the execution of legal diligence, or the intimation of assignations, upon which the defenders seek chiefly to rest their plea, can by no means vary the rule of division. A confirmation of an executor-creditor falls to be considered as a step [2799] of legal diligence, in establishing the creditor's interest in the defunct's effects ; and, in all competitions where the contrary is not established by statute, the clear rule of law, and which holds universally, is, that *prior tempore est potior jure*. The law in such cases does not mean to establish a *pari passu* preference. Such preference arises only *ex necessitate*, when it does not appear, with any reasonable degree of certainty, that the one was prior to the other : And therefore, before the defenders can claim *pari passu* preference with the pursuer, it is incumbent upon them to show, that their step of diligence was equal, in point of time, with the intimation of the assignment ; whereas this they have by no means done. The pursuer's instrument of intimation proves, that the same was made betwixt the hours of eight and nine in the morning of the 30th of October ; whereas, the defenders' confirmation, which mentions no hour, proves no more, as Lord Stair very properly expresses it, but once that day.

The present question must be regulated by the law as it now stands ; at the same time, it is apprehended, the defenders are in a mistake in supposing, that prior to the 1690, or 1693, a special assignation could not be intimated after the death of the cedent.

But all this is an investigation of very little moment in the present question. The pursuer does admit, that, even subsequent to the statutes 1690 and 1693, if a creditor should confirm a debt that had been specially assigned by the defunct, before the assignation was intimated, that he would fall to be preferred to the assignee ; but, on the other hand, it is equally clear, that if the assignation was intimated prior to the confirmation, even although the intimation was made after the death of the assignee, the assignee would be preferable to the creditor confirmed ; and the sole question here is, Whether the intimation of the assignation, or the confirmation, was prior in point of time ?

It is perfectly untenable to maintain, and for which there is neither precedent nor decision, that, because a creditor is *in cursu diligentie*, therefore a third party is not at liberty to complete a right which he had obtained from the debtor, before the creditor had proceeded to any step of diligence whatever. Such third party can never be interpellated, by any step of diligence against the common author, from completing a right which he derived from that author, at a time when he was at perfect liberty to dispose of the subject in what manner he inclined.

The Court, by two consecutive judgments, adhered to that of the Lord Ordinary, which found, " That the intimation of Cust's assignment being made to the acting manager and partner of the Carron Company, by delivering him a schedule at their

office at Carron, was sufficient; and in respect it appears, from the instrument of intimation produced, that the same was made to the acting manager at the Carron Company's office, between the hours of eight and nine in the morning of the 30th October 1771, and that it is not denied, that the hour of cause in the Commissary Court is not till 11 o'clock in the forenoon; finds, That the assignation in favour of the said Peregrine Cust was completed [2800] by the said intimation, before any step was, or could be taken upon the edict in the confirmation in favour of Garbet and Company; and, therefore, prefers Cust upon his interest produced."

Act. M'QUEEN.—Alt. D. FACULTY, LOCKHART.—Clerk, ROSS.

Fol. Dic. v. 3, p. 154. *Fac. Col.* No. 169, p. 74.

No. 76. [2844] BROWN v. SMITH. June 20, 1676.

An assignation to an incomplete real right, though directly done and intimated, has no effect against another singular successor completing his right by infeftment.

Andrew Sutor having disposed the equal half of the east side of Letsie to Ronald Brown, with power of resignation; the said Ronald grants an infeftment of annualrent to James Brown, and thereafter disposes the land irredeemably to David Smith in liferent, and John Smith in fee, and assigns the disposition and procuratory therein granted to him by Andrew Sutor, whereupon the Smiths are infeft as assignees to the disposition and procuratory, but Ronald Brown the cedent was never infeft. James Brown the annualrenter pursues pointing of the ground, wherein the Smiths compare and allege, That the pursuer's infeftment is null, neither being clad with possession, nor given by one who was infeft, or had power to give infeftment, but by Ronald Brown, who was never infeft.—It was answered, Imo, That Ronald Brown's disposition (before any infeftment) was transmissible by assignation, and the constitution of this annualrent imported an assignation, and the registrate sasine was equivalent to an intimation; 2do, Infeftment having followed upon Ronald Brown's disposition, albeit in the person of his assignee, yet it compleats his right, and makes it a real right, and as supervening accresseth to the annualrenter.

The Lords sustained the defence, and repelled both the replies, and found, That an assignation to an incomplete real right, though it had been directly done and intimate, had no effect against a singular successor completing his right by infeftment; and found, That the real right did never accress to the annualrenter's author Brown, who was never infeft, but only to Smith, the author's assignee.

Fol. Dic. v. 1, p. 183. *Stair*, v. 2, p. 428.

No. 77. JOHN RULE, Son to the deceased John Rule, Chirurgeon in Dumfries v. ANDREW PURDIE, Merchant in Edinburgh. December 8, 1710.

A naked disposition of lands was found to denude the granter *funditus*, having himself only a disposition with procuratory and precept; so that nothing remained for him to dispose, by legal or voluntary conveyance; consequently the donee was preferred to a posterior appriser, who had attempted to complete his right by obtaining infeftment, on the debtor's original procuratory.

Martin Newal, merchant in Dumfries, made a disposition, containing a procuratory of resignation of a tenement of land in that burgh, to James Robson, merchant there; who without being legally infeft, disposed it to John Rob-[2845]-son his brother, Andrew Purdie's author, with a procuratory to resign, precept of sasine, and assignation to all writs in his person; and John Robson was infeft in anno 1693; thereafter John Rule,

chirurgion in Dumfries, as creditor to James Robson, adjudged from him Martin Newal's disposition, and upon the procuratory therein, John Rule, as heir to the adjudger's father, being infeft, raised a process of mails and duties against the tenants. And Andrew Purdie, who derived right from John Robson, compearing for his interest, cross preferred; in respect the disposition to his author was anterior to John Rule's adjudication, and did totally denude James Robson.

Replied for John Rule; The disposition to John Robson, Purdie's author, never having been intimated till the present competition, after that John Rule, by adjudging the procuratory in the disposition granted by Newal to James Robson, and infefting himself thereon, acquired the real right, which till then continued in the person of Newal; he, Mr. Rule, as having the first complete right, is clearly preferable: and although adjudications, which are legal assignments, require no intimation to complete them; yet naked dispositions, as other personal assignments, transmit not effectual rights to the receivers, without intimation, and are preferable according to the date of the intimation.

Duplied for Purdie; A disposition of an heritable right whereon no infeftment has followed, doth fully denude the disponent, without necessity of infeftment or intimation. The Laird of Anstruther *contra* Black, No. 13, p. 829; and in the late case Dewar French, No. 12, p. 241, it was found, That Mr. David Dewar's first adjudication of land to which his debtor had only right by disposition, without infeftment, did quite denude the debtor; and he was preferred to David French, a posterior adjudger, who stood infeft by virtue of the procuratory of resignation contained in the common debtor's disposition. The reason of the disparity betwixt a disposition of land, and an assignment to a moveable bond, is, because the land is properly debtor to one that hath a disposition thereof, and so that disposition wants no intimation to perfect it; whereas, an assignment of a bond must be intimated to the granter, who is debtor, to put him *malà fide* to pay the cedent. It is in vain for Rule to plead upon Martin Newal's not being divested by the disposition to James Robson; seeing the question is not betwixt persons deriving right from Newal, who was last infeft, but only betwixt those whose common author James Robson, being never infeft, was sufficiently denuded by his disposing the procuratory to John Robson, before John Rule adjudged; 2do, *Eato*, that intimation had been necessary to perfect the disposition in favours of John Robson; yet that, being an heritable right, was sufficiently intimated by his public infeftment; and the long debate in the present competition, and several years possession before John Rule's infeftment as heir to his father.

Triplied for John Rule; John Robson's infeftment cannot supply the want of intimation of the disposition in his favours; because sasines are not properly intimations, but only publications of real rights; and though John Robson [2846] might, by virtue of the general clause in the disposition to him assigning to all writs, have been infeft upon the procuratory in Newal's disposition; yet he not having taken infeftment upon that, but only upon the procuratory in the disposition, granted by James Robson (who, being never duly infeft, could give no effectual precept for infefting another), John Robson's sasine is null, as granted *a non habente potestatem*; and so cannot be sustained as an intimation of the procuratory in Newal's disposition. Nor can the decision betwixt Dewar and French influence the present case; in respect both Dewar and French were adjudgers; and the first adjudication, being a legal assignment, was a complete assignment without intimation; whereas a simple disposition affords no *jus in re*, but only *jus ad rem*, which, though effectual against the granter and his heirs, or against tenants, where no person competes upon a better right, is never complete against singular successors, till sasine follow thereon.

The Lords found, That James Robson, having only a personal right by disposition without infeftment, the disposition made by him to John Robson, Andrew Purdie's author, did fully denude him, without necessity of intimation; so that the subject could not be thereafter adjudged from him; and therefore preferred Andrew Purdie.

No. 78. Colonel ERSKINE v. Sir GEORGE HAMILTON. December 19, 1710.

A party who had acquired right to an apprising, without taking infeftment, granted an infeftment of annualrent out of the lands. He afterwards disposed the lands to another party. The prior right was preferred.

An apprising being led of the lands of Tulliallan, at the instance of James Henderson, son to John Henderson of Fordel, against Sir John Blackadder in anno 1633, upon which infeftment followed in the 1634 ; in the year 1670, Alexander Earl of Kincardine (who acquired right to this apprising without taking infeftment) did, in the 1673, grant an infeftment of annualrent out of these lands to the Lord Cardross for 50,000 merks, and in the year 1676 granted an heritable bond of relief to him of several debts and engagements, upon which the Lord Cardross was infeft. In the year 1678, the Earl disposed the lands in favours of Sir Robert Milne, Sir George Hamilton's author, who was publicly infeft in the year 1680. Colonel Erskine, having the Lord Cardross's right in his person, craved to be preferred to the lands of Tulliallan, upon the disposition of Henderson's apprising in favours of the Earl of Kincardine.

Answered for Sir George Hamilton ; He had best right to the disposition of the apprising made to the Earl of Kincardine ; in respect it was directly conveyed to Sir Robert Milne by the foressaid disposition from the Earl, containing a general assignation to all dispositions and other rights he had to the lands ; and the infeftments of annualrent and relief, in favours of the Lord Cardross, were void and null as to the lands of Tulliallan, the Earl having no real right thereof in his person, but a simple disposition, never completed by infeftment, which could not entitle him to pass a real right to the Lord Cardross.

[2847] Replied for Colonel Erskine ; Sir George Hamilton, by virtue of the disposition made by the Earl to Sir Robert Milne, of the lands, writs, and evidents, cannot exclude Cardross's anterior infeftment of relief ; for the assignation to mails and duties in Cardross's bond of relief, upon which a decret of mails and duties followed, did effectually denude the Earl of the disposition to Henderson's apprising, which hath no further effect in law than an assignation to mails and duties ; as a translation denudes an assignee in any other case. 2do, A right to the property of lands doth tacitly convey any lesser right that stood in the granter's person, according to the rule, *majori inest minus* ; therefore the obligation to infeft, with the procuratory of resignation contained in Cardross's bond, which was a qualified right of property, did certainly convey to him any inferior right to these lands, and consequently the disposition to Henderson's apprising ; and a procuratory of resignation, as my Lord Stair, iii. 2, 8, says, hath the effect of a disposition. So the common way of tailzieing estates is not by a formal disposition, but by a bond obliging to infeft the heirs of tailzie, containing procuratory of resignation, or by a procuratory of resignation in their favours, without either bond or disposition ; which tailzies could not be disappointed by a creditor of the maker adjudging some old apprising to which his debtor had acquired right without infeftment ; for otherwise the rights of many of the best estates in Scotland might be called in question, and laid open, it being ordinary for persons once infeft to acquire other rights without expediting infeftment thereon, or being nicely cautious to infeft upon the most preferable. 3tio, An apprising, disposed to one already infeft, is so far extinguished and renounced, that it cannot thereafter be made use of against the acquirer or his successors ; though they may use it as a standing right against any third party pretending a better right to the lands upon which they were infeft.

Duplied for Sir George Hamilton ; Any pretended implied disposition in the obligation to infeft, did not enable the Lord Cardross to resign by virtue of the procuratory, or take infeftment by virtue of the precept in the disposition granted by Sir John Henderson to the Earl. And albeit, a subsequent infeftment in the Earl's person might have accrued to the Lord Cardross ; yet the Earl's right having continued ever in the terms of a simple disposition, Cardross's infeftment from him is null, as flowing *a non habente potestatem*. 2do, As the foressaid obligation to infeft could convey no real right, neither could it hinder the Earl to grant a direct disposition and assignation to Sir Robert Milne ; for, even a second disposition completed by infeftment would have carried the Earl's right away in prejudice of the receiver of a prior disposition, as was decided 20th June 1676, Brown *contra* Smith, No. 76, p. 2844.

Triplied for Colonel Erskine ; The decision betwixt Brown and Smith makes nothing for Sir George ; because, Imo, The question there was with an infeftment of annualrent which is not a right of property, and could not be understood a conveyance of the property that stood in Brown's person ; whereas the infeftment of relief given to Cardross was a right of the same nature with that [2848] which stood in the Earl's person, and might be transferred by any writ *inter vivos* shewing his intention so to do, Brown the annualrenter's infeftment was never clothed with possession, and therefore it seemed just to prefer Smith, a singular successor, who first perfected the right.

The Lords found, That Cardross's right of relief, containing a procuratory of resignation and assignation to the mails and duties, conveyed all rights personal as well as those that were in the Earl's person, for security and relief of the debts therein contained, and therefore found, that the Colonel's right being prior to Sir Robert Milne's right, preferable.

Fol. Dic. v. 1, p. 183. Forbes, p. 453.

No. 79.

SINCLAIR v. SINCLAIR. November 20, 1733.

A naked disposition of lands was found to denude the granter *funditus*, who had more himself than a disposition with procuratory and precept, so that nothing remained with him thereafter to be carried by a legal or voluntary conveyance ; upon which footing the disponent was preferred to a posterior appriser, whose apprising was against the common author, though the appriser had gone on to complete his right by obtaining infeftment upon the procuratory contained in his debtor's disposition. See APPENDIX.

Fol. Dic. v. 1, p. 183.

No. 80. BELL of Blackwoodhouse v. JOHN GARTSHORE, Merchant in Glasgow, June 22, 1737.

A personal conveyance of a personal right to land, does not denude the granter, or bar a second conveyance ; the first infeftment in such a case being always preferable.

Chatto having purchased an estate at a public sale, extracted his decree of sale ; and without infefting himself, he conveyed the same to Bell of Blackwoodhouse. Thereafter, John Gartshore, creditor to the said Chatto, adjudged from him the decree of sale with the lands ; and being infeft upon his adjudication, his was the first completed real right.

In a competition between them about the mails and duties, it was pleaded for Bell, That, by the conveyance to him, Chatto was *funditus* denuded of his personal right ; and that nothing was left with Chatto to be carried by Gartshore's adjudication. And to show that this is law, the decision, Rule. No. 77, p. 2844, was cited, with many of a later date, all combining to support a proposition that has governed our practice many years as an indisputable rule of law, viz. that a disposition to land without infeftment, is transferred *funditus* from the disponent to the disponent, by a simple disposition, without other solemnity.

It was pleaded for Gartshore ; That he stands infeft in the subject, having followed out the whole solemnities of the law of Scotland, necessary to establish [2849] the feudal-right in him ; and if his right, or the right of those who may purchase from him, can be defeated by a latent disposition granted by his author, purchases in Scotland will not be more secure than in a neighbouring country, where no records are kept of land-rights and conveyances. This case therefore deserves to be thoroughly weighed ; and, to that end, the following observations are offered.

Imo, As consent alone transfers not property, delivery is a necessary solemnity for that end ; actual delivery, where the subject is moveable ; symbolical delivery, where it is immoveable.

2do, A disposition of land, with procuratory and precept, imports no more but the granter's consent in favour of the disponent, and a mandate or order to deliver the

subject to him. Before sasine, which is the symbolical delivery, the disponent is not proprietor, nor is the disponent divested of his property.

3to, Supposing the same land to be disposed, with procuratory and precept, to two or three different purchasers, an opportunity is given to each of them to acquire the property ; but he only among them becomes proprietor who first obtains infeftment. This solemnity transfers the property, and of course extinguishes the disponent's property, with all the personal rights founded upon it.

4to, In this supposed case, the several purchasers have each of them the proprietor's consent to convey his property to him ; and each is entitled to have the land delivered to him, which leaves it in the bailie's power to give delivery to any one of them he thinks proper.

5to, Of a disposition granted to a man and his assignees, the meaning is, that sasine may be given either to the man or his assignee. When, therefore, a disponent assigns his personal right, the assignee is entitled to demand delivery ; which, at the same time, bars not the disponent himself to demand delivery ; and he of the two who is first infeft becomes proprietor, precisely as in the former case of several dispositions granted by the same proprietor.

This evinces that a procuratory and a precept are in their nature alternative ; being a mandate or order to give delivery to the disponent himself, or to any having his consent. And, when delivery is made to one or other, the property must of course be transferred to that person to whom delivery is made, because in him concur the consent of the proprietor with delivery, all that is necessary, by the principles of law, to transfer property.

The rule, that a personal conveyance denudes of a personal right, seems to proceed from an error in law, as if an assignment to a disposition, containing procuratory and precept, did necessarily denude the cedent, so as to make it no longer lawful to deliver the subject to him, but only to the assignee. And were this so, it behoved to support the doctrine in all its consequences ; for if the disponent himself be no longer entitled to demand delivery, it must be yielded, that neither can he entitle any other to demand it : that no person can give what he has not, is a clear principle in philosophy as well as in law.

[2850] But that a conveyance of a disposition, containing procuratory or precept, has no such effect, appears not only from what is said above, but is confirmed, past all doubt, from an established practice admitted by all to be effectual in law ; which is, that after conveyance of a procuratory or precept, the assignee commonly infefts his author, and then infefts himself. Is this practice consistent with the rule, that a personal conveyance denudes of a personal right ? Certainly not ; for, if the disponent were *funditus* denuded of his personal right, by conveying it to another, his case would become the same as if the right never had been in him ; and, consequently, sasine given to him would not be more effectual than if given to John a Groat. But, upon supposition that a procuratory or precept is a mandate or order in its nature alternative, empowering delivery to be made to the disponent, or to any other having his consent, the said practice is perfectly consistent ; because delivery to either is good in law.

This acknowledged power, which an assignee has to infeft his author, puts an end to the dispute. If a disponent, even after assigning the procuratory and precept, can be legally infeft, it must follow, that the power to receive delivery continues still with him, which is all that is requisite to validate a second assignment ; for, while the power of receiving delivery remains with the disponent, his consent to another's receiving it must be effectual. And, if he make twenty assignments, they are equivalent to so many dispositions granted by the proprietor himself ; the person first infeft must carry the real right ; for a plain reason, that the order is alternative to give infeftment to the disponent, or any other person having his consent.

And in this matter, the conveyance of real rights goes hand in hand with the conveyance of personal rights. An assignment to a bond, denudes not the cedent till the assignment be intimated ; why then should an assignment to a disposition without any thing further, denude the cedent ? Can it be thought that a disposition to land is transmissible with less solemnity, than a simple personal bond ? But, to carry on the comparison, a case in personal rights shall be figured precisely similar to the present ; an assignee to a bond, without intimating, makes two several conveyances ; and the last conveyance is first intimated : it was never doubted, that the first intimation gives right to the bond. Here then we have it established, that a personal conveyance denudes

not even of a personal assignment to a bond ; and as little ought it to denude a disposition to land. At the same time, the supposed case serves finely to illustrate the case in hand : An assignee to a bond, without intimating, conveys his right to several purchasers ; each of them is equally entitled to take the proper steps for establishing the subject in his person ; they are like so many creditors *in cursu diligentie* ; the first completed diligence carries the subject.

Having made out, that Bell's ground of preference is not supported by the principles of law, the next step shall be to enquire into the consequences that may result from particularly with respect to the records.

[2851] Probably the rule of a personal conveyance denuding of a personal right, has been introduced with respect to those cases where the rights in competition remain personal ; and has inadvertently been extended to infeftments proceeding from a common author not infeft. And, were it to have no further operation, the law would not be great, however erroneous the rule may be ; for men would be put on their guard, not to purchase but from one infeft. But the matter cannot rest here ; for it shall be made evident, that, by this rule, there is as little security in purchasing from one infeft as from one not infeft.

The cases that hitherto have been brought before the Court are, all of them, like the present, between purchasers where the common author was not infeft. But let us suppose that Garthshore, after being infeft, had sold the land, and that the competition were between Bell and the purchaser ; it is extremely obvious, that, if Chatto, the common author, was *funditus* denuded by his conveyance to Bell, the posterior conveyance from Chatto in favour of Garthshore, must be void, as flowing *a non habente potestatem* ; that this void right cannot be validated merely by taking infeftment ; and that a purchaser from Garthshore would be in no better condition, *quia nemo dare potest quod ipse non habet*. The purchaser, therefore, in this supposed case, acquiring *a non domino*, could not be secure otherwise than by the positive prescription. Thus then comes out clear, that, in making a purchase of a land estate, no man by this rule can have any security from the records, if there happen to be in the whole progress but a single author who was never infeft ; for there may be a latent conveyance from the author, which cannot be discovered from the records.

But the mischief spreads still more wide ; for, *esto* every one of the authors had been infeft, there remains the same uncertainty : one must have a disposition before he can be infeft ; and who knows, whether, before his infeftment, he has not denuded himself by some latent conveyance : if so, his infeftment is void as well as the titles of those who purchase from him.

No answer can be made for obviating such pernicious consequences, if it be not this, " That one who purchases from a person infeft, is secure, because he purchases upon the faith of the record." But where is the law, that declares a purchaser to be secure against every latent claim which appears not upon the face of the records ? We have no such law ; and many cases may be figured where our records are defective, and give us no security. Our statutes have made a provision with respect to certain deeds, that they must be put upon record, under certification, that otherways they shall not be effectual against purchasers, such as sasines, reversions, &c., with respect to which, the records make us absolutely secure. But there are many deeds, in their nature good against purchasers, which are not appointed to be recorded ; and there are others that admit not of being recorded.

And to show, that, by the legislature itself, the records are not held to be an absolute security, I appeal to the statutes concerning prescription. What [2852] use would there be for the vicennial prescription of retours, if a purchase from a younger brother served heir to his father were secure by the records, which cannot inform the purchaser that there is an elder brother existing ? And, if such purchaser be not rendered secure till after the lapse of 20 years, is not this in effect saying, that the records give him no security in this case ? There would be as little use for the positive prescription of 40 years ; the obvious purpose of which is, to shut the door against every latent claim that otherways would affect the purchasers, though not appearing upon the face of the records. This makes it evident, that a purchaser from a person infeft, is secure against no grounds of challenge that are in their nature good against purchasers, but such only as are appointed to be recorded. A latent conveyance, by a person not infeft, is none of those grounds of challenge that are appointed to be recorded ; and therefore, supposing such a latent conveyance to be good in its nature against a purchaser, the

records will not secure him, nor any thing else, but the positive prescription of 40 years.

When thus stands the law, it is mere amusement to imagine, that in every case we have security from the records. Hitherto it has been reckoned, that if a purchaser search the records for 40 or 50 years backward, he is in safety to pay his money. But how lame must a purchaser's security now appear, when possibly the very day before infetment, his author may have conveyed away his personal right? In vain, after this, will any person attempt to magnify the security of the records.

With respect to the many decisions urged on the other side, the following observations were made. The first of them, Rule, No. 77, p. 2844, stands upon a sandy foundation: the decision Dewar *contra* French, was pleaded as a strong authority in that case; and yet when we look into the decision, Dewar *contra* French, as compiled by Lord Fountainhall (No. 12, p. 241), it proves the direct contrary. The case was this: "In a competition betwixt two adjudgers, the common debtor's right being a disposition with procuratory and precept, but no infetment, the first adjudger pleaded preference; his adjudication, which denuded the debtor of his personal right, being the first complete or effectual, and the other adjudger was not within year and day. It was urged for the other adjudger, that his was the first complete and perfected right; for, after having adjudged the disposition, he proceeded to take infetment upon the precept therein contained. The Lords brought them in *pari passu*." This was in effect finding the last adjudication the first effectual, upon this medium, that the common debtor was not denuded by the first legal conveyance without infetment, but that the second legal conveyance, upon which the first infetment followed, was preferable; which is the very point pleaded for Garthshore, and is directly contrary to the decision Rule *contra* Purdie. It comes out, then, that this decision, which is the first that tends to establish Bell's doctrine, is founded upon a mistaken authority. And the later decisions have [2353] proceeded upon the same mistake, without adverting to the fatal consequences. At the same time, it must appear of great weight, that, from the first traces we have of our law down to the 1710, we find no support to this doctrine from any sort of precedent or authority: on the contrary, as the opportunities of pleading it must have been frequent, it is convincing evidence of its being disregarded by our judges and lawyers, that we find not any person putting in his claim upon it, save once in a decision compiled by the Lord Stair, Brown *contra* Smith, No. 76, p. 2844; where a purchaser of land, having a disposition with procuratory and precept, first gave an heritable bond for a sum of money, and then sold the land to a third party, assigning the procuratory upon which the purchaser was infet. "The Lords found the purchaser preferable to the creditor, upon this medium, that an assignment to an incomplete real right, though it had been directly done and intimate, could have no effect against a purchaser completing his right by infetment." This is the footing the Court went upon, if we can give faith to Lord Stair.

But, above all, we have the sense of the legislature itself against this doctrine. Had it ever been dreamed, that a latent disposition may be such an impediment in the commerce of land, or other heritable subject, as is pretended, it is not supposable that our legislature, in establishing the records, would have totally neglected this impediment. After appointing sasines and reversions to be put upon record, nay even the smallest eiks to reversions, discharges, renunciations, &c., it would have been great blindness to overlook latent dispositions, more dangerous to purchasers than all the former joined together. This may justly be held an authority against the rule, indirect indeed, but little less weighty than an express act of Parliament.

The Court, in this case, abstracting from all specialties, pronounced an interlocutor in favour of the personal right, led by the weight of former decisions. But, upon a reclaiming petition with answers, a hearing in presence, and informations, they "preferred Garthshore's real right, and refused a petition against this interlocutor without answers."

Fol. Dic. v. 1, p. 183. *Rem. Dec.* v. 2, No. 8, p. 16.

No. 94. [2877] Competition between Sir ALEXANDER COCKBURN of Langton's Creditors. January 11, 1709.

A competition between three sorts of creditors, inhibitors, adjudgers, and voluntary disponees. See short account of the case in the synopsis.

In the ranking of Sir Alexander Cockburn of Langton's Creditors, a competition arose betwixt three sorts of creditors. Some had inhibited and adjudged; others had adjudged, but for debts prior to the inhibition; a third class had got voluntary assignments and infestments of annualrent, but posterior to the inhibitions. The inhibitors requested a reduction of the annualrenter's rights, and obtain a decree. The annualrenters, being thus removed out of the way, the simple adjudgers being within year and day of inhibiting adjudgers, crave to come in *pari passu* with them, in virtue of the 62d Statute 1661 between debtor and creditor, making them all joint proprietors, as if they had been all contained in one apprising; and in the division to affect the subject effecting to the sums, as if the annualrents had never been granted. Against which the inhibitors contended, this was both unequal and unjust; for the annualrenters were clearly preferable to you, the simple adjudgers, and would have excluded you to the end of the world; and if I have removed them by my negative and prohibitory diligence of inhibition, you can reap no benefit by my diligence, but I must come in to the annualrenters' place, and draw the share that belonged to them; and for what remains of the estate, the annualrenters will affect the same before the simple adjudgers get anything; for *si vinco vincentem te, tunc te vinco*; and if I debar the annualrenters, I debarred you, then *multo magis* I debar you. By the first scheme, the simple adjudgers may draw something; by the last, they may be totally secluded, and get nothing. In the ranking of the creditors of Nicolson in 1697, in Miln of Carriden's case, No. 2876, the simple adjudgers came in with the adjudgers inhibitors; but in the ranking of Sir James Cockburn's creditors on the price of Dunse, the inhibitors were found to have right to the annualrenter's share, ay, till the debt contained in the inhibition was paid, but did not extend it to the accumulations in the adjudication.* And it was urged, that unless an inhibition had this effect, it would be altogether elusory, and make the adjudgers who had neglected that step of diligence almost as good as the inhibitor. See this standard laid down by Stair, lib. 4, tit. 35. And parallel cases were cited out of Huber, *ad tit. qui pot. in pign.* and *Sande decis. frisia* lib. 3, tit. 12, def. 6. The Lords thought it of great importance for the readier expedition of rankings to fix the standard, and, without varying, to make it a rule *pro futuro*; and therefore some of the Lords proposed to have some days to think better on it, which was yielded to.

January 20, 1709.—The competition of the Creditors of Langton, mentioned January 11th, was decided, and the vote being stated, whether the creditor-inhibitor, who had likewise adjudged, was only to be preferred, in so far as he would have been, in case no posterior annualrents had intervened; or if he, upon reducing the infestments of annualrent, the ground whereof is posterior to his inhibition, must come in his place, and have the full sum contained in his inhibition made up to him? It was carried, that he should only draw a share, in so far as the annualrenter prejudged him, and as if the annualrent had never existed, but to have his full sum. The Bench, consisting of thirteen, it splitted six against six, so it carried by the Lord President's vote. It was started, that the Lords might determine, if the annualrenter might not recur and carry away the simple adjudgers' share till he was paid, they being posterior to him, though he was forced to yield his place to the inhibitor-adjudger; but this not being fully pleaded was not decided at this time. See ASSIGNATION.—INHIBITION.

Fol. Dic. v. 1, p. 184. *Fountainhall*, v. 2, pp. 479, 482.

* See INHIBITION.

No. 100. [2895] ARCHIBALD BONTEIN *v.* BONTEIN of Mildovan.
February 21, 1745.

A father, debtor to his son, having been freed of the debt on account of the *beneficium competentia*; it was made a question, but not decided, whether the son might charge his claim on his father's estate, so as to compete with his other creditors.

Robert Bontein of Mildovan, by an agreement with Archibald, his eldest son, settled upon him £20 Sterling yearly in name of aliment.

Afterwards, falling into bad circumstances, and being incarcerated for debt, he pleaded against his son, who was in a good way, the *beneficium competentia*; the Lord Ordinary, 14th January 1744, "found that the father was entitled to the *beneficium competentia*."

Pleaded in a reclaiming bill, That this benefit was no part of our law, William Dick *v.* Sir Andrew Dick, No. 40, p. 409; 24th February 1669, between the same parties, No. 1, p. 1389; and Harcarse, title SUMMONS, July 1687, Cairns *v.* Cairns of Bellamore, No. 2, p. 1389.

2dly, The present aliment was not *in constituendo*, but was already constitute.

And, 3dly, The action was founded on a contract, not solely on the *pietas paterna*.

Answered, Wherever an action for aliment would be competent, there this defence behoved to be sustained. There could be few decisions of aliments decreed to parents, because few children would stand pursuits of this sort; but one was condescended on, viz. Brown of Thornydykes *v.* his two Sons, No. 82, p. 448, though here, out of regard to the sons, it behoved to be noticed, that the dispute was rather, which of them should be charged with their father's aliment, than if he should be alimented.

The Lords adhered.

[2896] There being other points in the petition, particularly how far the son might be allowed to charge his claim on the estate, to enable him to compete with other creditors, though it should be found he could not insist personally against his father. It was remitted to the Lord Ordinary, to hear parties thereon. See No. 3, p. 1390.

Act. GRAHAM, SEN.—Alt. HALDANE.—Clerk, MURRAY.

D. Falconer, v. 1, p. 80.

No. 102. [2901] Dame HELEN ERSKINE, Relict of Sir WILLIAM DOUGLAS of Kelhead *v.* WALLACE, and Others, arresting Creditors of Sir JOHN DOUGLAS. November 2, 1748.

In a competition between arresters and an annualrenter; the annualrenter preferred upon her annualrent-right, without doing diligence.

Two troops of St. George's dragoons being grazed during the Summer 1746 in the inclosures of Kelhead belonging to Sir John Douglas, several arrestments by Sir John's creditors were laid in the hands of the officers, in order to affect the grass-mail. The regiment being removed, the officers consigned the grass-mail, amounting to £180 Sterling, into the hands of Mr. Fergusson of Craigdarroch, the Sheriff-depute, to be made forthcoming to those having best right; and other arrestments having been used thereafter in Mr. Fergusson's hand, he called the whole in a multiplepoinding.

In this process, compearance was made for said Lady Douglas, who produced her infetment for a yearly annuity of 2000 merks out of the lands of Kelhead, whereof the said inclosures were a part, and thereon pleaded to be preferred to the arresters.

Accordingly, The Lords found, "her preferable upon her liferent-annuity to the arresters."

Of old, annualrents had no effect but by poinding of the ground, *vide Gray contra Graham*, No. 1, p. 565; but now, since Guthrie *contra* the Earl of Galloway, No. 4, p. 567, they have been found to be sufficient titles against all intromitters with the rents personally. *Vid.* Stair, tit. Infetments of Annualrent, § 13, and the decision observed by Dirleton, 20th December 1676, Ker *contra* Hunter, No. 6, p. 569.

Kilkerran (ANNUALRENT, INFETMENT OF), No. 1, p. 80.

No. 106. [2905] JOHN BUCHAN, Trustee for the Creditors of ROBERT GORDON
The Reverend ROBERT FARQUHARSON. May 24, 1797.

A creditor, claiming on an assignation to a personal bond, granted before the sequestration of the cedent, but intimated after it, preferred to the trustee for creditors, because the intimation was prior to the vesting of the estate of the bankrupt in the trustee.

Robert Gordon, on the 28th June 1788, assigned a personal bond to the Reverend Robert Farquharson.

Gordon's estate was sequestrated on the 19th July following, and on the 1st August, the assignation was intimated by Mr. Farquharson to the debtor in the bond, before the estate was vested in the trustee for the creditors, either by disposition from the bankrupt or an act of the Court.

John Buchan, the trustee, afterwards brought a reduction of the assignation ; *in alia*, because, it was not intimated till after the sequestration.

Lord Dreghorn, Ordinary, reduced the assignation.

The Court (9th December 1795), "repelled the objection to the want of intimation and remitted the cause to the Lord Ordinary.

This interlocutor was pronounced, partly upon the ground that the trustee was bound to take the subject *tantum et tale*, as it stood in the person of the bankrupt, and consequently under burden of the assignation.

A petition having been presented against this interlocutor, doubts were expressed of its being well founded ; but the petition was (15th January 1796), refused, "incompetent, being without the reclaiming days."

[2906] The trustee then brought a reduction of the interlocutor, 9th December 1795, which was likewise remitted to the Lord Ordinary.

His Lordship ordered informations on both causes.

The Court, from certain specialties in the case, and without meaning to infringe the general rule, that a reduction is incompetent wherever a petition before extra-judicial would be so, were of opinion, that the objection in point of form was ill-founded.

On the merits, the pursuer

Pleaded ; In competitions between voluntary and legal assignations of an heritable subject, the right first completed by infeftment is preferred ; 22d June 1737, Bell v. Gartshore, No. 80, p. 2848 ; 13th February 1781, *Mitchels v. Ferguson*, *voce PERSONAL and REAL* ; 31st January 1792, *Russell and Ross v. Creditors of Ross*, *IBIDEM* ; the same principle holds in an assignation of moveables ; consequently, in this case, the right of the trustee under the sequestration, which being a judicial act, needs not be intimated, is preferable to that of the defender, which was not intimated till after the date.

If, instead of a sequestration, an arrestment had been used of the same date, the arresting creditor would have been preferred to the defender. But the bankrupt declares arrestments and poindings incompetent after the date of the sequestration, and it would be singular if an assignation, which would have been postponed to that date at common law, should be preferred to a judicial act, by which they are excluded.

Answered ; It is not the sequestration, but the disposition afterwards granted by the bankrupt, or the act of the Court vesting his estate in the trustee, which divests the bankrupt of his property, 23d Geo. III. c. 18, § 19. For the statute requires him to grant a disposition to the trustee, which would, on the contrary supposition, be unnecessary. Indeed, it is expressly declared, by § 13, that the sequestration in heritable subjects shall merely have the effect of an inhibition ; consequently it could not prevent infeftment being taken upon a disposition previously granted by the bankrupt ; nor upon the same principle can it prevent the competency of intimating a previous assignation.

Observed on the Bench ; The trustee on a bankrupt estate will be preferred to the creditor claiming on a voluntary disposition, granted before the sequestration, if the right of the trustee be first completed. And therefore, the propriety of the decision, 8th December 1795, *Taylor and Smith v. Marshall*,* in so far as it went upon the

* Not reported. See APPENDIX.

supposition, that the trustee in such case is bound to make good the previous voluntary disposition, may be doubted. But, on the other hand, the mere act of sequestration, while it disables the bankrupt from disposing of his property voluntarily, does not at common law prevent a creditor from completing his right by legal diligence, or by any act independent of the consent of the debtor, such as intimating a previous assignation. The incompe-[2907]-tency of arrestments and poindings, arises entirely from the enactment of the statute.

The Lords, "in respect of the assignation challenged being completed by intimation prior to the disposition from the bankrupt, vesting the estate in the trustee, assoilized from the reduction so far as regarded that ground of challenge."

Lord Ordinary, ARMADALE.—Act. M. ROSS, AR. CAMPBELL.—Alt. GEO. FERGUSON.
—Clerk, COLQUHOUN.

D. D.

Fac. Col. No. 28, p. 66.

No. 2. [3] Creditors of ALEXANDER ROBERTSON v. Creditors of WILLIAM ROBERTSON. December 13, 1803.

An heritable debt specially secured upon one of three estates, of which the debtor was proprietor, must be paid out of it, without relief from the other estates, when the succession has been divided between two heirs of line.

William Mason (4th February 1772) executed a conveyance of the lands of Dalry, in favour of his eldest daughter, "Janet Mason *alias* Robertson, and Alexander Robertson her husband, their heirs, executors and assignees whatsoever, heritably and irredeemably."

[4] By a decision of the Court, it was found, that the fee of the lands was vested in Mrs. Robertson, and not in her husband.

Of the same date (4th February), Mason executed his last will, nominating Alexander Robertson his sole executor, bequeathing to him his whole personal estate, burdened with certain provisions to his three younger daughters.

Alexander Robertson, in his own right, was proprietor of the lands of Giffin, of a house in Edinburgh, and an heritable bond of £1450.

Robertson, in lieu of the provision he was bound to pay to Ann Mason, one of the daughters, granted her a bond (4th February 1777) for an annuity of £40, over the lands of Giffin, on which she was infeft. A similar transaction was made with Elizabeth Mason, another of the daughters, who accepted of an annuity of £30, secured on the lands of Dalry.

Robertson died in September 1779, leaving a son, William, besides other children, having previously (13th September 1777) executed a will in the English form, bequeathing his whole estate, real and personal, to his spouse, who, upon this title, entered into possession of the whole, uplifting the rents and interests due from the various subjects which belonged to him.

William Robertson having (14th June 1786) served heir in general to his father, brought a reduction of the settlement, so far as it respected the heritable property in Scotland.

He completed his title to the heritable bond (4th December 1787), by being infeft on a precept of *clare constat*. He also obtained a precept of *clare constat*, and a charter of confirmation of the lands of Giffin, but died before infeftment was taken.

He made up no title to the other subjects.

After his death his creditors raised processes of constitution against Alexander, his son and heir; and upon his producing a renunciation, they obtained decrees *cognitionis causâ*, and adjudications against the *hereditas jacens* of William. They also insisted in the action of reduction, when the Court found (9th December 1795), "That the last will, executed after the English form, cannot effectually convey an heritable property in Scotland."

Adjudications were also led at the instance of Ann and Elizabeth Mason, and others, creditors of Alexander Robertson, senior. Processes of ranking and sale were brought of the whole property belonging either to him or to his son William. The

whole was sold, and the price *in medio* was to be divided among the creditors, according to their rights. A dispute occurred in the ranking respecting the fund from which the annuity of Ann Mason was to be paid. The rents of Giffin amounting only to the remainder of the annuity had been paid by Mrs. Robertson, now looked upon as a factor for her son, from her intromissions with his other estates. In the account between her creditors and his creditors, the former were charged with £20 annuity as the rent of Giffin during William's life; and as an article of discharge in their favour [5] was stated the annuity of £40, during the same period paid out of the same intromissions.

The creditors of William objected to this, and insisted that the excess of the annuity above the rents of Giffin should be a burden upon the price of Giffin; in support of which they

Pleaded: The only subject which was feudally vested in William's person was the heritable bond, although he was also entitled to the whole succession of his father. The remaining subjects being in *hereditate jacente* of Alexander Robertson, senior, descendible to Alexander, junior, as heir of line to his grandfather. The heritable succession, then, of Alexander, senior, has been divided, part being taken up by his son as heir of line, and part by his grandson in the same character. While the creditors have both successions bound to them *in solidum*, in a question betwixt the heirs themselves, the ultimate payment of the debts must be divided *pro rata*, according to the value of the subjects that descend to each. Their separate creditors, deriving rights from them, are exactly in the same situation in their mutual claim for relief. When the succession is divided by the act of the law, as among heirs-portioners, the same rule is adopted. It was adopted also as the rule between an heir of line and heir-male. *Rose v. Rose*, 17th January 1786, No. 22, p. 5229. Again, the creditors of William would not only be entitled to a relief from the other funds of his father, in all cases of general debts having no particular reference to any special subject; but they are also entitled to a total relief, as the annuity is expressly laid upon the lands of Giffin. These lands, so burdened, must be taken by the heir who succeeds under this burden, and when he pays the debt, he must pay it without any relief; *Stair*, b. 3, tit. 5, § 1; *Ersk.* b. 3, tit. 8, § 52.

The creditors of Alexander

Answered: The creditor in the bond of annuity had a double remedy for obtaining payment; the heritable security over the lands of Giffin on the one hand, and the personal obligation against the debtor and his heirs on the other. Now, William Robertson was the sole heir of the granter, entitled to take up the whole succession. There was thus no person to divide the responsibility with him, and against whom a claim of relief could be competent. The debt, then, was paid by the proper debtor, who at the time of payment was not entitled to the benefit of discussion or claim for relief. The debt, therefore, is extinguished, so that it cannot afterwards be revived to any effect whatever.

It is true, that those who take an heritable estate, must take it with all the burdens affecting it. But the burden affecting Giffin is already, *pro tanto*, extinguished by the payment made by the proper debtor; so that when Alexander Robertson, junior, comes to take up the fee of this estate, or the creditors of the grandfather do so, they take it effectually disburdened of the bygone annuities, so far as already paid out of other funds belonging to the debtor.

[6] The Lord Ordinary (14th May 1799) found, "That as the annuity payable to Ann Mason was heritably secured by Alexander Robertson on his lands of Giffin, exceeding the amount of the rents thereof; and as credit is claimed and allowed to William Robertson's creditors for the whole of those rents during his surviving father, whom he must be held to have represented, and even down to his mother Jane Mason's death; her creditors or representatives are entitled to take credit, in accounting with William's creditors, for the said annuities, in so far as the same were paid by her to the said Ann Mason."

The creditors of William petitioned the Court, when it was found (25th May 1803) "That the bygone annuities due to Ann Mason, secured upon the lands of Giffin, are to be charged upon the price of these lands in the first place; and with this explanation, adhere to the interlocutor of the Lord Ordinary, and remit to his Lordship to proceed accordingly."

Upon again advising a petition, with answers thereto, the Court (13th December

1803) “ found, That the bygone annuities due on Alexander Robertson and his wife’s bond to Ann Mason at and subsequent to the death of Alexander Robertson, so far as they exceed the rents of Giffin for the same period, fall to be charged upon the price of the lands of Giffin, as a preferable debt thereon, in respect that the annuity was secured by heritable bond and infestment upon that particular subject ; and with this explanation adhere to the former interlocutor.”

Lord Justice-Clerk, **ESK GROVE**.—For William’s Creditors, **SOLICITOR-GENERAL BLAIR**.—Agent, **JA. THOMSON, W.S.**—Alt. **GEORGE JOS. BELL**.—Agent, **WM. MOLLE, W.S.**—Clerk, **HOMER**.

F.

Fac. Col. No. 129, p. 285.

No. 3. JEAN M’LURE, and Others v. WILLIAM BAIRD. November 19, 1807.

If a creditor use an inhibition against his debtor, and if, after the inhibition, but before any diligence used by any other creditor to affect it, an heritable subject belonging to his debtor be sold by voluntary sale, then the inhibiting creditor will have a preferable claim upon the price of that subject, in virtue of his inhibition.

James Reyburn was proprietor of a small tenement in Wallacetown. He owed £100 to David Cumming, and various sums to other creditors. Cumming raised letters of inhibition against Reyburn on the debt due to him, which were regularly executed and recorded on the 2d May 1775. No other creditor did any diligence against Reyburn’s estate. In this situation, Reyburn soon after sold the tenement to William Baird, who then held it as tenant for rent. Cumming went abroad in the naval service. His wife, Jean M’Lure, having in vain endeavoured to get payment of the debt due to her husband, at last raised, in his name, an action of constitution of this debt, in which she obtained decree, and afterward an action for reduction of the sale on the inhibition, concluding also for payment of the rents. She obtained decree in this action also, extracted it, and thereon charged Baird, who presented a bill of suspension, and after-[7]-ward brought a reduction reductive of the former proceedings, in which a long and intricate litigation took place. While this depended, an adjudication was led in name of Cumming, whose remaining in life began to be uncertain ; and on the other part, Baird got an assignation to the other debts due by Reyburn, and thereon likewise raised an adjudication, within year and day of the adjudication in Cumming’s name. A judicial factor was appointed on the estate of Cumming, who was at last ascertained to be dead ; and his wife and children sisted themselves in the proceedings above-mentioned instead of him. In the action of reduction reductive the defenders were assoilzied, and the inhibition found good.

The question then, 1st, As to the tenement itself,—2dly, As to the rents since the time of the sale,—took this shape. Jean M’Lure and the children of Cumming claimed the estate, on the inhibition and adjudication in name of Cumming. They also claimed the rents on the inhibition, from the time of the sale, or at least from the time of the decree of reduction ; and on their adjudication from the date of it.

Baird maintained, that the adjudication in name of Cumming was void as being led without any authority from him, and that an inhibition alone gave no right to either land or rents, so that they were both carried by his own adjudication, which was the only valid one.

The Lord Ordinary (29th May 1804), to whom the cause had been remitted, found, “ That the inhibition executed by David Cumming in the year 1774, remained latent till the year 1796, and that this negative or prohibitory diligence could create no preference on the rents from the date of the disposition to Baird in the year 1794, prior to the adjudication led in the name of David Cumming in the year 1800, and that Baird is not liable to account for said rents : And in respect that the principles adopted by the Court with regard to the action brought by Jean Maclure, and the authority under which she was understood to have acted, may be considered as sufficient to support the adjudication led by her in his name ; and as Baird’s adjudication was

within year and day thereof, finds these adjudications are come in *pari passu*, and decerns."

On a representation for Baird, his Lordship's interlocutor was: "In respect of adjudication upon which the respondents found in the present competition, was in the name of David Cumming alone, though out of the country, without mentioning his wife or any other person, as his attorney, finds said adjudication cannot be preferred *pari passu* along with the representer's adjudication regularly deduced; therefore finds the representer preferable upon the rents which fell due subsequent to Cumming's adjudication; so far alters the interlocutor represented against, and decerns."

The cause came into the Inner-House by petition against these interlocutors, with answers. A variety of arguments are contained in these papers, which it is not necessary to report.

[8] On advising the cause, the Lord President observed,

That the points on which this cause depends had been decided so long ago as the year 1777, in the case of Monro of Pointzfield, on a solemn hearing in presence, and decision of great importance, though unfortunately it is not known, because the decisions for that year are not yet reported. [His Lordship produced the papers in the cause, and notes of the opinions of the Judges, particularly Lord Braxfield and President Dundas.] From these, his Lordship said, it appeared, that in that case there had been an inhibition against the estate of a proprietor of land, who owed other debts besides that to the inhibitor. That after the inhibition, but before any other diligence was done against the estate, it was sold, and then, after the sale, adjudications were led by the creditors who had not inhibited, and a competition ensued. In that case the Court were clear, that the inhibitor was preferable for his debt without any further diligence at all. It was held that the sale rendered all diligence by other creditors against the estate void; because as to them it was a good sale, and conveyed away the property from their debtor. Their only claim it was found must be on the price in the hands of the purchaser. But the inhibiting creditor was entitled to disregard the sale altogether, because as to him it was struck at by his inhibition, therefore he might adjudge the estate. But further, his debt being the only one on which diligence could be done against the estate, without regard to the rights of the purchaser, was equivalent to a real incumbrance on it, which the purchaser was entitled to see cleared off before he paid the price, or to pay off himself with the first end of the price. Adjudication by the inhibitor was therefore, though competent, not necessary, because he was sure of payment out of the price of the estate, in preference to all the other creditors. This was solemnly laid down as law by the Court, and particularly explained by the able judges above named in the above-mentioned case, and the same rule of law applies to the present case.

Here there is an inhibition; then a sale; then adjudications by the creditors who had not inhibited, and no doubt also by the inhibitor. This last adjudication may be put out of the case. It is argued to be inept, perhaps it is so; but at all events it is unnecessary; the preference of the inhibitor in no degree depends upon its validity (especially as it may be renewed in more proper form), but rests upon the effect of the inhibition combined with that of the sale.

By the inhibition the sale to Baird is reducible as to the inhibitors Maclure, &c. Then by the sale all diligence against this tenement by the other creditors of Reyburn is void, since the property was carried out of him, by a conveyance valid as to them, before that diligence was executed. The adjudication, therefore, on their debts, is of no effect at all, and can never compete with the inhibitors if they should adjudge even now. This they might do, and their adjudication would still be the only effectual adjudication of this tenement. But it is not necessary for them to do this, because they must be paid in full by the purchaser Baird, who cannot hold the estate, without getting this debt purged [9] on which the inhibition has been raised. Unless, therefore, Baird is willing to give up the estate to them, he must pay this debt, since the seller Reyburn cannot pay it. He may, no doubt, retain it out of the price, but it must be paid to the inhibitors. Now, as it may be presumed, Baird will not give up this estate, it is not necessary to enter into the other points argued in the papers.

This view a great majority of the Court adopted; and accordingly the interlocutor of Court (19th November 1807) was: "The Lords alter the said interlocutor, and find that the adjudication led by William Baird is inept, and that the petitioners became preferable creditors on said subjects and rents thereof, from the fifteenth day

of June seventeen hundred and ninety-six, the date of the decree of reduction obtained against William Baird, in virtue of the inhibition executed by David Cumming in seventeen hundred and seventy-four, and decret of adjudication following thereon, to the extent of the debt contained in the said adjudication." *

Lord Ordinary, HERMAND. — Act. DAVID DOUGLAS. — Alt. ROBT. CORBETT. — Agents, P. ROBERTSON and THOS. GRIERSON, W.S. — Clerk, SCOTT.

M.

Fac. Col. No. 7, p. 26.

No. 2. [2923] JACK v. FIDDES. July 1661.

Condictio indebiti was sustained, although it was pleaded, that there existed an *obligatio naturalis vel civilis*, prior to the payment, by a bond and sentence of a court; but the bond was obtained by improper means, and the court was not duly constituted.

There being a decret recovered by another Fiddes v. Jack, before the English officers at Leith, in the beginning of the year 1652, for a sum of money; whereupon Jack being incarcerate, he was forced to give a bond to this defender, who was assignee constitute by this Fiddes, and to give his brother cautioner therein. Upon which new bond Jack was also charged, and an act of warding followed thereupon; the bond being registrate in the town court-[2924]-books of Edinburgh. Jack gave in a bill to the Parliament, which was remitted to the Session, desiring repetition of the sum. It was alleged, There could be no *indictio indebiti*, where there was *obligatio naturalis* or *civilis* preceding: *Ita est*, there was not only a civil obligation by the sentence recovered, but by the new bond granted to the assignee, who was not obliged to know, how, or what way the sentence was obtained: And Jack having transacted therefor, he could not now be heard to quarrel the transaction against the assignee, or to crave repetition. It was answered, That the officers' sentence was most unjust, both in the matter and in the manner, they having no civil jurisdiction: And the same defender was assistant to the cedent in recovering of the sentence, as he will not deny. Likeas, the pursuer was forced to grant the new bond to him as assignee, and pay the new bond to free himself of prison; there being no civil judicatory, where he could have any remedy; the English Judges for administration of justice not being then established, who sat not till June 1652. And though it had been sitting, it could not have been expected that Jack could have helped himself, by any course they would have taken, for annulling the sentence of the English officers. Likeas, by an act of the late Parliament, all sentences pronounced by the Englishes, since their in-coming, are appointed to be reviewed.

The Lords repelled the allegiance, and sustained repetition.

In præsentia.
Gilmour, No. 4, p. 4.

No. 9. [2930] STIRLING of Northwoodside v. Earl of LAUDERDALE. July 26, 1733.

Condictio indebiti sustained to one who had paid *errore juris*.

Fol. Dic. v. 1, p. 187.

* This form of the interlocutor does not prove that the adjudication was in itself unexceptionable, but the creditors having no interest to object to it, it was no longer challenged by any body, and therefore stood as valid.

No. 11. [2931] ROBERT CARRICK v. JOHN CARSE. August 5, 1778.

A cautioner paid a debt, and next day demanded repetition, as he found he was liable by the expiry of the septennial limitation. Answered; He was liable *jure naturæ*.—Repetition was ordered.

In 1768, Carrick became bound as cautioner for Robert Robb to Carse and others in a bond for £100, payable at Whitsunday, and containing a clause of relief in favor of Carrick. No demand was made for this money till November 1776, when Robb having become bankrupt, Carse required payment from the cautioner, Carrick, of the principal sum, and half a year's interest then due. Carrick, after looking at the bond, said, "there was no help for it," and paid the money.

Next day he required of Carse to repeat the money, on this ground, that he had paid it by mistake, when not bound, seven years having elapsed from the date of the bond. Carse refusing to comply with the demand, Carrick brought an action of repetition against him and the other creditors. The pursuer admitted that he was ignorant of the law at the time he made the payment, but alleged, that he was ignorant of the fact that the seven years were elapsed.

Pleaded in defence; The money paid was due at the time by the pursuer to the defender, *jure naturali*.—The statute 1695, c. 5, gives the cautioner an exception after the lapse of the seven years, on which, if sued in a court of law, he may refuse payment: But it does not take away the obligation in equity on the cautioner, to indemnify the creditor, who, on his faith, trusted his property [2932] with the principal debtor. It is an established point, that, where a person lies under an obligation, *jure naturali*, to pay, if the money is paid, no action for repetition lies; l. 13 et 16, *De Cond. Ind.*; *Voet. de Pact.* § 2 et 4; *Ersk. b. 3, t. 3, § 54*; *Bankt. b. 1, t. 8, § 27*.

2do, Even where there is no obligation in equity, repetition of money paid from alleged ignorance of law in every case, or of fact, when gross and inexcusable, cannot be required, if payment was made to the proper debtor, *qui suum recepit*; *Voet. l. 1, t. 6, § 7, l. 6, ff. De juris et fact. ign.* The pursuer admits that he knew the law. As he read over the bond, it must be presumed he knew the fact, that seven years were elapsed from its date. At any rate, it is a fact of that kind, of which the law does not excuse the ignorance. And, therefore, the case is the same as if he had made payment, knowing that he could have got quit of the debt under the exception given by the act 1695, but not chusing to use it.—Action of repetition, therefore, does not lie.

Answered for the pursuer; Imo, The principal debtor, who receives and has the benefit of the money, lies under a moral obligation, independent of his bond, to restore what he received. But the cautioner receives nothing, and lies under no other tie to the creditor, but the civil obligation which he comes under in the bond, the extent of which has been regulated by law.—The statute 1695 does not merely give an exception against payment to the cautioner, after lapse of the seven years, but declares him "*eo ipso*, free"; so that the obligation is totally at an end, as much as if it had never existed. This is laid down, and the distinction betwixt this statutory liberation, and that of prescription, is illustrated by Bankton, b. 2, t. 12, § 38, and § 74; *Ersk. b. 3, t. 7, § 24*.—It is therefore the same thing as if it had been expressly stipulated in the bond, that the cautioner was to remain bound for seven years, and then to be free.

2do, When there is no obligation in equity to pay, it makes no difference whether the mistake arises from ignorance of law or fact, of whatever species. Unless it appears that the money was given as a donation, it must be restored on the common principles of justice; for the receiver holds it *sine causa*, as he can derive no right from mere error; and the person who put the money into his hands continues in the just right to it, notwithstanding the mistake.

This is the received doctrine of our law; *Stirling v. Lauderdale*, No. 9, p. 2430; *Bank. b. 1, t. 8, § 27*, and *b. 1, t. 23, p. 467*; and it is agreeable to the principles of the civil law. That law distinguishes betwixt the case where the person who falls into an error is in *lucro faciendo*, and when he is only in *damno vitando*. In the former case, the civil law did not restore him against errors in law, or gross errors in fact, such as *error facti proprii*. But, in the latter, every species of error was excusable; l. 27, *de usu. et usurp.*; l. 15, § 2, *de contr. emp.*; l. 2, 3, 4, 7, *de jur. et fact. ignor.* *Vid. Finn. Sol. Quæst. l. 1, c. 47*. In this instance the pursuer is clearly in *damno vitando*, seeking

back what he had parted with only by mistake, and which, if not restored, he can never recover, as the debtor is bankrupt. The person who attempts to profit by this [2933] mistake, *non suum recipit*, though a like sum is due him by another. It is only where there is no error, and the debt is paid by a *negotiorum gestor*, for the debtor, that the creditor is said, in the civil law, *suum recipere*, l. 2, 6, *de cond. ind.* But, when that does not appear, *alienum recipit*: For the debt due to him by one, can give him no title to the money of another.

That no donation was meant in this case, is evident from the transaction, and the words used by the pursuer when the payment was made.

Observed on the Bench; It makes no difference whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and, when payment is made *sine causa*, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made *sine causa*; for, after the lapse of seven years, there was no obligation, natural or civil, on the cautioner.

The Lord Ordinary "found the defenders liable, conjunctly and severally, to repeat and pay back the sums libelled."

The Court adhered to the Lord Ordinary's interlocutor, on advising a reclaiming petition and answers; and again adhered, on advising a second petition and answers.

Act. ILAY CAMPBELL.—Alt. RAE, ROLLAND.

Fol. Dic. v. 3, p. 157. *Fac. Col.* No. 41, p. 70.

No. 12. WILLIAM KEITH v. CHARLES GRANT, RICHARD MOLESWORTH, and Others.
November 14, 1792.

Condictio indebiti takes place where a party obtains a preference in a ranking to which he is not entitled, although he has got no more than payment of his debt.

Sir Alexander Grant of Dalvey purchased the barony of Clava, and certain lands near the borough of Nairn, from James Rose. Sir Alexander took infeftment in the lands of Clava, but his right to the Nairn lands remained personal at his death.

In 1771, he granted an heritable bond for £10,000 over his whole purchase, to Archibald Grant of Pittencrieff, by whom it was disposed in trust to Colquhoun Grant, writer to the Signet.

Sir Alexander having died much in debt, his brother Sir Ludovick entered heir to him *cum beneficio inventarii*; and, in 1783, he disposed the whole of the said estate to Mr. Keith, accountant, in trust for his brother's creditors.

The trustee, in 1786, sold the barony of Clava to Charles Gordon, at the price of £6800.

In 1787, he sold the Nairn lands for £5000 to David Davidson, who, with the approbation of Mr. Keith, and in consequence of minutes of the creditors, paid the price to Colquhoun Grant, in part of the above heritable bond.

Mr. Gordon, in 1788, again sold, for £5400, the barony of Clava, except the lands of Fleeness, to Mr. Davidson, by whom £5000 of the price were paid to [2934] Colquhoun Grant, to further account of the same bond, and interest due upon it. This payment was also authorised by Mr. Keith.

Soon after these transactions, Mr. Keith having for the first time discovered, that Sir Alexander Grant had never been infeft in the Nairn lands, and that, therefore, the infeftment on the heritable bond, as *quoad* them flowing *a non habente*, could only affect the barony of Clava, brought an action, concluding, that Messrs. Davidson and Gordon should be decreed to pay to him the price stipulated for their respective purchases, or if the Court should be of opinion that the payments made to Colquhoun Grant were sufficiently authorised, that his representatives should be compelled to repeat all they had received, or at least the price of the Nairn lands.

Messrs. Gordon and Davidson had by this time brought an action against Mr. Keith, and all concerned, the object of which was, to have it declared, that the payments made to Mr. Grant should *pro tanto* discharge them of the price of their purchases,

and that Mr. Keith, on receiving the balance, should be ordained to grant them the titles.

In these actions, which were conjoined, appearance was made for Charles Grant the general disponee of Colquhoun Grant, and by Richard Molesworth, as acting the representatives of Grant of Pittencreeff, who

Pleaded; 1st, The payment of the price of Clava is liable to no objection. As with respect to the price of the Nairn lands, however defective as to them the infestment on the heritable bond may be, yet the payment having been authorised by Mr. Keith, it cannot now be recalled. Sir Alexander Grant's heirs are at least personally bound for the whole £10,000, and interest; and as Colquhoun Grant received £10,000 in all, neither his heirs nor the heirs of Archibald Grant can be objected to any claim of repetition. The *condictio indebiti* does not lie where a person only gets payment of what is truly owing to him; Stair, b. 1, tit. 7, § 9; 12th June 1713, Creditors of Muirhead v. Hamilton, No. 7, p. 2928.

But, 2dly, Even allowing that Archibald Grant's sasine in the Nairn lands may have been originally invalid, the defect was removed by the infestment in these lands obtained by Sir Ludovick, the heir of Sir Alexander, whereby in the eye of law he became *eadem persona cum defuncto*. For the maxim *jus superveniens auctori accrescit successori* applies not only where the *auctor* himself acquires the supervening right but also where it is acquired by a person liable in absolute warrandice of the debt. Dirleton's Doubts, *voce Jus Superveniens*, and Stewart's Answers; Bank. b. 3, tit. § 16 and 17; Stair, b. 3, tit. 2, § 2; Ersk. b. 2, tit. 7, § 4; 15th February 1676, Boyd v. Tenants of Cairsluth, *voce WARRANDICE*; 1st December 1676, Lindsay Grierson, *voce JUS SUPERVENIENS*, &c.

Answered for Mr. Keith; 1st, The brocard *repetitio nulla est ab eo qui suum recipit* is misunderstood. It relates merely to the case of a person voluntarily interposing to pay the debt of another, where, although he should have done so from mistaken motives, the civil law gives him no claim of repetition, if the money was due by the true debtor. But where a person pays the debt of another, upon the erroneous supposition that he lies under an obligation to that purpose, the competency of the *condictio indebiti* was never disputed; Voet, l. 12, tit. 6, § 9; 5th August 1778, Carrick v. Carse, No. 11, p. 2931.

2do, As Sir Alexander Grant never was infest in the Nairn lands, there was no feudal right in him which could accresce *successori*. It is therefore impossible his heir can be considered as *eadem persona* with him as to that property, so as to make the right now in him accresce to the heritable bond. Sir Ludovick in fact does not represent Sir Alexander in these lands. He is successor in them, not to his brother, but to James Rose. He is a singular, not an universal successor. Sir Alexander, as to the real right of these lands, was in effect a stranger, and continued till his death a mere creditor to Rose for the property.

Although it may be true negatively, that where a person is not bound in absolute warrandice *jus superveniens non accrescit*, it will not hold positively, that in all cases where the person is bound in absolute warrandice, the *jus superveniens* does accresce. Two sorts of rights may here be distinguished. Personal rights, which pass by a mere dispositive act, and real rights, constituted by infestment. With respect to the first, where the *jus supervenit* to any person bound in warrandice, it may accresce, because the will of the party is all that is requisite in order to convey. But this cannot hold in landed property, where certain solemnities are necessary to accomplish the transfer, such as sasine given by the author to the successor. Where indeed a person who is not *in titulo* at the time gives infestment to another, and is himself thereafter vested in the feudal right, the *jus superveniens* does accresce. All the necessary solemnities here concur, although there has been a little irregularity in point of time. But when the infestment flows from a person who, at no future period, acquires the feudal right, there is an essential defect in point of solemnity which never can be supplied. All the authorities quoted on the other side apply to the accretion of heritable rights, where sasine is not necessary, such as the casualties of non-entry and liferent escheat.

The Lord Ordinary reported the cause on informations.

Observed on the Bench; The *jus superveniens* cannot accresce in the present case. If an author, after giving infestment, is himself vested in the feudal right, his title becomes complete both in form and in substance, and this new acquisition of

right is communicated to all his former deeds. But a sasine obtained *a non habente* is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights, the law holds an obligation to convey, and a conveyance to be the same; and therefore every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir, whose ancestor conveyed, having only a personal right, is liable in warrandice, and is obliged to give an infeftment; still that infeftment cannot proceed on the precept granted by the ancestor, who never acquired any right [2936] which entitled him to grant that warrant. The circumstance of Sir Ludovick having entered heir *cum beneficio*, does not in the least affect the case.

The rule, *Nulla repetitio, &c.*, applies only where the debt was due *jure naturali*. Here the obligation on the trustee to pay to Colquhoun Grant the price of the Nairn lands, was altogether *civilis*, and contrary to his duty to the other creditors. Mr. Keith had no title *qua* trustee to apply the funds in any other manner than as the law directs.

The interlocutor of the Court was as follows: "Find, That Archibald Grant of Pittencrieff's heritable security was only effectual as to the barony of Clava, but not as to the Nairn lands and fishings; and therefore, that his representatives, in so far as they have received payment of more than the purchase-money of said barony, must repeat the same to the trustee for the creditors of the common debtor; assoilzie Messrs. Davidson and Gordon from the action at the instance of the trustee, in so far as payments were made to Mr. Colquhoun Grant of the prices of their respective purchases; and upon payment of the balance thereof, find, that Mr. Keith is bound to grant a disposition of the lands of Clava to Mr. Davidson, and a disposition to Mr. Gordon of the lands of Fleeness, in terms of the articles and conditions of sale."

A reclaiming petition for Molesworth, and another for William Keith, were refused, without answers, on the 4th December 1792.

Lord Reporter, HAILES.—For Mr. Keith, MACONCHIE, M. ROSS.—For Charles Grant, R. CRAIGIE.—For Messrs. Davidson and Gordon, ROLLAND *et Alii*.—For Molesworth, ARCHIBALD GRANT, JUNIOR.—Clerk, SINCLAIR.

R. D.

Fol. Dic. v. 3, p. 157. Fac. Col. No. 1, p. 1.

No. 7. [2941] Earl of DUMFERMLING v. The Earl of CALLENDAR. June 27, 1676.

A provision of conquest to a wife "in case there be no children of the marriage," was found not evacuated by the existence of a child, who died the same day that he was born.

In April 1633, there is a minute subscribed by the Earl of Callendar, bearing, "That he being to solemnize the marriage with Margaret Countess of Dumfermling, the minute or contract is to be amplified thereafter, containing these heads, viz. I bind and oblige me, my heirs and assignees, to infeft and seise in conjunct fee and liferent, the said dame Margaret in the barony of Livingston, &c., and likewise by these presents, obliges myself, my heirs and as-[2942]-signees, that of all and whatsoever lands, or sums of money, which shall be purchased during our lifetimes together (our debts being first paid), there shall be sufficient security thereof made in liferent as of the former lands to the said dame Margaret, in case of no issue of children, the one half thereof to be disposed upon, as the said dame Margaret shall think fit; and thereafter in September 1633, the Earl renounceth his right to the Lady's jointure, and obligeth himself not to meddle with it, but by her warrant in writ." This Earl of Dumfermling, as assignee by his father, who is heir to the Countess, did pursue both the late Earl of Callendar, and this Earl of Callendar, as he who hath accepted a disposition of the late Earl's estate, without any cause onerous in prejudice of these obligations, to fulfil the same: And, after the late Earl's death, insists against this Earl, who alleged absolvitor, because the conclusion now insisted on, being to denude of the half of the conquest, and to pay the bygone rent thereof since the Countess's

death, which was in anno 1659, by virtue of the clause of conquest in the said marriage, the said clause is conditional "in case of no issue of children"; *ita est*, There was a child born, which excludes the condition, and evacuates the provision. The plaintiff answered, That the existency of the child born of this marriage, and who died the same day that it was born, doth not exclude the condition, whether respect be precisely to the words, or to the meaning of the parties arising from their condition, interest, and acting; for the terms of the condition are, "in case of no issue of children," which cannot be understood as if the clause had been conceived thus, "in case there be children of the marriage, the Lady should have no interest in the conquest; for then the condition being positive, it might be pretended to have taken effect, the existence of a child; but this clause is negative, "in case there being no issue of children"; and therefore, if at any time of the marriage there were no children, the condition took place, whether by the childrens simple non-existency or deficiency; for if the Lady had been then pursuing her husband to fulfil this provision, and to infeft her in conjunct fee in the conquest, she would have been well founded on the clause, subsuming "that there are no children"; and it would not be a good answer that there had been children of the marriage; and seeing this minute bears, "only the not being of children," but "in case of no issue of children," it makes the matter much more clear, for the word issue were superfluous, if the simple existency of children did exclude the provision, but issue being a word customary in the English law and writs, but not with us, it doth there import succession, posterity, and relateth to the dissolution of the marriage, and must be understood as that formerly debated by the Doctors, *si sine liberis decesserit*, or *deficientibus liberis*, which respects the dissolution of the marriage, and imports a permanency, and cannot be purified by a momentary existence; and accordingly, the Lords have been always accustomed to interpret the ordinary clauses in contracts of marriage, "in case there be no children," or "failzieing of children," that the tocher should return or her jointure be increased by the survivency, [2943] and not by the simple existency of children, as hath been frequently decided. 2do, If the meaning of parties be considered, which is the best way to interpret a dubious expression, the case must be considered, as if the husband and wife were disputing the extension of the minute before either children or conquest, and then it is to be considered, if this case had been proposed to the parties at the time of the minute, what if a child be born, and die in some few days, would the Lady have acquiesced to quit the conquest? would the husband quit the marriage before he extended it further, which cannot be with any reason be thought, especially seeing he had only then the barony of Livingston, not exceeding 7000 merks of rent, and the Lady had a liferent of 22,000 merks by year, with money and moveables, and was a young and strong woman, and the husband had no visible way of making conquest but by her means; for what he had acquired, was abroad in the war, which he had quit, and settled at home by the marriage; so that being illiterate, and a most profound peace in the country in anno 1663, there was no ground of expecting conquest but by the jointure; and therefore, whether the words or meaning be considered, the simple existence of a child is not relevant. The defender replied, That "issue of children" imports no more than the existence of children, and amongst illiterate parties, words are oftentimes superfluous; neither can the clause be understood as equivalent to that formula, *si sine liberis decesserit*, which clearly implies that the want of children is at the time of death; but this clause is equivalent to this formula, *si liberos non habuerit*, or *si liberos non suscepit*; and it is clear, that in the condition introduced by law, that if the marriage dissolve within year and day without children, all things betwixt man and wife return *hinc inde*, the simple existence of children is sufficient; and if that be sufficient in this case, then, though there had been twenty children come to maturity and married, if they and their issue had died before the parents, the Lady would have recurred to her share of the conquest, which had been very unreasonable. It was duplied, That all the conditions alleged by the defender express a peculiar time, viz. the "procreation or birth of the children"; so that if here the clause had said, "in case there were no children procreate," or "in case there were no children born," their birth evacuates the condition; and, in the same manner, the law determines the time of existence, or non-existence of children to dissolve the marriage, viz. "if either party die within year and day, without children procreate, heard cry," and so their birth and maturity by crying and weeping, determines the time, which doth

ays quadrate to this clause, "if there be no issue of children," which at least import the ordinary clause "of failing of children."

The Lords found that the existency of a child, who died that day, did not evacuate condition in this minute, and therefore repelled the defences founded thereon.

In this process there was a second defence proponed, and debated the 28th day of June.—It was alleged for the Earl of Callendar defender, absolvitor, be-[2944]-cause the clause in the minute founded upon, could only import a liferent to the deceased wife, with a power to dispose on the one half of the conquest as she thought fit, which is a personal faculty, incommunicable to heirs and assignees, such as is ordinary dispositions by fathers to their children, reserving to themselves power to burden the fee, which is never extended to heirs; and it cannot be subsumed that the wife did dispose. And seeing the clause is imperfect and dubious, *in dubiis quod est et quod benignius est sequendum*; and certainly the personal faculty is less suitable to the property, and more suitable to the interest of both parties; for thereby the wife, if she had pleased, might have disposed of the half, and yet the husband might have prevailed with her, not to dispose, as he did; but if the meaning was to give her the fee of the half, which being the most important right, it would have been express *in verbis translativis dominii*; and if stretched further, would be an extravagant unreasonable provision, which was never in a contract betwixt noble persons, whereby a wife should not only have the liferent of all the husband had, but of all that he should acquire; and likewise the fee of the half of his conquest, where there was no issue. 2do, In conjunct fees betwixt man and wife, where the fees are not express, which may clear who is fiar, the law presumes *quod potior est opinio masculi*, that the husband is fiar, and the wife only liferenter; and therefore it must be so in this case. 3tio, The clause of conquest bears, that the conquest should be secured to the wife in liferent, as the barony of Livingston; but it is unsuitable that the security of the barony of Livingston was to be in conjunct fee and rent, whereby the husband was fiar, and the wife liferenter; and therefore the security of the conquest being expressly regulated thereby, behoved to state the husband fiar, and the wife liferenter; and so her power to dispose is no act of propriety, but a personal faculty.—It was answered, for the pursuer, That the clause of conquest, as to the import thereof, must either be considered precisely according to the words in the minute, and the terms in which the Lords could have extended a contract of marriage thereupon, or according to the meaning of the parties, to be deduced from the circumstances; and if the Lords were extending the minute, without any speciality of circumstance, they could only extend it thus, That seeing both the barony of Livingston, and the conquest, were to be by way of conjunct fee, and that heirs are express in neither, that the husband and his heirs would be obliged to infeft himself and his spouse, the longest liver of them two in conjunct fee and rent, and their heirs, or the heirs of the marriage, without expressing, which failing, &c. So that it would be left to the interpretation and construction of law, whether the husband were sole fiar, or whether the husband was fiar in the one half, and the wife in the other half; in which case the common presumption of law would construct the husband to be sole fiar, and the wife to be only liferenter, unless there were a stronger presumption or evidence in the contrary; and so the husband would be sole fiar of the barony of Livingston, because there is no presumption or evidence to the contrary; but the conjunct infeftment of the conquest behoved to run on these terms, That the husband should take his conquest to himself and his wife, the longest liver of them two in conjunct fee or liferent, and to their heirs; and in case there were no issue of children of the marriage, that the one half should be disposed of as the wife should think fit; by which conjunct fee, the presumption of law that the husband is sole fiar, is taken off by that adjection, that the wife being conjunct fiar, hath power to dispose on the one half, which is a sufficient evidence to take off the presumption, and to make the wife fiar of the half; for it is beyond question, that a conjunct fee granted to two men, the longest liver of them two, and their heirs, would have this effect, that both are fiars equally in the half, and that the survivor hath the liferent of the whole, and therefore they are said to be infeft in conjunct fee and liferent, because they are both fiars of the half, and they are both liferenters of the other half, as they happen to survive; but the only reason wherefore a conjunct fee to man and wife constitutes the man sole fiar, and the wife liferenter, is the presumption, that that is the meaning and intention of parties, which presump-

tion, as all other presumptions are, is elided by a stronger presumption in the contrary; as if an heretrix resign her lands in favour of herself and her husband, the longest liver of them two in conjunct fee, and their heirs; if this be not done by contract of marriage, or as a tocher, as it frequently occurs, that after contract of marriage, and marriage following, the wife succeeds to an estate, which, if she remain in manner foresaid, and she and her husband be infeft thereupon in conjunct fee, and their heirs, without expressing further, the wife will be sole fiar, and the husband only liferenter; because the presumption is stronger for the wife, that her meaning was, not to denude herself of the fee; but the case is much stronger here, where it is not left to presumption whether the wife be only liferenter, or fiar in the half, but it is expressly agreed to by both parties, that the wife should have power to dispose of the one half, if there were no issue or children; so that the precise question comes to be, whether a wife, being infeft in conjunct fee, with power to dispose of the one half as she pleases, be fiar of that half, or if she hath only power to dispose of the one half which is not her own but her husband's; and it is very clear that that clause adjoined takes off the presumption, and leaves the wife according to the nature of conjunct fee, to be fiar of the one half; and as to the meaning of the parties to be elicited from special circumstances, it makes strongly for the wife to be fiar of the half; 1st, Because the clause bears expressly, that her conjunct fee of the conquest is to be with the burden of their debt; and therefore must be meant of the property; 2^{do}, Because a liferenter was never burdened with debt; 3^{do}, It is acknowledged that the husband had only an estate of 7000 merks a-year, and that the wife had a liferent of 23,000 merks a-year, and was a young and healthful woman about 30 years of age; so that she had a better estate than he, which is very extraordinary; and therefore, though this clause of conquest were extraordinary, yet it was very reasonable; and if it had been directly proposed, [2946] the husband would not have relinquished the marriage, but rather have yielded to it; nor would the Lady have gone on without it, seeing there was no visible way of making conquest but by the Lady's great liferent; for the husband was an illiterate man, and could make no improvement of his fortune but by his sword, by which he acquired abroad the money that bought the barony of Livingston; but he had deserted that service, and settled at home by this marriage; and though he gained in the civil war that ensued at home, yet there was no thoughts of that war in April 1633, the time of the minute; 3^{tio}, The meaning of parties is yet further cleared by a bond granted by the husband, bearing date in September 1633, and which the defender hath pleaded to be of a later date, as after the marriage complete, whereby the husband renounces his *jus mariti*, and gives his Lady the sole disposal of her opulent jointure, which is much more extraordinary than the half of the jointure, in case of no issue; and if this posterior bond had been granted the time of the minute, it might have been a cause to have limited the ground of the conjunct fee; which being so long after, it can be no ground at all.

The Lords found, That by the terms of the clause of conquest, and by the meaning of parties elicited from the circumstances foresaid, it did not import a naked liferent with a personal faculty to the Lady to dispose the half; but that she being conjunct fiar with that power, was fiar of the one half of the conquest; for albeit the conquest, in the manner of security, was regulated by the infeftment of Livingston, both being conjunct fiars; yet the power of disposal not being in the conjunct fee of Livingston, but of the conquest, it made the security, as differing in that point, to have different effects as to the fee; but seeing this clause was but a general clause of conquest, the Lords found that it could only extend to what the husband acquired during the marriage, more than what he had the time of the minute, and with the burden of all his debts contracted during the marriage; so that though the whole estate he now hath, was acquired during the marriage, yet as much of it as was equivalent to the barony of Livingston, was not to be reached by the clause of conquest, but only the superplus that were free, over and above the debt contracted during the marriage, of which free superplus the pursuer, as succeeding to the Lady, was to have the half, but no part of the bygone rents from the Lady's death till her husband's death, because they belonged to the husband, as the surviving conjunct fiar. See this case by Dirleton, *voce* FACULTY.

No. 23. [2965] GORDON v. The Laird of LEYES. January 8, 1663.

Marriage being free, the Lords refused to sustain conditions and limitations regarding it, adjected to bonds of provision to daughters.

Sir Thomas Burnet of Leyes (now deceased) gives a bond of 9000 merks to Margaret Burnet his daughter ; of which bond, she and John Gordon of Brachlie her spouse, pursue exhibition and delivery against this Laird of Leyes, and Mr. Robert Burnet advocate haver. It was alleged, That the bond is conditional, that she should marry with consent of the Laird of Leyes for the time ; but so it is that she married without consent of Leyes, or any of her father's friends ; 2, That by an agreement after the marriage in writ, her husband and Leyes condescended upon a lesser sum in satisfaction of the said bond, and so the bond is innovate and taken away. It was answered to the first, That *matrimonia sunt libera*, and such conditions should be holden *pro non adjectis*, as has been often found ; and that the first bond is acknowledged by the second agreement. And as to the said agreement, and allegiance founded thereupon, it was answered, it was conditional, if the sum condescended on were punctually paid at Whitsunday 1661, the former bond should stand in force. It was replied, That the condition resolved only in a failzie, which the defender might yet purge, considering especially the time and scarcity of money, and that the said Margaret had so far miscarried against her friends ; and the bond was never a delivered evident, but put in her uncle's hand to be furthcoming to her, if she should carry a-right.

The Lords found the second allegiance or reply relevant, and that the defender might yet purge. See IRRITANCY.

Fol. Dic. v. 1, p. 189. Gilmour, No. 60, p. 43.

No. 24. FOWLIS v. GILMOURS. February 22, 1672.

A wife being substituted by a husband to a provision left to a child, in case of the child's death, upon condition *si vidua manserit et non nupserit*, the Lords found the condition lawful.

In a declarator pursued at the instance of Dame Margaret Fowlis, relict of Sir Andrew Gilmour v. Alexander Gilmour, eldest son to Sir John Gilmour, late Lord President of the Session, and Annes Gilmour, his sister, upon this ground, That Sir Andrew having dispoed, in favours of Margaret Gilmour his only daughter, his whole estate, which he then had, or should acquire, with this provision, that in case his daughter or her children should decease be-[2966]-fore her mother, the said estate should belong to her mother, she remaining unmarried ; as likewise by a testament of that same date, he appoints his daughter his universal legatar, and failing of her by decease, her mother to succeed upon the same terms ; whereupon it was craved to be declared, that the said Dame Margaret only had right to the bonds or sums of money that belonged to Sir Andrew, his daughter being now dead, and he having no other children. It was alleged by the defenders, That the disposition and testament being qualified, as said is, she could thereby have no right, but, in case she should die unmarried again ; and if she should uplift the sums of money belonging to her husband, she ought to be decerned to re-employ the same with that same quality and condition ; so that if hereafter she should marry, they ought to belong to the nearest of kin of her husband. It was replied, That such conditions being reprobate by the law, whereby *matrimonia debent esse libera* ; and it being the meaning of the defunct, that the said restraint of not marrying should only be in force during the lifetime of his daughter or children ; she being now dead, and there being no children of the marriage, that condition and the restraint is void, specially seeing the mother's substitution to the children is burdened with the provision of 500 merks to be paid to Sir Andrew's natural daughter ; which certainly he had never done, if he had not intended that his Lady should have right failing of his children, seeing that provision was payable at her marriage whensoever it should happen.

The Lords albeit they found, that the condition *si vidua manserit et non nupsit* be consonant to law and not reprobate, yet they decerned that the relict should have right to the whole estate, by virtue of that substitution, notwithstanding of the qualification; and, that it was the meaning of the defunct that it be so, not only because that it was burdened with a paction to his natural daughter, but likewise because, in a former bond when he had no lawful children, he had provided his Lady to his whole estate.

Fol. Dic. v. 1, p. 191. Gosford, MS. No. 485, p. 254.

No. 26. [2968] BUCHANNAN v. The Laird of BUCHANNAN. February 13, 1680.

A daughter being competently provided, her father gave her an additional provision which was to become void, if she married without his consent. The Lords found the irritancy incurred, she having married without his consent, though it was a suitable match.

The Laird of Buchanan in his contract of marriage, provides his estate to the heir male of the marriage, and to the daughter of the marriage, in case there should be no male, 10,000 pounds; but thereafter he gave her a bond of 20,000 merks, and she gave a bond that she should not marry without her father's consent, and if she did in the contrary, that she should lose any addition made to her portion-natural. Buchanan having no heirs-male, disposes his estate to Major Grant, he assuming his name, and providing that he marry the said Elizabeth his daughter, and in case of her refusal, burdens the estate only with the provision in her mother's contract, and declares the same to be free of the 5000 merks he had added to her by his bond. Major Grant came to the said Elizabeth with a notary, and offered to marry her, and desired that she should consent, which she refusing, he took instruments thereon. The said Elizabeth had now married Stuart of Ardvorlich, and with his concurrence pursues adjudication upon her father's bond. The defender alleged absolutor from the 5000 merks of addition because the pursuer had not married with her father's consent, but contrary to his express will; so that the addition being a gratuitous donation, it is not only revocable for her ingratitude in marrying without her father's consent, but by express provision both by the bond itself, and by the back-bond. The pursuer answered, 1mo, That such clauses are contrary to the freedom of marriage, and therefore are holden *pro non adjectis*. 2do, She ought not to have desired her father's consent to this marriage, knowing that he was pre-determined to assent to no marriage but to George Grant's; and it would be no ingratitude to refuse to marry George Grant, being a man so far above her age, and who shewed no affection for her, but rather to be rid of this addition, by an uncivil putting her to an acceptance of the marriage on the first proposition; neither was her father in a capacity to assent to this marriage, in respect of his disposition to Grant. 3tio, Such clauses do import no more but to guard against unsuitable marriages, and this marriage is most suitable, for if she had desired her father's consent, and he had been at freedom to give it, it [2969] would not have annulled her portion, unless he gave a reasonable cause of his refusal. The defender replied, That clauses adjected, in case parties marry not, are holden as not adjected, being impeditives of marriage, which should be free; but free donations granted on condition, "That the party marry such a man, or marry not, without the donor's consent," are no ways rejected; much less in the case of a father and daughter. 2do, The daughter should have craved her father's consent, both by her natural obligation, and her back-bond, nor was he bound up by his disposition to Grant; for, if she had proposed a reasonable cause why she should not marry Grant, if it had been no more but that she could not find affection for him, it might have excused her, if she was ready to depone that it was true; but she is inexcusable never to have demanded her father's consent; neither was he bound up, but if he had been convinced of the reasonableness of her refusal, in not marrying Grant, and marrying Ardvorlich, he might have consented, and so purified the condition in her bond, which being before Grant's disposition, could never be prejudged by any clause in it.

The Lords found the liberty of the marriage did not exclude the provision in the back-bond, and found that the father might have assented to her marriage with Ardvor-

sh, and so made the bond effectual, albeit after the bond he had insert an irritancy in Grant's disposition, and therefore adjudged only for the 10,000 pounds.

Fol. Dic. v. 1, p. 189. Stair, v. 2, p. 756.

No. 31. [2972] PRINGLE and RUTHERFORD v. PRINGLE. July 20, 1688.

found, that a brother not giving consent to his sister's marriage, which consent, by her father's appointment, she was bound to obtain, under an irritancy of losing part of her portion, did not infer the irritancy, unless he gave a reason for his dissent.

Elizabeth Pringle, and Rutherford her husband, pursuing Pringle of Symington, her brother, for her portion, he repeated a reduction upon these grounds ; 1mo, That some of the bonds assigned to her were heritable, and the assignation by her father was *in lecto*, at which time he could not prejudge his heir ; 2do, That she was obliged to marry with his consent, else 2000 merks was to return to him.—Answered to the first, He was her tutor, and granted discharges of the annuals of these sums *tutorio nomine*, and so had homologated, and could not now quarrel it ; 2do, He had accepted a disposition from his father, narrating this portion ; 3tio, As to her marriage, the quality was not known nor intimated to her.—Replied, His acting as tutor did not preclude him, as is clear from § 4, *Institut. de inofficios. testament.* The Lords repelled the reason founded upon deathbed, the charger proving that the suspender had accepted a disposition, which narrates the cause and occasion of the same to be the bonds assigned ; and find, that the suspender not giving his consent to the charger, his sister's marriage, does not infer the irritancy contained in the assignation, of applying 2000 merks of the said bonds to the suspender ; unless the suspender could give a reason of dissent ; for they would not allow him, upon the prospect of his own benefit, to deny his consent to every proposition of marriage made to his sister, because he hoped 2000 merks would fall in to him.

Fol. Dic. v. 1, p. 190. Fountainhall, v. 1, p. 512.

No. 32. WILLIAM BUNTIN v. ARCHIBALD BUCHANAN. July 7, 1710.

A lady and her husband pursued for her tocher, contained in a bond of provision having this condition, that she should marry with consent of certain friends, otherwise the bond to be null. The marriage was without disparagement, yet the nominees dissented. The defender pleaded for a restriction of the tocher to a sum equal to the lady's legitim ; but the whole tocher was decerned for.

William Buntin, son to the Laird of Airdoch, having married Jean Buchanan, daughter to Drummakill, he pursues Archibald Buchanan of Drummakill, her brother, for payment of 5000 merks contained in a bond of provision given to her by her father.—Alleged, She has forfeited her right, because the bond contains an express quality, that his daughter shall marry with the special advice and consent of George Lindsay of Blackhome, and John Cuninghame of Ballindalloch, otherwise her bond to be void and null ; but so it is, she never required their consent ; but, on the contrary, they dissented ; and this tocher being a donation, it may be given with what qualities and conditions the donor pleases ; and if not obeyed, the quality ceases, *tol. tit. C. de donat. sub modo et [2973] condit.*—Answered, That marriage is favourable, especially when with their equal without disparagement (as this was), and any restrictions and limitations whereupon are commonly rejected as *contra libertatem matrimonii*, and Ballindalloch (who was only on life of the two nominate), has since the marriage declared his acquiescence, and that he has nothing to object against it, so that his

ratihabition *comparatur mandato*; and such provisions are not pure donations, but as the effects of a pre-existent obligation from the laws and ties of nature; and whatever creditors may say against them, yet they are always good against the granter's heir; and such clauses have been oft repudiate, as *inutiliter adjecta*, and was so found, 3d Dec. 1680, *Fetterneer contra L. Semple*, No. 27, p. 2969; and in 1681, *Hamilton of Monkton hall contra Baird of Saughtonhall*, No. 28, p. 2970, where the clause was not intimate to the daughter, nor shown to the daughter, nor shown to her before her marriage, the bond never being in her custody, but in the hands of a friend. Provisions to children are *juris naturalis*, and not to be forfeited upon latent clauses, but only where there is evident contempt and contravention, but here *ignorantia invincibilis* plainly excuses her.—Replied, The Lords have not extended these irritant clauses about marriages without consent, to annul the provision *in toto*, but only to restrict them to a moderate and reasonable tocher, corresponding to what would befall them as their legitim and portion natural, and Drummakill pleads it no farther, but that the Lords may consider the condition of the fortune, and the debts affecting the same, and they will find this a most exorbitant provision; and all that is craved is, that it may be reduced *quoad excessum*, and brought to a just equality. And as to her ignorance, it is offered to be proven she knew the terms of her father's bond; and Ballindalloch's consent *ex post facto* is of no import; for he who justly refused his consent before the marriage, when the thing is done without his concurrence, what is the remedy but to make the best of an ill bargain they can?—The Lords repelled the defence, and found Drummakill liable in the whole tocher, and refused to modify it. If she had married to a *turpis persona*, or with great disparity, the Lords would have taken it to consideration. *Fol. Dic. v. 1, p. 190. Fountainhall, v. 2, p. 584.*

No. 35. [2977] Sir KENNETH M'KENZIE v. The CREDITORS of Kinminnity.
June 6 & July 1750.

A person under no natural obligation to provide, granted a bond to a Lady, under the condition that she should marry with the consent in writing of the donor. She married without it, yet the bond was found due. But there were circumstances inferring approbation.

Where a father, who is under a natural obligation to provide his children, qualifies a bond of provision to his daughter, with a condition "of her marrying with consent of persons therein named," the tocher will be due although she marry without their consent, without doubt, if the marriage be suitable: What the Lords might do in the case of an unsuitable marriage would depend on circumstances. But, where a bond of provision is granted by one who is under no obligation to provide the child, under this condition, that she marry with the granter's consent, then the condition is strictly interpreted, and the bond will be found null if she marry without his consent, be the marriage, in the opinion of others, suitable or not, as he is not bound to assign the reason of his dissent. And so far has this been carried, that even where a father, who had before competently provided his daughter, gave her an additional provision, which was to become void in case she married without his consent, the irritancy has been found incurred where she married without his consent, although the match was suitable. But where the consent required in the condition is not the consent of the granter himself, but of other persons therein named, How far [2978] the irritancy will, in that case, take place, where they cannot give a reason for their dissent, may be a question.

What will import a consent, has on some occasions, been disputed; and there are cases, when the granter was under no obligation to provide, in which the Lords have found that nothing less than an express consent could validate the bond; that the person's being present at the marriage and his silence thereat, nay, that even his signing witness to the contract of marriage was not sufficient to infer that consent which was required by the condition of the bond, unless it had been specially mentioned and treated upon; which was carrying the matter too far, especially as no particular form of consent was, in these cases, required by the bond of provision.

It is more dubious where a particular form of consent is expressed in the bond ; it, so far have the Lords receded from the strict construction put upon the clause by the foresaid judgments, that, even in that case, they have found the consent applied from circumstances, although it had not been given in the precise form required by the bond.

Of this there was a strong instance in the present case, being of a bond of 4000 merks granted by Elizabeth Edwards, relict of Sutherland of Kinminnity, to Mary Sutherland, her husband's daughter of his former marriage, under a condition in these words : " Declaring always, that the said Mary Sutherland shall be bound and obliged to marry with my consent, had and obtained thereto, by a writing under my hand ; and, if she does in the contrary, or dies unmarried, then, and in these cases, the foresaid bond of 4000 merks shall fall, accresce, and belong to me " : Which bond the Lords " Found to be due," although she married privately without the knowledge of the granter, in respect of certain circumstances, from which her approbation thereof was found to be inferred.

Whether these circumstances were rightly sustained or not, supposing equipollent circumstances sufficient to purify the condition of the bond, and upon which the Court was much divided, is not material to state, as a circumstantial case can be of little use as a precedent to any other.

N.B. It did not appear in this case, that Mary Sutherland, when she married, knew of the bond at all : Had she known of the bond, and the condition been concealed, it might have afforded an argument against the irritancy's being incurred ; but as she knew nothing of the bond itself, and that the granter was under no obligation to acquaint her of it, the circumstance of her not knowing of the condition was thought to import nothing.

Fol. Dic. v. 3, p. 158. Kilkerran (CONDITION), No. 1, p. 145.

No. 42. [2391] GEORGE CAMPBELL of Elister v. ARCHIBALD CAMPBELL of Jura.
December 16, 1757.

A man, in his daughter's contract of marriage, bound himself to pay a tocher, providing, " that if the marriage should dissolve within year and day, or without heirs procreate and existing," the tocher was to return to him. A child was born, but died soon after, and the marriage was dissolved by the death of the wife, after about two years. Found, that the tocher did not return.

Archibald Campbell of Jura became bound, in his daughter's contract of marriage with George Campbell of Elister, to pay the said George Campbell, at Whitsunday 1754, the sum of £166, 13s. 4d. Sterling, in name of tocher.

The contract contains this clause : " Providing and declaring, That if the marriage dissolves within year and day after the solemnization thereof, or without heirs procreate, and existing, of the same, then the foresaid tocher is to return to the said Archibald Campbell," &c.

There was a son procreated of this marriage ; but he predeceased his mother, who died in October 1754, after the marriage had subsisted two years.

In the year 1755, an action was brought against Archibald Campbell, for payment of the tocher stipulated to be paid by him.

Pleaded for the defender ; By the above recited clause in the contract of marriage, the tocher is provided to return, in two cases, 1st, If the marriage should dissolve within year and day ; or, 2dly, If it should dissolve without heirs procreated, and existing. These are separate and distinct conditions, and the words are clear and express ; so that there is no room left for interpretation, or presumptions of the intention of parties. And as the case has happened, that there were no heirs existing at the dissolution of the marriage, the defender is entitled to retain the tocher, which, in that event, was provided to return to him in case it had been paid.

Answered for the pursuer ; Although this contract is very inaccurately drawn, yet, from a fair and just construction of this clause, according to what must have

been in the view of parties, it is evident, that no more was thereby intended, but that in case of the dissolution of the marriage within year and day, without heirs procreated and existing, the tocher should return. There was no double condition here : And the word or, according to the received and known interpretation clearly established in the civil law, may, and, agreeably to circumstances, ought to be construed, not in the disjunctive but conjunctive sense, being only explanatory of the former part of the clause ; and imports no more, than that in case the marriage dissolved within year and day, the bare procreation of a child should not preclude the return of the tocher, if the child was not existing at the dissolution of the marriage within year and day. The contrary construction, contended for by the defender, implies manifold absurdities. For, supposing the word or to establish two independent conditions, if the marriage had dissolved within year and day, by the husband's death, though there had been a child of the marriage then existing, the wife would have been entitled to her liferent provision, and the tocher must have returned. Again, supposing the marriage to have dissolved within the year, by the wife's predecease, though there had been a child procreated of the marriage then existing, the por-[2992]-tion must also have returned ; because, according to the defender's argument, the procreation and existence of children constituted a separate independent condition, nowise connected with the dissolution of the marriage within year and day : And in the other event, of the marriage dissolving, though at the distance of fifty years, after the procreation of perhaps twenty children, if these children did not exist at the dissolution of the marriage, the tocher was still to return. These, and others that might be mentioned, are so many glaring absurdities attending the defender's construction of this clause, that it is impossible it can be received.

Observed on the Bench ; The words of this clause are very strong in favour of the defender. The obvious import of the words is, That *quandocunque* the marriage should be dissolved, if there were no children existing, the tocher should return. But the Court, *ex equitate*, may reject the express words, and explain their meaning from the intention of parties, which is as clear on the other hand.

The Lords " found, That, in respect it is acknowledged, that the marriage subsisted about two years, and that there was a child procreated of the marriage, who lived for several months, the pursuer was entitled to the wife's tocher, although the said child died before the dissolution of the marriage, by the death of the mother."

Act. LOCKHART.—Alt. HEW DALRYMPLE.

G. C.

Fol. Dic. v. 3, p. 161. Fac. Col. No. 72, p. 120.

No. 6. [3011] The BISHOP of ABERDEEN v. The Viscount of KENMURE.
July 15, 1680.

Sasine being taken upon an obligation to infeft *a se et de se*, without relating specially to either, a posterior confirmation was found to perfect the sasine *a se*, not only from the confirmation, but from the date of the sasine ; upon which footing, the creditor in an annualrent right having died before confirmation, the annualrent right was found to be in the superior's hands by non-entry, who confirmed it.

The Bishop of Aberdeen pursues a poinding of the ground of the baronies of Kenmure and Kirkmichael, upon an infeftment of annualrent.—It was alleged for Kenmure, heritor of these baronies, That the annualrent was in non-entry, by the decease of the Lord Whitekirk, who was infeft therein upon a precept relative both to the infeftment from his author, *a se et de se*, which not being confirmed in Whitekirk's life, the Bishop's retour should have retoured the annualrent, as being in the hands of Kenmure by non-entry, and not in the hands of the King, who was not Whitekirk's superior till the confirmation ; 2do, Whitekirk's sasine was null, as not having four witnesses.—It was answered, That such sasines upon precepts relating to infeftments, both public and base, are always applicable to either infeftment, as the party infeft pleases ; and when a confirmation supervenes, the right becomes

public, holden of the superior, and the confirmation perfects the sasine from the date of the sasine ; so that the confirmation being before the Bishop's retour, the annual-rent was rightly retoured, as in the King's hand, and Kenmure was never superior ; and as to the sasine, four witnesses are only required to writs of consequence, to be subscribed by the granters, who cannot subscribe with their hand, and was never extended to sasines, or any instruments of notaries, proceeding upon a warrant, sufficiently subscribed.

The Lords found, That if Whitekirk had taken infeftment expressly, to be holden of his author or successor, the annualrent would have been in non-entry till the confirmation ; but, the sasine bearing applicable to both infeftments, *a se et de se*, that the application made by the confirmation, did exclude the non-entry, and perfected the sasine *a se* from the date of that sasine ; and found no necessity of more than two witnesses in a sasine.

Fol. Dic. v. 1, p. 193. Stair, v. 2, p. 786.

No. 7. [3012] BOTHWEL of Glencorse v. DEANS of Woodhouselee. June 1687.

A superior confirming an infeftment indefinitely, which had been taken both *de me et a me*, conform to clauses in a disposition for that effect, was presumed to confirm the infeftment *a me*, to make the right public, and he was preferred to the casualties ; and the base superior was not found liable to enter the vassal conform to his obligation in the disposition.

Fol. Dic. v. 1, p. 193. Harcarse (INFESTMENT), No. 609, p. 170.

No. 8. LORD CHANCELLOR v. CHARLES BROWN. February 15, 1688.

Found in conformity with No. 7.

Upon the death of Robert Brown, who had an improper wadset of Gleghorn's lands, affected with a back-tack, there was a process raised at the instance of the King's donatar of ward, for mails and duties of the land since the ward, and a liquidation of the heir's marriage.

Alleged for the defender, 1mo, Robert Brown was not the King's vassal, in so far as the wadset was to be holden *a me* or *de me*, and the confirmation being [3013] indefinite of the infeftment taken on the precept, and the defender restricts it to the infeftment *de me* ; and so the confirmation shall give him no benefit as the King's vassal ; and if Gleghorn die, the casualties of the superiority will fall by his death ; and the confirmation of the base right will only secure against forfeiture ; 2do, *Esto* the defender's ward were fallen, yet there being a back-tack never declared, and the defunct not in possession, the mails and duties cannot exceed the back-tack duties ; and the confirmation is equivalent to the King's consent to the back-tack, which imports *non repugnantiam* ; 3tio, The wadset was a redeemable right, and the defunct had intromitted with the rents of the lands upon a comprising for the back-tack duties, which rents exceed these back-tack duties and sums in the wadset. Now this ought to be sustained against the superior, as well as it would be sustained against a singular successor in the wadset.

Answered for the pursuer ; The indefinite sasine following upon a precept to take infeftment both *de me* and *a me*, answers to both holdings, and is presumed to respect the best holding, unless it had expressly borne the *tenendas* to be only of the base superior ; and now the defender hath no election, *multo minus* after the casualty hath emerged ; and therefore the confirmation must be applied to the infeftment *a me* ; 2do, The ward of the wadset lands falls to the superior, and the back-tack doth not restrict the right, but possession, in which sense it is not real quoad the superior, and must sleep during the ward, just like a tack set by the heritor : Nor doth the superior's confirmation import any consent but such as is congruous to his own right of superiority ; for it is not to be supposed, that he intended thereby

to prejudice himself of his casualties, which are usually reserved in confirmations; and a consent to a tack not in a way of confirmation, being no act of a superior, is stronger than a confirmation of the back-tack duties. And as a confirmation of a back-infertment would not hinder the superior to exclude the party so infert from lands and duties, *multo minus* can the confirmation in so far as relates to the back-tack; but both must sleep during the ward; 3tio, Intromissions with the duties of land after declaring of the back-tack, or other extrinsic intromissions, do not extinguish the wadset, as intromissions within the legal in appraisings do by act of Parliament unless before the wadsetter's death application had been made by way of compensation. And though extrinsic payment to a wadsetter, even upon an unregistered discharge, or payment by poinding of goods, hath been sustained to extinguish the wadset, in prejudice of a singular successor thereto, yet that cannot be obtruded against superiors *quoad* the reddendo of their superiority.

The Lords repelled all the defender's three allegiances, in respect of the answer made thereto. And in the reasoning it was doubted by some, if the reverser might redeem the wadset during the minority.

Fol. Dic. v. 1, p. 193. Harcarse (WARDS & MARRIAGES), No. 1012, p. 287.

No. 17. [3022] JOHN GRIEVE, servant to Dr. George Grieve, Physician in Peebles v. JOHN WILLIAMSON, Cordiner in Peebles. December 11, 1760.

Where a disposition is granted to one, and the heirs-male of his body, a charter granted by the superior, without resignation, confirming the disposition to the disponee in liferent, and to his son in fee, with infertment following thereon, will not constitute the son fiar.

James Williamson of Cardrona, by disposition, anno 1706, for love and favour, and other causes, disposed to Mr. John Williamson, schoolmaster in Peebles, and the heirs-male of his body, or the heirs-male of the descendants of his body, which failing, to return to the granter's heirs, certain burgage tenements in the burgh of Peebles, and five acres of land in its neighbourhood, holding feu of the Earl of Traquair.

These five acres were neither resigned in terms of the procuratory, nor was infertment taken in virtue of the precept of sasine; but in 1709, a charter was granted by the Earl of Traquair, the superior, which confirms the disposition by Cardrona, *in omnibus capitibus et singulis clausulis, &c., secundum formam et tenorem ejus in omnibus punctis*. At the same time, this confirmation is not granted to Mr. John Williamson, as sole fiar, in terms of Cardrona's conveyance, but thus: *Predict. Magistro Joanni Williamson, in vitali redditu, et Jacobo Williamson ejus filio, in feodo*. Immediately after this, there is a clause of *novodamus* in the same terms; and the charter concludes with a precept of sasine for infertting the father in liferent, and the son in fee.

Upon this charter, infertment soon followed; and the sasine bears delivery to have been made to the father and son personally; and that the father, *pro semet ipso, et in nomine ejus filii, instrumentum petiit, &c.*

From this time, down to the 1735, Mr. John Williamson, the father, continued to possess as fiar; and, in that character, granted infertments of annualrent out of the lands. But the eldest son, James, having then died, John Grieve, one of his personal creditors, brought a process against John, the second son, as lawfully charged to enter heir to his deceased brother; and, upon John's renunciation, obtained a decret *cognitionis causa*, of date the 9th of January 1736; and thereafter proceeded to lead an adjudication.

Upon this, Mr. John Williamson, the father, executed a disposition in favour of his son John, reserving his own liferent, and containing a substitution and return in conformity with Cardrona's disposition, and assigning him to the unexecuted procuratory, and precept therein contained; but soon thereafter, he was himself infert upon the said precept, and appeared for his interest in the [3023] process of adjudication brought by John Grieve; in which a decret was obtained upon the 13th July 1736, reserving all defences *contra executionem*.

Immediately after this, Mr. John Williamson, the father, brought a process of reduction against the Earl of Traquair, of the above-mentioned charter and sasine, on account of their being disconform to Cardrona's disposition ; and accordingly obtained a decret, reducing the same, upon the 18th of January 1737.

Mr. Williamson having died a few years thereafter, he was succeeded by his son John ; who continued in the undisturbed possession for a considerable time ; but, at last, was called as a defender, alongst with his tenants, in a process of mails and duties, brought at the instance of the above-named John Grieve, upon the decret of adjudication obtained in the year 1736.

The defender produced Cardrona's disposition, and his father's infeftment, the disposition by his father to himself, and the decret of reduction, obtained against the Earl of Traquair ; and contended, That these were sufficient to exclude the pursuer.

Answered for the pursuer, 1mo, The decret of reduction obtained against the Earl of Traquair, who was the only defender called, can have no operation to the prejudice of any other person ; and, of consequence, cannot affect the right that stood in James Williamson, or cut off the interest of his creditors, or any claiming under him.

2do, As James Williamson stood upon record infeft in the fee, the pursuer was *in bona fide* to contract with him ; and therefore cannot be injured by any subsequent reduction of his right. And a similar judgment was pronounced by the Court, in the case of Mrs. Stewart of Phisgil, whose infeftment was sustained, although her husband's right to the lands was set aside. See GROUNDS and WARRANTS.

3tio, The charter by the Earl of Traquair was sufficient, although it had contained no clause of *novodamus*, to vest the fee in James, by confirmation ; seeing that, by the terms of Cardrona's disposition, no more than a liferent seems to have been intended to be given to the father.

4to, The clause of *novodamus* in the charter, with the sasine following upon it, made a proper and legal feudal investiture of the property in James.

5to, Supposing the charter liable to objection, as being disconform to the disposition, such objection was only competent to John Williamson, the father ; and as he homologated the alteration, by accepting of the charter, and by taking it *propriis manibus*, which supplied the want of a resignation, he could not afterwards retract. It was in his power to vest the property in his son in this manner ; and as he actually did so, he could not thereafter take the fee from him, or out of his *hereditas jacens*, either by a new infeftment in his own favour, or by a disposition to his son John. And so in effect it was found in the case of Cubbison v. Cubbison. See GROUNDS and WARRANTS. There, a father having received a disposition to himself, his heirs and assignees, with a precept of sasine ; and having afterwards taken a charter from the superior, who was [3024] also the disponer of the lands, to himself in liferent, and his son in fee, thought proper to bring a reduction of the same, as being granted without any warrant. But it having been urged for the son, That in the sasine, the father was said to have received the symbols of infeftment as attorney for his son, and that in a bond granted by the father, the son was designed by the lands contained in the charter, the Lords found, That the charter and sasine, without any warrant, joined with the circumstances above-mentioned, were sufficient to establish the fee in the son.

Replied for the defender. To the first ; The Earl of Traquair, who granted the erroneous charter, was the only person who could properly be called in the reduction. For James Williamson having died without issue, the defender was his immediate representative ; but he had, before that time, renounced to be heir to him, in the pursuer's process of constitution.

To the second ; *Resoluto jure dantis, resolvitur jus accipientis*. James Williamson could communicate no better right to another than he had himself. And the case of Phisgil is by no means applicable to the present. Phisgil was not only infeft, but in the unchallenged possession of the estate ; when his lady was infeft in security of her jointure, she contracted upon the faith of his being proprietor of the estate of which she saw him possessed ; and her infeftment created a real lien upon the lands for the most onerous cause. On the other hand, James Williamson never was in the possession, and the pursuer received no infeftment or real security from him. He was only a personal creditor ; and his adjudication of the lands, as in *hereditate jacente* of James, could give him no right to them, in the event of its appearing that James had no interest in them himself.

To the third ; The disposition by Cardrona was granted to John Williamson, and

the heirs-male of his body, without mention of liferent or fee in the one or the other, and no instance can be given, where such a grant was ever found to devise the fee, the issue of the dispositive, and only the liferent to himself.

To the fourth; The clause of *novodamus* is an intrinsic nullity of the right, being altogether without warrant. A superior may, indeed, enlarge the right of a vassal by a new grant; but it never has, hitherto, been alleged, that by an arbitrary act, he could deprive his vassal of what was formerly conferred upon him, and transfer it to another. Supposing that resignation had been made by Cardrona, in the face of his disposition, it could not be maintained, that the superior could have given a new investiture in different terms. But here the case is still stronger; for no resignation was made at all; and the superior took it upon him to give away the property of lands over which he had no power, the fee being full at the time.

To the fifth; In the first place. There is no legal evidence of any homologation on the part of the father. His acceptance of the charter is no otherwise instructed than by the instrument of sasine, which bears his receiving infeftment for himself and son. But this is only the assertion of a notary; and the inconveniencies would be great, if the bare attestations of notaries, produced [3025] at distant periods, were to be conclusive as to the interest of parties in land-rights. Besides, it is not denied that the father, from the date of the charter down to his son's death, acted not as a naked liferenter, but as absolute fiar of the subject; which shows, that he did not consider it as giving more than a *spes successionis*; and he no sooner discovered the contrary, than he gave the strongest testimony of his repudiating these erroneous rights, by taking a new infeftment on the precept in Cardrona's disposition, and obtaining a decret of reduction of the charter and sasine.

In the next place, even supposing the father's acceptance of the charter fully instructed, no right could thereby be vested either in his or his son's person.—The fact at that time was completely established in Cardrona. He had indeed granted a procuratory and a precept. The procuratory, however, never was executed; consequently Lord Traquair could grant no charter of resignation, nor convey the fee to any person whatever by a clause of *novodamus*. Again, no infeftment had been taken upon the precept; so the charter of confirmation was premature and inept. But, even supposing infeftment had at that time been taken in virtue of the precept, the confirmation would be warranted no farther, than in so far as it was agreeable to the precise terms of such infeftment; and, as it deviated from Cardrona's disposition, by giving the fee to the son in place of the father, it was *ultra vires* of the superior; and therefore void and null.

Lastly, The case of Cubbison will by no means apply. For, 1mo, In that case, the real right of the lands was truly in the superior's person at the time of granting the charter. 2do, The circumstance of the bond shewed the father's homologation of it in a strong manner. And, 3tio, The presumption arising from the notary's assertion, was confirmed into the most positive evidence, by the father's admission of the fact.

“The Lords sustained the defence, and assoilzied from the mails and duties.”

Reporter, JUSTICE-CLERK.—Act. MACINTOSH.—Alt. RAE.

Fol. Dic. v. 3, p. 162. *Fac. Col.* No. 258, p. 477.

No. 20. [3028] MILN v. The Laird of POWFOULS. December 6, 1678.

In a competition betwixt two infeftments, the first confirmation was preferred, and the bare giving in of a signature to the exchequer was found not sufficient, unless all diligence had been used by the one, or precipitation by the other.

In a competition betwixt the Creditors of Clackmannan, Alexander Miln and Powfouls, upon two base infeftments, were the same day and hour infeft in Clackmannan's estate; the said Alexander for an annualrent of a sum due to him, and Powfouls, for relief of several sums in which he had been cautioner for Clackmannan;

both infeftments to be held of and from Clackmannan. Both gave in signatures to the Exchequer in one day for confirmation, but Alexander Miln's signature was first past in Exchequer, and his confirmation first past the seals. Alexander did also, before either confirmation, obtain a decret of poinding of the ground; whereupon they compete for preference. Powfouls alleged, That his infeftment, being for relief, was valid from its date, there being no ground of simulation, but the infeftment astructed by anterior bonds to other creditors, wherein Powfouls is cautioner; and, therefore, by the act of Parliament, such infeftments, though base, are never to be postponed to any infeftments, not being prior, but are in the same case as infeftments of warrandice; both which cannot attain possession till distress, but from distress have effect from their date. 2do, As to the confirmations, the Exchequer, by act of Parliament, is ordained to give confirmations to all parties, as they demand the same; so that Powfouls having presented a signature of confirmation as soon as Alexander Miln, the gratification of Exchequer, in passing Alexander Miln's first, cannot pre-judge him. It was answered, That public infeftments are always preferred to base infeftments before possession, or diligence for the base infeftment first attaining possession; and, though custom hath accepted infeftments of warrandice, where possession is had of the principal lands, it hath not extended the same to infeftments for relief of personal debts, which would much unsecure purchasers. And as to the confirmations, the giving in of a signature, without continuing to get the same past, imports nothing. 2do, Though the King, as superior by the common law, must receive apprisers or adjudgers, yet as to infeftments upon resignation or confirmation, the King, as all other superiors, may refuse all or confirm whom he pleases. And, by the act of Parliament founded on, viz. act 66, Parl. 5, 1578, The first confirmation is declared the best right. And albeit that act mention an act of Council, yet the King or his compositors ought not to deny confirmation upon the reasonable expenses [3029] of any party, yet that is not repeated in the statutory part, but only in the narrative; and an act of Council can derogate from no man's right, much less the King's.

The Lords found the giving in of a signature could not bring in that party, without first obtaining a confirmation, unless all diligence had been used by the one, or precipitation by the other; but did not determine that point, whether the Exchequer was obliged to confirm according to diligence, and did resolve further to hear that point, whether infeftments for relief of personal debts were valid from their dates.

Fol. Dic. v. 1, p. 194. Stair, v. 2, p. 653.

No. 1. [3035] JOHNSTON v. IRELAND. July 20, 1610.

He who had sums of money to crave of a defunct, falling heir to him, may not the less pursue the defunct's executors for that debt, which is not confirmed nor taken away by the creditor's becoming heir to his debtor.

Fol. Dic. v. 1, p. 195. Haddington, MS. v. 2, No. 1978.

No. 6. [3038] Lady MARGARET CUNINGHAME v. The Lady CARDROSS.
December 21, 1680.

A gentleman having disposed the bulk of his estate to his second son, and certain heirs of tailzie, with the burden of relieving the heir of line of the debts; and, after the eldest son's death without issue, the second son being served heir both of line and provision, the obligation for relief was found not extinguished in his person, though he was both heir and creditor in the said relief, and therefore his heir of line, who was also heir of line to the maker of the tailzie, was found to have relief against the heirs of provision, so as to have the unentailed estate disburdened of all debts.

Sir James Stuart of Kirkhill disposed the bulk of his estate to William Stuart his second son (his eldest son being a weak person) and to William's heir male of his

body, which failing, "To Catharine Stuart, his younger daughter, and her heirs" the disposition contains this clause, "That the said William and his heirs of tail shall be obliged to pay Sir James's whole debts, and perform his whole deeds and obligations in the same way as if William were his heir, or as Sir James would obliged himself"; about the time that this disposition was signed, Sir James's eldest son died, and his son Sir William became infeft upon this disposition, and there being some wadsets not contained in the tailzie, Sir William was infeft in these, "as he was to his father," for they were disposed to him and his heirs whatsoever; Sir William died without heirs of his body, and thereby his succession divided, the tailzie descending to Catharine, now Lady Cardross his youngest sister, as heir of tailzie; and the untailzied estate fell equally to the Lady Cardross, and to Lady Margaret Cunningham, only daughter of his eldest sister; Lady Margaret and her husband, Sir John Maithland, pursue a declarator against the Lady Cardross and the Lord Cardross her husband, to hear and see it found and declared, that Lady Margaret had right to the half of the untailzied estate, and that the Lady Cardross, as heir of tailzie to Sir William, was obliged to pay Sir James's debts by the foresaid clauses in the tailzie, and to relieve the pursuer as heir of line thereof. It was alleged for the defender, That this clause contained nothing of relief, but was only to show that Sir James intended not by this disposition to defraud his creditors, to whom he was, or should become debtor, and therefore obliged his son and heirs of tailzie to pay his debt, which could only be understood according to the order of discussion allowed by law, after his executors and heirs of line were discuss. It was answered, That Sir James's disposition, bearing expressly, "to Sir William his second son," with an obligation "to pay his debt," could be no otherways intended or interpret, than that the little remainder reserved out of the tailzie, should be reserved for his eldest son, who otherways had no provision or aliment, and so being conceived in general terms, "That Sir William's heir of tailzie should relieve Sir James's heir of line," the clause behoved to have the same effect as to this pursuer, as heir of line, as it would have had to Sir James's eldest son, if he had lived; "The Lords did formerly find, That the foresaid clause did import a relief to Sir James's heir of line, that the heirs of tailzie behoved to pay Sir James's debt, without discussing or recurring upon the heir of line. It was now further alleged, That this pursuer could claim no relief as heir of line to Sir James, because she was now entered heir of line to Sir William, who was only heir of line to Sir James, and therefore was liable to all Sir William's debt, which comprehended not only the debts contracted by Sir William, but all Sir James's [3039] debts did become Sir William's debts, by entering his heir, and the pursuer being Sir William's heir of line is simply liable for all Sir William's debts, whatever way he was obliged, and can seek relief of none of them from Sir William's heir of tailzie by this clause, because the clause did oblige Sir William "and his heirs of tailzie to pay Sir James's debt"; and albeit the clause had borne expressly, "to relieve Sir James's heir of line"; yet Sir William being actually served heir of line to Sir James, he became both debtor and creditor on the relief, *et confusione tollitur obligatio*, for confusion is an unquestionable peremptory defence, as effectual as payment, or compensation. 2do, The pursuer neither is, nor can be heir of line to Sir James, seeing Sir William was entered heir of line to Sir James, and the whole estate tailzied and untailzied was once settled in the person of Sir William; so that the pursuer being Sir William's heir of line, must be liable to all debts whereunto Sir William was liable, as contracted by himself, or representing his father, and cannot be said to be Sir James's heir of line. It was replied for the pursuer, That albeit she be immediate heir of line to Sir William, yet she is immediate heir to Sir James, and would be liable to all Sir James's debts, although they had never been established against Sir William; and it is acknowledged, that *quoad* the creditors, they have full access against the heir of line, and of tailzie of Sir William. But all the question is, whether Sir James's heir of line succeeding both to him and Sir William, hath the benefit of the clause in the tailzie, importing relief, which cannot be denied, seeing it is evident that Sir James did settle a part of his estate tailzied, and a part untailzied, that he did design to keep the untailzied estate without burden, whensoever the succession should divide betwixt the heirs of tailzie and of line. And as to the pretence of confusion, though it was an absolute peremptory defence before the feudal law, when *additio hæreditatis* was *actus legitimus nec excipiens diem nec conditionem*; but now the feudal customs having introduced so many kinds of succession, which may

be qualified with all imaginable qualifications, the confusion that was then perpetual, is frequently now but temporal, during that time that only one person is both heir of line and tailzie ; so that such clauses must be interpreted according to the rational design and meaning of parties, to take effect at the first time the estate shall happen to divide betwixt the heirs of line and heirs of tailzie ; so that Sir James knowing clearly that this clause could never take effect during his son's life, in whose person his estate tailzied and untailzied was established, his eldest son being dead about the time he subscribed the disposition, his design could be no other, but so soon as his estate should divide betwixt his heirs of tailzie and of line, the heir of tailzie should pay his debt, without burdening the heir of line.

The Lords found, that the pursuer as being both heir to Sir William, and by him to Sir James, had right to crave relief off the Lady Cardross, as heir of tailzie, the succession being now first divided betwixt the Lady Cardross as heir of tailzie, and the pursuer and the Lady Cardross as heirs portioners and of line, [3040] and that the concurrence of both estates in the person of Sir William, did not absolutely extinguish the obligation of relief, but only during the time that the estate was in one person.

Fol. Dic. v. 1, p. 195. Stair, v. 2, p. 821.

No. 7. BURNET of Carlips v. NASMITH of Posso. January 25, 1693.

Though an apprising during the legal, purchased in by the heir served, becomes thereby extinct *confusione*, it is not the same, where it is purchased in by the heir having a disposition of the appraised lands, though thereby liable to the debt appraised for *præceptione hereditatis*, because *præceptio hereditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*.

The Lords found that a back-bond (though personal) affected a comprising even against a singular successor, during the currency of the legal, being but a collateral security ; and that though the 10 years were elapsed since Posso acquired in these rights upon his father's estate, whereof he was apparent heir, yet, that the said 10 years were interrupted by the extract of the summons at Carlips' instance against him, taken from the signet, and by the decision 19th June 1668, marked by Stair ; which the Lords found equal to an execution, though now lost ; the Lords judging these acquisitions often fraudulent and unfavourable, viz. Burnet v. Nasmith, *voce* HEIR APPARENT.

November 8, 1693.—On a bill given in by James Nasmith of Posso v. Burnet of Carlips ; it occurred to the Lords, to reconsider their former interlocutor given in this cause, that though a back-bond will affect the granter, yet how far it meets his singular successor, not by a voluntary disposition, but by a legal diligence of apprising or adjudication from him, even after it is perfected by infeftment ; the Lords resolved to hear it farther as a weighty and material point. See Stair's Institutions, b. 3, tit. 1, § 21, and the two decisions there cited in 1676 ; viz. Brown v. Smith, No. 76, p. 2844 ; and Gordon v. Chein, *voce* PERSONAL and REAL ; and 10th March 1629, Shaw *contra* Kinross, *voce* PERSONAL and REAL.

December 28, 1693.—The Lords advised the tedious and intricate debate between Burnet of Carlips and James Nasmith of Posso ; and as to the first point, they were all clear that a back-bond granted by an appriser, militated not only against himself, but also against his singular successors, in two cases ; if either the apprising was *in cursu* and not expired, or if the apprising stood *in nudis terminis* of a personal right, and no infeftment taken upon it. But the question here occurred, that the back-bond was given by Sir Michael after the apprising acquired by him was expired ; and though there was no infeftment upon it, at the time when he subscribed the back-bond, yet shortly thereafter infeftment followed, and whether from that time downwards the back-bond could meet, or affect singular successors ? For it was acknowledged, that, in heritable voluntary dispositions, such a back-bond given by the disposer,

would not meet the receiver of the disposition, and that there was the same parity in an expired apprising, because then it was no more *pignus legale* for security of the money, but the appriser turns proprietor: But it was alleged, there was a discharge [3041]-ference, seeing a discharge by an appriser, intromission with the mails and duties, a renunciation, or any other declaration of his will meet his assignee, but not in a disposition: Whereupon the Lords waved this point, and proceeded to the second which was clearer; and found that the comprising led against Brown of Smailholm coming into the person of his son (whom Carlips offered to prove, then representing his father as heir), it was a consolidation and extinction, and that the comprising could not subsist in his person. It is true, if he had been only apparent heir, the acquiring of these rights would only have exposed them to be redeemable within ten years conform to the act of Parliament 1661; or if the diligence had been on bonds granted by the apparent heir himself, and afterwards returned to him, it would have inferred a passive title by the act of sederunt 1662, made on the occasion of Glendinning v. Nithsdale, *voce* PASSIVE TITLE: But here, where they alleged he was actual heir to the debtor, the Lords thought it an extinction, he becoming both debtor and creditor; and though it was urged, that Carlips had consented under his hand, to Sir Michael Nasmith's acquiring that comprising, and so that was an homologation and acknowledgment that it was not extinct; yet the Lords considered the consent behoved not to be divided, but taken with its quality and condition, that the lands appraised should be sold for his payment and relief; and seeing that is not done, but the lands carried away by Sir Michael's apparent heir, who has bought in the comprising, the consent cannot be obtruded against him. The Lords also discoursed on the third point, whether an appriser fell under the exception of the act of Parliament 1621, anent singular successors purchasing *bona fide* for a price, and in satisfaction of their just debts; and if an appriser can be reputed a purchaser in propriety of law, he being at most only a legal buyer, and not for an adequate price, the lands being oftentimes worth more than the sum in the comprising; and statutes being *stricti juris*, are not to be extended *de casu in casum*; though it was alleged there was the same equity for both: But this point was not decided.

January 24, 1694.—The Lords advised the farther debate, in the case between Alexander Burnet and James Nasmith (mentioned 28th December 1693), and found, that though the coming of an apprising into the person of an heir served was an extinction, he being *eadem persona cum defuncto*, and so there is *concursus debiti et crediti, et confusio*; yet where it is not by a legal title of a service and retour, but by a *præceptio hæreditatis*, and a disposition of the appraised lands, that it was not equivalent to the being heir; for though it was more than a passive title, and gave him active right to the lands disposed, so that one could not be served heir therein, yet it was not an universal active title and representation *in omne jus defuncti*, and therefore found there was no extinction in this case.

Fol. Dic. v. 1, p. 195. Fountainhall, v. 1, pp. 550, 567, 585, 597.

No. 9. [3042] CUMING of Coulter v. IRVINE of Crimond, &c. January 4, 1726.

A person tailzied his lands to heirs male. Afterwards he granted a bond of provision to his second son; whom failing, to the heirs of tailzie. The heirs of the entailor's body failed; and a more remote heir of tailzie succeeded, to both the estate and the bond. The bond remained a distinct and subsisting debt upon the estate.

In the year 1683, Alexander Irvine of Drum made a tailzie of his estate in favour of himself, and the heirs male of his body; which failing, to certain other heirs male named. In the year 1687, the said Alexander Irvine executed a bond of provision for the sum of £80,000 Scots to his second son Charles, and the heirs male of his body; which failing, to the other heirs male of the persons nominated and designed by him to succeed in his lands and heritages. [3043] The heirs male of the entailor's body having failed, the succession, both of the entailed estate and of the bond, devolved

upon Alexander Irvine of Murthill, who was accordingly served heir of tailzie to the said estate, but did not expedite any service to the said bond of provision. After his decease, his son and apparent heir granted a bond for £10,000 Sterling to a trustee, who thereupon charged him to enter heir of provision to Charles, in order to make up a title by adjudication to the £80,000 bond; and having thus established the bond in his person, he again charged the apparent heir of tailzie in the estate of Drum, and obtained an adjudication against the estate for the said debt of £80,000. In a process at the trustee's instance against the heirs of entail, concluding that the bond of £80,000 Scots was a subsisting debt, and did effectually burden the entailed estate of Drum; the Lords found, That the heir male of Murthill being served heir to the estate of Drum, his service did not state him in the right to the £80,000 bond, so as to operate a confusion in his person; and that this Drum being charged to enter heir in special to Charles, and adjudication having thereon followed, did not operate a confusion of debtor and creditor in this Drum's person; and therefore found, that the said bond of provision is not extinguished, but is still a subsisting debt upon the estate of Drum. See APPENDIX.

Fol. Dic. v. 1, p. 196.

No. 10. JOHN MURRAY v. NEILSON of Chapel, and LANIRK of Ladylands.
January 27, 1728.

An apparent heir, liable *passive* upon behaviour, having purchased an apprising upon his predecessor's estate, while the legal was current, and conveyed the same to a singular successor; the same was found effectual in a competition, and not extinguished *confusione* in the apparent heir's person.

In a competition betwixt these parties, about the lands of Conheath, Neilson and Lanirk's titles, being apprisings deduced against the lands of Conheath, bought in by Elizabeth Maxwell the apparent heir, and conveyed from her to these purchasers; it was objected against the apprisings, That they were extinct *confusione*, being bought in by the apparent heir, during the legal, after she had behaved as heir, liable thereby to all her predecessor's debts, and to these apprisings among the rest; whereby there came to be a confusion of debit and credit in her person.

To which it was answered, That apprisings were never thus understood to be extinguished; witness the noted case of an apparent heir, possessing by virtue of an adjudication led upon his own bond, which was never understood to be an extinction, though a stronger case than that in dispute. See Lord Stair, *l. 1, t. ult. § 9, in med.* And though such a possession, since the act of sederunt 1662, did infer a passive title, nevertheless the adjudication was a good title, whereupon to possess the estate, and even to dispose upon it by sale, which could never be quarrelled by a succeeding heir. And indeed the same thing continues to be law still, even after the act 1695; for that law only makes the heir possessing upon such a diligence passive liable to the debts, but does not [3044] annul the diligence. And the true reason of all is, that confusion is not a proper extinction, but only a temporary suspension, while the debit and credit continues in the same person; for though the same person can support the legal characters, at the same time, both of creditor and debtor, so as to preserve the debt from an *ipso jure* extinction; yet because one cannot pay to or discharge himself, the debt must stand suspended as to execution, during the time the same man is both debtor and creditor. But whenever the confusion ceases, the debit and credit falling in different hands, the suspension ceases at the same time; the debt revives, and has its force as before the suspension. And to this purpose Lord Stair, in the forecited place, expresses himself, "If by different successions," says that noble author, "the debtor and creditor should become distinct, the obligations would revive, as in many cases may occur; and so confusion is not an absolute extinction, but rather a suspension of obligations."

"The Lords repelled the objection."

Fol. Dic. v. 1, p. 195. Rem. Dec. No. 102, p. 196.

No. 11. ROBERTSON of Urchany v. JOHN DAVIDSON. November 27, 1751.

A person purchased lands, on which his father had a wadset. Being heir to his father the wadset became extinct *confusione*, and he was under no necessity to make up titles to it.

Alexander Ross of Easterfeearn, purchased a wadset upon the west quarter of Meikle Allan; and was infeft therein.

William Ross of Easterfeearn, Alexander's son, purchased the irredeemable property of these lands, and was infeft; but made up no title to the wadset, in which he was apparent heir. He granted an heritable bond thereon to Captain David Ross his brother; to whom succeeded Alexander Ross, solicitor at law in London; and assigned it to John Davidson, clerk to the Court of Justiciary.

Charles Robertson of Urchany, and others, led adjudications against Alexander the son of William, as charged to enter heir to his grandfather; whereby they claimed to carry the wadset; whereas the heritable bond granted by William, could not affect the reservation, which was all that was in his person.

Pleaded for Mr. Davidson; William Ross, who had a competent title to the property of the estate, and was apparent heir in the wadset, which was an incumbrance thereon, needed not to make up titles to the incumbrance; which, by coming into his person, became sopite. It is the common way of proprietors to rest upon one title, and neglect others which may belong to them; and if such accessory rights could be reared up by adjudications against their successors, to evict their estates from their disponees, it would shake the titles to very many estates. Agreeable to this doctrine was the decision 19th February 1710, Colonel Erskine against Sir George Hamilton (see COMPETITION); and 15th February 1750, on the Duke of Gordon's claim for the estate of Lochiel, it was found, That the Duke having entered heir to his grandfather in the estate, needed not be served to his father, in the adjudication he had thereon, and on [3045] that title had infeft Lochiel as his vassal, but had sufficient right to them by his apparenacy; and so was Lochiel's superior, on which title he claimed his estate, *voce* FORFEITURE.

Pleaded for Urchany; There is no *ipso jure* extinguishing of feudal rights; but they must be taken away in a proper manner. The Earl of Dundonald disposed lands to his son the Lord Cochran, and infeft him base; and, on his death, disposed them to his grandson, who was infeft; and disposed them to the Marquis of Clydesdale, No. 3, p. 1262. It was found, that the disposition only carried the superiority; and the apparent heir, after his death, in the base infeftment, carried the property. And the like decision was given in the case of Menzies of Culterallers, and Dickson of Kilbucho. See HEIR APPARENT.

Replied; In both these cases the infeftment was in the superiority, and the disponers were apparent heirs to the property; but their onerous debts were sustained to affect the estate; and the subsequent heirs, making complete titles to the property, were preferred only to their gratuitous disponees.

Observed; That both superiority and property were irredeemable rights, and distinct; but a wadset was redeemable, and considered as an incumbrance on the property.

The Lords repelled the objection made to the infeftment granted by William Ross of Easterfeearn, to Captain David Ross; and found, that the said William Ross having purchased the irredeemable right to the property of the west quarter of Meikle Allan, it was not necessary that he should make up a feudal title to the wadset of the said lands, that was in the person of Alexander Ross his father, and in which he was apparent heir; and that these incumbrances could not be taken up by the creditor of the said William Ross, or of Alexander his son, as rights preferable to the property that was vested in William Ross.

Reporter, DRUMMORE.—Act. LOCKHART.—Alt. R. CRAIGIE.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 162. *D. Falconer*, v. 2, No. 235, p. 287.

No. 2. [3048] LA. DUMFERMLING v. The EARL. March 12, 1628.

A husband was bound by his contract of marriage to infeft his wife in all lands and heritages he should conquest during the marriage, and having, during the subsistence thereof, first acquired tacks of certain lands, and some years thereafter, the heritable right thereof, she was found to have right only to the rents of the lands as payable to by these tacks, but not to the profit accruing from the tacks, in respect there was no express stipulation in the contract, providing her to the liferent of tacks or other securities purchased during the marriage.

In an action by the Lady Dumfermling against her son, as heir to his father, for fulfilling of that part of her contract of marriage, whereby her husband was obliged to infeft her with himself, in all lands and heritages, which he should conquest the time of their marriage; it being controverted betwixt the parties, if that clause of the contract, of the tenor foresaid (for that was the tenor of the same) did extend to lands or teinds, whereof the umquhile Earl, her husband, since their marriage had acquired an heritable right to himself and his heirs; the same lands and teinds before that heritable right, being acquired by her said husband, in tack and assedation also since the marriage, and before the heritable right acquired by him two years at least, in respect whereof he being tacksman, and the tack being set for longer space, that would endure longer than the Lady's lifetime; the defender alleging, that the posterior acquiring of an heritable right could not be found, such a conquest, as might compel the heir, to give the relict infeftment thereof, as of lands whereof she could be effectually infeft, as conquest lands, the same being under so long tacks procured before, which ought of reason to stay the effect of the infeftment, so far as might extend to the profit of the lands, which would only pertain to the heir, by reason of the preceding tacks; and the pursuer replying, that if this should have place, all contracts bearing such clauses should be eluded, and the wives defrauded of their provision introduced in their favours; for, to prejudge the infeftment, which is provided to the wife, it should be then lawful to the husband who minds to conquest lands, whereby the wife would receive the benefit of infeftment, to defraud her thereof, by taking a preceding long tack of the same, whereof he shortly thereafter takes an heritable right, though the preceding tack is acquired also since the marriage, yet he might elude that clause of infeftment, if shortly after the tack he had also acquired infeftment, which is against the mind of the contract, appointing her to be infeft in all which he should conquest; this exception was sustained, notwithstanding of the reply; for the Lords found, that the acquiring of an heritable right by the husband, of that whereof he had acquired tacks two years of before, of the endurance foresaid; and albeit the tacks were also acquired by the husband since the marriage, they could not be repute a conquest, which might compel the heir to give the relict infeftment profitably, or of any greater benefit concerning the lands so acquired by her, except so far as was further acquired by the heritable [3049] right, in yearly profit, than was contained in the tack, viz. for the tack-duty allenarly, if the infeftment did free the receiver of that tack-duty; for, albeit the heir ought to give her infeftment thereof, as of a purchase, yet it was found it ought not to be so simply given, but with exception and reservation of the tack foresaid, and the benefit thereof to the heir; and, as concerning the destituting of the party of the mind of the contract, which intends to give the wife her liferent of all which the husband should acquire; this contract was not of that tenor, but did only bear, to infeft her in all lands and heritage the husband should conquest; and, if parties agree to provide the wife to liferent of tacks or bonds, or other securities and benefits purchased by their husbands, the same ought to be so expressed; but not being expressed by the parties in writ, could not be extended otherways than they agree in the words of their contract.

Act. AITON & STUART.—Alt. HOPE, NICOLSON & BURNET.—Clerk, HAY.

Fol. Dic. v. 1, p. 196. *Durie*, p. 359.

No. 9.

[3054] *MERCER v. MERCER.* July 1730.

In a contract of marriage, there is a provision of conquest in favours of the husband of the marriage, in the common stile, of all that the husband should conquest acquire during the marriage. During the standing of the marriage, the husband left him, as a pure donation, by way of legacy, the sum of 12,000 merks; and question thereupon occurred, whether this was comprehended under the above clause of conquest? The Lords found it was not. See APPENDIX. *Fol. Dic. v. 1, p. 197*

No. 19.

[3066] *OLIPHANT v. FINNIE.* February 10, 1629.

An obligation to provide the wife in liferent of all sums conquest, was not extended to certain sums, which the husband had taken the debtors obliged to pay to some of his younger children, but only to those which he had acquired to himself and his heirs.

The husband being obliged to provide his wife to a liferent of all sums to be conquest by him during their marriage; whereupon she having pursued the husband to provide her to her liferent of some particular sums, contained in certain bonds, which the husband had taken the debtor obliged to pay to some others of his bairns, whom the payment by the bond was appointed to be made, and which sums he had provided to the said bairns;—it was found, That that clause, and the like clause contained in such contracts, could not oblige the heir to provide the relict to a liferent of sums, which, in the bonds and securities made thereupon, were provided to the defunct's other bairns: For such a general clause, in contracts made by a husband in favours of his wife, ought to be understood only of such sums as the husband acquires to himself and his heirs, and whereunto his heirs may succeed him after his own decease; and whereof the fee remained in his person while he lived. For, if it should receive any larger interpretation, it would tend to take away the power from the husband, to provide anything to his other bairns; but to acquire that which he had or might purchase to his eldest son only; yet to this it is answered. That the bairns' provision is not affected with the wife's liferent.

Act. OLIPHANT.—Alt. NICOLSON.—Clerk, HAY.

Fol. Dic. v. 1, p. 199. Durie, p. 423.

No. 21.

[3067] *BEATTIE v. ROXBURGH.* January 4, 1672.

By contract of marriage, the husband bound himself to employ 3000 merks for his wife's liferent use, and by a posterior clause, provided her to the liferent of all lands conquest during the marriage. It was found, that this clause of conquest could only be understood of what was conquest, more than answerable to the annualrent of the 3000 merks.

By contract of marriage betwixt Roxburgh and Sandilands his spouse, Roxburgh is obliged to employ 3000 merks for her liferent use; and, by a posterior clause, provided her to the liferent of all lands conquest during the marriage. Shortly after the marriage, he conquest a land in Edinburgh; likeas he had another tenement before the marriage, out of which he infett his wife in an annualrent, in full satisfaction of the contract of marriage; which infettment, she kept both in his lifetime, and after his death; but being on deathbed, he infett her of new in the tenement acquired after the marriage, bearing expressly, for implement of the clause of conquest. And she pursues now James Roxburgh, as lucrative successor to his father, by a disposition

after the contract of marriage, to fulfil that obligation, to employ the 3000 merks.—The defender alleged absolutor, 1mo, Because the pursuer had accepted an infeftment of an annualrent out of the tenement acquired before the marriage, in full satisfaction; 2do, The two clauses in the contract of marriage, cannot import that the wife should have the whole lands conquest by the clause of conquest, and should return for the implement of the special clause, for employing the 3000 merks, upon the husband's heirs, or the tenement he had before the marriage; because the clause of conquest can only be understood of what was conquest, more than was answerable to the annualrent of 3000 merks; so that the last infeftment granted to her by her husband, must necessarily satisfy both clauses, there being no other conquest. And albeit the infeftment bear, to be expressly in satisfaction of the clause of conquest; that was but a voluntary gratuitous deed, that the husband was not obliged to by the contract, and was done *in lecto ægritudinis*; whereupon the defender has a reduction *ex capite lecti*, which he repeats by way of exception.—The pursuer answered to the first defence, That she never accepted or bruiked by the first infeftment, that bears in satisfaction; and her intending of this cause is a renouncing of it; and to the second defence it was answered, That the clause of conquest extended to the whole conquest, and the husband might well, in implement, infeft his wife in this tenement; neither has the defender interest to reduce this disposition, as done on deathbed, in prejudice of the heir, because he is not heir, but lucrative successor, which is only a passive title, but no active title.—The defender answered, That albeit primarily and immediately, it be the heir's privilege, not to be prejudged [3068] by deeds on deathbed; yet secondarily, it is competent to the creditors of the defunct, or heir, who are also prejudged by such deeds; because, if the right stood in the heir's person, they could affect the same; and it was so found in the reduction, at the instance of the creditors of Balmerino and Couper; at whose instance, Couper's disposition on deathbed was reduced, albeit Balmerino was neither heir nor pursuer; and there is no reason, that if an heir should forbear to enter, creditors should be prejudged. See TITLE TO PURSUE.

The Lords found, That the defender, as creditor in the sums whereupon the disposition proceeded, had interest to reduce the disposition; and found the wife's second infeftment reduceable, as being *in lecto*, in so far as it deborded from the contract of marriage; and found, that thereby that infeftment behoved to be interpreted in the first place, for satisfying the special obligation of employing the 3000 merks; and that the superplus benefit of the tenement, if any was, was comprehended in the clause of conquest only; and found no necessity to decide the first defence, concerning the acceptance of the first infeftment, whether the wife's taking and keeping of it in her custody, did import the same. *Fol. Dic. v. 1, p. 199. Stair, v. 2, p. 34.*

No. 23. [3070] GEORGE BOYD v. JOHN BOYD. June 28, 1774.

A father had taken a disposition in favour of himself and his wife, in conjunct fee and liferent, for the wife's liferent, and to their son in fee, with a reserved faculty, to burden without the consent of either. Afterwards, he took a disposition to other lands, in favour of himself and his wife in liferent, and to their son in fee; whom failing, to the father's nearest heirs or assignees in fee. On the failure of father and son, the succession devolved on the heir of line, not of conquest.

A part of the lands of Wester Crounerland, which some time ago belonged to William Fisher, holden of a subject superior, were, in 1718, conveyed by him to John Kid, by a disposition containing procuratory and precept; and John Kid was accordingly infeft base upon the subject.

Mr. Robert Boyd, in the year 1733, purchased these lands from John Kid, and took the disposition to them, "in favour of the said Mr. Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her life-rent use allenary, and to John Boyd their lawful son, his heirs or assignees, in fee," under a faculty therein reserved to the said Mr. Robert Boyd to burden the lands with any sum of money, without the consent of his wife and son.

Another parcel of the said lands of Wester Crounerland, which belonged to John Scot, were, in the 1749, disposed by him "in favour of the said Mr. Robert Boyd, and Alison Douglas his spouse, in liferent, during all the days of their lifetime and to Mr. John Boyd their eldest lawful son, in fee ; which failing, to the said Robert Boyd, his nearest heirs or assignees whatsoever."

The dispositions to both parcels contain procuratories and precepts ; and John Boyd, his wife, and son, were infeft in virtue of those precepts, in the above terms.

John Boyd the son having predeceased his father and mother, and there being no other children, Mr. Robert Boyd the father expedite a general service, as heir to the son ; and, in the 1756, he obtained from the superior a charter and precept, to the purport following ; The superior gives, grants, disposes, and for ever confirms, and in favour of the said Mr. Robert Boyd, and Alison Douglas his spouse, in conjunct fee and liferent, for the said Alison Douglas her liferent use allanarly ; and in favour of the said Mr. Robert Boyd, his heirs and assignees whatsoever, in fee, all and whole the lands, as described in the first disposition above noticed ; and to which said disposition, so far as the same was competent to, or conceived in favour of the said John Boyd, now deceased, the said Mr. Robert Boyd his father has now right, as heir served to him ; and which lands were, by virtue of the procuratory of resignation contained in Fisher's disposition to Kid, and assigned by him to Mr. Boyd, his wife and son, and lawfully resigned in his the superior's hands, in favour, and for new [3071] infestments of the same, to be given and granted in favour of the said Mr. Robert Boyd and Alison Douglas, in conjunct fee and liferent, for her liferent use allanarly, and in favour of him the said Mr. Robert Boyd, and his heirs and assignees, in fee, as he and come in place of the said John Boyd, his deceased son, conform to authentic instruments in the said resignation. After this, the holding and reddendo are mentioned ; and, last of all, there is a precept for infefting Mr. Boyd and his wife ; upon which infeftment followed.

Mr. Robert Boyd died in the year 1766, leaving no issue ; and upon the death of his widow, who liferented the whole, the lands, contained in the foresaid two dispositions, were claimed by John Boyd, the nephew of Mr. Robert Boyd by his immediate elder brother, and, of consequence, heir of conquest to both Mr. Robert Boyd and his son ; and they were also claimed by George Boyd, the son of Mr. Boyd's immediate younger brother, and, of consequence, the heir of line both of Mr. Robert Boyd and his son.

George Boyd and his curators accordingly brought an action before the Court against John Boyd, the heir of conquest, concluding to have it found and declared, that the pursuer had the only right to the whole of the foresaid lands, and to be served and retoured heir therein ; and that the defender had no right thereto.

The pursuer, in support of his claim to the first parcel, maintained, That, by the conception of the disposition 1733, the fee of the lands was vested in John Boyd the son ; and that the father's general service, with the charter and infeftment following thereupon, was sufficient to vest the right in the person of the father, as being a virtual confirmation of the base infeftment in the son's person, and a precept of *claw* in favour of the father, as heir to the son ; and as these lands became therefore heritage, and not conquest, in the person of the father, he having taken them up by succession to his son, the same does now devolve upon the heir of line, and not upon the heir of conquest.

With respect to the second parcel, it was pleaded ; That the lands having been specially provided to the father and wife in liferent, and to John Boyd in fee, which failing, Mr. Robert Boyd, his nearest heirs or assignees whatsoever, the heir-general of Mr. Robert Boyd, designative, was entitled to take the succession, as heir of provision to John Boyd the son.

As to the first parcel, it was pleaded, on the part of the defender ; That, if the fee was in the son by the conception of the disposition, it remained in *hereditate jacente* of him at this day ; for that the charter of resignation, and infeftment following thereupon, could carry no more than the blanch superiority, the procuratory in the disposition having remained unexecuted after the son's death ; and as it was a *feudum novum* in the person of the son, and which, quoad the property, fell to be taken by a service, as heir to him, it behoved to devolve upon his heir of conquest, and not upon his heir of line.

[3072] As to the second parcel, it was contended, That, as the same were conquest

he person of him to whom titles fell to be made up, the father's heir of conquest, not his heir of line, could alone take up the succession.

The Lord Ordinary pronounced the interlocutor following: " Finds, that, by the position granted by John Kid in the year 1733, the fee of his part of the lands of Wester Crounerland was vested in the deceased John Boyd; and that the titles, which were afterwards made up by Robert Boyd, his father, were insufficient to carry the property of the said lands, which must still be considered as *in hæreditate jacente* John Boyd; and therefore, and in respect that the said land was a *feudum novum* in him, finds, that the property thereof does now devolve and fall to the defender, heir of conquest to him; but finds, that the titles made up by Mr. Robert Boyd, his father, were sufficient to carry the superiority of said lands; and being therefore to be considered as heritage in him, must, of consequence, devolve and fall to the pursuer, his heir of line: Finds, that, by the disposition granted by John Scot in the year 1749, the fee of his part of the lands of Wester Crounerland was vested in John Boyd, the son, and is to be considered as a *feudum novum* in him; but, in respect that the substitution in said disposition is not in favour of his own heirs whatever, but in the favour of the heirs whatsoever of Mr. Robert Boyd, his father, which might have been different from the heirs whatsoever of the son, finds, that the pursuer, as heir of line to the father, is entitled to take John Scot's part of said lands, heir of provision called by said substitution, and decerns and declares accordingly." Upon a report, the Court unanimously (one Judge excepted, who had some difficulty with regard to the first parcel of lands, whether the taking this parcel in that way was not to be considered as a kind of *præceptio hæreditatis* in the son, and, therefore, this particular subject not to be considered as conquest, but as heritage *quoad* the said lands, and as such to go to his heir of line) approved of the Lord Ordinary's judgment on both points, and pronounced their own in the precise terms thereof.

Reporter, COLSTON.—Act. BAILLIE.—Alt. M'QUEEN.—Clerk, ROSS.

Fol. Dic. v. 3, p. 163. Fac. Col. No. 117, p. 315.

o. 1. [3081] INNES v. STEWART. July 1, 1542.

The Lords found, that a servitude of thirlage being once consolidated with the property, cannot be understood to revive again, when any part of that property is alienated, unless it be so expressed.

Alexander Innes claimt the thirle multures of the corns that grew certain years, ypast upon the lands of Blairmondi, as due by the tenant thereof to James Gordon, who held the lands of the said Alexander, and the said multures of the corns that grew upon the lands of Baidinspyle, against James Stewart, heritable tenant thereof, eldest son of the said Alexander, because the said Alexander was heritably infeft in the said forestry of Bony, with all the thirle multures of the lands thereof, and the lands ressaid ly within the said forestry. It was *excepted ex altera parte, quod non tenebatur eum solvere dicto Alexandro*, because they were heritably infeft and immediate tenants of him of the lands foresaid in blench, paying one penny money *albæ firmæ tantum si velatur pro omni alio onere* that might be asked of these lands *vel occasione earum cum molendinis et multuris*; and, because the said Alexander's father, who annalizied, as said is, these lands reservit not the thirle multures to his said new mill of the forest of Bony, therefore might not claim the same, because it is ane duty that is auchtand *occasione occupationis terrarum, et sic occasione earundem*. And the Lords, notwithstanding diverse allegiances made in the contrare, by their sentence *definitive decreverunt* the tenants free of all the said Alexander's claim, and sua the seller of the lands man warrant it to them of all charges, but allenarly them that he makes and specifies in the alienation making. And sua *venditor warrantizat terras venditas emptori ab omni redditu et alio onere quocunque de dictis terris nisi aliter conventum sit, inter ipsos tempore alienationis*. And sua the Lords fand that this thirle multure is *onus reale et servitus quod non venit in contractu nisi hoc dictum sit, et multuram remitti nisi con-*

trarium sit conventum, et hoc virtute specialium clausurarum reservatarum prædictarum in chartis specificatarum; and also, the said servitude videbatur extincta eoquod the said Alexander had coft the said multure of all the forestry, he got all the land heritage to himself, and sua the lands ought to have been thirled to himself, quia sua nemini servit et sic illa servitus semel fuit extincta et consolidata cum superioribus et proprietate terrarum earundem et per alienationem partis earum reviviscere non potest.

Fol. Dic. v. 1, p. 200. Sinclair, MS. p. 32.

No. 10. [3089] *EDGAR v. JOHNSTON alias MAXWELL.* July 6, 1736.

A right may be completed upon any one of two titles competent.

An estate being disposed to an eldest son in his contract of marriage, and to his heirs-male of his body, which failing, to the heirs-female of his body, the said eldest son, after the father's decease, neglecting to infest himself upon the disposition in the contract, made up his titles as heir of the investiture; again, after his decease, his son made up his title also as heir of the investiture, and thereupon made a gratuitous conveyance of the estate. The heirs-male of the marriage having failed in him, the heir-female was served heir of provision in general upon the contract of marriage, and thereupon claimed the estate upon this medium, that the gratuitous disponee can be in no better situation than the heir general, or the heir of investiture, who would be bound by the deed of his predecessor, granter of the disposition in the contract of marriage. It was answered, That the disposition being in favour of the apparent heir, was absorbed by his making up titles to the estate as heir general, and it would be an useless form to oblige him to infest himself over again, upon the disposition in the contract, or to oblige his son to serve heir of provision to him in general, in order to carry the provision in the contract, which would not make the estate more amply theirs than it was by their making up titles as heirs of the investiture.—The Lords repelled the allegiance, that the right of the contract of marriage [3090] was not established in the person of the heir, in respect of the answer, that the real right of the estate was established in this person. *Fol. Dic. v. 1, p. 200.*

No. 4. [3092] *DOUGLAS v. CHEESLIE.* July 15, 1615.

A sasine within burgh was sustained though granted by one who was not town-clerk, and though there was another, in regard the giver was habite and repute town-clerk, and was in use to give sasines.

In an action pursued by Geo. Douglas of Bonjedburgh *contra* Marion Cheeslie, the Lords repelled the exception founded upon the act of Parliament 1567, anent sasines to be given within burgh by the town-clerk, in respect of the reply, that it was offered to be proven that Mr. George Douglas was repute and holden to be town-clerk, and in use to give sasines; and that, notwithstanding, they offered them to prove, that there was another town-clerk. *Fol. Dic. v. 1, p. 201. Kerse, MS. fol. 71.*

No. 3. [3112] *STEWART or ANDERSON v. IRVINE.* July 20, 1632.

Although the children die before the mother, and both within the year, yet the husband has right to the courtesy.

Alexander Irvine is obliged, by contract of marriage, to pay in tocher with —, his half-sister, a certain sum to her future spouse; the heir of the husband pursues registration of the contract against Irvine. Excepted the marriage dissolved within

year and day be the wife her decease. Replied, There was a bairn born and christened. Duplied, The bairn died before the mother, and both within the year, and bearing of a bairn gives only by practice the benefit of curialitie, but not of tocher nor conjunct-fee, this never being practised. Finds I. P. the contract to be registrate, and repells the exception and duply, and finds the reply relevant.

Fol. Dic. v. 1, p. 205. Nicolson, MS. No. 57, p. 38.

No. 4. M'AULAY v. WATSON. January 19, 1636.

A husband having claimed his right of courtesy during his life, his executors could not claim it in prejudice of a singular successor from the heir of the heiress.

Agnes Watson executrix, confirmed executrix to Robert Watson her brother, obtained a decret before the commissaries of Edinburgh against James M'Aulay, heritor of certain lands within Edinburgh, for payment to her of the mails of the saids lands from the 1604 to 1628; which mails as she alleged, did of right belong to the said Robert all these years, by reason of the courtesy of Scotland, in regard he had married the heritrix of the said lands, and consequently did now appertain to her as executrix to her brother. The said James M'Aulay intended a reduction of this decret upon this reason, that this courtesy is only personal, and died with the person of the said relict, who having neglected it all his lifetime, his executors can claim no right thereunto after his decease; even as in a Lady tercer, who albeit she had never so good right to a terce, yet if she be not kenn'd to it in her own time, in vain should her executors sue for it. And this pursuer being infeft in the saids tenements by disposition from the heritor thereof, and having brooked them *bona fide* all the years libelled unquarrelled, cannot now be drawn in question *post tanti temporis intervallum et post fructus bona fide perceptos*; no more than if the said Robert were yet alive himself, who would not be heard to seek the bygonies of so many years, which the heritor had intromitted with *bona fide*. Alleged, The reason was no ways relevant, for the mails being due to the defunct, his executors had good right to seek them, neither was the simile of lady tercer to the purpose, because by the ordinary practice, before a woman can have right to a terce, she must be first served by a brieve, and after that kenn'd to it by the Sheriff's precept; before which be done, if she happen to decease, it is true that her executors have no place to call for the profits of the said terce; but it is otherwise in a curiality, whereunto he that has right needeth no previous declarator of the same, but may summarily, by virtue of his right, enter to the possession of the lands, [3113] whereunto he hath right during the courtesy: And the pursuer's possession cannot maintain him against the defender's uncontrollable right, nor can he be thought to have possessed *bona fide* where another had a good right standing. The Lords found the reason of reduction relevant.

Spottiswood (CURIALITAS), p. 78.

No. 5. ROBERT DARLEITH and his Tutor v. Mr. ALEXANDER CAMPBELL.
February 20, 1702.

The second husband of an heiress cannot claim the courtesy where there is a son of of a former marriage alive.

Magdalen Edmonston, only child to James Edmonston, merchant, being first married to one Darleith, and by him had the said Robert, her son; she afterwards marries the said Mr. Alexander Campbell, by whom she had likewise a son, but he died a little after his birth; and when she is on deathbed, Mr. Alexander, her husband, serves her heir to her father in some houses in Edinburgh, and infests her by heip and staple, *more burgali*, and then procures a disposition from her in his own

favour ; but Robert, her son of the first marriage, serving heir to his mother, raised the reduction of that disposition *ex capite lecti*. Alleged, 1mo, He had acquired a right to some debts, which would make the disposition as onerous *pro tanto*. 2do, He had a right to liferent the whole by the courtesy of Scotland, his wife being an heiress in fee and there having been a living child heard weep and bray. Answered, No husband of a second marriage can claim the curiality, where there exists an heir of the former marriage. 2do, She died not in the fee, being denuded in his favour. 3tio, The serving her heir and infesting her being all done when she was on deathbed, cannot prejudice her heir. 4to, It takes no more place in burgage-lands, no more than the terce does. Replied, Our law and custom have made no distinction whether the heiress be a maid or a widow, or whether the husband be the first, second, or third, and whether there be heirs of a former marriage or not ; for, if he exclude the first husband from a courtesy, why does not a brother, or other remoter heir succeed, as well exclude him, which we know is not pretended. 2do, This pursuer quotes the disposition *ex capite lecti* ; and if he prevail, then her fee revives, and consequently the curiality takes place. 3tio, The serving her heir, and infestment *in lecto*, were not alienations (which are only prohibited at that time), but rather an acquisition, and so not quarrellable. To the 4th, Stair, tit. LIFERENT INFESTMENTS, and other lawyers, are clear, that courtesy holds in burgage, as well as in country lands. Duplied, The courtesy being local, and peculiar to Scotland and England, is not to be extended, and has been given to the father as administrator to the apparent heir but not to a stepfather, and is only due to a husband where his child would have been heir to the estate, which did not exist in Mr. Campbell's case ; and though the infesting her on deathbed was no alienation, yet it was in order to capacitate her to make a very unnatural and unkind one by her own son, to her second husband. [3114] Several of the Lords thought there was no difference whether the heir was the husband's son, or of a prior marriage, and that the curiality was due in either case, and was not given *intuitu* of the heir, but to make the husband live honourably, as was suitable to the heiress's estate and circumstances after her decease : But the case being new, the Lords resolved to hear it in their own presence in June next, before they would determine it.

December 1.—The case mentioned 20th February 1702, between Robert Darling and Mr. Alexander Campbell, being heard in presence, was this day advised and determined ; being an abstract point in law, Whether a second husband has right to the courtesy, where the heiress, his wife, has a son by a prior marriage ? Craig, lib. 2, dig. 22, is for the affirmative, though it was answered to his authority, that, as to these words, *Etiamsi primus maritus habuerit hæredem, tamen secundo debetur* ; that *habuerit* must be so taken as to import the child that is now dead, otherwise, if it were alive, he would have said in the present time, *elsi habeat*, and not *habuerit* ; and *Regiam majestatem*, lib. 2, cap. 58, seems to clear this, that a husband shall liferent his wife's heritage, *si ex eadem hæredem habuerit* ; so that it is due to her husband, not under the reduplication qua husband, else every husband would have right to it, though he procreate no child by her at all ; but was under the reduplication as parent to the heir. Yet, *vide Leg. burgorum*, cap. 44, which requires not the procreation of the heir, but only *si ex ea genuerit masculum vel feminam*. Skene *de verb. significatione*, voce *Curialitas*, thinks its original was *ob reverentiam prioris matrimonii, quod quis cum uxore hærede contraxerit, ne, ea mortua, ad egestatem maritus redigatur* ; though Craig derives it from the Emperor Constantine's rescript, l. 1, *C. de bonis maternis*, giving the parent the usufruct of his children's heritage, derived to them by succeeding to their mother : And seeing this custom differs from the common law, the Lords have been in use to interpret it strictly ; as Forbes *contra* the Earl of Marishal, No. 2, p. 3111 ; the courtesy was not extended to the liferent of a sum, which was the price of lands belonging to the wife in fee, though *surrogatum sapit naturam surrogati*. And 19th January 1636, Macaulay *contra* Watson, No. 20, p. 1740, and No. 4, *h. t.*, the husband's executors were secluded from the courtesy, because neglected to be pursued for by the space of thirty years, though that was ten years within prescription. The Lords, by a plurality, found the second husband could not claim the courtesy where there was an heir of a former marriage in life.

No. 6.

LAWSON v. GILMOR. June 22, 1709.

The courtesy found to take place only where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself *ex titulo singulari*, and this because of the uniformity of all our authors and decisions on this head.

Janet White being married to one Lawson, in her widowity, buys a tenement in Anstruther, and some acres, and then marries Charles Gilmor. She [3115] being deceased, and he refusing to cede the possession of the lands, Thomas Lawson, her son of the first marriage, and her heir, upon a warning pursues Gilmor, his stepfather, to remove. Alleged, He must have the liferent in right of the courtesy, his wife having died last vest and seased in these lands. Answered, No courtesy in this case; because that only takes place, where the wife succeeds in lands and heritage, as heiress to some of her predecessors; but here she has it by purchase and acquisition, as a singular successor, where the courtesy was never claimed; and there is scarce any principle wherein our lawyers are more clear and positive than in this. *Vide Skene de verbor. Sign. voce Curialitas*, and his notes on *Regiam majestatem*, lib. 2, cap. 58; Craig, lib. 2, *Feud. Dieg.* 22, Stair, lib. 2, tit. 6, who citing the foresaid Skene and Craig, joins with their opinion; and Sir George Mackenzie, tit. MARRIAGE, who states the courtesy to arise by marrying an heretrix; so the vouchers being so unquestionable, it is wondered how it comes to be debated. Answered for Gilmor, the husband, that the origin of this courtesy, may either be derived from Constantine's rescript, l. 1, *C. de bonis matern.* giving the husband the liferent of all the wife's heritages; or from the Norman feudal constitutions, where the wife being vassal, and unfit to perform the military services, and other duties to the superior's court, the husband was substitute in her place, and in compensation of that burden liferented her fees, without distinction whether she succeeded therein, or otherways purchased and acquired them; and the famous English Lawyer Littleton, in his *Institutes and Tenures*, speaking of the courtesy, he does not restrict to the case of succession only; and though some of our own lawyers incline that way, yet the word *hæres* made use of by them in a large sense not only signifies an heiress, but comprehends any fiar or proprietor of lands; so Gilmor may claim the courtesy, though it came to his wife *titule emptionis et venditionis*, even as a terce is due to a wife out of her husband's lands, whether he got them by succession or acquisition. The Lords remembered, that in the case of Campbell and Edmiston (*supra*), they had preferred the wife's son of a former marriage to his stepfather claiming the courtesy, which some thought a great stretch; but however, in this case the Lords were all clear, that the authorities were so pregnant and uniform, besides the decision founded on, they could not recede from so fixed a rule; and therefore found the courtesy only took place where the wife succeeded in lands to some of her predecessors, but not where she acquired them herself, *ex titulo singulari*; and so repelled Gilmor's claim to the courtesy, and decerned him to remove.

Fol. Dic. v. 1, p. 205. *Fountainhall*, v. 2, p. 505.

No. 8.

[3117] HAMILTON v. BOSWELL. June 15, 1716.

Courtesy may have place where the defunct heiress was not habilely infeft.

An heiress's infeftment, upon a service to her predecessors, being quarrelled by a reduction after her death, upon alleged nullities, in order to disappoint her husband of his right of courtesy, the Lords found, that the heiress's infeftment not having been quarrelled in her lifetime, was sufficient to support the courtesy, upon this ground of equity, that had it been quarrelled during her life, these nullities might and would have been supplied. See APPENDIX.

Fol. Dic. v. 1, p. 205.

No. 9. ANNA MONTEITH v. Her NEAREST-OF-KIN and CREDITORS. January 3, 1711

A husband possessing by the right of courtesy, is liable for the annualrents of personal, as well as real debts.

Anna Monteith being heiress of certain lands which descended to her by her mother and there being several personal debts to which she would be liable as heir, she, and her father as tutor and administrator, pursue a declarator, "That it is necessary to sell the above inheritances, or a part thereof, for discharging the debts."

It was alleged for the pursuer's friends on the mother's side, That there was a necessity of a sale, because, by a scheme of the debts and inheritance, it appears that there was a sufficient fund for payment of the yearly annualrents, and a valuable surplus.

It was answered, The pursuer's father had right to the inheritance by the courtesy of Scotland during his life, and was not in law obliged to pay either principal or annualrents of personal debts, whereby the inheritance would come to be affected with debts and wholly exhausted, unless a part were sold; and the father, for the good of the party, was willing to concur in the sale, and lose the benefit of his courtesy of such lands should be sold: Whereupon the question arose, "Whether a husband possessing by courtesy was obliged to pay the current annualrents of his wife's personal debts? And the father did allege, that it was of his own goodwill, for the advantage of his party, that he [3118] passes from his right to so much as shall be sold; but that a husband possessing by a courtesy, is only subject to real debts: In which Lord Stair expresses his opinion very plainly, and makes a parallel betwixt a courtesy and a terce; and it is certain that a tercer is subject to no personal debts; and the right of courtesy is a full usufruct, which is subject to no personal burdens.

It was answered, The present question is not stated, nor did occur to Lord Stair nor is there any decision upon record that can clear it; and therefore it must be determined according to the nature of the husband's right, and the analogy of law. And Imo, Although a terce and courtesy do in many things agree, yet not in the present question; for, by our ancient law, the provision to wives was very much qualified and restricted. The husband could not anciently make a larger settlement upon the wife than the *rationabilis tertia*, which was the liferent of the third part of the heritage he had at the time of his marriage; he might by paction give her less, as appears by the 16th chapter of the 2d book of the Majesty: And therefore it was very reasonable that this *rationabilis tertia* should be free of all burdens which did not really affect the subject at the time. On the other hand, the courtesy of the husband was very ample by our ancient law, whereby the husband did not only enjoy the liferent of the wife's heritage, but did even enjoy the honour and dignity of the family, if any did belong to the wife, and had seat in Parliament, and all other privileges that would have belonged to her if she had been a male, both in her life and after her death: So that the husband, by the courtesy, represents the wife's family. From which it necessarily follows in reason and equity, that he should leave the family as he got it; and if it were not so, the family would be subject to diligences for personal debts, and sunk. And seeing the law or practice have expressed nothing upon this subject, the decision falls to be made according to reason and equity. And the learned Skene, in his notes upon the said 16th chapter of the 2d book of the Majesty, says, "That the courtesy is *forma cujusdam successionis*." It is not a proper succession, otherwise the husband would be liable to the principal sums, as well as the annualrents; therefore he calls it *forma cujusdam successionis*, a kind of succession which subjects him to the payment of all current yearly burdens, where there is not another subject or debtor, out of which or by whom the same may be paid.

"The Lords found, That the husband, in possession of the courtesy, was liable in the payment of the current annualrents of personal as well as of real debts, to the value of the rents he enjoyed by the courtesy; reserving to him relief against executors, or other heirs or successors to any other part of the wife's estate, heritable or moveable, which he did not enjoy by virtue of the courtesy."

No. 10. [3119] JOHN HODGE v. JAMES FRASER. January 11, 1740.

The courtesy does not take place in lands acquired by the wife by singular titles. See No. 6, p. 3114.

The question betwixt these parties was, whether a husband had right to the courtesy of lands which were acquired by his wife by singular titles, and in which she died infert ?

For John Hodge, the husband, it was argued, That the right of courtesy was introduced by the common law, founded upon ancient immemorial custom ; so that, in order to find in what cases it takes place, recourse must be had to our old law-books, and the opinion of such writers as treat of this subject. In the book of Majesty, this right is treated of ; but no distinction is there made betwixt lands to which the wife succeeded as heir to any of her predecessors, and such as she had right to by singular titles ; but it is there laid down in general terms, " When ane man receives with his wife lands, in name of marriage, and begets upon her ane heir, son or daughter, heard cryand, within four walls of the house, and the wife happen to decease, the lands and heritage which pertained to the wife shall remain and be possessed by the husband induring his lifetime " ; 2d b. of Majesty, chap. 58. It was a common thing of old, for the wife's father, or other friends, to give with her a part of their lands and estate, in name of tocher, as appears from the 18th chapter of the same book ; and if in such cases the courtesy took place, where the wife's right was no more than a disposition from her father, &c., it follows, that the wife's being an heretrix is not essential, provided she dies infert in the lands.

In like manner, in the burrow-law, chap. 44, " Giff ane man receives with a woman, in name of tocher, ane burgage, and with her begets son or daughter ; and it happens the wife to decease, &c., the man or husband shall bruick and possess that burgage, during all the days of his life." There is not the smallest insinuation here, as if the right to this burgage behoved to be by succession to some one or other of her predecessors, in order to entitle her husband to the courtesy. What is observed by all our writers, touching the affinity betwixt the courtesy and the terce, which likewise took its rise from ancient custom, serves further to illustrate and strengthen this argument. Of old, the wife's terce was a third of the heritage, in which the husband was vest and ceased the time of the marriage ; but now the terce due to the wife is a third of the heritage in which he died infert, tenements within burgh excepted ; and it makes no difference as to the terce, whether the husband's infertment proceeded on singular titles, or in the right of succession, provided, as Craig says, *In feudo eorum diem obiit supremum* ; and the same author says, that the courtesy only differs from the terce with regard to the quantity. But *in reliquis eadem lege et paritate terminantur*. In the same manner as a relict claiming her terce is only bound to instruct that she was lawful wife to the defunct, and that her husband died in the fee of the lands, without condescending in what manner the fee was con-[3120]-stitute in the husband ; so the husband claiming the courtesy, is not bound to instruct any thing further, than that a living child was procreate of the marriage ; and that his wife *tempore mortis obiit vestita* in the lands of which he claims the liferent ; and if the courtesy is likewise considered as taking its rise from the rescript of the Emperor Constantine, lib. 6, tit. 60, *cod. de bonis maternis*, which is the opinion of most of our writers, there can remain little doubt. See Wood's Inst. book 2, chap. 1, § 4. And a decision observed by Haddington, where it is said, He who marries a woman who had heritage or annualrent heritable, and procreates a living bairn upon her, will get the curiality, as well of her annualrents, as of her lands, No. 1, p. 3111.

The defence for James Fraser was, That seeing the wife acquired the feu herself, and did not succeed thereto as heir to any of her predecessors, the pursuer could have no claim to the courtesy out thereof, as was evidently the opinion of all our lawyers. See Skene *verbo curialitas*, § 2. Craig, lib. 2, dieg. 22, § 42. Sir George M'Kenzie, lib. 1, § 6. Stair, lib. 2, tit. 6, § 19 ; 22d June 1709, Lawson, No. 6, p. 3114. This being the case, it was needless to enquire into the law of England upon this head, seeing they have their own law in that respect, which it was no wonder should differ from ours in some circumstances, even though ours was derived from it, of which, however, no vestige appears ; for instruments of sasine were introduced into our law

and custom by King James I.; and yet our infeftments differ vastly from the feoffments. And it is in vain, in such cases, to argue on the rationality of the thing, namely, that the courtesy ought to take place, without distinguishing how the thing came: for it is a law introduced by our particular customs, and therefore termed the courtesy of Scotland; and whatever the learned Craig may labour with respect to the reason thereof, namely, that it had its rise from the civil law, whereby the life of the child's estate belongs to his father, the reason does not apply almost in any shape; for that the birth of a living child, though it instantly die, founds the courtesy when it is impossible to pretend that any thing belonged to it; so that it may justly be said of this, as of many ancient customs, that *non omnibus quæ a majoribus, &c.*

The Lords found, That the courtesy only takes place in lands and heritages which the wife succeeds as heiress, but not in those purchased by her, although she dies infeft therein. *Fol. Dic. v. 1, p. 205, & v. 3, p. 165. C. Home, No. 138, p. 236.*

No. 1. [1] ELISABETH PRIMROSE, Spouse of Thomas Brown v. ROBERT CRAWFORD in Airth. December 10, 1771.

The right of the husband sustained over lands which the wife had got by a disposition but in which she was *alioqui successura*, and which she was held to have acquired *præceptione hereditatis*.

James Club, by an only daughter, had three grandchildren, Elisabeth, Anne, and Mary Primroses. He disposed to Anne, his house and yard in the town of Airth, and his lands of Potterfield, which amounted to one half of the heritage; the remainder of his lands he disposed to Elisabeth.

Anne was infeft in the subjects; and having been married to Robert Crawford, she, in the year 1760, granted a holograph missive, subsuming, that as there had been no contract, she then disposed to him, as long as he lived, every thing that belonged to her as her grandfather gave it.

Thereafter, in a contract of marriage, she disposed to herself and husband, as the longest liver of them, in conjunct fee and liferent, the survivor always liferent in the whole, her houses and yards in the parish of Airth; but, in this disposition, the lands of Potterfield were omitted. This marriage was dissolved by the death of the wife in 1767, and all her children were dead soon thereafter.

Upon this event, Elisabeth Primrose, as apparent heir of her sister, having brought an action against the tenant in the lands of Potterfield for the rent, compearance was made for Robert Crawford; who contended, 1st, That as there had been several living children of the marriage betwixt him and Anne Primrose, he had a right to the rents of the said heritable subject by the courtesy of Scotland; 2dly, Independent of the courtesy, he had a right to the liferent of the whole subjects that had belonged to his wife, in virtue of the holograph missive in 1760.

The Lord Ordinary, by one interlocutor, found Elisabeth Primrose entitled to the rents of Potterfield since the death of the last surviving child of Anne Primrose; to which he thereafter adhered, "in respect that Anne Primrose was not *alioqui successura* to her grandfather in the subjects disposed by him to her, and that the contract of marriage, and not any previous writing, must be the rule to determine what Robert Crawford had right to."

In a reclaiming petition, Robert Crawford, the defender, pleaded:

By the mode in which Club, the grandfather, had disposed his property, which was by making an equal division, he had done the same thing as if he had disposed the whole to his two grand daughters, Elisabeth and Anne, equally *pro indiviso*. If he had disposed his whole lands in this manner, the interest which each sister had, in the half conveyed to her, would, quoad two-thirds, fall to be considered as a *præceptio hereditatis*; and they could be held as taking no more than the other third, the share which, independent of the settle-[2]-ment, would have fallen to the third sister Mary, by a singular title. When the grandfather therefore allotted to Anne the subjects in Airth and lands of Potterfield, in lieu of the half of his whole heritage, Anne was truly to be considered as taking two-thirds of Potterfield under the character of heir.

As the defender's wife was accordingly, to a certain extent, *alioqui successura* in the grandfather's heritage, and could have been connected therewith by a service, in which event it was unquestionable that the courtesy would have taken place, there was no solid reason for excluding that right; where, to save the expense of a service, she had taken infetment upon a disposition from her predecessors. This doctrine was expressly acknowledged by Stair, b. 2, t. 6, § 19; Bankton, b. 2, t. 6, § 2; and hence the right of courtesy now claimed must, at all events, extend to two-thirds of the lands of Potterfield; because so far it was in effect a *præceptio hereditatis*, and which, independent of the disposition, the wife could have taken up as heir at law to her grandfather.

The pursuer answered:

By the consuetudinary law of Scotland, the right of courtesy to the husband was only sustained over subjects in which the wife died infet as heiress. Skene, *voce CURIALITAS*. From this it followed, that the defender had no claim to the courtesy of the lands in which his wife died infet; because she died infet therein, not as heiress, but as dispoonee; characters perfectly different; and as to which it had been found, that the condition of succeeding as heir was not purified by the heir's obtaining a disposition; 25th June 1701, Borthwick, No. 46, p. 2997.

The disposition, in the present instance, by the grandfather, had not been granted merely to save a service; as, had that been the case, it would have conveyed the whole subjects to both the daughters *pro indiviso*; nor would such a disposition have sufficed, as the daughters would not, even in that case, have been infet as heiresses to their father. The disposition founded on had no connection with the succession that would have been carried by a service to him *ab intestato*. He had thereby made a distribution of his property different from what would have been made by law; there was no ground accordingly for arguing that what had been taken was *præceptione hereditatis*; so that, as the wife's title to these lands was singular, the right of courtesy was excluded.

Some argument was used by the defender upon the import of the holograph missive granted by his wife in his favour; but as the contract of marriage did not confirm, and even differed from that obligation, no regard was paid to it.

The following interlocutor was pronounced: "Find that the petitioner cannot found on the holograph note subscribed by the deceased Anne Primrose, in respect of the subsequent contract of marriage betwixt him and her, which does not give him right to the liferent of the lands of Potterfield; but find that he has right to the liferent of two-thirds of these lands in virtue of the courtesy, as Anne Primrose succeeded thereto *præceptione hereditatis*."

Lord Ordinary, KENNET.—For Primrose, J. MACLAURIN.—Clerk, ROSS.—For Crawford, MACQUEEN.

R. H.

Fac. Col. No. 117, p. 345.

No. 5. [3126] PATERSON v. BRUCE. December 19, 1678.

The Lords found, that the axiom *contra non valentem agere, non currit. præscriptio*, takes no place in the short prescriptions, and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be extended to this case, where the term of payment fell sometime after the defunct's death, and the creditor had done diligence within three years, counting from the term of payment.

In a competition betwixt Captain Paterson and David Bruce, both having apprised the lands of Thomas Tweedie, from his apparent heirs;—it is alleged for Paterson, That he ought to be preferred, because he has the first apprising and infetment.—It was answered for Bruce, That his apprising, though posterior, is upon the defunct's debt, and Paterson's is upon a bond granted by the apparent heir; and therefore, by the act of Parliament preferring the diligences for the defunct's debts, before the apparent heir's, the said diligences being done within three years, are preferable.—It was replied,

That the foresaid act prefers only diligences for the defunct's debt, being done within three years after the defunct's death.—It was duplied for Bruce, That these three years must be *anni utiles* ; but here Bruce could use no diligence, because the term of payment of his debt was not come ; and the narrative of that act bears, " That the defunct's creditors either did not know, could not, nor used no diligence " ; and there can be no case more favourable than this, where Paterson's right is upon a fraudulent gratuitous bond of the apparent heir's.—It was triplid, That this statute being a retraction of the former law, which did not distinguish the defunct's debt, from the debt, cannot be extended beyond the terms expressed, of diligences done within the years after the defunct's death, and if it were otherwise extended to bonds conditional or whereof the terms were not come, that [3127] they should have three years for the purification of the condition, which might run for 40 years, it would unsecure legal diligences and purchasers from heirs, though for onerous causes ; and that the apparent heir's bond in this case be gratuitous, the statute cannot be extended, which mentions expressly gratuitous deeds of the heir's, and makes no exception to these ; neither doth the exception of *non valens agere*, continue any prescription except where it is expressed, as in the prescription of heritable rights, but it hath effect in the prescriptions of spuilzies or removings.

The Lords found, That though the apparent heir's bond was gratuitous, the diligence upon the defunct's debt, could not be preferred to a prior diligence on the apparent heir's bond, unless the diligence on the defunct's debt were within three years of the defunct's death, and that no impediment could continue the three years ; but whether the defunct's creditors might not reduce the gratuitous bond of the apparent heir, that occurred to the Lords, and they allowed the parties to be heard thereon ; and after a full hearing, reduced the same. See HEIR APPARENT.

Fol. Dic. v. 1, p. 206. *Stair*, v. 2, p. 659.

No. 6. Lord BALLENDEN v. WILLIAM MURRAY. March 1685.

In a competition between the creditors of a defunct and the creditors of an apparent heir, the Lords found, That the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make appear, that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like ; and preferred a disposition granted by the heir to one of his creditors, even within three years after the defunct's decease ; albeit the creditors of the defunct had obtained a decret *cognitionis causa* within the three years, the decret of adjudication being after. In this process it was also found, That a disposition granted by the heir to the defunct's creditors, within a year after the defunct's decease, was not quarrellable, seeing the clause of the act of Parliament is conceived in favours of the defunct's creditors ; nor yet that [3128] such a disposition by the heir to one of his own creditors, is quarrellable by another of his creditors.

Fol. Dic. v. 1, p. 206. *Harcarse* (PRESCRIPTION), No. 773, p. 219.

No. 11. [3135] MAGISTRATES of AYR v. QUINTIN MACADAM. June 14, 1780.

Action for setting aside rights granted by an heir within the year after the predecessor's death, endures for forty years. The second clause of the act 1661, c. 24, is not confined to rights granted by heirs in a state of apparenacy.

Campbell was debtor to the burgh of Ayr. Within the year after his death, his heir made up titles, and sold lands which belonged to him. More than three years thereafter, but within forty years, the Magistrates of Ayr, for effectuating payment

of the debt due to the burgh, brought a process against [3136] Macadam the purchaser, for setting aside the sale, upon the clause of the statute 1661, c. 24.

The defences insisted on by the purchaser were, 1st, That the action of reduction, not having been commenced within three years after the ancestor's death, was not now competent; and, 2dly, That the enactment only affected alienations made by heirs when in a state of apparenecy.

For the arguments on the first point, Taylor *contra* Lord Braco, No. 8, p. 3128.

On the second point

The defender pleaded; The statute founded on, being of a correctory nature, and creating nullities in the titles of landed property, which are undiscoverable from the public records, ought to receive a strict interpretation. It is entitled, "An act concerning apparent heirs." The preamble sets forth, That apparent heirs, immediately after their ancestor's death, frequently dispoise their estate, in whole or in part, to the prejudice of their predecessor's creditors." The hardship thereby imposed on the ancestor's creditors is said to arise "their not having it in their power to pursue the heir within the year," which is not applicable to the case where the heir has completed his titles by service. And the enacting clause provides, "that no disposition made by the said apparent heir shall be valid, unless made a full year after the defunct's death."

Answered; This statute affects, in the first place, diligence by the creditors of the heir, which undoubtedly may take place whether he make up titles by service or not; and, 2dly, voluntary deeds of alienation by the heir. The title of the statute is general; and as in the first part it must be understood to extend to diligence done against the predecessor's estate after the heir is served, it must in the second be equally applicable to alienations made by heirs in that predicament.

There are in the statute itself expressions which clearly show this to have been the intention of the legislature. Thus it is said, "that apparent heirs do often, before they are served, make dispositions of their predecessor's estate." And the reason given for the different periods fixed in the first clause is, "that it would be unjust that the apparent heir, after he is served, and retoured, and infeft, respective, should, for the full space of three years, be bound up from making rights and alienations of his predecessor's estate."

But the defender's argument is not only contradicted by the words of the statute, but is totally adverse to its spirit. As a service may be completed by an heir, in some cases, in fifteen days after the ancestor's death, and in all cases within a period greatly short of a year; the duration of this privilege would in this manner be measured, not by the time prescribed in the statute, but by the diligence used by the heir in making up his titles.

"The Lords repelled the defences."

Lord Ordinary, GARDENSTON.—Act. G. FERGUSSON.—Alt. RAE.—Clerk, TAIT.

Fol. Dic. v. 3, p. 166. *Fac. Col.* No. 110, p. 206.

No. 13. [3137] ANNE MACKAY *v.* The Representatives of Colonel HUGH MACKAY.
February 15, 1783.

A bond heritable, *destinatione*, was found to fall under the act 1661, c. 24.

Anne Mackay, the second wife of William Mackay, was, by their contract of marriage, entitled to certain provisions.

[3138] Among other funds belonging to William Mackay, were two wadset rights, and a bond conceived "in favour of him and his (former) wife, in conjunct fee and liferent, and of the heirs-male to be procreated betwixt them, in fee."

Those wadsets William Mackay disposed to George, his eldest son, by the prior marriage, to whom, by the conception of the bond, that right likewise was to devolve.

Within a few months after the death of William Mackay, George disposed the wadset rights and bond to his immediate younger brother, John.

Posterior to this conveyance, Anne Mackay, sued these sons of her husband as being his representatives, for payment of her provisions; and, on the dependence of the action, used inhibition against them both.

Afterwards, John conveyed to Colonel Hugh Mackay, a creditor of his, the wadsets and bond in security of his debt.

A competition then ensued between Anne Mackay and certain persons representing Colonel Mackay, the event of which was chiefly to depend on the effect of the conveyance by George to John, and of the inhibition used by Anne Mackay against them.

Pleaded for Anne Mackay: As the wadsets and the bond, now the subject of competition, are both heritable rights, the last, by virtue of its destination "to his male," being not less so than the first, the debts of the ancestor are still preferred upon them to those of the heir, notwithstanding the conveyance by the latter within a few months of the death of the former. Both come equally within the sanction of the statute of 1661, cap. 24, which declares, that "no right or disposition made by any apparent heir, so far as may prejudice his predecessor's creditors, shall be valid, until it be made and granted a full year after the defunct's death." As a creditor, therefore, of William Mackay, the father, the claims of Anne Mackay, respecting both rights alike, are to be preferred to those of any creditor of his sons. And her preference has likewise been secured by inhibition.

Answered; *Nomina debitorum* are not the subject of inhibition: Nor is the order altered from their becoming heritable *destinatione*. With respect to Mrs. Mackay's preference, as a creditor of her husband, over the creditors of his heirs, the bond, being a personal right, falls not under act 1661.

The Lord Ordinary reported the cause to the Court, who were clearly of opinion that the statute 1661 applies to heritable subjects indiscriminately, whether they be such *destinatione*, or *sua natura*.

Some of the Judges denied the competency of inhibition to affect bonds heritable *destinatione* only. The majority, however, appeared to be of a different opinion, though it proved unnecessary to give a direct judgment on that point, the following being the interlocutor of the Court;

"The Lords, in respect the bond for 4000 merks, due by Lord Reay, was conveyed by George Mackay to his brother John, prior to the inhibition at the instance of Mrs. Anne Mackay, repelled the grounds of preference pleaded by her upon the inhibition; but found, that as George Mackay disposed the said [3139] bond to his brother John within five months of his father's death, the said disposition is not effectual against Anne Mackay, who was a creditor to the father, being contrary to the enactment of the second clause of the statute 1661."

To that judgment, which was brought under review by mutual petitions and answers, the Court adhered; with this only variation, that as it had been omitted to mention, that Anne Mackay's preference was effectual on the wadset, this omission was now supplied. See INHIBITION.

Reporter, LORD GARDENSTONE.—For Mrs. Anne Mackay, ELPHINSTON.—Advocate, HONYMAN.—Clerk, HOME.

S.

Fol. Dic. v. 3, p. 166. Fac. Col. No. 93, p. 144.

No. 16.

[3140] GRAY v. CALLENDAR. July 1723.

Creditors of a defunct, after the first six months, are preferable, according to the dates of their citations, against the executor; though it was pleaded by the competing creditor, whose diligence was first completed, that, from the nature of the thing, a citation, which is only a step of diligence, can give no preference, that it is the first completed diligence, not the first inchoated, that is to be considered. See APPENDIX.

Fol. Dic. v. 1, p. 207.

2.

[3148] STRATON v. —. July 10, 1610.

carrier's horse, hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone on his back, the Lords sustained process for the price, but not for the profits that might have been made of the horse.

A carrier having agreed to carry a merchant's packs to Wigton, pursued the merchant for the price and profits of his horse, because he died and was burser in fault of the merchant, who promised only to make the packs of 16 stone weight, and yet made them of 20 stone weight;—The Lords sustained the summons (albeit the owner of the horse laid on the packs and drove the horse) for the price of the horse, but not the profit; it being verified by the merchant's oath, that he promised to make the packs only of 16 stone weight, and no heavier, and that in contrary thereof he made them of greater weight.

Fol. Dic. v. 1, p. 208. Haddington, MS. v. 2, No. 1947.

11. [3158] MARJORY STEVEN, Relict of William Johnston Maltster in Aberdeen v. JOHN ROBERTSON, Merchant there. November 18, 1760.

No action of damages found to lie against the seller of victual for non-implement, where the price was referred to the seller, and the buyer himself having died before the whole was delivered, his representatives made a demand for the remainder, but without offering ready money, or caution for the price.

In November 1756, William Johnston, maltster in Aberdeen, and Provost Robertson, entered into a verbal agreement; whereby the Provost sold his farm-bear of Pitmillan, for crop 1756, to Johnston, deliverable as soon as the same could be got ready by the tenants, the price to be fixed by the seller.

In pursuance of this agreement, 30 bolls were delivered before Christmas; but Johnston dying soon after, the Provost sold the remainder of his bear to others, at £10 Scots per boll, the same price charged for 30 bolls that were delivered; having previously let Johnston's widow know, who made a demand [3159] for the remainder, that he would deliver her none, as he knew nothing of her circumstances.

Some months after, an action of damages was brought by the widow against Robertson, upon this medium, That he had taken only £10 Scots for the bear delivered, and she had been obliged to pay £12 soon thereafter for what bear she wanted; and decreet was pronounced in her favour.

Pleaded for Robertson, in a suspension of this decree, 1mo, That in point of interest he could have no temptation to resale, as it was impossible for him to get better terms; and the pursuer could have as little reason for insisting on implement, as she might at that time have purchased any quantity of bear she chose at £10 Scots per boll. The defender informed her why he declined the delivery of the remainder of the barley; and she tacitly acquiesced, having never made further requisition. She got that notice immediately upon her husband's death, which was before Christmas. The bear continued from that time till March to be sold currently at £10 Scots per boll. She had, therefore, three months to provide herself, at the same price fixed by the defender for the bear formerly delivered; and if, by her own delay, she was obliged to pay a higher price, no claim could from thence arise against the defender; l. 21, § 3, ff. de act. empt. vend.; Hotoman. Disp. p. 728.

2do, There was no stipulation as to the quantity to be delivered; no penalty for failure; the price, the time of delivery, and term of payment, were all left in arbitrio of the seller. Had Johnston lived, the seller would have been entitled to have demanded ready money; and, if refused, to have sold his victual to whom he pleased. His answer to the pursuer plainly imported such a demand, or at least a demand for good security; but as she offered neither, and did not even make any further requisition, in common sense he was no longer bound.

3tio, Although an action for damages may be well founded, when a certain price is stipulated, and the seller refuses delivery for the sake of a higher price; yet when the price is referred to the seller himself, there can be no such motive for his failure in delivery. Neither can damage be any consequence of that failure. By the civil law, where the price is referred either to the seller or to the buyer, there can be no claim of damages against the seller for failure to deliver, or against the buyer for refusal to receive; l. 13, *C. De contr. empt.*

Lastly, By the terms of the agreement, the defender was certainly entitled to demand the highest price given for barley that year, which was £12. It is inconsistent, therefore, to plead, that his charging only £10 for what he had delivered, should be the foundation of an action of damages against him.

Answered for Marjory Steven, The defender's arguments resolve into an objection, 1mo, To the validity of the contract; 2do, To the ascertaining damages through breach of it.

With respect to the first, it is in vain to have recourse to the civil law to prove its nullity; for whatever may have been the opinion of the civilians, it is [3160] certain, that such contract is binding by the law of Scotland. In this case, there was a complete bargain for the whole farm-bear, deliverable so soon as it could be got ready. Part of it was delivered; and consequently, as matters were no longer entire, there could be no *locus penitentie* to the seller, on the death of the buyer. The only thing left to him was, to ascertain the price; and he could not arbitrarily use that power, either to avoid the contract, or commit extortion; if he had attempted either, a court of justice would have given redress.

2do, Neither is the defender's allegiance, That in point of interest he had no temptation to resile, a good defence. The law does not so much consider the benefit arising to the person who resiles, as the damage done to the other party by the breach of a mutual contract. And as to the pursuer's acquiescence in the not delivery, the contrary is manifest; for it is admitted, that she made a demand for delivery, and was refused. Besides, although she had made no requisition, it was incumbent on the defender to have made an offer of the grain, on her paying, or finding sufficient security for the price; but he does not pretend that he made any such offer; and therefore he ought to be liable for any damage she has sustained by the bargain.

Nor is it a good objection, That the pursuer might, some time after her husband's death, have bought bear at £10 per boll. She had then a considerable quantity on hand; and it is not pretended, that she could foresee the rise of the price that happened so soon after. Neither do the authorities from the civil law conclude against her, as they do not fix the precise length of time sufficient to bar such an action. And as to what is urged for the defender, That he might have charged the highest price of the season for his barley, and consequently there could be no loss incurred through the not delivery; that argument is fallacious. When a contract is entered into, the terms of which are indefinite, these terms must be settled upon equitable principles. In this case, as the current rate of the country was not known at the time of the bargain, the period for ascertaining the price was very properly deferred to that of delivery. Part of the barley was delivered, and the remainder in readiness for delivery, before the end of December. At that time, it is agreed, the current price was £10 Scots, and in equity no more could have been demanded by the defender; and therefore he ought to pay the difference between the price at that time, and what the pursuer was afterwards obliged to pay.

"The Lords found no damages due."

Act. RAE.—Alt. GARDEN.

I. C.

Fol. Dic. v. 3, p. 168. Fac. Col. No. 247, p. 450.

No. 2. [3166] DUFFUS v. FORRESTER. February 2, 1628.

The executor of the umquhil Laird of Duffus pursued John Forrester for exhibition of a bond of 500 merks made by the defender to Duffus. And being exhibit to hear and see the same registrate; alleged, He cannot exhibit the bond, because

umquhil Duffus by his letter, directed to the defender, desired the said defender to pay to David Sutherland, carrier of the letter, the said sum, and receive his bond from him; conform whereunto he paid the sum to David, and retired his own bond and cancelled it. Replied, Not relevant, unless it were alleged that he paid conform to the letter before Duffus's decease. Which reply the Lords sustained, *quia mortuo mandatore exspiravit mandatum*.

Fol. Dic. v. 1, p. 209. Spottiswood (EXHIBITION), p. 123.

No. 8. [3183] Mr. JOHN GOLDIE v. The Trustees of MURRAY of Cherrytrees.
July 31, 1753.

The Crown's donatar, on a gift of *ultimus hæres*, is entitled to pursue a reduction of a disposition of lands granted by the last possessor, upon the head of deathbed.

Margaret Morison, proprietor of the lands of Maison-Dieu, when fifteen years of age, and on deathbed, executed a settlement of her estate in favour of James Murray of Cherrytrees. She died about four weeks after the date of this deed, without heirs.

Mr. John Goldie, her uncle by the mother's side, obtained from the Crown a gift of the said lands of Maison-Dieu, as having fallen to his Majesty as *ultimus hæres*.

In consequence of this gift, Mr. Goldie raised a declaration of his right, wherein he called Mr. Murray of Cherrytrees; and concluded for reduction of the [3184] deed granted in favour of Mr. Murray by Margaret Morison, as being granted during her minority and on deathbed.

Mr. Murray died during the dependence; and the process having been transferred against his eldest son, he refused to enter heir or to defend; whereupon decret was pronounced in favour of Mr. Goldie. After which he insisted against the tenants of Maison-Dieu for mails and duties; in which process the Trustees, to whom Mr. Murray had disposed his estate for certain uses, appeared, and were admitted to be heard.

It was pleaded for the Trustees; That, in this case, there was no place for the King's donatar; because Margaret Morison having executed a disposition of her estate before her death in favour of Mr. Murray, the lands thereby belonged to him and not to the Crown; and though the disposition was executed upon deathbed, yet the law of deathbed being introduced singly in favour of heirs, as appears from the statutes Willielmi, cap. 13, and from the deeds being valid if consented to by the heir, and as it is a limitation of that natural right which a man has of disposing upon his property, it is not to be extended in favour of the Crown or its donatar; for the Crown does not succeed as heir, but takes the estate *tanquam bona vacantia* as belonging to nobody. Any difficulty which occurs upon this point, arises from an abuse of words, the King being said to take as *ultimus hæres*; but there is in this case really no succession, but there being none to succeed in the character of heir, the right vests in the Crown *jure coronæ*. That the matter ought to be thus considered, appears from Craig, tit. *de Regalibus*, § 30. And Lord Stair treats of this right not under the head of succession, but in b. 3, t. 3, § 47, under the general title of CONFISCATION, where he has these words: "*Ultimus hæres* may seem to be a succession from the dead, and to come in amongst other heirs; yet though it hath the resemblance of an heir, because it hath effect where there is no other heir, and makes the heritage liable to pay the defunct's debts, it is only a caducuary confiscation of the defunct's estate, with the burden of his debt, but no proper succession to him therein." And therefore to extend the law of deathbed in support of an escheat or caducuary confiscation, or to defeat a settlement of an estate executed by the defunct who had no agnates or lawful heirs, whilst *sancæ mentis* though on deathbed, would be extremely hard, and would be an extension of the law of deathbed, to a case which does not fall within the reason or purview thereof. And though a bastard cannot dispose of his heritage on deathbed in prejudice of the Crown, it will not from thence follow, that another person, who has no heirs, cannot dispose of his; for the reason why a bastard cannot dispoise, is because he has not *testamenti factionem ob defectum natalium*; and a disposition on deathbed, even of heritage, is considered as a testament or *donatio mortis causa*.

As to the other reason of reduction, founded on Margaret Morison's minority,

this depends on the same principles with the other ground of reduction upon the head of deathbed ; and therefore the same answer will suffice ; the restraint [3185] upon minors is in favour of their heirs, and he who challenges the deed must be heir, and qualify the lesion ; but surely it was no lesion for a minor to dispose her estate prevent its becoming caducuary or being confiscate.

Answered for the pursuer ; 1st, That the law of deathbed was introduced in favour of all sorts of heirs, whether those succeeding *ab intestato*, or those named by the defunct when in health ; and there is no reason for denying the benefit of this law to the King, who, though in some particulars he differs from other heirs, not being universally liable for the defunct's debts, yet succeeds, and is considered as heir, *Stair*, l. 4, tit. 13. Besides, the law of deathbed was not introduced singly in favour of heirs, but likewise in favour of dying persons, that they might be free from undue solicitations ; and because they are presumed not to have sufficient firmness of judgment for disposing of their heritage. This is the account given of the matter *Edinb. Mag.* l. 2, c. 18, § 9. *Unde presumitur, quod si quis in infirmitate positus, quasi a morte, terram suam distribuere cœperit, quod in sanitate facere noluit, hoc potius a fervore animi, quam ex mentis deliberatione, evenit :* and by *Craig*, l. 2, diæg. 1, § 1. With these authors Lord Stair agrees, l. 3, t. 4, § 27. "The reason of this custom may be conjectured, not only from the nature of feudal rights not disposable by testaments, but only by investiture ; but also for public utility, because persons on deathbed are weak, the mind being easily affected by the trouble of the body, and so it is easy to be wrought upon by insinuations and importunities to do deeds contrary to their interest and former resolutions." If these authors are right in the account they give of the foundation of this law, it must take place, whoever is to succeed to the heritage ; and there appears no reason why persons who have no heirs *jure sanguinis*, should be exposed to disturbance and importunities when dying, more than the rest of his Majesty's subjects.

2dly, It is admitted, and is proved by the authority of most of our law-books, that a bastard cannot dispose of his heritage, on deathbed, in prejudice of the Crown. Now the King's succession to a bastard is a species of his succession as *ultimus hæres* ; for when a bastard has no issue, he can have no agnates, being *ex incerto patre*, and therefore his estate falls to the Crown ; and seeing, in such a case, the law of deathbed takes place, there is no reason why it should not also obtain when the King succeeds as last heir, because the defunct left no heirs of blood. It is not owing to a bastard's not having *testamenti factio* that he cannot dispose of his heritage on deathbed ; for this right has no connection with the disposal of heritage ; no lawful born subject can dispose of his heritage by testament ; nor can a bastard dispose of his heritage on deathbed, though the King has by legitimation granted him the power of testing.

3dly, It appears from the tenor of the declarator of the King's right as last heir, that it has been understood, that his right could not be defeated by a deathbed deed ; for it calls on all and sundry having or pretending interest, "to hear and see it found and declared, that all lands and heritages, &c., which belonged to the defunct at the time of his decease, or at the time of contracting [3186] the disease whereof he died, do belong to the donatar," &c., *Stair*, l. 4, tit. 13, p. 582 (604).

The other reason of reduction, founded on the minority of Margaret Morison, is also relevant ; for minors are debarred from altering the course of succession to their lands, because they are presumed, during their minority, not to have sufficient stability of judgment for making such an alteration ; and this reason takes place whoever be the heir that is prejudged by the alteration.

"The Lords found, that it was competent to the Crown's donatar to object to the disposition granted by the deceased Margaret Morison to James Murray of Cherrytrees, upon the head of deathbed, and sustained the objection."

Reporter, JUSTICE-CLERK.—Act. ADVOCATUS & J. FERGUSON.—Alt. LOCKHART.—Clerk, JUSTICE.

Fol. Dic. v. 3, p. 169. *Fac. Col.* No. 86, p. 129.

* * * This case was appealed :

The House of Lords "ordered, that the interlocutor complained of be affirmed."

Co. 9. ALEXANDER GRAHAME v. MARGARET GRAHAME. February 4, 1779.

A general service to the heir last infeft is not a sufficient title to pursue a reduction *capite lecti*; but the Lords found that the right of apparenry entitled the pursuer to carry on his action, though it was objected, that he was not natural heir, or of line, but heir of provision, viz. a substitute in an entail.

Grahame of Hourston executed an entail of his estate on his five sons *seriatim*, and the heirs-male of their bodies respectively, but did not record the entail.—Charles, the eldest son, succeeded his father, and was infeft upon the precept in the disposition of entail.—Upon his death, Henry, his only son, entered into possession of the estate, without making up any titles, and contracted a considerable debt to his sister Margaret, and her husband, Robert Grahame.

Subsequent to this contraction, the entail was recorded; after which, Henry granted a lease of part of the entailed lands to his sister Margaret and her husband for 171 years. Henry possessed the estate for 30 years, as heir apparent, [3187] and died without issue; upon which the succession opened to his uncle Alexander Grahame, youngest son of the entailor.

Alexander made up a title, by a general service, as heir of tailzie to his brother Charles, the heir last infeft; and, on this title, brought a reduction of the above-mentioned tack by Henry Grahame to his sister, and a removing from the lands, on various grounds; among others, that the lease was granted on deathbed.

Objected by the defender to the pursuer's title; The property of the lands leased to the defender is still *in hæreditate jacente* of Charles Grahame, the heir last infeft, and cannot be taken up by the pursuer without a special service to Charles.—The pursuer's general service establishes his propinquity, but does not vest in him the right of property in the lands. He has therefore no other title to carry on this action but his right of apparenry.

A lease of lands, clothed with possession, is a real right in the lands for the time; and, therefore, according to the general principle, cannot be challenged by the heir while the lands are *in hæreditate jacente*.

An exception is admitted in the case of a reduction on the head of deathbed, brought by an apparent heir of line; but it has been found, that this privilege, given to the natural heir, does not extend to the heir of provision; Edmonstone *contra* Edmonstone, March 16, 1637, *voce* TITLE TO PURSUE.

But further;—The pursuer is not the apparent heir of Henry Grahame, the granter of the deed, nor can make up any titles to him as his predecessor in the lands.—It is only by serving heir in special to Charles Grahame, the heir last infeft, that he can vest himself in the property of this estate. He is, therefore, in the proper and legal sense of the words, the apparent heir of Charles Grahame, and has no connection with Henry Grahame, while the lands are *in hæreditate jacente*.

The pursuer avoids making up his titles to Charles, that he may nor be subjected to the debts and deeds of the interjected heir, Henry Grahame, upon the statute 1695.—His conduct, therefore, is *in fraudem* of the statute; and the pursuer ought not to have the benefit of challenging the deeds of Henry Grahame, while, by lying out unentered, he does not become liable for his debts and deeds, as the statute justly requires.

Answered for the pursuer; That, by his general service, he is ascertained to be the heir entitled to take up the succession to this subject; but, without that service, he has sufficient title, as heir apparent, to carry on the present action.—The law has given the privilege of reduction *ex capite lecti* to heirs of provision and tailzie, as well as to the heirs of line.—Consequently there is no room for any solid distinction betwixt the heirs-apparent of the one kind and of the other. Both are accordingly now considered as equally entitled to challenge deeds on deathbed granted to their prejudice, though anciently the law might be different in this respect; *vide* Erskine, b. 3, t. 8, § 100.

[3188] The pursuer is heir apparent to the granter of the deed.—Before the act 1695, there was reason for considering the interjected apparent heir as a stranger. His successor serving to a remoter predecessor was not liable in implement of his debts or deeds. But now he is made, by such service, to represent the interjected

heir, who has been three years in possession, as much as any predecessor to whom he serves;—consequently, before he makes up his titles, he is truly and substantially apparent heir to the interjected heir. This is the meaning which the statute itself puts upon the term Apparent Heir. The statute says, that when he is served, “he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir.”

The Court found, “That the pursuer’s general service is no sufficient title to pursue this action: But found, that the pursuer’s right of apparency, as heir to Charles Grahame, is a sufficient title to carry on the process of reduction on the head of deathbed.” See HEIR APPARENT.

Lord Ordinary, GARDENSTONE.—Act. STEWART.—Alt. SWINTON.—Clerk, MENZIES.

Fol. Dic. v. 3, p. 170. *Fac. Col.* No. 65, p. 122

No. 14. [3195] CAMPBELLS v. CAMPBELLS. December 16, 1738.

One having become bound in his contract of marriage to provide a certain sum, and also the conquest during the marriage, to himself and spouse in conjunct-fee, and to the children to be procreate of the marriage in fee, did purchase an estate during the marriage, taking the rights thereof to himself, his heirs and assignees, and upon deathbed did execute a deed, settling both heritable and moveable estate upon his eldest son, with the burden of certain provisions, in favour of the younger children; in a reduction of this settlement, at the instance of the younger children, upon the head of deathbed, the Lords were unanimous, that seeing there was no actual settlement of the conquest in terms of this obligation, to constitute the children heirs of provision, they had not the privilege of deathbed; that they were constituted creditors by this obligation, and in whatever way a service in general as heir of provision or conquest may have crept into our practice, it is, strictly speaking, inept; such a thing, while the father is alive, cannot be, and if he died without implementing, the obligation is purified in favour of the children, and they have a direct action against their father’s representatives to make over the conquest in their favour. See APPENDIX.

Fol. Dic. v. 1, p. 211.

No. 32. [3208] SHAW v. GRAY. January 7, 1624.

The law of deathbed strikes at moveable bonds as well as heritage, since for these also the heritage may be comprised, and so the heir prejudiced. A moveable bond sustained to an apothecary for the price of drugs furnished.

In an action betwixt Shaw and Gray, for reduction of a bond made by a woman called Shaw, to whom the pursuer was brother and heir, given to the said [3209] Umphra Gray, defender, containing the payment to him of 600 merks, the reason being, that the bond was made *in lecto ægritudinis*. The Lords found that reason relevant, viz. That the bond was made by the party thereby obliged, she at the date thereof being diseased of a sickness, whereof she never convalesced, but whereof she died, about the space of seven weeks thereafter; which reason was sustained, albeit the defender alleged, that the same ought not to strike upon bonds made for payment of moveable sums, which might be made upon deathbed, and that the municipal law, whereupon the reason was founded, was only to restrain parties to make alienations of their lands and heritable rights, in prejudice of their heirs upon their deathbeds; and also alleged, That in this case, this bond cannot be reputed done *in lecto ægritudinis*, in respect that the party, maker of the bond, at the date thereof, and by the space of six weeks thereafter, was of good health, to administer her lawful affairs, and in that same estate for sickness as she was in by the space of an whole year before, viz. that albeit she kept the house for the indisposition of her body,

aving a lent-sickness of hydropsie all that time, yet she lay not bedfast, but rose mly and put on her clothes, and went up and down the house ; which allegiance as repelled, seeing the party alleged not, that she came out to kirk and market, or at ast did other deeds of health, equivalent to such outcoming ; and found, that the w struck as well upon moveable bonds, as upon deeds done in heritage ; for upon the oveable bonds, the heritage might be comprised, and so the heir thereby prejudged ; ad albeit it was a lent-sickness, *et non morbus santicus*, the reason was found relevant. and because the party to whom the bond was given was an apothecary, who alleged, hat the bond was made to him for drugs, and satisfaction of his cure ministrated by im, during the whole space of her being in sickness ; the Lords found, that they would sustain the bond *pro tanto*, viz. for the prices of his medicines, as should be proven o have been furnished to her by him, and also for such further sum, as in the end of he cause should be modified by the Lords, for satisfaction of his pains and for his art.

Act. HOPE *et* OLIPHANT.—Alt. NICOLSON, JUN. *et* RUSSEL.—Clerk, HAY.

Fol. Dic. v. 1, p. 213. *Durie*, p. 95.

No. 35. [3212] LORD CRANSTON RIDDEL *v.* RICHARDSON. July 1, 1637.

Found, that a father on deathbed cannot make any provision in favour of his children, although unprovided, which might burden the heir with payment, and that the maxim was universal for all, as well children as strangers.

Umquhile Sir Robert Richardson of Pencaitland, having given a bond in favours of his second son, "obliging him and his heirs to pay to the said second son, 8000 merks for his provision, and portion-natural, and for help of his living," which bond being made by him, he then being sick of a palsy, whereof he lived a year and an half after the date of the said bond, which being desired to be reduced at the instance of the heir of the maker, viz. his eldest son, and at the instance of the Lord Cranston Riddel, to whom the said heir had sold the lands, whereto he succeeded by his father, and so as he whose lands might be distressed upon some pretext, through the said bond, upon this reason, that the said bond was null, being made by the defunct upon his deathbed, to the prejudice of his heirs. And the defender alleging, That this bond being granted by the father to his lawful bairn, who had no other benefit provided to him by his father, and who had no other thing to succeed to by his decease, neither moveable nor immoveable, but this bond, it ought not to be found under the compass of this reason, as a null deed, specially where the maker lived so long after the date thereof, and continued in this lent-sickness, which sickness cannot be found, and was not of itself of the nature of *morbus santicus*, and which is not *impedimentum rebus agendis*, and which cannot be an impediment to hinder the father, to provide his children to their natural portions, according to his estate ; at least the quantity for which it may be sustained against the heir (there being no other moveables pertaining to the defunct the time of his decease) ought to be modified and determined by the Lords ; for the which quantity so to be modified, the bond ought to be sustained, and ought not to be re-[3213]-duced *in toto* ; for albeit persons on deathbed may not burden their heirs, yet the mind of the law is, that they cannot do such deeds as may take away the heritage from them, which ought to be understood to take it from them directly, and to give it to a stranger ; but that they may not provide a *legitime* to their own bairns, they being then of sound judgment, albeit in sickness, and therewith to burden the heir, where the heritage is not thereby evicted, albeit it may be thereby something burdened for so just a cause, ought neither to be found the meaning of the law, nor maxim adduced in this reason ; and it is against the law of God, of nature, and all reason, to find that the father, even on deathbed, may not do such a deed, as to provide his bairns, who were destitute of help, and that one should have all. The Lords repelled the allegiance, and sustained the reasons ; for they found, that the father on deathbed, could not make any provision in favours of his bairns, albeit unprovided, which might burden the heir with payment thereof,

and that he could do nothing, but in so far as he might do in his own part in belonging to him, in so far as concerned his moveables, and that the maxim was universal for all, concerning bairns alike as any other persons whosoever ; and found that no modification ought to be made.

Act. ADVOCATUS.—Alt. STUART.—Clerk, HAY.

Fol. Dic. v. 1, p. 213. Durie, p. 847.

No. 36. JACK v. POLLOCK and RUTHERFOORD. February 23, 1665.

Husbands *in lecto* are not hindered to give liferents to their wives, otherwise unprovided.

Marion Rutherford married David Clerk, and had no contract of marriage with him, but he having acquired a little ruinous tenement, took it to her and him in conjunct-fee, and in the time of the plague, he provided her to the annualrent of 500 merks. His heirs raise reduction of the provision, as being *in lecto aggritudinis*, after he had kept his house upon suspicion of the plague, of which he died. It was alleged for the said Marion, That keeping the house upon suspicion of the plague could not be as *in lecto aggritudinis*, unless it were proven, that he was infected with the disease before the provision was granted. 2dly, Even in that case, defuncts are not hindered to give liferents to their wives, for which there is a natural obligation, according to Craig's opinion.

The Lords repelled the first allegiance, but found the second relevant, in so far as might extend to a competent provision to the wife, and therefore, having examined many witnesses *hinc inde*, upon the estate of the husband, and the tocher and frugality of the wife, and finding his means did consist in a tenement worth 500 merks by year, beside that inconsiderable tenement, wherein she was infet, they restricted her annualrent, which came to 300 merks, to £123, which was about the terce of the tenement, albeit terces of houses within burgh are not due.

[3214] In this process, the wife and her second husband, and having repaired the other little tenement, which was ruinous, and built it much better than ever it was ; for which they pursued for the reparations.

The Lords found, that they ought to have the reparation decerned, not only in so far as is necessary, but *in quantum*, the heir will *lucrari*, by getting greater mail to be paid at the wife's death, she leaving the tenement in as good case as now it is.

Fol. Dic. v. 1, p. 213. Stair, v. 1, p. 275.

No. 43. [3219] EDMONSTON v. EDMONSTON. July 20, 1706.

A party, who by a contract of marriage, was bound to provide the children in a certain sum, having granted a bond of provision on deathbed to one of them, for a sum something less than the due proportion, but making no mention of the contract of marriage, the Lords repelled the defence of deathbed, and sustained the bond of provision.

The deceased James Edmonston gives a bond of provision to Catharine, his daughter, for 5000 merks. She and Mr. Steven Oliver, her husband, pursue James Edmonston, her brother, for payment.—Alleged, He has raised reduction [3220] *ex capite lecti*, his father having died shortly after granting it.—Answered, Imo, There is a natural obligation on parents and brothers to provide their children and sisters : This is sufficient to support the bond, it being moderate and alimentary, though on deathbed ; 2do, This has an anterior onerous cause, viz. her mother's contract of

marriage, where 20,000 merks are provided to the heirs and bairns of the marriage, whereof these are only three; and so 5000 merks are less than the proportion of that sum.—Replied, Whatever might have been pleaded, if this bond of provision had expressly related to the contract of marriage; yet here is a simple and absolute bond without mentioning the contract; and the bond being null as *in lecto, quod nullum est nullos sortitare effectus*, and cannot be supported by a cause to which it noways relates; 2do, The contract of marriage is fully implemented, seeing the bairns of the same marriage gets it, he being the son and heir thereof; and it is alike if any of them enjoy the provision; seeing parents, by their power of division and distribution, may give it to any of the bairns procreate of that marriage, he not going out of that line, nor taking in bairns of another bed.—Duplied, When a deed on deathbed can be ascribed to a cause, *ab ante*, preceding his sickness, there law sustains the deed, though it does not expressly mention it; and it is all one as if there were a pursuit intented upon the obligation of the contract, to give her a share of the 20,000 merks, as a bairn's part of gear, being a child of the marriage; and so, without multiplying processes, may be admitted by way of reply, *ad finiendas lites*; 2do, Though he be the eldest son of the marriage; yet his succession is not by virtue of the contract as heir of provision, but as heir of line.—Triplied, Law requires things to be done *habili modo*; but here the defunct *non fecit quod potuit*, in making the bond relate to the contract and its obligation, *et fecit quod non potuit*, by granting a simple bond *tempore inhabile* when on deathbed.—The Lords remembered, that they had lately sustained Carnegie of Kinfaun's obligation as a sufficient exercise of his faculty and reserved power, though it bore no express relation thereto; and therefore they, in this case, repelled the reason of deathbed, and sustained the bond of provision, in respect of the antecedent obligation in the contract-matrimonial, though not mentioned therein. See FACULTY.

Fol. Dic. v. 1, p. 214. Fountainhall, v. 2, p. 344.

No. 44. JANET COWIE and MR. DAVID HARDIE, her Husband, for his Interest v. WILLIAM BROWN of Seabegs, JANET COWIE, and Others. July 22, 1707.

A person's moveables, notwithstanding of gratuitous rights thereof made on deathbed, found liable both to the payment of a debt due by him to his heir, and for the heir's relief of the defunct's other moveable debts, and these rights found reducible *ex capite lecti*, in so far as prejudicial to the heir *qua talis*, or as creditor.

John Cowie of Bothkennar having granted, for love and favour, to William Brown of Seabegs, Janet Cowie, and others, respective, a discharge and some [3221] assignments of some moveable debts due to him; Janet Cowie, as one of the five heirs portioners of the said John Cowie, her brother, and as creditor to him in 500 merks, raised reduction of the foresaid gratuitous deeds *ex capite lecti*, with a conclusion of declarator, That notwithstanding thereof, the granter's moveable goods and gear are liable to be affected, both for payment of the debt due by him to the pursuer, and for the pursuer's relief of the other moveable debts to which she might be obnoxious as heir.

Answered for the defenders, 1mo, The pursuer, as creditor, cannot be heard to reduce, except upon the act of Parliament 1621, about deeds *in fraudem creditorum*, which cannot take place here where the defunct was solvent; 2do, Neither can she reduce, as heir, the rights quarrelled; because they relate only to moveables, and none of them burdening or affecting the heritage, and the old statute in the Majesty forbids only the disposing of heritage without consent of the heir; which, by the rule of *inclusio unius, &c.*, argues, that men are at liberty, even upon deathbed, to do what they please with their moveables, except children be wronged of their legitim, or a relict of her share, which is not the case.

Replied for the pursuer; The defunct could not, by any gratuitous deeds on deathbed, which are of a testamentary nature, prejudice the heir, or any of his own lawful creditors; for, 1mo, The moveables of the defunct ought to be burdened and affected with his moveable debt, and he could not dispose of his moveables, except in so far as

they were free ; it being a maxim in law, That *bona non sunt nisi debitis deductis*, and decided, Lady Colvil *contra* Lord Colvil, *voce* SUCCESSION. The pursuer needs not resort to the act of Parliament 1621, she being founded in the common law, whereby legacies can only be of the defunct's free moveables, and if more be legated, they suffer proportionable abatement. It is not a good defence against all gifts on deathbed, that *debita excedunt bona*, which evinceth that debts are not thereby to be prejudiced. So the Lords found, that a special legatar could not pursue the debtor, till the executor was called, lest the debts should exhaust even the special legacy, Forrester *contra* Clerk No. 36, p. 2194 ; 2do, The pursuer has right as heir to crave it may be declared, that no deed on deathbed can directly or indirectly burden or affect the heritage ; and if persons who have considerable moveable debts were allowed to exhaust their executor by gratuitous deeds, it were easy to evacuate the law of deathbed by exposing the heritage to be swallowed up by the moveable debts.

Duplied for the defender ; The cited decisions are not to the purpose ; for though legacies be affected with the burden of debts ; deeds *inter vivos*, though granted on deathbed, are not ; 2do, Though the heir is to be relieved by the executor of testamentary deeds, that relief is not to be extended to deeds *inter vivos*, though made on deathbed ; for how can the executor's obligation to relieve the heir, which commenceth but after the defunct's decease, operate *retro*, to reduce an assignation or discharge granted by the defunct to third par-[3222]-ties. True, bonds granted upon deathbed are reducible when they come to affect heritage ; because thereby the law is directly eluded : But here the heir is left only under debts contracted by her predecessor in *liege pousie*, by the withdrawing some moveable subjects from her relief, which is a different case.

The Lords found the defunct's moveables, notwithstanding of the discharge and assignations on deathbed, liable both to the payment of the debt due by him to the pursuer, and for the pursuer's relief of other moveable debts, to which she might be obnoxious as heir ; and found the foresaid deeds reducible *ex capite lecti*, in so far as the same prejudice the pursuer as heir or creditor. *Forbes*, p. 187.

No. 47. [3224] WILLIAM M'KAY, and ELSPETH his Wife v. THOMAS ROBERTSON.
January 12, 1725.

A bond secluding executors cannot be disposed of upon deathbed.

Thomas Robertson, merchant in Inverness, became debtor in a bond for 3000 merks, to William M'Wirrich and his heirs, secluding executors. John M'Wirrich, only son to the said William, made up a title to the bond, by serving heir in general to his father ; and thereupon charged Robertson the debtor, who suspended. Thereafter upon deathbed, he conveyed this bond, by a testamentary deed, in favours of his mother, and William M'Kay her husband, the present pursuers ; who being confirmed executors to the defunct, insisted against the debtor Robertson for discussing the suspension.—It was objected, " That the pursuers had no sufficient active title by their confirmation as executors, the bond charged on being heritable, secluding executors " : To enforce which it was pleaded, 1mo, That formerly all bonds bearing annualrent were heritable, whether in the person of the original creditor or his heirs ; and could only be transmitted by a service. The 32d act, Parl. 1661, declares all bonds bearing annualrent moveable, except in these cases following, viz. " That they bear an express obligation to infest, or that they be conceived in favours of heirs and assignees, secluding executors ; in either of which cases, ordains the sums to be heritable, and to pertain to the heir." Here there is a general alteration of our ancient law with respect to bonds bearing annualrent, with an exception [3225] from that alteration ; so that in the cases excepted, the former law continues in its full vigour as if no alteration had been made ; and therefore it clearly follows, that bonds secluding executors are simply heritable, without regard in whose person they exist, equally as bonds with clauses of infestment ; 2do, In this bond there is a destination of succession, *sciz.* to the creditor's heirs, secluding his executors ; for it is not conceived to the creditor and his heir, but to the creditor and his heirs ; and therefore, till this destination be altered in a legal way,

the bond for ever must descend from one heir to another, because *heres heredis mei, est heres meus*. But this alteration could not be made upon deathbed, or by way of testament; in both which views the pursuers, as executors confirmed to the defunct, can have no right to this bond.

Answered to the first, A bond secluding executors, though it go to the heir, not to the executor, is not for that reason in its nature heritable; for these questions are perfectly distinct, "What rights are in themselves heritable and moveable? And what go to heirs in opposition to executors?" This last is a *quæstio voluntatis*; the other independent of any man's will; for though a proprietor has it in his power to make his rights descend from him in any channel he pleases, he has no power to alter the legal essence and nature of them. Thus then, as bonds bearing annualrent are made simply moveable after the act 1661, they cease not to be so, though having clauses secluding executors; and when the act mentions bonds secluding executors as an exception, it is not with an intention to continue them simply in their nature heritable, but only to make them pass to the heir, according to the destination of the creditor. Hence it is that a bond secluding executors, though it would go to the creditor's heir by virtue of that clause, yet if the creditor assign the bond, it goes to the assignee's executor by virtue of the legal succession, unless the contrary be expressed; which is a demonstration, that it is in its nature, and by the law, moveable; for did it continue heritable, as before the act, it would infallibly go to the assignee's heir, as bonds bearing annualrent did before that time. To the second, answered, That this bond was indeed heritable in the person of the first creditor *destinatione*; but having devolved into the person of a successor by service, it became moveable, so as to fall to the heir's executors. The reason is, that when a moveable sum, contrary to its nature, is made *destinatione* heritable, that destination not being intended as a continued tailzie to heirs, but only a provision for the first heir of the creditor; the destination coming to be satisfied by an heir once existing, the sum thereafter returns to its proper nature of a moveable subject. But granting even such a destination to heirs, as is contended for, the pursuers title falls notwithstanding to be sustained; for where a subject, in itself moveable, the case of bonds bearing annualrent, comes to be tailzied to heirs, it ceases not to be moveable in its nature, and therefore capable to be disposed of in testament and upon deathbed. Thus a bond granted to a creditor, "which failing, to Titius; which failing, to Mævius," &c., will as effectually exclude the executors, as a bond expressly excluding them; and the [3226] right too must be made up in the person of the substitutes by a service; and yet the creditor, or any of the substitutes, may dispose of such bond by way of testament. Neither is it in law considered as any other way heritable, but as to the form of establishing the title; and why it ought not to be so likewise in bonds secluding executors, when once come in the person of the successor, no solid reason can be given; for as Sir James Stewart observes, *voce* BOND HERITABLE, p. 17, *versus finem*, "There is a great difference betwixt heritable and moveable, and testible and intestible; and some subjects may befall to the heir, and be carried too by service, and yet the creditor or the substitute may test upon the same."

Replied for the defender; Were it even true, which will not be allowed, that bonds secluding executors, are in their nature moveable, and consequently conveyable by testament; the pursuers will still be cut off by the law of deathbed. For if any moveable subject by a tailzie be appointed to go to heirs, the proprietor upon deathbed, has no more power over this moveable subject, than if heritable; because in no case can a man prejudice his heir upon deathbed; and this the pursuers will never get over. See February 1722, Maxwell *contra* Neilson of Barncailly, No. 13, p. 3194.

"The Lords sustained the objection."

Fol. Dic. v. 1, p. 213. *Rem. Dec.* v. 1, No. 53, p. 103.

No. 64.

[3248] KER v. KER. December 9, 1676.

A deed not delivered till the party be *in lecto* is reducible.

Janet Ker as heir to John Ker her grand-sire, pursues reduction of a disposition granted by the said John in favours of Ninian Ker, son to Patrick Ker his second son,

of a tenement in Rothsay, on this reason, that albeit the disposition bear date seven years before the disponer's death, yet it was no delivered evident, till the disponer was on deathbed, and doth not contain a clause to be valid, though not delivered during the disponer's life, or *liege pousie*. This reason being found relevant, and admitted to probation, there were only two witnesses which knew any thing, the one Gilchrist, a notary, who depones, that two or three days before the defunct's death he delivered to him this disposition, and desired him to draw two disposition of the same tenor of the equal halves of the tenement, the one in favours of Patrick Ker his father to Ninian, the other in favours of Janet Ker, daughter to his eldest son deceased. And for that effect he subscribed two blanks, which were filled up after the defunct's death, and delivered to John Kelburn by his order; which two dispositions are now produced. John Kelburn depones, that John Ker delivered to him the disposition to Ninian seven years before his death, and that three days before his death he called for the same, which Kelburn having put in a chest of the defunct's, some days before he took it out thereof, and brought it to the defunct, who delivered it to Gilchrist the notary, to frame other two dispositions by it. There is also produced an act in process of exhibition before the Bailie of Rothsay, bearing, that Kelburn being pursued to exhibit the disposition to Ninian, did depone that he had received it from John Ker, for the behoof of Ninian his oye. At the advising of this cause, it was alleged, that the reason was sufficiently proven, two witnesses concurring, that Ninian's disposition was in the disponer's hands on deathbed, and one of them only deponing that it was delivered to him of before. It was answered, 1mo, That this being a disposition in favours of an oye, it is valid without delivery, the good-sire's custody being the oye's custody. 2do, That this writ was only delivered on deathbed, is not proven, because Kelburn, one of the two witnesses, depones it was delivered to him of before. The pursuer further alleged; that suppose it were proven that the disposition was delivered to Kelburn in *liege pousie*, yet Kelburn did not depone in the process, on what terms it was delivered to him; and therefore *quod est verisimile præsumitur*, that John Ker gave him [3249] the disposition in keeping, not to incapacitate himself to recall it, otherwise he would have given it to his son Patrick, Ninian's father, which is further confirmed, Kelburn giving it back at John Ker's desire, which had been a breach of his trust, if it had been delivered to him in place of Ninian, to make it an irrevocable right, which cannot be presumed. And as for the act of Rothsay, it was by collusion, and it does not appear that Kelburn subscribed his oath, but before the Lords, though it was most proper to the purpose, neither doth it express what was said to him by John Ker, when he gave him the disposition, and the deponing that it was to Ninian's behoof, may be his conjecture. It was answered for the defender; that writs in favours of children, require no delivery; and though this be a grand-child, and not of the family, yet any delivery is sufficient, unless it had been expressly qualified on these terms, to be re-delivered to the disponer at any time in his life, and even in that case deathbed excluded any alteration, the law having presumed that defuncts are then weak, and therefore disabled them to do any deed, not only in prejudice of the heir, but of the wife and bairns. 3tio, There is no alteration made, but the subscribing of blank papers, in which nothing was written, till after the defunct's death. 4to, Ninian's disposition is not simply recalled, but *qualificata et ad specialem effectum*, viz. to divide the right betwixt Patrick and the pursuer Janet, who therefore can only claim right to the half.

The Lords found that it was not proven that this disposition remained an undelivered evident, till the disponer was on deathbed; but found that the issue depended upon the terms of the delivery to Kelburn, that if the deliverer exprest that it should be at his call, he might recall it even on deathbed, not being in prejudice of his heir, his wife's third, or bairns part; and therefore ordained Kelburn to be re-examined in their presence, whether John Ker delivered to him the disposition, without saying any thing; or whether he exprest that it was to be kept for, and delivered to Ninian, which they found relevant to make it a valid right in favours of Ninian; but if a power to recall were exprest, reserved to themselves to consider, whether the revocation being in favours of Patrick and Janet, their rights would thereby stand; or, if nothing were exprest, whether the terms were to be presumed, that the disposition should be in the disponer's power to recall it during his life, or it should be irrevocable, as simply delivered.

January 25, 1677.

A deed not delivered is in the absolute power of the granter, and therefore cannot prevent him from executing contrary deeds on deathbed.

In the competition betwixt these parties, wherein there is an interlocutor observed before upon the 9th of December 1676; John Ker having disposed a tenement first in favour of Ninian Ker his oye, by Patrick Ker his second son, and having delivered the disposition to John Kelburn, and nothing appearing upon what terms, or what he had exprest when he delivered the disposition, nor any time thereafter till he was on deathbed, at which time he called for the disposition from John Kelburn, which he brought to him, and he did then deliver the same to M^r Gilchrist, a notary, and subscribed two blank papers, and ordered him to fill up both dispositions according to the first disposition, the [3250] one in favours of Patrick the son, of the one half of the tenement formerly disposed to Ninian, and the other in favours of Janet, only daughter to umquhile John his eldest son; this being the matter of fact appearing by probation;

The Lords found, that the delivery of a gratuitous disposition, not being delivered to the party it whose favour it was granted, or to his father, or to any other whose custody might be held as the custody of Ninian who was a pupil, but being delivered to Kelburn a stranger, without expressing that it was to the behoof of Ninian, or to be kept for him, or delivered to him when he came to age, neither yet being delivered to Kelburn on these express terms, till it were called for by the disponent, that therefore the condition and terms implied and presumed by the delivery, as aforesaid, did not so far complete Ninian's right, as that the disponent might not recal his disposition, but that the disponent's trust was presumed to be, to re-deliver the disposition to the disponent, if during his life he called for it, and if not, to deliver it to Ninian after his death; and therefore found that the disponent might, and had recalled it, and that if he had recalled it simply, the new disposition on deathbed would not have been effectual against Janet his heir, but having recalled it *specificate*, and *ad qualificatum effectum*, to give Janet the heir the half, and Patrick the other half, they therefore sustained the two dispositions, though subscribed *in lecto*, seeing the heir, the wife and bairns are secured by the law *de lecto*, but a disposition revocable to any other person might be recalled effectually *in lecto*, neither could the heir quarrel the qualified revocation, but behaved either to accept of it *in toto*, as it was, or to reject it *in toto*, and thereby get nothing, the first disposition remaining effectual, which being in *liege poustie*, did absolutely exclude the heir. *Fol. Dic. v. 1, p. 215. Stair, v. 2, pp. 474 & 499.*

No. 67. [3255] DAVIDSON v. DAVIDSON. November 17, 1687.

A father took an estate to himself in liferent, and his eldest son in fee, with a reserved faculty to innovate in *articulo mortis*. A deathbed deed in favour of his second son was reduced.

The case of James Davidson v. Mr. Alexander his brother was debated. Mr. Alexander Davidson, advocate at Aberdeen, their father, in 1675, acquires the lands of Newton to himself in liferent, and his eldest son, Mr. Alexander, in fee, reserving always to himself an express faculty to alter the said fee, and to dispoise it *etiam in lecto*. Afterwards, being disobliged by his eldest son, he revokes his fee on deathbed, and turns it to a liferent, and dispoises the fee to James the second son. Mr. Alexander, after his father's death, raises a reduction of the second disposition, 1mo, because his wife had married him in contemplation of his estate, and brought a considerable fortune with her; 2do, He could not exerce the reserved faculty, *nisi modo habili et tempore legitimo*, in his *liege poustie*, else that cardinal law of deathbed shall be supplanted by such reservations, which has hitherto preserved our estates sacred and entire against wives, children, and churchmen, and makes us die in quiet. 3tio, The clause *etiam in articulo mortis* takes only effect where the disposition containing that clause is made to an assumed heir, and a stranger who is not *alioqui successurus*, and so must take his right with all the qualities annexed; but an eldest son may

enter *aliunde*, and so it ought not to be exercised against him *in lecto*; else this was to exheredate him *absque elogio*. 4to, A reservation to grant deeds on deathbed must be construed of rational considerate deeds, and not where it is evident he proceeded by passion, solicitation, and suggestion, *aut delinimentis novercalibus*, and that it is *factum inofficiosum contra pietatem*; and they cited these decisions in Stair 25th February 1663, Hepburn, No. 1, p. 3177; 24th July 1672, Porterfield, No. 1, p. 3179; and 7th June 1676, Yeoman, *voce FACULTY*; and Craig, *de feudis*, page 13. Answered to the reasons of reduction, That the law of deathbed is very fundamental; but yet it has its exceptions, where the deed depends on an anterior cause, viz. reserved faculty in *liege pousie* to alter *etiam in articulo mortis*; which certainly may be exercised at any time when he is *mentis compos*; else this were to abridge the parent's power, and stir up their children against them; and that this was clearly decided *supra*, 3d February 1687, Hepburn, No. 66, p. 3253; and the like was found 28th June 1662, Hay, No. 61, p. 3246; and 23d June 1670, Douglas, No. 6, p. 329, observed by Stair; and, in a narrower point, the Lords found a father might alter his eldest son's fee, given him in his contract of marriage, which dissolved within year and day, and bestow it on his second son, Burleigh, *voce HUSBAND AND WIFE*. 2d. Deathbed may be as well dispensed with by a clause, as the not delivery of a writ is dispensible with by a like clause; the one being as great a nullity as the other: And faculties need not be exercised *in forma specifica*; as Stair observes b. 2, t. 3, § 54, and Hop-Pringle, *voce FACULTY*: And we have not the nicety of the Roman exheredations, who behoved either to institute or disinherit, under the pain of nullity of the testament; but, with us, a father may dispone [3256] to any son, *sine querela inofficiosi*, even as by the Roman law he could give the patronage of a slave to any child he pleased: And here Mr. Alexander could not succeed to this estate as heir, because his father was never fiar, and so the inquest could not retour nor answer that head of the brieve, *quod pater obiit ultimo vestitus et satus ut de feodo*. 3tio, The decisions cited meet not; for, in Humby's case, the faculty wanted the clause *in articulo mortis*, and only bore at any time in his life; and in the rest, the heir could repudiate that right, and enter by another title, which Mr. Alexander the pursuer cannot do here: And Craig is speaking of succession to Crowns, and not of private men's successions; being in answer to Doleman, or Jesuit Parson's book against King James's succeeding to the Crown of England. 4to, It was not here an entailed estate, but purchased by old Mr. Alexander's virtue and industry; and the eldest son had proved ungrateful, whereof the father was best judge, and should not be put to prove it; and Christ, in the parable of the labourers, has determined this case, "May I not do with my own as I please; I will give to the last born as much as to thee." 5to, He had homologated this disposition, by pursuing on it since his father had exercised the faculty, and possessing the lands by virtue of it; and he is not totally exheredated; for his father has given him 18 chalders of victual and the liferent; and his wife's portion was but inconsiderable.

The Lords having, on the 24th of November, advised this cause, they found that the father in this case (for they would not generally decide it *in tota latitudine*) could not, by virtue of his reserved faculty, alter and retract his eldest son's fee on deathbed, nor dispone it then to the prejudice of his apparent heir; and therefore reduced the second son's disposition. The President was not clear in this, but the plurality carried it; for they thought, that if these reserved faculties were once allowed to be exercised *in lecto* (which clause was first introduced and advised by Sir Thomas Nicolson, advocate) the good law of deathbed should be evacuated, and that this was *fraudem legi facere*, and so every one hereafter would reserve that power; and though it seemed to restrict parents power, yet such a faculty was rather a snare and prejudice to parents, than a favour, and was not to be desired: And though one, in moveables, should reserve such a power, yet on deathbed he would not be allowed either to wrong his relict's part or bairn's legitim, and even so here by the analogy of law; for no man can reserve to himself, that he shall have then solidity of judgment; without which he ought not to have power; and in Keith's case he was a stranger, and had no other way to bruik the estate, but by the disposition bearing that burden. Yet here Mr. Davidson could not be heir, his father not being fiar.

In Irvine of Drum's case, the like point falls to be debated, but with this difference, that Drum's faculty and power is given him in the King's charter under the Great Seal, which he had exercised in favours of his children of the second marriage, against

his eldest son ; and though *pactis privatorum non derogatur juri publico, et nemo potest pacisci, ne leges in suo testamento locum habeant* ; yet [3257] there is more to say where the King gives and allows the power, than when it is only reserved by the party.

Mutual bills having been given in against this interlocutor, and the same being advised 3d December, the Lords ordained the eldest brother, pursuer, to prove that his father was *in lecto* at the time of exercising the said faculty, by signing the second disposition ; and also, before answer, to prove that he was imposed on, and himself kept from having access to him, and what composure of spirit he was then in ; and also allowed the second brother to prove what acts of disobligeement or ingratitude the eldest had committed against his father, which might provoke him to put this estate by him ; by which last tour, the President brought this case to the principles of equity and justice, and somewhat rectified and corrected the harshness of the first interlocutor.

Fol. Dic. v. 1, p. 216. Fountainhall, v. 1, p. 478.

No. 87. [3305] CLIELAND v. CLIELAND of Faskin. December 5, 1672.

Two witnesses deponing that the person alleged sick was supported when he went to kirk or market, was found to make a full probation, although many witnesses deponed negative that they did not see him supported ; and it was found that domestic deeds were not to be regarded for proving convalescence.

Clieland of Glenhove having no children, disposed his estate to Clieland of Faskin, of whose family he was descended ; his sister's son, as nearest heir to him, did raise a reduction of the disposition, as being done upon deathbed ; and the defender having alleged, that the defunct having had a pain in his legs and feet, did thereby keep the house for many years before he died ; but that he contracted no inward disease when this disposition was made, being two years or more before his death, but at that time he was in perfect soundness of judgment, and of the same condition of health, as he had been for seven years before ; 2do, Though it could be proven that he contracted any sickness, he perfectly convalesced and came abroad unsupported, when he gave sasine upon his disposition, *propriis manibus*, and did oft-times walk about his house, and did play several games at penny-stone, which was an exercise requiring far more strength than going unsupported to kirk and market, and returning, being so short a space, for no man was obliged to walk further than men did ordinarily come upon horseback to the kirk ; nor can it be controverted, that albeit going to kirk and market be the ordinary evidence of convalescence, yet there may be other evidences sufficient ; and that going to kirk and market cannot be the sole evidence of convalescence, as in the case if a person were lame, or had received a hurt in his foot or leg, by a fall, or otherways, that it did not arise from any inward disease. 3tio, The defender offered to prove, that the defunct went to the kirk unsupported. The pursuer answered ; That his reason of deathbed stood most relevant, and was libelled in the ordinary form, viz. that the disposition in question was made after the defunct contracted the sickness, and went never abroad thereafter, until his death ; so that the contracting of his sickness being proven, and his dying before he went abroad, *probatis extremis præsumentur media* ; and as for the allegeance of his health, it is contrary to the libel, and sickness is more positive and pregnant ; neither can the acts equivalent be sustained, unless they were such as were clearly more pregnant to prove convalescence, than going abroad to the kirk in the time of the gathering of the [3306] congregation, or to the market in market time ; but all the acts condescended upon, are but performed before a few persons picked out for that purpose ; and are far less than the acts performed by the Lord Cowper, which yet were not found relevant : And as to the alleged going to the kirk, all that can be pretended is, that the defunct was borne in a chair within a pair of butts or two to the kirk, and did thence attempt to go to the kirk freely of himself, of design to validate this disposition ; for though he lived two years thereafter, he never came out again ; and such attempts of design are most suspicious ; and if they be not perfectly performed, as the law requires, they are of no force ; as in this case, where the going to the kirk was not to any public meeting of the congregation, nor was there either market or market-place : And albeit the defunct might have ridden to the ordinary place where men alight, he

being carried to that place in a chair, is no ways equivalent ; for sick folks, as they are not able to go without help, so they are not able to sit upon horseback without support ; nor doth it import whether the defunct kept the house long before, or after this disposition ; for in a most favourable case, wherein Sir Robert Richardson made a disposition for the use of his children ; after which, though he remained eight months in his house, yet did all his affairs, and had only a palsy in one of his sides, which was not *impedimentum rebus agendis* ; nevertheless the Lords reduced the disposition. No. 34, p. 3210.

The Lords, that they might not give either party the sole probation, did, before answer, ordain witnesses to be adduced for either party, anent the condition of the party deceased, when he made the disposition, whether he was sick or in health, and anent the manner of his going abroad thereafter ; and especially anent his going to the kirk ; and whether he was supported, or whether he walked freely of himself without help ; and there being many witnesses adduced upon either hand, the impression whereof was, that the defunct was not only sore by an extrinsic pain or trouble in his legs or feet, but that the sameness proceeded from inward sickness, whereby he had kept the house for several years before and after the disposition, but that all along he was very infirm, and spoke of himself as a gone and a dying man, and ordinarily sat in a chair, and lifted himself by a pole that was fixed by him, but that he was still sound of judgment and memory, and did his affairs. It was also proven, by the notary and witnesses of the disposition, that he went out unsupported, and gave sasine *propriis manibus* upon the disposition, upon the croft near the house ; and that some time he went to the barn, and to some roan trees about a pair from the house ; and one of the witnesses deponed, he played three or four plays at pennistone with him, but he could not be positive whether before or after the disposition. It was also proven, that he was carried in a chair from his house to a house within two pair of the kirk ; and that he walked from the chair to the kirk, and staid some time there in a house, and returned from the kirk to the chair again, and was carried home therein ; and as to his walking free unsupported, from his chair to the kirk, and back again, several of the witnesses de-[3307]-poned, that they did not know, in regard there was a number of persons about him as he walked ; and several deponed, that he walked freely without help ; and two deponed, that themselves helped him, as he went to the kirk, from a strand which was in the way. Upon which probation the Lords found that the contracting of the sickness, whereof he died, was sufficiently proven, notwithstanding of the allegiances and testimonies as to his health : And they found also, that his going abroad about his house was not equivalent to kirk and market ; but because of the one witness, who proved the playing of several games at pennistone, deponed that the pursuer was one that played with him, the Lords did presently examine Mr. Robert Boyd, who followed the pursuit, and whom the Lords conceived to be understood to be the pursuer, in regard the pursuers named in the process were women, who being examined, he deponed he never played with the defunct at pennistone, but that he heard that the defunct had played at it with others the time he kepted his house, but that was long before the disposition.—The Lords also found, that the manner of the defunct's going to the kirk was not sufficient to infer convalescence, and therefore reduced the disposition.

December 6, 1672.—There was a bill given in by Faskin, containing many allegiances, founded upon the depositions of the witnesses, and the Lords' procedure in the advising, and craving, that seeing the act was only before answer, and that there was yet no litiscontestation in the cause, that the Lords would hear them further ; and that they offered to prove, by witnesses above exception, that the defunct, after the disposition, went with them a mile from his house freely unsupported, which, with the other acts of going abroad, already proven, was sufficient to instruct convalescence.—The Lords repelled the bill without any deliverance, as being upon the matter of testimonies, and advising of the cause, which was improper to parties to allege upon. And it being questioned amongst themselves, whether or not, after probation is closed and advised, and such acts before answer, parties might propound new defences, and crave terms to prove the same ?—The Lords found, that when acts before answer were upon the whole moment of the cause, both anent the libel, the exception of going to kirk and market, and the reply of supporting, and that the Lords had ordained the probation to be before answer, that there could be no new

allegiance or probation more than if it had been in an ordinary litiscontestation; because, the intent of making it before answer was, that there might be in effect a conjunct probation, which form admits not after litiscontestation, and yet was of great importance, as carrying men's inheritance; wherein, if ordinary litiscontestation had been made, the pursuer might have by any two habile witnesses proven, contracting of the sickness, and supporting; and the defender, by any two witnesses, might have proven going to kirk and market; whereas, by this probation, there was none that knew any thing of the affair, but were examined, and thereby the lieges are in much more security; and if, after that new litiscontestation were made, or new probation admitted, it would never be wanting in any case, and would exceedingly vex parties by the length and expense of process; but that the Lords *ex proprio motu*, if any thing occur to them in a dubious probation, for clearing thereof, as they do in all concluded causes, so in this manner of probation they might *ex officio* ordain the same to be adduced. See PROCESS.

Fol. Dic. v. 1, p. 218. *Stair*, v. 2, pp. 126 & 128.

No. 114. [3336] Sir JOHN OGILVIE, and Others v. CATHARINE MERCER, and Others.
December 10, 1793.

A deed reduced as made on deathbed, where the granted survived its execution fifty-nine days and three hours.

Robert Mercer, on 22d February 1791, at eight o'clock in the evening, executed a deed of entail of his lands of Lethindry, in favour of Catharine Mercer his niece, and various substitutes. He died on the 22d April thereafter, betwixt ten and eleven o'clock at night.

Mr. Mercer, when he executed the entail, had contracted the disease of which he died, and he did not afterwards go either to kirk or market.

[3337] Sir John Ogilvy and others, his heirs at law (as representing deceased sisters), brought action against Miss Mercer, and the other substitutes in the entail. for setting it aside, because Mr. Mercer had not survived its execution for the space of sixty days, in terms of the act 1696, c. 4. In defence, Miss Mercer first

Pleaded; The law of deathbed, as being a restraint on that freedom of disposal which is the essence of the right of property, must be strictly interpreted; Tailziour, No. 95, p. 3317. And whatever may have been the case at a former period of society, when perhaps, had it not been for this law, the clergy would have employed their influence with dying persons, in prevailing on them to leave their fortunes to pious uses, to the prejudice of their near relations, and when it was the object of the law to prevent as much as possible the vassal from alienating his benefice without the consent of his superior, Craig, b. 1, d. 12, § 36; *Stair*, b. 4, tit. 20, § 38; No. 113, p. 3333; in the present age, no plea of expediency can be urged in its favour. The act 1696, therefore, though correctory in its nature, yet being highly expedient in itself, ought to receive that interpretation which is most consonant to its spirit, and most favourable to the granter of the deed, for whose benefit it was intended; Mackenzie's Observations, p. 410; 22d Nov. 1748, *Sutherland v. his Father's Creditors*, *voce* HEIR APPARENT.

Now, reckoning from the 22d February, the date of the entail, to the 22d April, the day of Mr. Mercer's death, he lived sixty days after its execution. It is true, the sixtieth day was not complete; but *dies inceptus in favorabilibus pro completo habetur*. This maxim is strongly founded in reason, and clearly established in our law; *Stair*, b. 2, tit. 8, § 34; February 25, 1680, and 7th June 1681, *Weddel, voce* DIES INCEPTUS; *Lady Bangour v. Hamilton*, No. 22, p. 248; *Wilson v. Haddo*, No. 46, p. 647; *Elliot v. Ferguson, voce* MEMBER OF PARLIAMENT; *Telfers v. Ferrier*, *IBIDEM*; mentioned in *Wight's Treatise of Election Law*, p. 221; in the civil law, *Voet*, lib. 44, tit. 3, § 1; *Finn. ad. Inst.* lib. 1, tit. 23, p. 100; lib. 41, t. 3, l. 6 et 7, *ff. de usurp. et usucap.*; lib. 44, t. 3, l. 15, *ff. princip. de divers. temp. prescrip.*; *Grotius* Comment. on Matthew.

c. 12, v. 40, lib. 40, t. 1, l. 1, *ff. de manumissionibus*; and likewise in the law of England Viner, vol. 20, p. 269, *voce* TIME.

It is seldom possible to ascertain with perfect accuracy the precise moment which any given event or transaction took place; and when, in order to make effectual, it is necessary that it should have happened at a particular period, the cast of the balance is *in dubio* to be given where the favour lies. Accordingly, Ulpian lib. 28, t. 1, l. 5, *ff. qui test. fac. post.* lays it down, that if one born on the 1st January make his will on the 31st December of his fourteenth year, at any time after midnight, the deed will be valid, which is, in other words, saying, that the day of birth and that of executing the deed were both to be reckoned in making up the period of fourteen years, the age which the law required in a male before he could make a testament.

[3338] Indeed, it is a general rule in all cases where the period is measured in days, and favourably computed, to avoid fractions, and to hold the parts of the beginning and ending days as whole days, by referring the act from which the period commenced to the first moment of the day, without enquiring at what hour it really happened; and the act, which is the *terminus ad quem*, in like manner, to the last moment; Viner, vol. 2, p. 268.

The "year and day," so often required in our law, was established from the known effect of the maxim *dies inceptus*, &c., as it is universally agreed, that the day is added solely in order to secure the full completion of the year. But this would have been unnecessary, had it not been understood, that otherwise the commencement of the last day of the year would, in many cases, have been sufficient. The act 1696, however, does by no means declare, that in order to have the benefit of it, a person should live part of the sixty-first day; and as the Legislature could not suppose that a man would just survive to a moment sixty full days, the currency of the sixtieth, which happened in the case in question, must be all that is required.

Answered; There is no occasion to resort either to the influence of the Roman clergy, or to feudal customs, to discover the foundation of the law of deathbed. From the most ancient authority in our law, it appears to have been introduced as a protection to dying persons against the artifices of those around them; *Reg. Maj. lib. 2, c. 18, § 7*. Both on this account, therefore, and as preserving the succession to the natural heir, it has been approved of by our most eminent writers; *Dirl. v. LEGITIMA LIBERORUM*; Craig, lib. 1, d. 12, § 36; lib. 2, d. 1, §§ 18, 28; Stair, b. 4, tit. 20, §§ 38, 41, and 44; Macdowall, vol. 2, p. 412, § 17; p. 301, § 32; Erskine, b. 3, tit. 8, § 95; and in judging of defences stated against the plea of the heir, a strict interpretation has uniformly been adopted; Shaw, No. 32, p. 3208; Lord Cranston *Riddell v. Richardson*, No. 35, p. 3212; Spottiswood, *voce* HEIRS, p. 143, 30th July 1635; *Heir of Pencaitland v. Sinclair* (in the Appendix to this title).

Hence acts equipollent to going to kirk and market unsupported, are not admitted as equally probative of convalescence; *Lawrie v. Drummond*, No. 96, p. 3319; *Creditors of Balmerino v. Lady Coupar*, No. 77, p. 3292; *Keirie v. Craigengelt*, No. 100, p. 3321; *Clelands v. Cleland*, No. 87, p. 3305; Stair, b. 3, tit. 4, § 28.

And, for the same reason, the Court have given a rigorous interpretation of what shall be held as going to kirk and market, so as to avoid the objection of deathbed; *Durie*, 7th July 1629, *Maxwell v. Fairlie*, No. 84, p. 3303; *Laird of Luss v. Carden*, No. 89, p. 3310; *Nicol v. Johnston*, No. 88, p. 3309; A. S. 29th February 1692. See APPENDIX.

The act 1696, c. 4, being correctory in its nature, and more particularly as limiting the right of the heir, the exceptions against which, even at common law, are strictly interpreted, must not be extended beyond the strict letter; *Blair v. the Magistrates of Edinburgh*, *voce* DIES INCEPTUS. The de-[3339]-fender therefore, as she pleads upon it, must shew that its condition has strictly and literally taken place, by proving that Mr. Mercer "lived for the space of three score days" after making the entail. But this she cannot do; for whether the time he survived, be computed *de momento in momentum*, or *de die in diem*, it amounts only to fifty-nine days and three hours.

Neither can the maxim *dies inceptus*, &c., aid the plea of the defender, as it applies only *in favorabilibus*; and, in this case, it is not the donee, but the donor and his heir at law, who are the *personæ prædictæ*. Indeed, the maxim itself seems rather to be an exception, than a general rule. It does not apply to obligations, for there the granter may perform during any part of the last day mentioned in his stipulation.

§ 2, *Inst. de verb. oblig.* ; lib. 3, t. 16 ; l. 42, *ff. de verb. oblig.* Nor to prescription ; *Voet.* § 1, *ad tit. de diversis temporal. præscript.* ; l. 6, *ff. de oblig. et action.* lib. 45, t. 1 ; *Voet.* lib. 4, t. 4, § 1, *ad. tit. de minor.* 25, *annis.* ; to which the limitation of the act 1696 is extremely similar, as, in both, a right is lost by the lapse of a definite period.

The cases too in which the rule *dies inceptus*, chiefly applies, are those where some act is to be performed within a year and day ; in which case, the day is added in *majorem evidentiam*, that the year itself is completed, and therefore the running of any part of the day is sufficient ; Mackenzie Obs. on 1661, chap. 62, 1st Parl. Charles II. sess. 1 ; Erskine, b. 1, tit. 6, § 42. And in all other instances where the maxim takes place, there are reasons for it which do not apply to the present question. Thus, if a landlord survive any part of the day on which his rents fall due, his right to them is as complete as if he had outlived the whole ; because it was lawful for his tenants to have paid him at any hour of that day ; 21st February 1609, Lord Merchiston v. his Brothers, *voce* TERM LEGAL AND CONVENTIONAL ; 8th December 1704, Paterson v. Smith, *IBID.* ; see also 22d February 1740, Executors of Mrs. Leith, *voce* DIES INCEPTUS.

Indeed, the statute itself, by declaring that the granter must live for threescore days after granting the deed, excludes any interpretation which is to shorten the *tempus lege præfixitum*. If the Legislature had declared it sufficient that the granter should live for the space of one day after making the deed, the maxim of *dies inceptus* could not surely have applied ; because, if it did, the deed would be valid the moment it was executed ; and, it is equally contrary to the words and spirit of the statute, to render a deed effectual, where the granter has only survived fifty-nine, the law requiring that he should live for sixty days after its execution.

The Lords, after a hearing in presence, ordered memorials. When they were advised,

Two of the Judges were of opinion, That in the present state of manners, the plea of favour lay for the *facultas testandi* ; and that, therefore, the defender was entitled to plead the maxim, *dies inceptus*, &c. ; and that, as the Legisla-[3340]-ture had not adjoined a day to the sixty in *majorem evidentiam*, it was sufficient to validate the entail, that Mr. Mercer had lived till the commencement of the sixtieth day.

A majority of the Court, however, thought that the deed ought to be reduced. It was observed, That in this case it would not be necessary to enter upon the question, Whether the plea of favour was on the side of the heir, or of the donee ? There being no instance in our law, of the maxim *dies inceptus* taking place where time is computed by days. Its operation is strictly confined to cases where time is measured by years, and even then it has place only in *favorabilibus*. Thus, in the *induciae* of summonses, where time is computed by days, it is established, that either the day of citation or the day of appearance must be free. If the statute had indeed declared the granter's living to the sixtieth day sufficient, the defence might have been good ; but it requires, that the granter shall live for the space of sixty days ; and, even counting the day Mr. Mercer executed the deed, as one day, he only survived fifty-eight more. So far, therefore, from its being obvious to a plain understanding, that Mr. Mercer lived sixty days, there is no way to make that out, but by having recourse to violent fictions, contrary to acknowledged facts, viz. by holding the deed to have been executed before it was executed, and Mr. Mercer to have survived his own death.

The Court, 30th May 1793, "sustained the objection to the deed of tailzie, dated the 22d February 1791, That the said Robert Mercer did not live sixty days after the execution of that deed."

And, on advising a reclaiming petition, with answers, they adhered.

Miss Mercer, in the next place, founded on a deed executed by Mr. Mercer, on the 21st day of February ; and so confessedly not falling under the law of deathbed.

By this deed, Mr. Mercer, in the first place, gives the liferent of part of the estate of Lethindy to a natural son ; and, in order to make the grant effectual, he "binds and obliges himself, and his heirs of tailzie and provision, &c., to subscribe and deliver all writs and deeds requisite," &c. He then grants certain annuities, with which he burdens his heirs of entail in the following terms : And I hereby bind and oblige me, and my said heirs succeeding to me in my said lands, to pay the following persons the free yearly annuities after mentioned," &c.

Then follows this clause : "And I do hereby recommend to Miss Catherine Mercer,

who is the first heir appointed to succeed me, to pay to Charles Mercer, residing Meikleour-house, the sum of £100 Sterling, and that at the first term of Whitsun or Martinmas that shall happen next after my death : And further, as James Mercer, writer at East Hatton, has been for this considerable time past employed in the management of my affairs, and in carrying on my business, I do hereby recommend to the said Miss Catherine Mercer-[3341]-cer, and the other heirs upon which my lands and estate may devolve, still to continue him in the management and transacting of the business of my said lands and estate."

It appeared from the evidence of the writer, that both this deed and the other had been prepared in consequence of final instructions received by him from Mr. Mercer on the 19th February ; and that the drawing and executing them had been his business from that day till their execution.

Miss Mercer contended, That this deed afforded her a twofold defence against the reduction, and,

Pleaded ; 1st, The entail of the 22d February, and this deed are parts of the same family-settlement, just as much as if the contents of both had been engrossed in one paper. Now, in questions like the present, the date of commencing the execution of one general settlement, whether contained in one or in separate papers, is to be considered as the date of the whole.

But, 2dly, The deed of the 21st February, taken by itself, is sufficient to exclude the reduction ; because the defender is there expressly declared Mr. Mercer's heir, and any solemn written declaration of the proprietor's intention, though it may not operate as a direct conveyance, is sufficient to create an obligation upon his heirs in law, to give effect to it by an after formal deed ; 13th July 1722, *Kennedy v. Arbuthnot*, *voce VIRTUAL* ; 31st January 1667, *Henderson v. Henderson*, *voce TESTAMENT*. Mr. Mercer, however, in place of leaving his intention to be fulfilled in this manner, carried it into effect himself, by his entail of the 22d February ; and, as these repeated acts show a more deliberate intention than could appear from any one deed, they must greatly strengthen that legal favour which is always due to the deeds of a person rationally disposing of his property, l. 15, *Cod. de test.* (lib. 6, t. 23).

Answered ; The deed of the 21st of February speaks of the defender as already appointed to succeed, and of settlements then made ; it therefore cannot apply to a deed to be afterwards executed. But even if it did refer to the entail, the two deeds cannot be considered as *partes ejusdem negotii* ; as the one is a conveyance of a landed estate, and the other merely a settlement of moveables. And if the alleged intention of the testator in this last were good for any thing, Miss Mercer would take the estate in fee simple, while, by the deed of the 22d, it was conveyed to her under the fetters of a strict entail.

Granting, however, that the two deeds were to be viewed as *partes ejusdem negotii*, that of the 21st February cannot give validity to the entail. It is only in questions of interpretation, in order to discover the true import of a deed, that it is either necessary or legal to consider other deeds relative to the same matter. But the point at issue is not respecting Mr. Mercer's intention, but respecting his power, and therefore the entail cannot be affected by any relative deed.

[3342] Besides, were the two deeds to be held as the same settlement, it could not be regarded as complete, till the date of the last deed, and thus, both would fall under the law of deathbed.

2dly, Heritage cannot be alienated, unless by a deed *inter vivos*, and containing dispositive words. The deed of the 21st February was granted by Mr. Mercer *more causa*, and the signification of all which it is supposed to contain in favour of Miss Mercer, being of a testamentary nature, is altogether ineffectual for that purpose ; 18th January 1764, *Burgess v. Stantin*, *voce FOREIGN*. Besides, the clause in which the defender is mentioned as his heir, was introduced merely historically, and by no means *eo intuitu* of vesting her with that character, and a reference of this sort was never held in our law to be a sufficient *institutio heredis*.

Replied ; Although the entail was made on deathbed, yet the defender, as a *heres facta*, is not entitled to challenge it on that ground. Besides, the entail is to be considered as a restriction of the deed of the 21st February ; and although Mr. Mercer does not there reserve any power of making such limitations, yet he was entitled to do so in the last hour of his life, for the same reason that a person on deathbed, making a deed, without a clause dispensing with the delivery more than sixty days previous

to his death, may deliver it validly, or make a codicil, dispensing with the delivery at any time before he dies.

After hearing counsel on this branch of the cause, it was

Observed on the Bench ; The two deeds are no doubt so far *partes ejusdem negotii*, that both were intended to regulate Mr. Mercer's succession ; and if they contained any doubtful clause, recourse might be had from the one to the other, to get at his intention. But this is a question not of will, but of power. The deed of the 21st February, therefore, if considered as referring to the subsequent entail, cannot possibly support it ; because, in that view, it would form a part of it, and so must stand or fall along with it, being a mere relative deed, according to the maxim, *Nihil intelligitur actum dum quid superesset agendum*.

The Court were unanimous in this opinion ; and a majority also thought that the clause of the deed 21st February was of itself insufficient to convey the estate, both because it was evidently not inserted *eo intuitu* of making a settlement upon Miss Mercer, and because, even supposing it had, the words, "who is the heir first appointed," &c., would not have been sufficient for that purpose, the principles of our law rendering dispositive words essential, unless in the exercise of reserved faculties.

The Court found, That the deed "executed by the deceased Robert Mercer, of date 21st February 1791, is not effectual to convey the lands and other heritable subjects which belonged to Mr. Mercer, in favour of the defenders, or any of them, nor to support the deed of entail executed by him on the 22d of said month of February."

Lord Ordinary, ALVA.—Act. LORD-ADVOCATE DUNDAS, ROLLAND, W. ROBERTSON, ARCH. CAMPBELL, JUN.—Alt. SOLICITOR-GENERAL BLAIR, M. ROSS, TAIT, HAGART.—Clerk, MITCHELSON.

R. D.

Fac. Col. No. 84, p. 181.

[3343] * * This cause was appealed :

The House of Lords, March 1, 1796, "Ordered and Adjudged, That the appeal be dismissed, and the interlocutors therein complained of, be affirmed."

No. 2. [7] ELIZABETH BISSET v. GEORGE and JAMES WALKER. November 26, 1799.

Two sisters who had purchased an heritable subject with their joint funds, and taken the rights to themselves and "the longest liver of them two, their heirs and assignees," concurred in disposing it *mortis causa* away from their heir-at-law. One of them was on deathbed. After the death of the other, who survived three years, without challenging the joint settlement, it was found not reducible *ex capite lecti*, as to the share of the predeceasing sister.

Elizabeth and Margaret Bisset, two sisters, purchased a house, offices, and garden, from their joint funds, and took the rights to themselves, and "the longest liver of them two, their heirs and assignees."

They afterwards, by a joint disposition *mortis causa*, conveyed them to George and James Walker.

At this time Elizabeth was on deathbed. Margaret survived her sister about three years, and died without serving heir to her.

After Margaret's death, Elizabeth Bisset, the niece and heir-at-law of both sisters, brought a reduction of the disposition, on the general grounds of fraud, imbecility, and lesion, and also in so far as related to Elizabeth's share, as being executed on deathbed.

After a hearing in presence, on a proof, the Court (24th May 1799) repelled the whole reasons of reduction as to Margaret's half, and ordered memorials on the objections peculiar to Elizabeth's.

In a petition against this interlocutor, the pursuer argued the whole cause.

On the question of deathbed, she

Pleaded : If the expression "longest liver of them two," had not been in the disposition, a conjunct fee would have been vested in the sisters, of which she would have transmitted her own share to her separate heirs ; Craig, b. 2, d. 3, § Bankt. b. 2, tit. 3, § 113, Stair, b. 2, tit. 3, § 42. The expression in question denotes, that the survivor was to have a total liferent. Each might have buried or disposed of her own half during their joint lives.

The expression "their heirs," in grammatical construction, means heirs of the survivor. And as both parties contributed equally toward the purchase, and there was no preference given to the heirs of the one above those of the other (the criterion fixed by lawyers for deciding cases of this kind ; Stair, b. 2, tit. 3, § 41, b. 2, tit. 6, § b. 3, tit. 5, § 51 ; Bankt. v. 2, p. 337 ; Ersk. b. 3, tit. 8, § 36), both must contribute equally.

Supposing the fee of the whole to have gone to the survivor, still a service was necessary to vest the feudal right in her. She could not in apparen- cy gratuitously dis- pose her sister's share, and cannot by implication be held to have passed on the right of challenge vested in her, and which is now competent to the pursuer. Ersk. b. 3, tit. 8, § 99.

Answered : When a right is vested in two persons, and the longest liver of the two survives, the survivor has not a liferent merely, but an absolute fee in the whole ; 22d Nov. 1627, Lidderdale, No. 39, p. 4247 ; Dict. voce FIAR, January 1673, Archibald Ogilvy, No. 61, p. 4274. So much is this the case, that, though in general, when the subject is vested in a husband and wife, the [8] former is sole fiar, if the expression "longest liver" occur, the wife becomes fiar by survivancy ; 6th Nov. 1747, Riddell, No. 10, p. 4203 ; and the case is the stronger when the subject belongs to strangers.

Independently of the expression "their heirs," therefore, an absolute fee was vested in Margaret merely by survivancy. She came, then, to have the same as which both had formerly ; and as she did not succeed as Elizabeth's heir, a service was not necessary. If the superior had raised a declarator of non-entry, he would have been told, that the fee was full in the survivor.

The meaning of the expression "their heirs," varies according to circumstances. In a case like the present, it means the heirs of the longest liver ; Ersk. b. 3, tit. § 35, 22d July 1739, Fergusson v. Macgeorge, No. 9, p. 4202.

Supposing Margaret to have succeeded merely as her sister's heir, as her share is effectually conveyed, it cannot be supposed that she did not wish Elizabeth to go the same way ; and having lived three years without challenging the disposition, her homologation in apparen- cy excludes the plea of the pursuer ; Ersk. b. 3, tit. § 99, 100 ; Bankt. b. 3, tit. 4, § 42, 31st July 1666, Halyburton v. Halyburton, No. 5, p. 5675.

On advising the petition, with answers, the case was considered to be attended with much nicety. The right of the sisters (it was observed) may be compared to that of trustees, or of a corporation, which transmits to the survivors without a new investiture. Each had an immediate fee in a half, and an eventual one in the whole.

The term "Their heirs," means heirs of the survivor.

Even if a service had been necessary, the right of challenge on deathbed is excluded by homologation in apparen- cy.

The Lords, by a great majority "adhered to the interlocutor reclaimed against as to Margaret's share of the subjects in question ; and likewise found, that, by the surviving Elizabeth, the fee of the whole subjects became vested in Margaret, and was carried to the defenders by the settlement ; and therefore assoilzied the defend- ers."

Lord Ordinary, POLKEMMET.—Act. JA. GORDON.—Alt. D. MONYPENNY.—Clerk GORDON.

D. D.

Fac. Col. No. 144, p. 322.

No. 4. [9] STEPHEN MITCHELL v. MARGARET WATSON. February 3, 1801.

In ascertaining whether the granter of a deed challenged on the head of deathbed, has lived sixty days, the day of its date is excluded, but the day of the granter's death is held to be completed, if he has survived any portion of it.

Hugh Mitchell executed a disposition of part of his heritable property in favour of Margaret Watson, on the 23d May 1799.

He died on the 22d July following.

Stephen Mitchell, his heir-at-law, averred, that at the date of the disposition, Hugh had contracted the disease of which he died, and never afterwards went to kirk or market. He further averred, that Hugh executed the deed about two o'clock afternoon of the 23d May, and that he died about one o'clock of the 22d July.

On these facts he instituted an action of reduction of the deed on the head of deathbed, and

Pleaded: It is settled by the case 10th December 1793, *Ogilvie v. Mercer*, No. 114, p. 3836, that in ascertaining whether the granter of the deed has survived its execution for sixty days, the day of its date is not to be counted. Now, according to this mode of reckoning, Hugh Mitchell survived only fifty-nine days, and a part of the sixtieth; and as the heir is the *persona prædilecta*, the defender cannot take the advantage of the maxim, *Dies inceptus pro completo habetur*; for that maxim has place only in *favorabilibus*.

Besides, the operation of the maxim is precluded by the act 1694, c. 4, which expressly requires, that "the person live for the space of threescore days."

The Lord Ordinary "assoilzied the defender," and his Lordship added the following note to his judgment.

"The above interlocutor is founded on the admission, that the deceased died at one o'clock afternoon on the sixtieth day after executing the deed under reduction, not reckoning the day of its date, so that I apprehend there is of course room for the rule, *Dies inceptus pro completo habetur*.

On advising a reclaiming petition against the Lord Ordinary's judgment, it was

Observed on the Bench: The interlocutor is fully supported by the principles of the judgment in the case of *Ogilvie v. Mercer*, in the House of [10] Lords, of which an account is given in the Dictionary, No. 114, p. 3343, *voce* DEATHBED.

The Lords refused this petition; and a second on the 24th February.

Lord Ordinary, MEADOWBANK.—Act. MAXWELL MORISON.—Alt. M'CORMICK.

R. D.

Fac. Col. No. 217, p. 493.

No. 6. [12] WILLIAM IRVINE v. CRAWFORD TAIT, Esq., W.S., and Others. June 3, 1808.

A disposition having been executed on deathbed, and the heir having died in minority, reduction at the instance of the next heir was sustained.

On the 11th June 1801, Andrew Irvine executed a trust-disposition, or settlement, conveying his whole property to William Irvine, his brother, Crawford Tait, Writer to the Signet, and certain other trustees, whom he likewise named tutors and curators to his son. The objects of trust were, after payment of his debts, 1st, "For the maintenance and education of David Irvine, my only son, until he shall arrive at the age of 21 years complete; whom failing, before the age of 21, and having lawful issue of his own body, for payment to, or division among them, such lawful children as he shall so leave, equally among them, share and share alike. 2dly, I hereby appoint my said trustees, so soon as my said son shall attain the age of 21 years, to denude themselves of this trust, and to convey my whole heritable and moveable subjects in favour of my said son, and pay over what balance shall remain in their hands, upon a legal and

sufficient discharge of their hail intrusions and management. But in case my son shall die before attaining the age of 21 years complete, without leaving issue of his own body, then, and in that case, I hereby appoint my trustees to convert my whole heritable and moveable estate into money, and to make payment of the following legacies to the persons under-written, to whom I leave and bequeath the same, and that as soon as possible after the death of my said son as aforesaid." A variety of legacies are then enumerated, of which several were granted to the trustees and their families.

At the time of executing this deed, Andrew Irvine was in bad health; and he died on the 25th June 1801, fourteen days after it was subscribed, without having been either at kirk or market.

Messrs. Irvine and Tait, and the other trustees, accepted of the trust; and succeeded in the arrangement of the affairs, by selling certain subjects, and by finishing buildings which had been begun by the trustor. William Irvine was active in the management; and received a pecuniary remuneration for his trouble.

[13] William Irvine, the trustee, died on the 27th August 1804; and David Irvine the son of Andrew, having entered into the navy, died in the month of August 1804 in minority.

William Irvine, the eldest son of the deceased William, who now became heir-at-law of Andrew, then raised a process of reduction, on the head of deathbed, for setting aside the trust-deed executed by his uncle Andrew, and under which his father had acted. The trustees raised a process of multiplepoinding and exoneration; and these two joined actions having been advised by Lord Meadowbank, Ordinary, the following interlocutor was pronounced (May 12, 1807): "Finds, that the possession of David Irvine, under his father's settlement, being that of a pupil or minor, did not bar a challenge, of the person who might be heir-at-law to him at his death, of that settlement: Finds, that the actings of William Irvine as a trustee under that settlement while the succession had not opened to himself, do not bar the same challenge, and that even though the person who brings it happened to represent him (which, however, is not alleged in the present case to be the fact), therefore repels the defences; and that the reduction, reduces, decerns, and declares in terms of the libel."

The cause came before the Inner-House by petition and answers.

The argument for the trustees.

1st, The deed having been accepted by David, the immediate heir, and his tutors and curators, all challenge at the instance of a remoter heir is precluded.

The origin of this branch of law is lost in obscurity; but from the earliest accounts it conferred on the heir, *alioqui successurus*, a right to reduce any deeds affecting heritable property executed by his predecessor on deathbed, and to his prejudice. This right, however, might be renounced, either by consenting to the deed at the time of its execution, or by ratification after the grantor's death.

At one time it was even doubted whether, where the immediate heir had died without either approbating or reprobating the deed, challenge was competent to the remoter heir. But such right was at last acknowledged, 21st January 1668, Shaw, No. 15, p. 3196; 16th July 1672, Gray, No. 16, p. 3196.

It was then agitated whether the ground of challenge, competent to the remoter heir, arose from the injury done to himself, or whether he must plead in right of the immediate heir, against whom it was necessary to shew that lesion had been committed; and the Court at one time sanctioned the principle that "the exception of deathbed was competent to remoter heirs, though the deed was not in prejudice of the immediate heir apparent." *Kennedy v. Arbuthnot*, 13th July 1722, No. 17, p. 3198.

But by a series of decisions, the Court have departed from this principle, and required that lesion to the immediate heir shall be established to found a [14] reduction at the instance of a remoter heir, 13th February 1739, Craigs, No. 18, p. 3199; November 1738, Irving, No. 4, p. 3180.

In the present instance, David the immediate heir, so far from being injured, derived material benefit from the deed challenged. It left him the entire disposal of the property, as soon as the law authorised him to exercise such power,—it saved him from the expense of a judicial nomination of tutors and curators; and enabled the trustees to take those measures for the beneficial arrangement of his property, which could not otherwise have been without considerable expense.

The deed being thus beneficial to the pupil, the trustees were entitled in his name

to homologate, and act under it. Such ratification being a beneficial act of administration, is as binding in law as if it had been done by a person of full age. Such a proceeding does not amount to a settlement or alienation of heritage, to which a minor is incompetent, but is an useful act of administration which must validly infer its legal consequences. The trustees were bound to adopt the alternative of repudiation or ratification, and at the same time to consult most effectually the interest of the pupil.

It is impossible, therefore, to establish that lesion has been committed against the pupil, the immediate heir, by the deed challenged; and the ratification of the deed, and possession under it, now preclude challenge. For it has been determined, by the most recent decisions on the subject, "That the institutes in the disposition quarrelled, who were nearest heirs at the time, having attained possession, the same is not reducible at the instance of a remoter heir," 18th November 1740, Hedderwick, No. 5, p. 3180.

2d, William the trustee, the father of the pursuer, and the uncle of the minor, homologated the trust-deed. This William, next to the minor, was *alioqui successurus*; and his acceptance, joined to that of the minor, must remove all ground of challenge. If William, the uncle, had survived the minor, challenge would have been incompetent to him, for he could not have approbated the deed, so far as the nephew was concerned, and reprobated it so far as it contained the substitution. The one provision was as illegal as the other; and both must have fallen or none. To have sustained reduction at his instance would have been to reduce all those dispositions and sales of the heritable property which himself had authorised and subscribed. It is no answer to say, that he had no interest, in respect the succession had not opened to him. His situation is the same as that of a remoter heir of entail, who may challenge contravention; and there exists for this right the same necessity. To wait till the succession devolved, would be to allow the period to elapse during which alone the necessary facts could be proved; viz. that the granter, at the date of the deed, laboured under the disease of which he died, and did not walk unsupported to kirk and market.

Argument for pursuers.

That the minor could not himself homologate the settlement challenged, is indisputable, because "a pupil has no person in the legal sense of the word; [15] he is incapable of acting or even of consenting." Erskine, lib. 1, tit. 7, § 14.

Farther, the possession of the trustees cannot, in law, be held to be that of the minor, because they had a distinct personal interest to support the deed, in as much as, considerable legacies were eventually to arise to them under it. Besides they did not take those measures, by making up tutorial and curatorial inventories, to invest themselves with the character of tutors and curators, which alone could identify them with their pupil, and render their actings his. They acted merely as trustees, in which character they had an interest distinct from that of their pupil. But it was *ultra vires* of the trustees to homologate the settlement, for such a proceeding amounts to alienation of heritage. Accordingly, if an heir ratify a deathbed deed, his creditors are entitled to set it aside under the act 1621, on the principle, that ratification is equivalent to a conveyance. Bank. lib. 3, tit. 4, § 44.

Such being in law the nature and amount of ratification, it was incompetent to the trustees, because they cannot authorise the alienation of a minor's heritage. Erskine, lib. 1, tit. 7, § 33, 8th March 1797, Cunninghame, No. 80, p. 8966.

Even the possession of a wife along with her husband, does not infer homologation or consent on her part in such a case; 16th July 1672, Gray, No. 16, p. 3196.

So likewise in the case of a minor or infant. DEATHBED, Sect. 13, Bank. lib. 3, tit. 4, § 45.

In contemplation of law, the minor suffered lesion by the deed challenged; 1st, From the substitution of stranger heirs, in case he died in minority and without issue; and, 2d, From the distribution of the property among his children, in case of his dying in minority and leaving issue. In one event, his lawful heirs were altogether excluded; and, in the other, their interest was injured by a division of the estate different from that which the law would have declared. Accordingly, such lesion has been recognized in law. DEATHBED, Sect. 2.

Sir George Mackenzie (Treatise on Tailzies) likewise doubts whether a minor can, with consent of his curators, make a tailzie, "in respect that a minor may be justly said to be lesed, in that he wrongs his family and nearest relations."

That lesion against the immediate heir is not required to entitle the remoter to

reduce, and that the latter pursues on the injury done to himself, may be considered to be determined. Erskine, b. 3, tit. 8, § 99; Bank. b. 4, tit. 4, § 34.

And there are several decisions in support of this opinion. DEATHBED, Sec. 13th July 1722, Kennedy, No. 17, p. 3198.

In the last place, nothing has been done by William Irvine to preclude the pursuer. He acted as trustee under the settlement, and not *privato nomine*; and, therefore, that which is essential to homologation is wanting, viz. intention and consent.

[16] But into his intention it is unnecessary to inquire, because, till the death of the immediate heir, any challenge at his instance was incompetent; and there is to be found an instance in which such a challenge has either been made or sustained. Till the death of the immediate heir, he has no interest; he has only a precarious or defeasible right, a *spes successionis*, on which he was not entitled to pursue. An heir of entail is in a different situation; and has a *jus crediti* in the estate, which entitles him to challenge every act which interferes with his right. The pursuer, however, does not in any shape represent William the trustee.

The Court agreed in opinion with the Lord Ordinary. It was observed, that homologation cannot be inferred against a minor, even where acting with consent of his tutors and curators; and in the present case, the introduction of strangers into the succession was lesion, of which the heir was entitled to complain; neither did the acceptance of the trust, and the proceedings under it by William the trustee, preclude him. Homologation implies a right to challenge; and till the death of the immediate heir, the remoter was not entitled to pursue.

The Court adhered to the interlocutor of the Lord Ordinary; and upon advising another petition and answers, adhered (3d June 1808).

Lord Ordinary, MEADOWBANK.—Act. THO. W. BAIRD.—Alt. ALEX. IRVINE.—Agents, JA. GREIG, W.S., and WILL CALLENDAR.—Clerk, S.

J. W.

Fac. Col. No. 48, p. 178.

No. 3. [3346] ADAMSONS v. Lord BALMERINO. June 26, 1662.

An annualrent being payable out of two tenements, which came afterwards into the hands of two different singular successors, it was found, that the annualrenter might uplift the whole out of any one of the tenements, assigning against the other for relief.

Adamsons being infeft in an old annualrent out of two tenements in Leith, and having thereupon obtained decret of pointing the ground in anno 1661, [3347] and insisting for pointing one of the tenant's goods, now belonging to the Lord Balmerino, for the whole annualrent, Balmerino suspends, on these reasons, 1mo, The heritor, against whom the decret of pointing was obtained, and all his tenants, were dead; and therefore it can receive no summar execution against the present heritor and his tenants, but there must be a new decret against them. 2do, Balmerino hath peaceably possessed this tenement 20 or 30 years, and thereby hath the benefit of a possessory judgment, by which his infeftment cannot be questioned without reduction and declarator. 3tio, The English possessed this tenement several years by the public calamity of war; and therefore there must be deduction of these years annualrents, as is frequently done in feu-duties. 4to, The two tenements being now in the hands of different singular successors, Balmerino's tenement can only be pointed for a part of the annualrent. The pursuer answered, That pointing of the ground is *actio realis*, chiefly against the ground; and therefore, during the obtainer's life, it is valued, not only against the ground, while it belonged to these heritors and possessors, but against the same in whosoever hands it be, that the moveable goods therein, or the ground right thereof, may be appraised. To the 2d, Annualrents are *debita fundi*, and a possessory judgment takes neither place for them, nor against them. To the 3d, Though in some cases, feu-duties cease by devastation, that was never extended to annualrents, due for the profit of a stock of money. To the 4th, The annualrent being out of two tenements promiscuously, the annualrenter may distress any part for the whole, in whosoever hands the tenement may be.

The Lords repelled all these defences, but superseded execution for one-half of the annualrent for a time; and ordained the suspender to give commission to Balmerino to put the decret in execution against the other tenements for its proportion, for his relief, *medio tempore*. *Fol. Dic. v. 1, p. 221. Stair, v. 1, p. 114.*

No. 6. [3350] Lord BALMERINO v. HAMILTON of Little Preston. June 22, 1671.

Found in conformity with No. 1, p. 3345.

— Wishart in Leith did grant infeftment of an annualrent of £40 yearly, out of two tenements in Leith, in any part of them; which annualrent by progress belonged to Mr. John Adamson, and after the constitution of the annualrent, the two tenements were transmitted to different proprietors, and now the one belongs to the Lord Balmerino, and the other to Hamilton of Little Preston; the annualrenter did only insist against Balmerino's tenement, and upon an old decret of pointing of the ground of that tenement, hath continued in possession, and distressed Balmerino; who having suspended on this ground, that the annualrent being out of two tenements, whereof he had but the one, he could be only liable but for the one half.

The Lords found that the annualrenter might distress any of the tenements for the whole, but reserved to Balmerino his relief as accords.

Whereupon Balmerino now pursues Little Preston to repay him the half of the annualrent, for which he was distressed, because he having paid, did libe-[3351]-rate Little Preston of the annualrent which affected both tenements, they being now in different heritors' hands, behoved to infer a proportional relief, as is ordinary in all annualrents, constitute upon any barony or tenement which thereafter comes to be divided. The defender alleged absolvitor, because he had bruiked his tenement much more than 40 years before this pursuit, free of any such annualrent; and therefore had prescribed the freedom thereof. The pursuer answered, that prescription was hindered by the annualrenter's possession, in getting his annualrent, which though it had been but by a personal obligation, it would have preserved his right entire to all effects in the same manner, as payment by a principal debtor hinders the cautioner's bond to prescribe, though he were free thereof for 40 years. It was answered, that albeit there might be ground for the reply, where the annualrent is constitute out of one barony or tenement, whereon infeftment may reach the whole, yet it cannot hold in this case, where the annualrent is constitute upon two distinct tenements; and where there behoved sasine to be taken upon both of them, and if omitted upon one, that would be free.

The Lords found that payment of the annualrent out of any of the tenements, saved prescription as to both. See PRESCRIPTION.

Fol. Dic. v. 1, p. 221. Stair, v. 1, p. 738.

No. 22. [3367] SCOTLAND v. BAIRDNER. January 3, 1696.

A person had an infeftment affecting a whole subject. A liferentrix had an infeftment affecting the half, but posterior. The first had also an assignation, but posterior to the liferenter's right. In these circumstances, he was not bound to assign in prejudice of his adjudication.

Philiphaugh reported Mr. William Scotland, the chancellor's chaplain, against Thomas Bairdner of Cultmilne. The pursuer, as assignee by a liferentrix, convenes this defender for his possession of the liferented lands; who alleges, he has right to two infeftments of annualrent, which being preferable to the widow, exhaust the subject. Objected, These annualrents were universal over the whole; whereas the widow's liferent was only out of a half; and the other being sufficient to pay it, they

ought to restrict thereto, at least to assign [3368] the relict to the other half *nemo debet uti jure suo in æmulationem alterius*. Answered, In all infeftments annualrent, *unaquæque gleba servit*, and the creditor may distress any part of the tenement wherein he stands infeft; yet he acknowledges this is not to be used with rigour and judaically, and that the Lords, in such a case, would ordain the annualrenter to assign where he has no prejudice. But if he have another right upon the relict, law will not oblige him to assign to the prejudice of his separate right; and the defender has right to an adjudication on the other half of these lands, and which being posterior to her liferent infeftment, it would wrong his own right to cause him assign and involve him in a plea. Replied, If both the debts were originally his own, might, in that case, protect, cover and defend his lamer right, by extending the preferable one over the whole subject; but if he has acquired and purchased in right, which of themselves are not preferable, it should be in the power of a creditor, at the rate, by an unlawful gratification, to prefer one creditor to another, who would otherwise be clearly preferable to him, conform to the brocard, *si vinco vincentem tunc vinco*, as was determined in the competition among the creditors of Lanton * and Nicolson.† The Lords thought, if he acquired in any such right less preferable *propter rem motam*, after a citation in the multiplepoinding, or after the competition was started, he might be reputed *in mala fide* to make use of such a right, to impede his assigning to the liferentrix; but, if he had got it before, there was no law hindering him to do the same, and to cover it by his better right; and therefore the Lords would not decern him to assign the relict against the other half in prejudice of his adjudication. Then it was contended for the relict, That her liferent was not out of a precise and definitive half, but was general, *unius dimidietatis terrarum et molendinorum*, and so not being restricted to an east or west half, but to an half *pro indiviso* over the whole, and the one half being able to pay this defender the preferable annualrent, she may, without any assignation, recur upon the other half; in which case, he cannot obtrude his adjudication against her, in regard it is long posterior to her right. The Lords thought this a relevant ground to prefer her to the superplus rent after the annualrents were first paid, if her infeftment run in these indefinite terms.

Fol. Dic. v. 1, p. 223. Fountainhall, v. 1, p. 696.

No. 25. [3371] JEAN PITCAIRN, Relict of Mr. JOHN AINSWORTH, Merchant in Edinburgh v. THOMAS HALIDAY, Bailie of Selkirk. December 21, 1710.

The Lords found, where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he has left him only to get his payment out of the debtor's means, he is not obliged to assign, except with a quality and reservation that it should not prejudice his other debts and rights, though posterior to those of the party craving the assignation.

In the poinding of the ground at the instance of Jean Pitcairn, as having right to an infeftment of annualrent effeiring to 1000 merks of principal, granted by James Mitchelhill in his lands of Kingscroft, dated and registered in the year 1704; Thomas Haliday, who had an infeftment of annualrent out of the same lands in anno 1701, and also out of James Mitchelhill's burrow-lands in Selkirk in the year 1700, for the principal sum of £1280, and another infeftment of annualrent out of the foresaid lands of Kingscroft, and burrow-lands in the year 1707, for the accumulate sum of £2000 compared and claimed the whole annualrent of his £1280 out of the lands of Kingscroft, by virtue of his first and preferable infeftment.

Alleged for Jean Pitcairn: Seeing Haliday stands infeft both in the Kingscroft and burrow-lands, if he takes his whole annualrent out of Kingscroft, he [3372] must assign her to his infeftment out of the burrow-lands, to the end she may get payment of her annualrent.

Replied for Thomas Haliday: Seeing he hath another infeftment furth of both

* No. 94. p. 2877.

† No. 92, p. 2876.

lands for the accumulate sum of £2000 posterior to Pitcairn's infetment in Kingscroft, he may take his first infetment subservient to the other, and cannot be obliged to assign it to her to affect the burrow-lands till he get payment of both. For albeit a preferable creditor who having right to poind the ground of several lands for one and the same annualrent, maliciously, without any benefit arising to himself, exacts the whole out of one, to the prejudice of a posterior creditor infet therein, may be ordained to assign the posterior creditor to his right upon the rest, in so far as may extend to the proportion of annualrent that fell to be taken furth thereof, had he poinded all equally; *cum jus civile non indulgeat malitiis*; yet when a person can shew any prejudice he may sustain by doing such a neighbourly office, he may very well say, *Ego me mihi proximus*, charity begins at home, and he cannot be obliged to assign to his own loss, *Nemini enim fraudem facit, qui jure suo utitur*, l. 55, ff. de Reg. Jur. And it was so decided in a parallel case, 11th February 1676, Bruce contra Mitchell, No. 19, p. 3365.

Duplied for Jean Pitcairn: One is not indeed obliged to assign a prior personal right, in prejudice of a posterior competent to him; there being no record of personal rights to certiorate creditors thereof; but since the real burdens upon heritage are patent upon record, a person having an universal infetment cannot *bona fide* acquire any new right in prejudice of an anterior particular infetment competent to another, and therefore if he draw his payment by virtue of the transcendent infetment out of the particular subject affected by that other, *in amulationem vicini*, he must assign to the party so excluded. Otherwise, a debtor granting a general infetment to one creditor, would be obliged to grant general infetments to all: whereas law hath rather encouraged the taking special rights, and therefore introduced special adjudications of lands equivalent to the sums.

The Lords were all clear that an annualrenter might take his payment out of any tenement in which he hath got infetment from the debtor, and that if he get payment out of the debtor's effects, it extinguisheth the security; so as it cannot be assigned to another creditor. But found, That if Haliday receive payment from Pitcairn out of her own means, he is obliged to assign to Pitcairn for a proportionable relief, with this quality, That the same should not be made use of against Haliday's other infetment.

Fol. Dic. v. 1, p. 223. Forbes, p. 458.

No. 27. [3376] Brigadier PRESTON v. Colonel ERSKINE. February 22, 1715.

Creditors not bound to assign, when to their own prejudice.

Brigadier Preston, purchaser of the estate of Valleyfield, at a roup, gave in a petition to the Lords, representing, that he was preferable creditor, or had paid the whole price to the preferable creditors; and therefore craving up his bond, conform to the 6th act, Parliament 1695.

The Brigadier gave in a scheme of the decret of preference, and of the rights acquired by him to the debts preferred, whereby it did appear, that some debts preferred, to which the Brigadier had right, were preferable over the whole estate of Valleyfield. Other rights, which the Brigadier had also purchased, were preferable upon particular parts of the said estate, but did not affect the whole or any other part. And the Brigadier, in the scheme of the payment of the price, did pretend to exhaust the value of the particular lands of Valleyfield, with those rights that were found preferable over the whole estate.

Colonel Erskine objected, and alleged, That these debts that were preferable upon the whole estate ought to be taken off the whole head of the price, whereby the value of every particular part of the estate would be diminished proportionally; which was just in itself, and whereby Colonel Erskine would get a share of the price, and otherwise would be wholly excluded; because, by the Brigadier's scheme, he pretends to exhaust the value of the lands of Valleyfield entirely, by the sovereign rights that go over the whole estate, and leaves no fund to the Colonel, whose diligence affects the lands of Valleyfield. And again the Brigadier pretends to exhaust the price of the other parcels of the estate, by virtue of the preferable debts upon these particular

parts to which he has right, and which parcels are not affected with Colonel Erskine's debts, whereby the Brigadier gets payment of all, and the Colonel wholly excluded; whereas creditors, by sovereign rights over all, affecting any particular part which stand affected with other less preferable diligences, the posterior creditors are entitled to obtain assignations to such sovereign rights, that they may recover out of one part of the estate what they lose in another.

It was answered for the Brigadier; That every creditor is allowed to make the best use he can of his debts and diligences for obtaining his payment, providing it is without emulation of his co-creditor; and therefore it is, that a creditor, having sovereign right over all, cannot *in emulationem* burden any part, to the exclusion of a creditor who has a particular interest in that part, if the posterior creditor is willing to purge and take an assignation to the debt; but, if the preferable creditor upon the whole subject have also other rights upon parts of it, he will not be obliged to assign in his own prejudice, but with a quality that his assignation shall not be made use of to affect the separate subject upon which he hath other rights; for that would be directly to assign against himself. And that is directly the Brigadier's case, for, by some rights and diligences, he is preferable upon the whole subject; and other rights of his [3377] do only affect particular parts. If he should take the value of the sovereign rights of the whole head, there would not remain a fund sufficient to pay his other debts affecting parts of the estate only. Whereas, by taking the value of his sovereign right out of such parts as are not affected by his debts, he operates to his own payment of all, as far as the price goes. And if, by that method, the Colonel comes to be excluded, the Brigadier is sorry the fund falls short. But it is his right to make his preference to the best advantage.

"The Lords found the Brigadier might exhaust the price of any part of the estate by his sovereign rights affecting the whole; and that he might make the best use he could of his rights, providing the same were not acquired or made use of *in emulationem* of the Colonel." *Fol. Dic. v. 1, p. 223. Dalrymple, No. 140, p. 193.*

No. 28. [3378] Sir WILLIAM MENZIES v. Sir JOHN CLERK. July 25, 1716.

A preferable creditor can do no arbitrary deed to prefer one secondary creditor to another.

A disposition being granted by James Clerk, to his brother Sir John, of his lands of Wrights-houses, but qualified with a back-bond, obliging him to denude in favours of the cedent, so soon as he should relieve him of some debts, all mentioned in the bond in which he already stood engaged for him, and pay him such sums of money as he should happen to be resting to him thereafter, or for which he should be engaged. Some years thereafter, Sir John gets also an heritable bond for security of the same sums mentioned in the back-bond, and some others he then was engaged in for him; and grants another back-bond, with a clause of reversion much of the tenor of the former, either of which rights he was to be at liberty to make use of as he thought fit, and then gets himself infeft upon both securities in one day. After granting of which rights, but before infeftment thereon, James Clerk became debtor to Sir William Menzies, whereupon he adjudged not only the lands, but the said back-bond and reversion competent to the common debtor, and stands infeft, but posterior to Sir John's infeftment; and the Lords, in a competition, having ordained Sir John to denude in favours of Sir William upon his purging the above debts, and paying a certain sum in name of expenses, and Sir John having acquired some other debts after Sir William's adjudication, this question came under debate, viz. Whether Sir William should be obliged also to pay these latter debts (whereupon adjudication had also followed), before Sir John were obliged to denude?

And here it was alleged for Sir John Clerk; 1mo, That the foresaid clause (all other sums which James Clerk should be resting to him thereafter) being an express quality and condition of the reversion, he could not be bound to denude till he were also paid of the said posterior debts. 2do, Sir William having adjudged the back-

bond and reversion competent to the common debtor, and [3379] thereby come in his place, he was consequently liable to all his prestations, *tanquam utens jure auctoris*.

Answered for Sir William Menzies, to the first ; That James Clerk having the right of reversion, and that right being carried from him by the creditors' diligence, and thereby stood in their persons, and he denuded, that reversion could never afterwards be burdened without their consent ; just as if a man should dispoise the fee of lands, but with a faculty to burden, if that faculty were adjudged from him, he could never thereafter exerce it in prejudice of the adjudger : For although, before the act 1696, infeftments of relief were valid for debts contracted after the date of the infeftment, yet not for debts thereafter acquired voluntarily ; and therefore the act takes only notice of debts contracted, not of those acquired ; and the reason of the difference is, that, by borrowing, the reverser consents that the lands be further burdened, but the acquiring is only a deed of the creditors ; and, if it were otherways, it were in the power of Sir John Clerk to alter the preference, and to make those debts, which were once posterior, to become preferable, which no diligence could prevent ; whereas creditors, by inhibiting, can prevent further contracting. To the 2d, That, if the creditors are in the same case with James Clerk, then they are in the same case he was in at the time they denuded him of the reversion by their diligences ; and so no burden brought upon the reversion after their diligence can be effectual without their consent.

Replied for Sir John Clerk ; 1mo, That it is not absurd Sir John should have it in his power to prefer one creditor to another, since, if he had not granted the back-bond to the common debtor, the competitor's author, the said competitor's diligence could never have affected the subject ; besides, that there are many cases where debts, that are not so much as really secured, are yet preferable to other debts whereupon adjudication has followed, as particularly in the case of Sir John's own expenses, modified already in this cause, which are found to be a condition affecting the reversion, and that Sir John is not obliged to denude till these expenses be paid.

Duplied for Sir William Menzies ; 1mo, That the expenses is quite another case, because particularly expressed in the back-bond, but not one word of debts afterwards to be acquired. 2do, The expenses were a kind of accessory of the debt, and came in place of the penalties. 3tio, The Lords have decided this matter already in several parallel cases ; 17th July 1706, Sir Hugh Campbell v. the Creditors of Park, *voce PERSONAL AND REAL* ; and 19th January 1715, the Creditors of Hackburn competing. No. 210, p. 1153.

"The Lords found, That, after James Clerk's creditors had adjudged any right competent to him, Sir John Clerk could not acquire any right due by him in prejudice of the adjudgers."

For Sir John Clerk, GRAY.—Alt. ROBERT DUNDAS.—Clerk, Sir JAMES JUSTICE.

Fol. Dic. v. 1, p. 222. Bruce, No. 24, p. 31.

No. 31. [3383] Mr. HENRY RAMSAY v. The BANK of SCOTLAND. June 13, 1729.

A purchaser of an estate who had purchased a preferable debt, affecting both that estate and another, was found to have no claim on the separate estate, but that the debt was extinguished *confusione*.

A creditor, ranked in the second place, did, after the ranking, purchase in the preferable debt, and having these two rights in his person, he became purchaser of the estate at a public sale, and gave bond for the price, payable to the creditors as they were ranked ; the preferable debt purchased in by him, as said is, did not only reach over the lands purchased by him at the public roup, but also over a separate subject belonging to another. The fact was, that the price of the lands, sold publicly, was but sufficient to answer the preferable right ; and therefore, the purchaser, willing to bring his secondary claim within the price, craved payment of his preferable right, entirely out of the separate subject ; which the Lords refused, and found, That the said debt, being in the person of the purchaser of the lands, upon

which it was ranked *primo loco*, which purchaser granted bond for payment the price to the creditors as ranked, the said debt became *eo ipso* extinguished by *confusione*, and could not revive to be a charge upon the separate subject.

APPENDIX.

Fol. Dic. v. 1, p. 224.

No. 40. [3390] GARDEN of Troup v. Dr. GREGORY. February 1735.

A cautioner can reap no benefit from a separate security unless conveyed to him.

A creditor of a tenant's having arrested corns belonging to his debtor in a third party's hand, a cautioner in the tack, who had been forced to pay the tack-duty to the setter's creditors, appeared in the furthcoming, and pleaded preference upon the right of hypothec.—Answered, The right of hypothec was extinct by payment of the rent, the cautioner having demanded no assignation of the same from the setter. Replied, What a party is bound to do, the law holds as done. Here the tack-duty was drawn out of the cautioner's hands by the setter's creditors; so that there was opportunity to demand assignation from the master; the law supplies this, and the cautioner pleads upon his legal assignation.—The Lords preferred the arrester, in respect the cautioner had not an actual assignation from the setter to the tack-duty and hypothec. See APPENDIX.

Fol. Dic. v. 1, p. 227.

No. 48. [3402] THOMAS BUCHANAN and Co. v. JAMES SOMERVILLE. February 1779.

A new company granted bill for a sum due by a former company, of which some of the new company were partners. An obligant in the former debt found no longer liable.

Messrs. Bogle, Somerville, and Co. stood indebted to Thomas Buchanan and Co. in the sum of £97, for different articles by open account.

In July 1776, Somerville sold his share in the company to Jamieson, one of the partners.—The co-partnery contract expired 1st May 1777; on which day the dissolution of it was advertised in the newspapers, and the creditors of the company desired to apply to Messrs. Bogle and Jamieson for payment.—From that time a new company took place, under the firm of Bogle, Jamieson, and Co. consisting of the former partners, with this variation, that Somerville was entirely out, and one new partner assumed.

Buchanan and Company soon after applied for payment of their account to Jamieson, who proposed, that, as immediate payment was not convenient, they should take a bill payable at six months date for the amount of the account.—The creditors agreed; but, understanding that the bill was to be accepted by the old company, drew it upon Bogle, Somerville, and Co. They likewise made out the account in their name, and subjoined a receipt to it in the following terms: "Received their acceptance for the above £108, 17s. Od., payable six months after date, which when paid is in full."

In place of the above draught, the Creditors afterwards agreed to take a bill accepted by Bogle, Jamieson, and Co. for the money.

This bill, when due, was protested for non-payment against the acceptors, who, before that time, had become bankrupt; and afterwards the Creditors brought an action against all the partners of the old company, for payment of their account.—No appearance was made for any of them except Mr. Somerville, the others being likewise partners of the new company, and acceptors of the bill.

Pleaded in defence for Somerville; The debt due to the pursuers by Bogle, Somerville, and Co. was discharged by the pursuers, who took in place of it the bill accepted by the new company;—consequently the defender is not liable.

The pursuers are, at any rate, *in mora*. They ought to have demanded their payment from him at the time the company was dissolved. If they had done so, they could have paid them safely, as the new company were at that time solvent. But the pursuers wilfully postponed their payment, by taking the bill at six months. They give themselves therefore only to blame, that they have come too late, and after their debtors are insolvent.

Answered for the pursuers ; It is a transaction which will not, *in dubio*, be presumed, that a creditor consents to his debtor becoming free, upon another becoming bound. The consent of the creditor to free the original debtor must be clearly established ; and, if circumstances can admit of another construction, it will not be inferred.

[3403] In this case, the pursuers did not give any absolute or unqualified discharge of the account to the partners of the old company on getting the bill. The discharge was only conditional, upon payment of the acceptance received for the amount of their account. If the bill had been paid, the condition would have been purified, and the discharge effectual to all parties. But, as it was not paid, no person is free from the debt who was formerly bound ; and the partners of the old company, to whom the furnishings were made, are still liable.

This transaction did not cut out the defender from any relief against the partners of the new company, which he would otherwise have been entitled to. The claim of the pursuers for payment must have preceded any step taken by the defender for relief. If the pursuers had allowed the matter to lie over during these six months upon the footing of the open account, without taking any acceptance, the defender still would have remained liable ;—yet, in that event, he would have been equally deprived of his relief, as in the case that has really happened.

The Court “ sustained the defences, and assoilzied the defender.”

Lord Ordinary, HAILES.—Act. ILAY CAMPBELL.—Alt. WIGHT.—Clerk, TAIT.

Fol. Dic. v. 3, p. 175. *Fac. Col.* No. 71, p. 135.

No. 10. [3420] Sir WILLIAM BINNY v. HOPE. December 1687.

The Lords repelled the declinator against my Lord Harcarse, that Sir William Binny the pursuer was brother-in-law to my Lord, by marrying his Lady's sister, and was also uncle-in-law to my Lord's Lady, who was then deceased, but had left a child of the marriage behind her ; that relation being only *affinitas affinitatis*, which the act of Parliament extends not to. And the like declinator in another case, against the said Lord Harcarse, that Hugh Wallace and he had married two sisters, was rejected, the Lady being dead. The first declinator was proponed by Sir Thomas Hope of Kerse, and the other by Lord Forrester ; the like will hold as to being witness.

Fol. Dic. v. 1, p. 230. *Harcarse* (PROBATION), No. 806, p. 226.

No. 8. [3436] JOHN FINLAY v. RUDDIMAN. January 28, 1763.

The publisher of a newspaper was condemned in £15 Sterling as damages to a gentleman who thought himself pointed out by an indirect and unguarded expression.

In the Edinburgh *Caledonian Mercury*, dated 17th September 1760, the following paragraph was inserted upon the authority of an anonymous letter from Glasgow : “ Saturday one John Finlay a shoemaker was taken into custody for “ committing a rape on a servant-maid belonging to one of our present magistrates, which, with other bad usage, has occasioned her death. He is a worthless fellow, and it is hoped will receive a punishment adequate to his many atrocious crimes.” The publishers

of this paper soon being convinced that their information was false, published the following article in their paper, 27th of December 1760: "We have reason to believe that several paragraphs of the letter from Glasgow, inserted in our paper of the 17th are groundless; particularly that concerning John Finlay shoemaker. This letter appears to us to have been wrote with a malicious design. We are sorry we took any notice of it; and are making every inquiry that can tend to a discovery of the imposition. In the meantime, in justice to Mr. Finlay, we can assure the public that the above mentioned paragraphs are void of foundation."

[3437] John Finlay, merchant in Glasgow, was a member of the incorporation of shoemakers in Glasgow; and in that character carried on an extensive manufacture of boots and shoes. This gentleman imagining himself to be pointed out by the paragraph first mentioned, brought a process against the publishers for damages. It was clear that there was here no *animus injuriandi* with respect to the pursuer, because 1mo, The designation of John Finlay, shoemaker, could not point out the pursuer, who never carried that designation till he thought proper to assume it in the present process. 2do, The paragraph bears that Finlay the shoemaker was taken into custody, which was not the pursuer's case. And 3tio, The defenders could have no intention to defame the pursuer their good friend, with whom they had a constant correspondence, by sending him weekly their newspapers.

The pursuer urged, 1mo, That the defenders must have had an *animus* to defame some person under the name of John Finlay, shoemaker, and being *versantes in illicito*, that they must be liable for all consequences. The answer was, That they had no *animus* to defame any person, but barely to state a fact as an article of news.

It was urged, in the next place, That they ought to insert no article but where their information can be depended on. It was obvious to answer, that the purpose of a newspaper is to publish facts wherever happening; and such a paper must be extremely defective, if no intelligence be admitted but what proceeds from unexceptionable authority; for the profits of a newspaper will not defray the expense of establishing faithful correspondents in every corner.

When this cause, which concerns the liberty of the press, was advised, it occurred as a matter of no slight difficulty to ascertain the boundary betwixt that liberty which must be indulged to a news-writer, in order to inform or divert the public, and that licentiousness which, without any evil intention, may do mischief. One thing is clear, that the writer of a newspaper is not privileged to communicate to the public any private transaction, however certain his information may be. He must confine himself to what is publicly transacted, and what must spread, of course, without a newspaper; in which case a newspaper has no other effect but to quicken the intelligence. The article challenged is of that nature; for nothing can be more public than a man's being taken into custody in a great city to be tried for a crime. News-writers, however, are not privileged to defame a person by characterising him as a worthless fellow, deserving punishment adequate to his atrocious crimes. This was certainly rash and unguarded, and the less excusable, that such virulent expressions are by no means necessary for carrying on the purpose of a newspaper.

"The Lords accordingly found the defenders liable in damages, and modified the same to £15 Sterling." *Fol. Dic. v. 3, p. 179. Sel. Dec. No. 204, p. 270.*

No. 3.

[3452] E. CASSILS v. SIMPSON. March 18, 1626.

A nobleman left his Parliament robes with his tailor in a trunk. To render the tailor liable, it was found necessary to prove, that the key of the trunk had been given to him, and that he undertook the custody.

The Earl of Cassils, as heir to the deceased Master of Cassils, his uncle, pursues George Simpson, tailor in Edinburgh, for delivery to him, as heir to the said umquhile Earl, of his Parliament robe, which was within a trunk, and which trunk, having the said robe within the same, was put by the said umquhile Earl's servant, at his command, in the said George's dwelling-house, and was committed to the said George's custody and keeping. The summons was not found relevant, seeing it was not therein

libelled, that the key of the trunk, where the said robe lay, was delivered to the defender, and that he took upon him the custody thereof, and to be answerable therefor; without the which had been specially libelled, the Lords found, that the defender could not be convened, nor be found answerable therefor, albeit the summons bore, that the same was put in his house, and expressly was committed to his custody and keeping. For the Lords found, that such persons, as was this defender, being common servants to noblemen, as this excipient, who was his tailor, ought not to be answerable for coffers and trunks, and boxes with writs, and such other wares, pertaining to noblemen, which their servants would set in within the dwelling-house of their merchants, or tailors, at the noblemens' coming, or being in Edinburgh; for they would take the same out, and put the same in again, at their own pleasure, as they had occasion to use the same, without the knowledge of the owner of the house, so that it were great iniquity to burden the master of the house with the same thereafter, except that it could be proven, and that it were libelled, that they had meddled with the same, and done any deed prejudicial to the owners therein.

Act. — *et* NICOLSON.—Alt. MOWAT.—Clerk, SCOT.

Fol. Dic. v. 1, p. 234. *Durie*, p. 193.

No. 1. [3459] PATRICK PARK *v.* NICOL SOMMERVILLE. November 12, 1668.

The act 14th, Parliament 1621, as to playing at cards and dice, found not to be in desuetude.

Patrick Park pursues a reduction of a bond of 1200 merks Scots, upon these reasons, first, Because albeit the bond bears borrowed money, and be in the name of Nicol Sommerville; yet he offers to prove by Nicol's oath, that when he received the bond, it was blank in the creditor's name, and offers to prove by witnesses, that the true cause thereof was, that — Sommerville, Nicol's brother, having win all the pursuer's money he had at the cards, he being then distempered with drink, caused him subscribe a blank bond, for filling up what sum he should win from him, and that this sum was filled up in this bond, which he offers to prove by the oath of Nicol's brother that won the money, and the other witnesses insert; so that the cause of the bond being played money, by the act of Parliament 1621, the winner can have no more but 100 merks thereof; 2dly, Before Nicol's name was filled up, or any diligence or intimation thereof, there was a decreet arbitral betwixt the winner and the pursuer, wherein all sums were discharged; which discharge being by the cedent, to whom the bond was delivered before the filling up of Nicol's name, or intimation thereof, which is in effect an assignation, excludes the assignee.—It was answered for the defender, That he opposed the bond, bearing borrowed money, granted in his own name; and though he should acknowledge that the bond was blank in the name, and that thereby his name being filled up, he is in effect an assignee; yet the bond being his writ, the bond cannot be taken away but by writ or oath of party, and not by his cedent's oath, or witnesses insert, unless it were to the cedent's behoof, or without a cause onerous, as the Lords have found by their interlocutor already; 3dly, Albeit it were acknowledged to be played money, the act of Parliament is in desuetude, and it is now frequent by persons of all quality to play, and to pay a greater sum than 100 merks; 4thly, The pursuer who loseth the money, hath no interest by the act of Parliament, because thereby he is appointed to pay the money; but the superplus money more than [3460] 100 merks, is appointed to belong to the poor; and the defender shall answer the poor whenever they shall pursue; but it is *ius tertii* to the loser, who cannot detain the money thereupon; but whatever was the cause, the defender having received the bond for a cause onerous, and being ignorant that it was for any other cause but true bestowed money, he must be *in tuto*; otherwise, upon this pretence, any bond may be suspected, and the cedent, after he is denuded by witnesses, may take the same way.

The Lord Advocate did also appear for the poor, and claimed the superplus of the money more than 100 merks, and alleged that the act of Parliament did induce a

vitium reale, which follows the sum to all singular successors; and that though ordina the cedent's oath or witnesses be not taken against the writ, yet where there is force, or fault, witnesses are always receiveable, *ex officio* at least, and ought to be in case, where there is such evidence of fraud, that it is acknowledged the bond was bla the creditor's name, when Nicol received it, and the filling up was betwixt two breth and the debtor dwelling in town, did not ask him what was the cause of the bond; that an act of Parliament cannot fall in desuetude by a contrary voluntary ca never allowed by the Lords, but being vitious against so good and so public a law.

The Lords found the act of Parliament to stand in vigour, and that the losert liable upon the same grounds, and therefore ordained the sum to be consigned in clerk's hands; and before answer, to whom the sum should be given up, ordain Nicol's oath to be taken when his name was filled, and for what cause.

Fol. Dic. v. 1, p. 235. Stair, v. 1, p. 561

No. 1. [3465] DRUMMOND v. L. CUNNINGHAM-HEAD. June 26, 1624.

The Lords reduced a bond of caution signed by a minor, though he wanted only tw or eighteen hours of majority.

In an action of suspension betwixt Drummond and Cunningham-head, whos Cunningham-head being charged upon his obligation, as cautioner for Patrick Somme ville, to pay 1000 merks, which being suspended, as being subscribed by him, be then minor, having curators, without their consent; and this reason being elided by answer, That he was major at the date and time of the subscribing of the bond; wh being admitted, it was found by the probation, that he wanted 12 or 18 hours, or at most a day of his years of majority, when he subscribed the bond foresaid, and for th inlake they found the bond null; for the Lords found, That in this, and the like cas the account behaved to be made *de momento in momentum*, for he was born upon th 24th November 1601, and the bond was subscribed upon the 23d November 1622.

The Lords also found, That where a renunciation to enter heir is subscribed by a minor, with consent of his curators, the curators are not restricted to be bound as cautioners for the minor, or otherwise to become obliged for him to warrant that dea and that they are no further obliged, but to consent.

Act. NICOLSON.—Alt. CUNNINGHAME.—Clerk, HAY.

Fol. Dic. v. 1, p. 236. Durie, p. 130.

No. 4. [3468] MARGARET BLAIR v. the TOWN of EDINBURGH. November 11, 1704.

A creditor being required to aliment a prisoner, and no offer of aliment being made, the magistrates set him at liberty on the 10th day at 12 o'clock, alleging that in such favourable cases *dies inceptus habetur pro completo*. The Lords repelled the allegiance.

Margaret Blair pursues the Town of Edinburgh, for suffering Oliver Sinclair, her debtor, to escape out of their tolbooth. Alleged, Absolvitor, because by the 32d act, Parliament 1696, it is provided, that if the creditor, ten days after the incarceration, being required, shall not aliment the prisoner, it shall be lawful for the Magistrates to set him at liberty; and *ita est*, this pursuer being required did not aliment, and therefore the Magistrates did liberate him in terms of the act; for they kept him in till the tenth day at 12 o'clock, and no offer of alimentering being made, they were *in bona fide* to let him out, and in such favourable cases *dies inceptus habetur pro completo*. The Lords repelled the allegiance, and found the days in the act of Parliament were *tempus*

minimum, and to be counted *de momento in momentum*; and they having anticipated the hours, behoved to be liable. 2do, Alleged, That, by this subsidiary action, they should not be decerned for the whole debt in the caption, but only for the sum to which, booking the prisoner in the tolbooth register, she and the messenger had restricted viz. to 210 merks. Answered, That, by the common practice, they used not to set the whole sum for which they were taken, because that made the dues payable to the goodman of the tolbooth, and his under-keepers, very heavy, they exacting a penny for each pound; and therefore, to prevent this, they ordinarily entered them within the debt of the horning and caption to diminish the jailor's fees, and made it out 200 merks; because, by an act of sederunt, 5th February 1675, Magistrates were allowed, where the sum is within 200 merks, to set the debtors at liberty in some cases, without putting them to the expense of a charge to set at liberty; and therefore, marking the sum above that, whenever they get the charge, they arrest them upon the manent debt in the caption, and so hinder their liberation. Replied, On whatever equitable consideration you restrict, we are not concerned; for a Magistrate finding a prisoner entered for 210 merks, if he please he can set him at liberty, and say he will pay the debt himself, and take his hazard; in that case, the creditor-incarcerator could claim no more, neither could he in justice burden him with the rest of the debt contained in the caption, not booked in the tolbooth-records. The Lords found the prisoner could crave no more than the restricted sum, but prejudice to her to insist for the superplus of her debt not booked as accords. 3tio, They craved compensation for the sum of £34 Scots she was resting, and whereunto they had acquired right. Answered, I must have recompensation upon the remainder of the debt in my caption, not allowed me in this subsidiary action. The Lords sustained the recompensation to strike off the compensation craved. Then, 4to, alleged, There was neither penalty nor expenses of process due, *ob penam plus petitionis*, having pursued for more than what you had imprisoned him for. Answered, You must be liable in expenses, because you set me to an act to prove my requiring the [3469] prisoner before the ten days were expired, and I have expended more than all the sum now decerned to me. The Lords considered this was only a pursuit *ex quasi delicto*, for setting the prisoner at liberty, and that they had a probable ground of mistake and ignorance, on a new statute not yet fully interpreted, to think they might liberate at any time of the tenth day if the creditor did not offer to alimnet the prisoner; therefore they assoilzied the Magistrates from expenses; but the Lords thought the jailor's exaction too high and exorbitant, on the sums due. *Fol. Dic. v. 1, p. 236. Fountainhall, v. 2, p. 238.*

No. 34. [3496] ROBERTSONS v. BAILLIE. December 26, 1704.

An executor was not allowed to exhaust the testament by an heritable debt paid by him without distress, he having omitted to do diligence against the heir for his relief.

Gilbert Robertson, in Inverness, by his testament, nominates Jean Campbell his spouse, his executrix. She is afterwards married to William Baillie, commissary of Inverness, who confirms the first husband's testament in the relict's name, and introduces with a considerable moveable estate. Janet and Isobel Robertsons, her daughters, and as nearest-of-kin to their father, pursue their mother, and Baillie her present husband, to count to them for the inventory of the testament. Alleged, It is exhausted conform to a decret of exoneration produced. Objected, That though they allowed all the legacies and testamentary debts, with the privileged funeral charges and medicaments instructed, to be paid, yet she could not exoner herself with an annuity of 400 merks yearly due to Marjory Ross, the said Gilbert's mother, whereof she produced discharges for four years [3499] posterior to her husband's decease, because that liferent annuity was heritable *quoad debitorem*; that is to say, the debtor's heir was bound to pay it, and relieve the executor of the same, and therefore ought not to have been ultroneously paid by her, the executor, without a distress by a process, and decret obtained against her. Answered, The creditor in law has both the heir and executor liable and subject to him, and he may pursue and affect

any of them he pleases, at his option ; only, law has provided recourse to the heir against the executor, where the heir is compelled to pay a moveable debt ; and *e contra* the executor has relief against the heir if he pay an heritable debt ; but this does not hinder an executor to make payment of a true debt, though heritable, without putting the creditor to the charges of a pursuit ; and though it be voluntary, yet they may recur against the heir, as he who is *primo loco* liable for such debts ; as was found 7th March 1629, Falconer *contra* Blair, *voce* PROOF. Replied, This being an annual not accessory or relative to any principal sum, it did not burden his executor, the being *quot anni tot debita*, l. 4, *D. de ann. et menstr. legat.* and was so decided by the Lords, 5th February 1663, Hill *contra* Maxwell, *voce* HERITABLE and MOVEABLE ; and so Lord Stair seems to understand it, lib. 3, tit. 8. However you have neglected to seek relief of this debt from the heir, and therefore can never burden the executry due to *jure sanguinis* therewith, but must take it in your own hand, and operate your own relief as you think fit, having paid it without a sentence, and so exhausted the inventory by partiality and gratification, in preferring one creditor to another, which is unwarrantable. The Lords considered that a sum may be heritable quoad the creditor and fall to his heir, and yet be moveable quoad the debtor, and *primo loco* affect the executry and moveables, *et e contra* ; but here they found the executor paying the heritable debt without a sentence, and having never pursued the heir to make him liable for it, she cannot exhaust the testament thereby, nor get allowance of the same.

Then she claimed a third of the dead's part, as being executrix nominate. Alleged That, by the 14th act 1617, that third is only due to stranger-executors, which the relict is not, but falls to a third of the whole ; and it were unjust to give her likewise a third of the dead's part ; and so thinks Lord Stair, lib. 3, tit. 8, and that stranger-executors get a third for their encouragement to accept, even as the fiduciary heir among the Romans deducted his *quarta trebellianica* ; and in this sense the heir was found a stranger-executor, and got a third as having no proper interest in the executry, —December 1690. Answered, Wives fall their share in their husband's moveables, not *jure successionis*, but rather as a division of the communion of goods now ceased by the dissolution of the marriage ; and Sir George Mackenzie, in his first observation on that act of Parliament 1617, seems to incline to give the wife a third of the dead's part. The Lords having balanced the decisions, and particularly, 29th November 1626, Forsyth, *voce* EXECUTOR ; 9th July 1631, Wil-[3600]-son, *IBID.* ; and 15th January 1674, Paton, *IBID.* ; they found a relict being executrix nominate, had no right to a third of the dead's part.

In the preceding decision the question was, where the creditor died, whether his heirs or executors had right to the money ? In the first branch of this decision, the doubt is just in the opposite case ; the debtor dying, whether his heir or his executor are *primo loco* liable in payment of the debt, and which of them is bound to relieve the other in case of distress ? *Fol. Dic.* v. 1, p. 240. *Fountainhall*, v. 2, p. 250.

No. 42. [3504] CHARLES CASS v. JAMES ELLIES. November 18, 1671.

A curator continuing to intromit after the expiry of the curatory is only liable for his actual intromissions, not for any diligence or omission.

Umquhile Richard Cass having umquhile Patrick Ellies and several other curators, Charles Cass his heir now pursues James Ellies, as heir to Patrick Ellies, for count and payment of his whole rents and estate. In the count and reckoning this point was reported by the auditor ; and it was alleged for James Ellies, that he could not be liable as representing his father as curator, because, albeit his father was nominated by the minor, and that the act of curatory bears, that he was elected by the judge ; yet it does not bear that he compeared, made faith, and found caution, and therefore he was not sufficiently authorised as curator, and could never have pursued action upon that title. It was replied, albeit the curators not making faith, and finding caution, might have been a ground that the minor or other curators might have excluded him from acting, yet he having acted and subscribed several bonds produced as curator, by which the minor gave provisions to his sisters, and which bore expressly, with consent

of his curators under-subscribing ; and the writ bears, " Partick Ellies consents," so that the defunct having acknowledged himself curator, and acted *eo nomine*, the defender his heir can never controvert it, even though he neglected to make faith, and find caution : For he may be found curator passive, as an heir served [3505] will be heir passive, but not active, unless he were retoured. It was answered, that all that is pretended can only make the defender's father pro-curator ; for a vitious or erroneous declaration is not sufficient, where the truth of the thing doth manifestly appear to the contrary ; the act of curatory makes it appear, that there were several curators compearing, making faith, and finding caution, which Patrick Ellies did not, and so was no curator ; and it is above question, that it is not the nomination of the minor that makes the curator, but the authority of the judge proceeding upon a citation of the nearest-of-kin, and a formal process and sentence thereupon, which cannot proceed, unless the curator accept, make faith, and find caution ; so that curators being once established, nothing that the pupil, or any other pretending to be curator can do, can make a curator, but at most he can only be pro-curator ; and though pro-curators be ordinarily liable in the same way as curators, yet it is only where there is no curators ; for if there be curators authorised, as there can be no vitious intromission where executors are confirmed ; so there can be no pro-curators where there are curators authorised ; and the defunct's subscription, as consenting to the provisions made by the minor to the sisters, bearing expressly to be revockable at his pleasure, during his life, it was in effect *donatio mortis causa* ; and neither a testament nor legacy require to be authorised by curators ; nor is an act proper for them. It was answered, that albeit it be true, that curators are constitute by authority of the judge, and upon process ; yet it is as true, that the sentence of the judge is given upon the calling of the nearest of kin, and the minor's nomination, if there be no just opposition ; and doth not depend upon the curator's compearance, acceptance, making faith, and finding caution ; for it is without question, a curator may be authorised though he were absent, but that does not oblige him to accept unless he please, and at any time thereafter he may compear judicially, make faith, and find caution ; or if without these, he act, he is truly curator, albeit he has failed in his duty, in making faith, and finding caution, and upon that ground may be repelled *ab agendo*, by the minor, or other curators, but not by other parties, who had not that interest ; so that the defender's father having directly authorised the minor as curator, he became thereby curator as the rest, at the least from the time of that acceptance. 2do, He is alike liable though he were but pro-curator ; for pro-tutor and pro-curator being but vitious passive titles, may subsist *in odium* of the actor, even where there are tutors or curators ; neither is there any consequence from executors, and vitious intromitters ; because vitious intromission being the most odious and extensive passive title, it is by custom restricted where there are executors confirmed : But pro-tutors or pro-curators, neither were, nor ought to be restricted so, who are not thereby liable to all the minor's debts, but only for diligence in that office, which they unwarrantably assume.

The Lords found, that the defender's father being nominated and appointed by the act of curatory, and thereafter subscribing with the minor, consenting [3506] as curator, was liable as curator passive, though he had neither made faith, nor found caution ; and that he might be liable as pro-curator, albeit there were curators authorised, and that not only for his intromissions, but his omissions, from the time he began to act as curator, or pro-curator. The pursuer further alleged, that the defender having been his curator, continued to intromit with the mails and duties of his lands, some years after his majority, and was liable for these years *in solidum*, having continued to act in the same way, as when he was curator, and therefore being liable to the same duty ; and now after twenty years' time, cannot put the pursuer to prove his several intromissions ; for as tacksmen, after the expiring of their tacks, are liable for the full duty, although it were more than the value of the lands ; and a factor, after expiring of his factory, continuing to meddle ; and a tutor after expiring of his tutory ; are liable for these whole years in which they meddle ; so, for the same reason, a curator continuing to meddle after the curatory is ended, must be liable as before. It was answered, that a curator could not be liable further than his intromission, for years after his curatory ; neither does the parallel hold with tacksmen or factors, for there *per tacitam relocationem*, or *reconventionem*, the tack or factory is prorogate, by consent of both parties, the one suffering, and the other acting ; but

it cannot hold in a curatory, which being a judicial act introduced by law, having definite time in the law, the tacit consent of parties cannot prorogate the same, but the minor must impute it to himself, that did not hinder them; and in that it differs from tutors, who act for pupils, and therefore are obliged to obtain them authorised as curators; neither could the defender be liable as *negotiorum gestor*, for though such is liable for diligence in *negotio capto*, if it be one individual thing, yet not to continue the intromission with the rents of several lands, which have no such connection.

The Lords found that albeit the curator had intromitted before the expiring of the curatory, and had continued to intromit thereafter, that he was only liable for what he intromitted with thereafter, and not for any diligence or omission, unless he had been factor constituted by the minor, or remanent curators, in which case he might be liable for years thereafter, as factor, for diligence.

Fol. Dic. v. 1, p. 242. Stair, v. 2, p. 3.

No. 47.

[3509] M'MURDOCH v. FINDLAY. July 7, 1699.

Co-tutors are not liable for one another's debts.

Whitelaw reported Elizabeth Macmurdoch v. Robert Findlay, tenant in Coatbridge her late tutor. He and Mr. George Campbell having been conjunct [3510] tutors, and Mr. George being debtor to his pupil in 2000 merks by bond, Robert is now pursued to make up that sum for not doing diligence against the said Mr. George before he broke. Alleged, Though the law be strict against tutors, yet it cannot tie them to impossibilities, or to more diligence than they use in their own affairs; and here all looked on Mr. George Campbell as a most opulent solvent person, till he broke by surprise, like a thunderbolt, in 1689, and the Signet and Judicatories not being then open till November, it must excuse him, this not being so much as *levis culpa*, especially considering he, Mr. George, was a co-tutor and trusted by the defunct with the papers, which upon the matter was a dividing of the administration of the tutory betwixt them. See Stair's Instit. Obligations of Tutors, Num. 23, where curators chosen with this quality, to be free of omissions, were approved; and, Smith contra Creditors of Invergelly, *voce* EXPENSES, an article of victual was allowed, being sold to one then reputed solvent, though bankrupt at the time of the compting. Answered, Where a co-tutor is debtor to his pupil (which was expressly forbid by the Roman law), there is the greater obligation on the other tutors to look that he pay the sum, and though they are not debtors nor cautioners for what he owes the pupil, yet they are liable for his mal-administration, and for diligence against him as well as other debtors; and here Mr. George's condition was very suspicious before the Revolution or shutting up of the Signet; and Findlay the co-tutor was certainly *in mora* in not registering the bond, and charging and denouncing thereon, which diligence would have exonerated him. There being several circumstances either aggravating or extenuating urged on either side, the Lords resolved to hear it in their own presence, how far Findlay was bound *in solidum* for Mr. George his co-tutor's obligation to pay.

The cause being heard in presence, 15th November 1699, the Lords found the co-tutor not liable in this case for the other tutor's debt, but only for his administration; and found no negligence on his part, and therefore assolizied Findlay.

Fol. Dic. v. 1, p. 241. Fountainhall, v. 2, p. 58.

No. 59. [3519] THOMAS GARDEN, Merchant in Dundee, and JOHN DONALDSON, Writer there, his Assignee v. JOHN PILMORE, Writer in St. Andrews, and JOHN LINDSAY, Merchant there. January 30, 1724.

A person gave a mandate to his agent to arrest a ship. He having got a bill for the debt, neglected to use the arrestment. The Lords found him liable in the debt.

Robert Balfour, skipper in St. Andrews, was debtor to Thomas Garden in £40 Sterling per bill; for security of which he gave to Garden a bill of bottomry, and also a vendition of five eighth-parts of his ship.

Balfour's ship having come into the harbour of St. Andrews, Garden left the bill of bottomry and vendition in Mr. Pilmore's hands, to be given up to Balfour, upon his payment of the £40, or finding security; and Garden being to go abroad, committed the inspection of that affair to David Brisbane, writer in Dundee.

Brisbane wrote two pressing letters to Pilmore, to take out an admiral precept, and arrest the ship till good security should be got for the £40, and Pilmore in return to these letters wrote to Brisbane, that he had got a bill drawn upon and excepted by John Lindsay, merchant in St. Andrews, for £40, and that thereupon he had sent back the precept unexecuted.

Garden and his assignee brought an action against Pilmore upon his said letter, either to deliver up Lindsay's bill, or pay the £40. Pilmore pretended, that the bill was in John Stark, writer in St. Andrews, his hand; and having got a diligence for recovering it, Stark at exhibiting deponed, that it was deposited by Lindsay in his hands as his doer, not to be delivered up to Garden, until he should make over to Lindsay the security he had from Balfour, both with regard to his person and the ship, for his relief of the sum in the bill.

[3520] Compareance was made for Lindsay, who pleaded, that the bill could not be given up, nor any sentence passed thereon against him, because it was never a delivered evident, but had been deposited in his own doer's hands upon the above mentioned condition, which was now become imprestible, by reason that the ship had since perished.

It was pleaded for Pilmore, that the bill being out of Lindsay's hand, he behoved to prove that it was a depositate deed otherwise than by Stark's oath, and that being once proven, Stark's oath would indeed prove the terms of the deposition. 2do, Even taking it on the footing of Stark's oath, it was evident that Lindsay had bought Garden's right, and therefore he ought to pay the bill, upon Garden's conveying the same; nor could Lindsay be liberate from the bargain, upon pretence that the ship was now perished, because *periculum rei venditæ, etiam ante traditionem, pertinet ad emptorem*. In the next place, Whether Lindsay be liable or not, he Pilmore had done his duty sufficiently; for he could do no more than take such a security as he did, because he had no power from Garden instantly to convey his right, nor could it be expected that Lindsay would give a simple bill till he got such a conveyance for his relief: And further, that Garden had approved of his management, in so far as he took up his papers from him, and gave him a gratification for his service.

It was pleaded for the pursuers, that they were not to enter into the question, whether Lindsay was liable upon a bill so clogged, at least in the management of it, for which Pilmore was to blame: But surely if Lindsay was not liable, Pilmore was; because he had not duly executed the mandate given him by Brisbane, who was Garden's trustee in his absence, namely, to arrest the ship, or, to get good security for the sum; for by good security must be understood not only what is taken from a responsal person, but also what affords *parata executio*. And it is but an affected excuse, that Lindsay would not give his bill in other terms; for if he would not engage purely and absolutely, Pilmore's instructions were plain, to arrest the ship: Garden was under no obligation to Balfour, further than to cancel and deliver up his bill of bottomry and vendition of the ship, which Pilmore could have done (since he had them in his hands) upon getting payment or security for the £40. It was Balfour's business to find out the security, and if he could not prevail with Lindsay to engage simply, then the ship was to be detained by arrestment. In the next place, though Garden was obliged to take up his papers from Pilmore, in order to commence this process, and did pay his account, because he would not otherwise part with them; yet he at the time objected to the article for his pains, and was so far from approving his management, that he protested at the very time against him for cost, skaith, &c., because of his not duly executing the commission to arrest the ship, as appeared from an instrument in Process.

July 16, 1723.—“Upon report of the Lord Polton, the Lords found it proven, That Lindsay's bill to Garden the pursuer was depositate in the hands of Stark till the pursuer should make over to Lindsay the debt due by Balfour the [3521] skipper, and corroborative security of bottomry: And found, That Pilmore did accept of a commission to arrest and secure Balfour's ship at St. Andrews, or to procure to Garden the pursuer a sufficient security of the debt; and that not having secured the ship, nor intimate to the pursuer or his doer that the bill taken in the pursuer's name was

depositee, he has not duly execute his commission, and thereby is become liable for the pursuer's debt; the pursuer always making over to him the debt against Balfour and any claim of right he might have to Lindsay's bill, that he might operate his relief either against the original debtor or against Lindsay, as accords."

Pilmore reclaimed, and insisted, That Lindsay should be found liable on his bill for the £40 upon the topics formerly mentioned; and because he had, by granting the said bill, obtained his main end, viz. liberty for the ship to sail, which was of great value to him, because he was chiefly concerned in the freighting of her, so that Lindsay bought two things, first the ship's freedom to sail, and next Garden's right affecting her, and the price of these was his bill. The liberty of sailing he got; nor was he a loser by not getting a transmission of Garden's right, for that would not have hindered the ship to perish; nor could he pretend that ever Garden refused, or was in doubt to grant it, or that he Lindsay had a mind to sell that right to any other person; and therefore he was equally liable as if he had got it.

It was answered for Lindsay, That the bill was properly never delivered, being still in his own doer's hand; and the quality in Mr. Stark's oath could not be separated from the exhibition, because it was by Mr. Stark's oath only that it appeared the bill was ever out of the granter's hand; and, therefore, if Pilmore founded on the oath for that purpose, he could not both approbate and reprobate it, especially *in iis quæ se respiciunt partes ejusdem negotii*. 2do, The maxim, that *Periculum rei venditæ et non traditæ perit ad emptorem* was disputed even among the civilians; it was contrary to Cujacius's opinion, *ad l. 33, ff. locati*; and it did not hold in our law, as appears from the Lord Stair, p. 128 (134) of his Institutions. But further, in the present case, there was no *venditio*, but only an offer, not obligatory till Garden should accept; and supposing it was a sort of sale, it was at least pendent, upon the condition of Garden's being willing to convey his right; and in such a case, *pendente conditione rei interitus venditori nocet*. Voet *ad tit. de peric. et commer.*, &c. Further, the present case falls more properly under the head of a debt to have been innovated by delegation, which is a species of *novatio*; and Voet determines the precise point in § 7 of his Commentary on the title *de novationibus*. 3tio, It was a fallacious argument, that because Lindsay purchased liberty for the ship to sail, therefore he should run the risk of her perishing because he purchased that liberty, by entering into a bargain pendent upon a condition, before the existence of which the ship sailed upon the risk of its proper owner or those who had right in her.

The Lords adhered to their former interlocutor, with the following alterations: found Pilmore liable, upon the pursuer's making over to him the debt [3522] against Balfour, that he may operate his relief against the common debtor; but found Lindsay not liable, and that the pursuer is not to assign against him.

For Garden and Donaldson, ARCH. MURRAY.—For Lindsay, ALEX. GARDEN.—And for Pilmore, Jo. OGILVIE.

Fol. Dic. v. 3, p. 181. Edgar, p. 11.

No. 65. [3529] ELISABETH MAULE, Widow of Thomas Ker v. JAMES GRAHAM and Methie. March 4, 1757.

A person who had been curator to a man who was weak in his judgment, continued to manage his affairs after the curatory expired, and lent out his whole funds on personal security to a shopkeeper, who dealt in smuggling. The shopkeeper having become bankrupt, the Lords found the *negotiorum gestor* liable for the sums lent, though his interference was gratuitous, and the uncle of the fatuous person had subscribed as witness to the bond.

Thomas Ker, farmer at Ovenstoun, died, leaving Helen Fotheringham his widow, and Thomas Ker his son, a minor, in possession of his farm and stocking.—The widow, and James Graham of Methie, were chosen two of the son's curators, and acted accordingly during his minority.

In the 1746, while Thomas Ker was yet under age, he, with consent of his curators,

intermarried with Elisabeth Maule; and, by contract, became bound to provide her in a jointure of 400 merks Scots.

In December 1747, Thomas Ker having come of age, discharged his curators of their intromissions; but, as he was of so weak a mind as to be totally incapable of all business, and particularly of judging as to the import and propriety of deeds which he signed, when desired by his friends; so his mother continued to manage the farm after his majority till her death, in the 1749; and Mr. Graham of Methie took the charge of his other affairs.

Upon the death of the mother, the farm was given up, and the stocking roused. The proceeds were received by Mr. Graham; who accounted for the same, and obtained a discharge from Thomas Ker, at the sight of his uncle John Ker, who had also been one of his curators. About the same time, Thomas executed a bond of interdiction of himself to the said James Graham and John Ker; but, as he had no heritable estate, it was not used nor recorded. Mr. Graham, without any express factory or commission, continued in the management of Thomas Ker's affairs.

[3530] The only funds belonging to Thomas Ker, besides the produce of the stocking, were, a bond-debt of 1000 merks due by Sir Patrick Murray, which Mr. Graham compounded along with Sir Patrick's creditors; and another bond-debt of 8500 merks due by Mr. Fotheringham of Pourie, who at the same time was due to Mr. Graham himself, by bond, a sum of 22,000 merks. In 1751, Pourie having intimated his resolution to pay up both his bonds, unless the interest was restricted to four and a half per cent., Mr. Graham received payment of both debts at Martinmas 1751, and delivered to Pourie, Thomas Ker's discharge for his bond, witnessed by John Ker his uncle.

Mr. Graham having thus in his hands the funds of Thomas Ker, did, on the 29th November 1751, lend out the same, to the amount of 10,700 merks, to Thomas Kinnear, on his personal bond, payable at Martinmas 1752; and, upon Kinnear's owning his subscription to John Ker, some months after the date of the bond, John Ker subscribed the same as an instrumentary witness; but was not present at the transaction itself.

Thomas Kinnear had been bred a weaver, and resided in the cottar-town of Finlary; where, after the 1738, he kept a shop for retail of sugars, soap, tea, &c.—He also purchased a small feu, and built a house upon it. But his credit was chiefly from the British Linen Company, and other dealers in linen; for whom he was employed to purchase yarn, and to weave part of it, to a considerable extent.—It did not appear, indeed, that any other person had ever lent him above 1000 merks on a lasting security; and he was discovered to have been deeply engaged as a partner with his son John Kinnear, who carried on a smuggling or contraband trade.

Thomas Ker died in February 1752, leaving Elisabeth Maule, his widow, and two infant daughters. In July thereafter, John Ker, acting as tutor of law to these two infants, received payment from Kinnear of part of the interest then due on his bond; and, about the same time, Elisabeth Maule and the said John Ker granted a factory to Isaac Jolly for receiving the interest of all sums due to the widow or children; and, under that factory, Jolly received from Kinnear payment of the interest of his debt due in the years 1752 and 1753, and paid over the same for the uses of the widow and children.

In the beginning of the 1754, Thomas Kinnear became insolvent.

Elisabeth Maule being decerned executrix to her deceased husband, as creditor in the provisions of her marriage-contract, brought an action against the said James Graham of Methie, and John Ker, jointly, for payment of the sum contained in Kinnear's bond. She afterwards passed from her conclusion against John Ker, and insisted against Mr. Graham singly, on this ground, That Thomas Ker having been under a natural incapacity, Mr. Graham took upon him the management and direction of all his affairs as a *negotiorum gestor*; and having uplifted all the funds belonging to him, when settled on good security, and lent out the whole to Thomas Kinnear on his personal bond, payable at a distant term, when Kinnear was in such a situation as no prudent person would have [3531] entrusted him, for any length of time, with such a large sum, Mr. Graham was liable, in law and equity, to relieve Thomas Ker's family of the consequences of Kinnear's insolvency, by paying the bond, on obtaining an assignment to it.

Pleaded for the defender; Imo, Thomas Ker, though a weak man, was under no legal incapacity. The lending the money to Kinnear was consequently his own

act; and the defender, from motives of humanity, considering, that his situation required the interposition of friends, only acted the part of a friend, and had no part thereby, nor any ill design or fraudulent intention in advising that loan. 2do, None of the characters of *negotiorum gestor*, of mandatary, or tutor, are applicable to the defender; and therefore he must be proved guilty of a fraud or gross negligence before he can be made liable; which cannot be here done, as Kinnear's circumstances seemed then good, and his credit fair. 3tio, John Ker, the uncle of Thomas, under the character of tutor for his children, and the pursuer herself, having rested on Kinnear's security for two years after Thomas Ker's death, and having joined in naming a factor, who, by their authority, uplifted from him those two years interest, the defender was thereby discharged of any consequences of Kinnear's failure, even supposing him to have been originally answerable, all demand or challenge being barred by that homologation.

Answered for the pursuer; 1st, Though Thomas Ker was not under a legal obligation, he was confessedly under a natural incapacity of managing his affairs, and cannot be said to have received advice from the defender, or to have authorised the defender to act for him. A person who voluntarily, and without any authority, takes the management of another's affairs, makes himself responsible for all the consequences. He excludes all others from acting; and is therefore bound to bestow the greatest care and attention, insomuch that if even mere negligence appears, without ill design, he who acts so officiously is bound to repair every loss. 2do, The defender was liable in the strictest diligence, as a *negotiorum gestor*, which is defined, *Is qui absentis, et ignorantis, negotia gerit sine mandato*. Thomas Ker, though corporally present, was in mind and understanding absent, and ignorant as to this loan; which therefore was not the act and deed of him, but of the defender; who is liable for the consequences, *ex quasi contractu*, since it appears any other person more diligent would have managed the matter to greater advantage. Here the circumstances even indicate fraud and collusion, as the defender lent none of his own money to Kinnear, but of himself put the whole fortune of a helpless family into his hands, and secured him in possession of it for an uncommon time, by taking the bond payable at the distance of a year from its date; and his procuring John Ker's subscription, at a distance of time, as a third instrumentary witness, was in order to give some sanction to his proceedings. But, at any rate, the defender was grossly negligent and culpable, in sinking the whole stock of this family (which was till then well secured), in the hands of a labouring manufacturer, embarked in the pernicious practice of smuggling, and with whom he had been long [3532] acquainted. The credit which Kinnear had, was only from merchants and dealers in linen, residing at a distance, who traded for profit, and are obliged to venture that they may gain. They did not (like the defender) trust him for any considerable time; but caused him make his returns always in a few days or weeks. And 3tio, It does not appear that John Ker was a party to this transaction, or approved of it; but supposing he did, that cannot prejudice the pursuer.

The pursuer, kept ignorant of this transaction, and of all the other business of her family, was obliged to accept of the interest of this money for their immediate subsistence.—She gave a general power for receiving monies due to her husband, without knowing who was bound in Kinnear's bond; which having been necessary, cannot be construed into an approbation of the defender's conduct; and neither this, nor any other act of the pursuer, can disappoint the just claim of her infant children, for whom, as well as for herself, she is now prosecuting.

The Lords found James Graham of Methie liable to the pursuer in the sum of 10,700 merks lent to Thomas Kinnear, and annual rents thereof resting since Martinmas 1753, upon her making a valid conveyance to him of the bond for the above sum granted by Thomas Kinnear to Thomas Ker; without prejudice to the said James Graham's insisting against John Ker, or any other parties, as accords.

Act. RAE, WEDDERBURN, LOCKHART.—Alt. ADVOCATUS, GEO. BROWN.

D. Rae.

Fol. Dic. v. 3, p. 182. Fac. Col. No. 20, p. 33.

* * This cause was appealed :

March 9, 1758.—The House of Lords "ORDERED and ADJUDGED, That the appeal be dismissed; and that the several interlocutors complained of be affirmed."

No. 67. [3534] Mrs. JACINTHA DALRYMPLE v. JOHN MURRAY and Others. August 4, 1784.

Trustees liable for factors, by the conception of the trust, removed a factor for mismanagement. Their second factor also acted improperly. A legatee, who had been dilatory in demanding payment, and to whom no fund now remained, was found not entitled to payment from the trustees, on the footing of their liability for their factors.

Mr. Robert Dalrymple, by a deed of trust, conferred on Mr. Murray and others of his friends, the whole management and administration of his estate after his death. The declared purposes of this trust were, that the trustees should first of all discharge his debts, which were very inconsiderable, and pay his legacies, one of which was devised to Mrs. Jacintha Dalrymple, his granddaughter, and then make over the residue of his effects to Hugh Dalrymple, his grandson.

The trust-deed contained the following clause : " Declaring, That the trustees shall not be liable for omissions, nor *in solidum* one for another, but each shall be liable and accountable for his own actual intromissions only ; nor shall they be liable for any factor or cashier to be appointed or employed by them, further than that he is habit and repute sufficient and responsible for the time ; being satisfied that my said trustees will act herein as if they were acting for themselves."

The factor whom the trustees first appointed was one of their own number ; a man in good credit at the time, but who afterwards became insolvent. Instead of complying with the direction of the trust-deed, by discharging the debts and legacies in the first place, he began with paying large sums to the residuary legatee. The trustees dispossessed him of the office, and named in his room a person not of their number. But he, too, made ample payments to the residuary legatee, insomuch that there remained not sufficient funds for the satisfaction of the other legatees and the creditors.

Mrs. Jacintha Dalrymple, therefore, instituted an action against the whole trustees, as being personally liable to her in payment of her legacy ; when, in defence, it was

Pleaded ; The mismanagement of the factors arose not from any fault in the trustees. They nominated to that office persons, who, at the time, were possessed of credit and character ; nor were they bound, either by the nature of their duty, or by the terms of the trust-deed, to watch every step in the conduct of their factors with a jealous eye. If any blameable negligence has occurred, it is on the side of the legatee, who was not restrained by a trust-settlement of this kind, as she might have been by a deed framed for behoof of creditors, from obtaining payment as soon as it became due.

Answered ; The acceptance of this trust implied an obligation on the trustees to act in such a manner, with respect to the affairs of their deceased friend, as they would do in their own concerns. But to these, it is not to be presumed that they would have shewn such a degree of inattention.

The Lord Ordinary " assolvied the trustees " ; and

[3535] " The Lords having advised the petition for Mrs. Jacintha Dalrymple, reclaiming against the above judgment, with answers for the trustees, and having heard parties procurators thereon, and upon the whole cause, found no sufficient ground, from the terms of the trust-right, or from the manner in which the trust has been executed, to subject the trustees personally to the payment of the sums pursued for."

The Court adhered to this interlocutor, on advising a reclaiming petition and answers.

Lord Ordinary, BRAXFIELD.—Act. MACLAURIN, H. ERSKINE.—Alt. LORD ADVOCATE, G. FERGUSON.—Clerk, HOME.

Fol. Dic. v. 3, p. 183. *Fac. Col.* No. 174, p. 272.

No. 6. [3547] SEATON v. SEATON. December 19, 1668.

A discharge to one of more co-tutors was found not to liberate the rest, except in so far as satisfaction was given by the party discharged, or in so far as the other co-tutors would be excluded from recourse against the party discharged.

Mr. Alexander Seaton, as executor to his brother, Pitmedden, pursues Seaton Menzies, as representing his father, who was one of the pursuer's brother's tutors, for his father's intromission with the pupil's means; who alleged absolvitor, because the pupil, after his pupilarity, had granted a discharge to one of the co-tutors, which discharged the whole debt of that co-tutor, and consequently of all the rest, they being all *correi debendi*, liable by one individual obligation, which cannot be discharged as to one, and stand as to all the rest; for albeit *pactum de non petendo*, may be granted to one and not be profitable to the rest, a simple discharge, which dissolveth the obligation of the bond, must be profitable to all.

The Lords repelled this defence, unless the discharge had borne payment, or satisfaction given, and *in tantum*, they found it would be relevant, but not a [3548] simple discharge, which could only be relevant in so far as they by this tutor would be excluded from the co-tutors' bearing a share with this tutor, *in omissis et male administratis*; there being nothing here but this tutor's own proper intromission, now insisted for.

The Lords repelled the defence simply.

Fol. Dic. v. 1, p. 244. Stair, v. 1, p. 575.

No. 1. [3559] DUNBAR v. HAY of ——. June 22, 1621.

Found that the heir of tailzie cannot be pursued while the heir-male of blood be discussit, the opponer condescending that there are lands, teinds, or annualrents, to the which the heir-male may succeed. *Fol. Dic. v. 1, p. 245. Kerse, MS. fol. 138.*

No. 2. CREDITORS of FAIRLY v. His Heirs. February 12, 1630.

The heir of line must be discussed before the heir of conquest.

If a creditor pursue registration of a bond both against the heir of line and conquest, the heir of line offers to renounce, the heir of conquest opposes to the renunciation, and alleges no registration can be decerned against him, till the heir of line were first discussed;—The Lords ordain registration against both the heirs, but suspend execution till the heir of line be first discussed.

Fol. Dic. v. 1, p. 245. Auchinleck, MS. p. 6.

No. 6. [3561] WALLS v. MAXWEL. February 10, 1700.

A father took a bond to himself, and failing him by decease, to his second son. In an action against the son for payment of a debt due by his father, he was assolizied, the defunct having both heirs and executors.

Agnes Walls and her Husband pursue Frederick Maxwel to pay a debt owing by Captain Edward Maxwel, his father, on this ground, that the Earl of Nithsdale resting the said Edward £1000 Scots, he did take the bond to himself being on life, and to

said Frederick his son, failzieing of himself by decease; and she contended this de him liable passive, at least heir of provision in that sum, and so bound to pay debt *quoad valorem*, in so far as the £1000 would extend. Answered, Such conditions and substitutions in bonds are generally interpreted to make the father life-ter and the son fiar; but here there could be no representation, neither in *univ- sum jus* nor *quoad* the value, for he was not *alioqui successurus*, but only the second, and the father left both heirs and executors, and thay must be first discussed; id, an heir of provision in a special sum can never be convened but only *in suo gradu ordine*, after all the nearer heirs are discussed; and whereas, they crave he may rade of this sum in favours of his father's creditors, he is only liable *subsidiarie*, ther have they legally affected it, either by adjudication, if heritable, or confirma- m, if moveable, as executors-creditors. I find Dirleton, in his Doubts and Questions, p. de *feoda pecunie et nominum*, thinks the substitute in such a case liable as an heir provision; but there, he is both the eldest son, and likewise the father reserves an press power to dispoise, which being a plain effect of dominion, shews he continues r. The Lords assoilzied Frederick Maxwell and found him not liable.

Fol. Dic. v. 1, p. 245. Fountainhall, v. 2, p. 87.

No. 7. [3562] JOHN VINT v. The Earl of DALHOUSIE. November 13, 1712.

An apparent heir-male passing by his immediate predecessor, who had been three years in possession of the estate without infeftment, and serving heir to a remoter last infeft, cannot be pursued for payment of his immediate predecessor's debt, till the heir of line be discussed.

In this action, mentioned *supra* 8th November instant, *voce* HEIR CUM BENEFICIO, the Lady Hawley being decerned as heir of line to the late Earl of Dalhousie, to dispoise of the pursuer, for security of his debt, the inventory of the defunct's estate, the pursuer insisted for payment against William, now Earl of Dalhousie, upon the act of Parliament 1695; because he, passing by the defunct, his immediate predecessor, who was three years in possession of the estate, had served heir-male to a remoter predecessor, and consequently was liable for the debts of the interjected person to the value of that estate.

The Lords found, That the defender being only apparent heir-male to the pursuer's debtor, can only be liable *suo ordine*, after the heir of line is first discussed. For the act of Parliament doth not take away from an apparent heir the privilege of discussing, that would be competent to him if served.

Fol. Dic. v. 1, p. 245. Forbes, p. 631.

No. 10. [3563] TRAIL v. JACKSON. January 17, 1611.

Not only an heir, but even an executor may be compelled to lay out money upon land in implement of a contract of marriage betwixt the defunct and his relict.

In an action of suspension pursued by John Trail in Dundee, *contra* Janet Jackson, relict of umquhil James Kyle, and Common Seal, her spouse for his interest; the Lords fand, that the executors of James Kyle might be compelled to lay 2000 merks upon land to the said Janet, conform to the contract of marriage, and that the said action was not only competent against the heir, but also against the executor.

Fol. Dic. v. 1, p. 246. Kerse, MS. fol. 132.

* * Haddington reports the same case :

A relict and intromissatrix with the goods and gear of a defunct, being pursued, and defending her that there are executors confirmed, to wit, the bairns of the defunct;

if it be replied, That the confirmation is fraudulent, because the bairns being minors, as mother, gave up the testament, and made faith, that the free gear amounted to forty pound, albeit she intromitted with a thousand pounds more, the reply will be admitted. Albeit actions for infeftments and heritable rights be only competent against the heir, yet, if a man be found to bestow money for infeftments, heritable or in liferent, that action is competent against the executor of the defunct to furnish the money to that effect.

Haddington, MS. No. 2099.

No. 11. [3564] ADAM v. GRAY. November 18, 1626.

The Lords fand the executors obliged to pay an heritable bond.

Fol. Dic. v. 1, p. 246. Kerse, MS. fol. 133.

No. 12. CARNEGIE v. KNOWES. February 24, 1627.

A Creditor may, at his option, pursue either the heir or executor of his debtor, albeit the bond be heritable; because the heritable clause is always thought to be introduced in favours of the creditor, and therefore should not prejudge him.

Fol. Dic. v. 1, p. 246. Spottiswood (CREDITORS AND DEBTORS), p. 76.

* * Durie reports the same case, calling the defender Lermonth :

In an action betwixt William Carnegie and Lermonth, for payment of a sum of money contained in an heritable bond, whereby the debtor was obliged to pay annual rent to the creditor, as well not infeft as infeft, the Lords found, that the creditor might as well pursue the executor of the defunct, as his heir, for payment of such heritable sums, notwithstanding that the bond was heritable, and that the heir need not be pursued, and discussed before action were granted against the executor; but that, in deeds which were prestatable by executors, the creditor had in his option and election, either to pursue the heir of the defunct debtor, or his executor, or any of them whom he pleased to chuse, for payment.

Act. AITON.—Alt. HOPE.—Clerk, GIBSON.

Durie, p. 281.

No. 15. [3565] LAIRD OF LUSS and GLENDUNNING v. EARL OF NITHSDALE. January 24, 1672.

An heir-male being pursued for payment of his predecessor's debt, the Lords found no process, in regard the heir of line was not called, though the heir of line had no visible estate.

The Laird of Luss and Glendunning pursue the Earl of Nithsdale as heir to Robert Earl of Nithsdale, to pay a debt of his, who alleged no process, because all parties having interest are not called, viz. Hugh Wallace, son to the deceased Laird of Craigie, who is heir of line to the deceased Earl of Nithsdale, and the defender is only heir-male; and the heir being heir absolute, and liable in the first place, who may have writs and defences, exclusive of the pursuit, he must be called. It was answered, There was no necessity to call the heir of line, unless the defender can condescend upon any estate competent to him, that might be first affected, which is the ordinary reply, and ordinarily sustained. It was replied, That this reply is ordinary where the heir

of line and others are both called, against the exception of the order of discussing ; but such processes were never sustained without calling the heir of line.

The Lords found no process till the heir of line were called, and that he could not be called by a new diligence upon this summons.

Fol. Dic. v. 1, p. 246. Stair, v. 2, p. 53.

No. 16. [3566] ROBERT ALLAN, Merchant in Edinburgh v. The Earl of LAUDERDALE. January 25, 1715.

An heir-male being pursued for payment of his predecessor's debt, the Lords sustained process, though the heir of line was not called, unless the heir-male would allege that the heir of line had a visible estate.

Robert Allan having right by progress, to a debt due by the deceased Duke of Lauderdale, pursues the present Earl as heir-male and of tailzie by progress to the said Duke, for payment.

It was excepted for the Earl, That he being only pursued as heir-male and of provision, the Duke of Lauderdale heir of line, ought to be first discussed.

Answered for the pursuer ; That the benefit only took place, where the heir of entail could condescend upon the heritage that fell to the heir of line, and which might be reached by diligence.

Replied for the Earl ; That he could not so condescend, yet the heir of line ought to be discussed ; because it is the privilege of an heir-male, or of tailzie, that he is but liable *secundario* or *in subeidium*, and cannot be attacked for the predecessor's debt, except in the event that the creditor cannot recover payment from the heir of line, who is the universal successor. Now, although there were nothing to which the heir of line could succeed, yet, if he represent by service (which oftentimes happens when there is no estate), or by behaviour, or if he suffer a decree to go against him when lawfully charged, without renouncing ; in all these cases he is liable to the creditors, and must pay their debts, though he should not have a sixpence by the defunct ; therefore, the heir of line ought still to be discussed, though no estate were condescended on, to which the heir of line could succeed.

Duplied for the pursuer ; That if the order of discussing were required, even when no heritage is condescended on, to which the anterior heir might succeed, then creditors should be put to unnecessary delay, trouble and expense, if in the event there is nothing to be affected, to which the heir of line could succeed ; and the privilege law gives to the heir-male, is still upon the supposition, that there is a subject which may be affected, the very import of the word discussing implying it ; for to discuss, is not only to procure a personal, but to affect a subject according to the nature of it ; and where there is none such to be condescended on, it is impossible this discussing can take place. And of this opinion is the Lord Stair, § 21, tit. HEIRS, where he positively asserts the exception of the order of discussing will not be sustained, unless the defender condescend on an heritage, to which the anterior heir might succeed.

Triplied for the defender ; That there is this other reason for discussing the heir of line, that he being the universal successor, and the heir of provision, with respect to him, *quodammodo* a creditor, the heir of line is presumed in law to have the instructions of the payment of the debt, if any be ; and likewise to know the objections or defences that may be competent against the debt, which the heir of provision is not presumed to know, where there is an heir of line either entered or that may enter ; and the heir of line, in such cases, is always held to represent, until he renounce.

[3567] Quadruplied for the pursuer ; That that is not the reason of discussing ; the true reason lying in the prerogative of the heir-male, tailzies being understood to be made for the preservation of families, and they are accounted as creditors, with regard to the heir of line : And as, when the heir of line had renounced all, and that there was a total and universal tailzie, he is not presumed to have the keeping of the writs, so this is always supplied by a diligence of exhibition, the heir-male think fit to seek it ; and the benefit of discussing competent to a cautioner is not

founded upon this, That the principal is presumed to be master of the instruction of payment, and to know best the defences against the debt; but is founded upon the nature of a cautioner's stipulation, *qui pro alio fide-jubet*; and so is only subsidarily liable, and he may renounce the benefit.

The Lords sustained the condescendence of an estate to which the heir of line might succeed.

Act. Sir WAL. PRINGLE.—Alt. RO. DUNDAS.—Clerk, MACKENZIE.

Fol. Dic. v. 1, p. 246. Bruce, No. 40, p. 50.

No. 17. WILLIAM INNES of Sandside, and Others, Creditors on the Estate of Stircock v. ALEXANDER SINCLAIR of Barrock. January 13, 1773.

A decree of constitution taken against the heir-male singly, in an action for the predecessor's debt, wherein the heirs of line had been also called, and offered to renounce, but did not, found liable to challenge for want of discussion, and being in other respects irregular; and the objection sustained as relevant to restrict the adjudication led thereon to a security.

In the ranking of the Creditors of Stircock, Sinclair of Barrock founding upon a bond of provision granted by Francis Sinclair of Stircock to Katharine Sinclair, his sister, for 2000 merks, with the decree of adjudication, and other diligence following thereon, conveyed in his favour, the other Creditors proponed objections to the interest; in particular, that the action of constitution upon which the adjudication proceeded, having been brought both against the heir-male and the heirs of line, was improperly carried on against the heir-male only, without any discussion of the heirs of line; and that the procedure in it was erroneous and inept.

The Lord Coalston Ordinary "sustained the objection to the decree of constitution as relevant to restrict the adjudication to a security for the principal sum, annual rents, and necessary expenses accumulated at the date of the decree of adjudication."

Pleaded by Barrock in a reclaiming petition; The decree of constitution upon which the adjudication afterwards followed, is well founded; and there is nothing solid in the objection moved against it.

George Sinclair was brother-german and heir-male and successor of Francis Sinclair, the granter of the bond, and lawfully charged to enter heir to him; and, as he did not renounce, this was a sufficient passive title for founding a decree against him. The only defence that was insisted upon by him, was, that the heir of line ought to be first discussed; and, to remove that defence, it was [3568] replied on the part of the pursuer, that the heir-male was bound to relieve the heirs of line; and, of this fact, the pursuer was allowed a proof; but which proof does not appear to have been taken.

If that proof had been absolutely necessary to support a decree against the heir-male, there might be some room for alleging, that the decree against George Sinclair was not strictly regular. But the proof there allowed was, in no respect, necessary for supporting the decree. The decree was extremely well founded without it; and, of consequence, it can afford no objection to the decree that such proof was not taken.

And, in order to explain what is thereby intended, the petitioner apprehends, the benefit of discussion is not a good defence to the heir-male, when convened for payment of the debts of his predecessor, unless he, at the same time, points out an estate that can be taken up by the heir of line: And so it was determined by the Court, February 1662, Floyd *contra* Duke of Lennox, No. 5, p. 3561; where, in a process against an heir-male, the Lords found no necessity to discuss the heir of line, unless he had a visible estate that could be affected. In the present case, no estate was condescended upon which the heir of line was entitled to take up; nor, in fact, were the heirs of line entitled to any part of their father's estate; the whole devolved upon George the brother, and heir-male of Francis, who was then in possession of all his brother's estate; and, it is in the right of the apparent heir of George that the foresaid objection is now stated.

But, 2do, Supposing, for argument's sake, that it had been necessary to discuss

the heirs of line, they were sufficiently discussed by their offering to renounce to be heirs to their father ; after which, it became altogether unnecessary to prove, that the heir-male was bound to relieve the heirs of line of the debts, in order to found a decree against the heir-male. After the heirs of line had taken a day to renounce, and no subject was condescended upon as belonging to them, a decree against George Sinclair, the heir-male, was, unquestionably, well founded, independently of any such proof.

That the renunciation of the heir of line is a sufficient discussion to found an action against the other heirs of the debtor, is a proposition that cannot admit of dispute. At the same time, whether the heirs of line renounced or not, as they offered to renounce, and a day was assigned to them to produce a renunciation ; and, as Stircock, the heir-male, did not deny the passive titles, or condescend upon any subject belonging to the heirs of line, there was clearly no necessity of farther discussing the heir of line ; and the decree obtained against Stircock, is a good, effectual, and regular decree. It was incumbent on Stircock to have renounced, or denied the passive titles ; but, as he did neither, the pursuer was entitled to have decree against him, without bringing any proof of the transaction between him and the heirs of line ; though, at the same time, there was a decret-arbital on record, by which George Sinclair was expressly ordained to relieve the heir of line of all debts and deeds con-[3569]-tracted and resting by the said Francis Sinclair preceding his death, and especially of the debt in question.

Answered ; From the procedure in the action of constitution, it appears, in the first place, that, by a final interlocutor pronounced by the Lord Ordinary, and acquiesced in by the parties, it was necessary, before decree could be obtained against the heir-male, that the alleged obligation upon him, to relieve the heirs of line, should be proven *scripto* ; and a day was assigned to the pursuer for bringing this proof, and diligence granted. 2dly, That no such proof was ever brought, or attempted, nor anything done, in compliance with the Lord Ordinary's interlocutor ; but the cause having slept, and having been afterwards wakened, the pursuer craved, and obtained decree, in absence, against George Sinclair, the heir-male, without any further discussion of the heirs of line, without any renunciation being given in by them, and without inquiring whether the heir-male was bound to relieve them or not. 3dly, That this wakening was not so much as executed against the heirs of line, but only against George Sinclair, the heir-male ; nor is any interlocutor pronounced, either of assoilzieing the heirs of line or otherwise. And, lastly, It does not appear that, when the process was wakened, and given out to see, and returned, it was enrolled before the same Ordinary before whom the original process depended. It would rather seem to have been called in the outer-house before the Ordinary of the week, from whom decree in absence was obtained.

The whole of this procedure was most inept ; and Barrock does not attend to the nature of the objection, when he argues, that, as the heirs of line had succeeded to nothing, therefore it was not necessary to discuss them. In the first place, it was not pretended, by either of the parties in this case, that the heirs of line had taken nothing ; on the contrary, it was well known to all of them, that, by a decret-arbital pronounced between the heir-male and heirs of line, the succession had been divided, the bulk of the estate of Stircock had been given to the former, and the lands of Bilbster, with £10,000 Scots of money, to the latter, for which the heir-male was decerned to grant an heritable bond. Had it been pleaded, therefore, that no estate could be pointed out, to which the heirs of line had succeeded, it would immediately have been answered, that there was such an estate which could be pointed out ; and therefore the decision, in the case of *Floyd v. the Duke of Lennox*, does not in the smallest degree apply.

But, 2dly, The procedure must be taken as it stands, and not what it might have been, had the cause been pleaded in a different way, and had other defences and answers, &c., been stated. The pursuer of the constitution did not dispute that it was incumbent on him to discuss the heirs of line, or, at least, to show that the heir-male was primarily liable, in consequence of an obligation upon him to relieve the heirs of line. It was pleaded for the heirs of line, that they were willing to renounce ; but, in fact, they gave in no renunciation ; nor would it have been proper for them to do so ; and the other parties, viz. the [3570] pursuers, and George Sinclair, the heir-male, joined issue upon the proof of a fact which was admitted to the pursuer's probation, viz. that George had obliged himself to relieve the heirs of line.

In these circumstances, how is it possible to maintain that the pursuer could

proceed, without so much as extracting his diligence, or making the least attempt to establish that proposition, which he had undertaken to prove, as a necessary step, subjecting the heir-male? Had the proof been incumbent on the other party, might he not have got the term circumduced against him for not proving, and might he not upon have obtained an effectual decree. But he himself was the party who made the allegation, and upon whom the proof lay; and it is clear that he could not stir an inch against the heir-male, without doing what he had thus undertaken, and what was indeed fixed by a final interlocutor of the Court, acquiesced in by all parties.

Neither would it avail him, though he should now be able to prove the averment in his petition, that George Sinclair was bound by the decree-arbitral to relieve the heirs of line of this and other debts. In fact, he was only bound, in a qualified manner, upon getting assignations, to operate his relief against the executors and moveable estate of Francis Sinclair, the predecessor, or against any other estate, personal or real, that belonged to him; which action of relief was reserved unhurt by the decree-arbitral, together with all objections and defences against such debts. These reasons gave him an interest to insist that any decree or adjudication for these debts should be regularly led, by calling and discussing the heirs of line; as, upon payment, he was entitled to hold these decrees and adjudications as collateral rights to the estate, and as a ground of being relieved out of any separate estate belonging to the predecessor.

But, as already noticed, the objection does not lie upon the truth or falsehood of the allegation, which was admitted to proof in the action of constitution; nor is it in the least material to inquire whether it can now be proved or not; the objection lies upon the irregularity of the proceedings, which cannot now, after an extracted decree, be supplied, by any proof, in the present competition. The decree must be taken as it is; and it is submitted if a more inept proceeding can be figured.

“The Lords adhered.”

Act. ILAY CAMPBELL.—Alt. SOL. DUNDAS.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 183. *Fac. Col.* No. 43, p. 114.

No. 18. [3571] WILLIAM BLAIR v. ANDERSON. February 18, 1663.

One having bound himself and his heirs-male, the heir-male was found liable *primo loco*, and the heirs of line *secundo loco*.

William Blair as assignee by the wife and bairns of Mr. David Anderson, by his second marriage, pursues his daughters, both of the first and second marriage, as heirs of line, for implement of the second contract of marriage, and the daughters of the second marriage offering to renounce to be heirs of line, but prejudice of their provision, by contract of marriage, as bairns of that marriage, the assignee insisted against the daughters of the first marriage, as lawfully charged, &c. Who alleged no process, because the provision, by the contract of marriage insisted on, runs thus, that Mr. David obliged himself, and his heirs-male, successors to him in his estate, but did oblige no other heirs. *Ita est*, there is an heir-male. The pursuer answered, albeit heirs-male were only expressed, other heirs were not excluded; especially, seeing he bound himself, so that the effect thereof would only be, that the heir-male should be liable *primo loco*.

The Lords found the heir-male liable *primo loco*, and the heirs of line *secundo loco*, and found the heir-male sufficiently discussed, by an apprising of the clause of the contract of marriage, in favours of the heirs-male, they not being infeft as yet, and having no other right.

Fol. Dic. v. 1, p. 247. *Stair*, v. 1, p. 183.

No. 22. [3574] Earl of KINGHORN v. LESLIE. June 18, 1607.

Though an heir of conquest or tailzie must first be discussed with respect to debts affecting the conquest or tailzied lands; yet, if the debt exceed the worth thereof, the heir general must first be discussed *pro reliquo*.

The Earl of Kinghorn pursued the general heir and heir of conquest of umquhile Mr. William Leslie of Warthill, to hear and see a decret of violent profits obtained by him against the said Mr. William, as cautioner in a removing for John Arbuthnot of Lintuch, transferred in the said heirs. It was alleged for the heir of provision; that it could not be transferred in him, at least could have no execution against him, till first the general heir was discussed, in respect of the daily practice, and alleged the decision betwixt Durie and Rosyth, and diverse others. It was answered by the general heir; that the decret behoved to have execution against the heir of provision, because the said umquhile Mr. William having in his own time comprised the said John Arbuthnot's lands for his relief of the said cautionary, and his heir of conquest and provision having succeeded to the said lands, he behoved to bear the burden of the said [3575] decret of violent profits, and execution to follow thereupon, and alleged the practice betwixt William Hamilton, burgess of Edinburgh, and the Lady Samuelston, and Archibald Hamilton her son. The Lords found, that the heir of conquest should first be discussed *in quantum sufficebat valor terrarum appretiatorum*, and if these were all exhausted, that he should be no farther discussed *nisi in subsidium* of the general heir, who should be first discussed for all the rest of the decret.

Fol. Dic. v. 3, p. 247. Haddington, MS. No. 1363.

No. 24. GORDON v. M'DOWAL. June 23, 1615.

In an action betwixt Hugh Gordon of Grange and Fergus M'Dowal, The Lords found an execution proper against Grange as heir of conquest, without discussing the heir of line, because the contract was made upon the lands that pertained to the heir of conquest.

Fol. Dic. v. 1, p. 247. Kerse, MS. p. 138.

No. 38. [3584] DUNBAR v. The Earl of DUNDEE. July 1665.

A cautioner bound as surety and full debtor, though not conjunctly and severally, has not the benefit of discussion.

By contract betwixt George Dunbar and Margaret Carnegie, David Carnegie of Craig, her brother, as principal, and the Earl of Dundee as cautioner, sovrty, and full debtor, are obliged to pay to the said George the sum of 8000 merks; whereupon George charges the Earl, who suspends upon this reason, That he is but cautioner, and not obliged conjunctly and severally, and therefore the principal ought to be first discussed.—Answered, That he is bound as [3585] full debtor, and therefore there is no necessity of discussing, unless it had been so provided.

The Lords found the letters orderly proceeded. See No. 41, p. 3586.

Fol. Dic. v. 1, p. 248. Gilmour, No. 162, p. 114.

No. 2. [3591] TRAQUAIR and ROBERTSON v. BLUSHIELS. March 8, 1626.

A man granted a bond to his brother, containing disposition to certain goods, with provision, that they should not be delivered till after his decease, and the death of his daughter. The brother's assignee pursuing for delivery of the goods, at the death of the granter, and his daughter, the deed was found not to be a *donatio mortis causa*, and therefore not revoked by a testament made by the granter.

James Traquair having received a bond from umquhile Thomas Traquair, his brother, whereby the said Thomas disposed to him certain particular goods and gear, with provision, that the same should not be delivered till after his own decease, and the decease of his daughter, she dying unmarried; to which bond James Traquair had made one Robertson assignee, after the decease of the maker of the bond, and his daughter, who died before her father, and unmarried; he pursues Eupham Blushiel, relict of the said umquhile Thomas, for delivery thereof. In the which action, it was alleged, That that bond was *donatio mortis causa*, and that the giver of the bond survived six or seven years after the making thereof, and retained the use and possession of the goods disposed to the time of his decease. Likeas, the said bond being *donatio mortis causa*, as said is, was revokable, and was in effect revoked, in so far as the maker thereof made his testament, wherein he nominate his executors, and left his whole goods and gear to them, which makes the executors to have right to [3592] the said goods, contained in the said bond, seeing he left his whole goods to the executors, and so must extend to the special goods disposed in that bond, and render the said bond ineffectual, and the same is thereby innovated and become null. And, it being further alleged, That the goods contained in the said bond were heirship goods, and could not be disposed after that manner, in prejudice of the heir of the defunct, viz. another of his brethren, who was returned heir to him, and so had the best right thereto, where he could not be prejudged by that preceding disposition, which never took effect, but ceased and became void by the retention of possession six years thereafter, and the defunct's being in possession when he died, as said is, whereby the heir had good right to the same; which allegiances were repelled; for the Lords found, that the retention of the possession, and the clause foresaid, whereby the delivery was suspended to the time of the decease of the maker, and of his daughter, did not derogate from the bond, but that it ought to be effectual at the time destinate therein; neither found they that the bond was revoked by the posterior testament, especially seeing therein no mention was made of any of the goods mentioned in the bond, but only that he left his goods and gear generally to his executors, which behaved to be understood only of such goods as were not disposed before; and sicklike found, that the heir had no right to the same, but, by the contrary, that if the heir had these goods, he might be compelled by the foresaid bond to deliver the same.

Act. MOWAT.—Alt. HOPE.—Clerk, HAY.

Fol. Dic. v. 1, p. 250. Durie, p. 190.

No. 1. [3601] DURIE of Grange v. HERITORS of BURNTISLAND. November 1683.

A decret being obtained for the demolishing of a dove-cote upon a new foundation, because the builder had not ten chalders of victual, conform to the act of Parliament; the Lords found, that the party was not obliged to demolish the dove-cote, seeing the house might be employed to some other use; but decerned the defender to build up the head of the dove-cote, so as doves could not enter, and to continue it so till he acquired an estate conform to the act of Parliament. Here the dove-house did not consist of a few holes, which are usual on the top of another house, but contained five or six hundred holes.

Fol. Dic. v. 1, p. 251. Harcarse (DECREETS), No. 401, p. 106.

No. 2. KINLOCH of Conland v. WILSON. January 19, 1731.

By act of 19th Parl. 1617, it is ordained, "That none thereafter shall have the privilege to build a dovecote, unless he has ten chalders of victual." But if one purchase lands with a dovecote from an heritor, who had the privilege of a dovecote, he may enjoy the same privilege, though he be not possessed of ten chalders of victual. And it was found, that if there was a dovecote at the time of the purchase, the purchaser might repair or rebuild it upon the same foundation, but with no more dovecote holes than the former had ; but, if it was ruinous, at the time of the purchase, he could not rebuild it. See APPENDIX. *Fol. Dic. v. 1, p. 251.*

No. 3. [3602] ALEXANDER BRODIE of Brodie, Esq. v. Sir ROBERT GORDON of Gordonstoun, Bart. July 3, 1752.

The act of Parliament prohibiting possessors of land, under 10 chalders of victual, to erect dovecotes, implies no restriction as to the number of dovecotes upon those who possess more than 10 chalders.

Brodie obtained suspension of the building of a pigeon-house, after Sir Robert Gordon had made a considerable advance in it.

At discussing, the question turned upon the construction of the act 19th Parl. 22, Ja. VI. which declares, "That no person shall have power, liberty, or privilege, to build a dovecote upon any lands within this realm, except that the person, builder of the dovecote, have lands and teinds pertaining to him, extending in yearly rent to ten chalders of victual, next adjacent to the said dovecote, at the least, lying within two miles of the same ; and that it shall noways be lawful to the person foresaid, worth in yearly rent the foresaid ten chalder victual, to build more dovecotes upon and within the bounds foresaid, except one dovecote only."

[3603] It was for Brodie averred, in point of fact, That the parish of Kinnedar belonged wholly to Sir Robert and him : That Sir Robert's yearly rent in it was about 60 chalders of victual, and Brodie's about 30 : That there is a large muir, about half a mile long, belonging to Sir Robert, which lies between Sir Robert's corn-lands and Brodie's lands, which bears the best grain in the county ; and that the place chosen by Sir Robert, for building this pigeon-house, was the extremity of this barren muir next to Brodie's lands, with an apparent intention, that the pigeons should be maintained wholly upon Brodie's corn-fields, as the pigeons had a full half mile of a barren muir to fly over before they could touch Sir Robert's corn-fields ; which therefore he was well entitled to oppose so far as law could support him : He therefore contended, That Sir Robert was not entitled by law to build this dovecote, as he already had three dovecotes upon his estate in that parish, all within less than two miles of the place where the fourth was now a-building, which is the very thing that the act of Parliament forbids, when first it declares it unlawful for one to build a dovecote who has not ten chalder of victual within two miles of the place where it is built, and then adds, that no man having ten chalder of victual shall build more than one within the bounds foresaid.

It was, on the other hand, argued for Sir Robert, That as the evil intended to be remedied was that of persons of small substance building dovecotes, whereby other men's grounds were oppress, when the law fixes ten chalders of victual as the qualification, it supposes the land, out of which that rent is paid, to be sufficient to maintain the pigeons : That, at the same time, it wisely declares, that there should be only one dovecote upon the lands producing ten chalders victual ; but there is nothing in the statute limiting a man, who may have 60 chalders yearly rent, to have but one dovecote : For, what could have been more absurd, than that ten heritors, of ten chalders victual each, should be entitled to ten pigeon-houses among them, and that yet an heritor of 100 chalders should be only entitled to one.

The letters were found orderly proceeded.

The Lords were of opinion, that an heritor had liberty to build a pigeon-house

for every ten chalders of yearly rent : Though some thought the suspender's construction of the act to be more agreeable to the words, and even to the spirit of the act; the words, bounds foresaid, did more properly apply to the two miles, than to the extent of the ground producing ten chalders of victual, which had not been described by bounds ; and that, according to what is now found, an heritor of 60 chalders of victual may have six dove-cotes within the bounds of half a mile, close to the march of another heritor's ground.

Kilkerran (DOVECOTE), No. 1, p. 16.

No. 17.

[3629] GRAY v. GORDON. July 31, 1666.

A bond being granted to Sir Robert Farquhar, and bearing the term of payment to be diverse years after the date of the same, and annualrent to be paid in the interim termly and yearly, was found to be heritable *quoad fiscum*, though Sir Robert Farquhar had deceased before the term of payment of annualrent ; and the assignee was preferred to a donatar.

Dirleton, No. 39, p. 15.

No. 69.

[3668] CLERK'S Creditors v. GORDON. December 6, 1699.

In the competition for the sum in Ruthven of Gairden's wadset on the Earls of Home and Annandale their estates, betwixt the Creditors and donatars of Mr. Clerk's escheat, on the one hand, and James Gordon of Seaton as donatar to Ruthven's escheat, the Lords found the disposition made of this wadset to James Clerk by Ruthven of Gairden, when he was minor, with the consent of his uncle as curator, was not null by law, though there was no *decretum judicis* interposed, but was only reducible upon minority and lesion ; for though a pupil can alienate nothing without the authority of a Judge, yet it was no legal nullity, where a minor either wanting curators, or without their consent, where he has them, alienates heritage without the warrant and cognition of a Judge ; but the deed subsists, if not revoked or quarrelled *intra quadriennium* after the date of the deed, 2d February 1630, Hamilton *contra* Sharp, *voce* MINOR ; 13th December 1666, Thomson *contra* Stevenson, *IBIDEM*. The Lords also found, That the donatar to Gairden's escheat was preferable to a base infeftment granted by the rebel to Clerk prior to the denunciation, unless the said base infeftment was either confirmed or clad with possession before the annual rebellion existed ; and which agrees with the current of former decisions, 19th March 1633, Renton *contra* Blackader, No. 61, p. 3662 ; and 21st February 1667, Milne *contra* Clarkson, No. 64, p. 3664. And possession *in cursu rebellionis* will do the turn to prefer the base infeftment to the donatar of the liferent escheat. But now, since the act of Parliament 1693, taking away the distinction betwixt public and private infeftments, any infeftment prior to the denunciation will now seclude the superior and his casualty.

Fol. Dic. v. 1, p. 256. *Fountainhall*, v. 2, p. 71.

No. 27.

[3700] DOUGLAS and HERON v. ARMSTRONG. November 23, 1779.

A summons having been executed in time of vacation against an advocate at his house in Edinburgh, while he was residing at his estate in Dumfriesshire, attending the duties of his office as Sheriff of that county, was found a valid execution. See APPENDIX.

Fol. Dic. v. 3, p. 187.

No. 57. [3722] *Laird of BLANERNE v. Laird of RESTALRIG.* June 19, 1561.

A comprising was found null, because the lands lying within a regality, the denunciation was made, not at the head burgh thereof, but at the head burgh of the shire.

The denunciation of landis to be comprisit sould be maid at the ground of the samin, and at the mercat cros of the principal burgh of the schirefdome or schirefdomis quhair the landis lyis.

Lord SEYTON v. Earl of MONTEITH. Janaury 27, 1562.

But gif the landis lyis within ony regality, the denunciation thair of aucht and sould be maid at the ground of the saidis landis, and als wa at the principal and heid town of the said regality; utherways, gif the landis lyand within the regaltie be denuncit at the mercat cros of the heid burgh of the said schirefdome, the denunciation, comprising, and all that followis thairupon is of nane avail, and may be reductit.

Fol. Dic. v. 1, p. 262. *Balfour* (COMPRISING), No. 1, p. 401.

No. 61. [3724] *PATERSON v. FERMOUR.* November 20, 1672.

Horning found null, as not executed at the cross of Edinburgh, in which city the rebel had his house and furniture.

John Paterson pursues a declarator of the escheat of John Fermour, who having alleged that the horning was null, he being denounced at Cupar in Fife, whereas his dwelling and domicile was at Edinburgh; whereupon the Lords, that they might not give either party the sole probation of the domicile, did, before answer, allow either party to adduce witnesses. The pursuer adduced five, all conform, proving that Fermour, with his wife and bairns, came to Anstruther in the middle of March, and staid at his good-brother's house, being an ale-house, till the date of the denunciation, which was upon the 16th of May, and thereafter till about Whitsunday. The defender proved by as many witnesses, that he had a house taken in Edinburgh from Whitsunday to Whitsunday, and that he dwelt therein during that time; and some of them deponed, that he, his wife, and one bairn, went over and staid about their business of Balcony in Fife, 20 days; [3725] and most of them deponed, that they were his nearest neighbours, and saw him frequently come and go to his house, but could not depone how long he was there, or how long he was absent about his business.

The Lords found, That albeit a domicile by 40 days staying at any place, though in an inn or hired chamber, might be sufficient to sustain a citation made there, yet not to constitute a domicile, whereupon denunciation and escheat might follow, or whereupon the confirmation of a defunct's testament might fall to the Commissary of that place; but as to these the principal domicile behoved to be considered; and found, that by the probation foresaid, Fermour's principal domicile was at Edinburgh, where he had his house and plenishing, and was the most part of his time; and therefore found the denunciation at Cupar null, and assoilzied. *Stair*, v. 2, p. 119.

No. 75. [3739] *DOUGLAS v. JACKSON and GRAHAME.* February 11, 1675.

The Lords found, that a poinding is not lawful, unless it be begun before the setting of the sun; and what is to be done at that time, be all done and complete before the day light be gone. *Fol. Dic.* v. 1, p. 263. *Dirleton*, No. 250, p. 121.

* * * *Stair* reports the same case :

Robert Douglas having pursued Jackson for spuilzie, or restitution of goods poinded from him, insists, upon this reason, that the poinding was not done in due time of day, but in night, at least after sunset. It was answered, That it was sufficient that it was done with day light.

The Lords found, that the poinding was not valid, unless it were begun before sunset, and ended during the day light. *Stair*, v. 2, p. 321.

No. 95. [3755] NAPIER v. GORDON of Grange. February 12, 1670.

An inhibition found null, because the executions of it bore not that a copy was at the market cross.

John Napier, as representing his father, did pursue William Gordon of Grange as representing Hugh his father, for payment of 2000 merks, due by the said umquiller Hugh's bond; and upon the said William's renouncing to be heir, obtained adjudication of the lands of Grange and others, in so far as might belong to the said umquiller Hugh's debtor's heirs, and thereupon did pursue the tenants for mails and duties in which action, it was alleged for William Gordon, now of Grange, That he stands infeft by a disposition from the said umquiller Hugh Gordon of Grange, his father, for onerous causes and sums of money undertaken, and paid for his father, which was found relevant; and to evite the same, the said John Napier raised reduction of Grange's right, granted by his father, *ex capite inhibitionis*, raised against his father upon the said bond, before the disposition made to this Grange; which inhibition being produced this day fortnight, it was alleged for Grange that the same was null because the executions bore not a copy to have been left at the market cross, at the publication of the inhibition, which the Lords found relevant; and now the pursuer insisted on this reason, That the disposition, though it bore onerous causes, yet being after the contracting of his debt, by a father to a son, the narrative bearing the cause thereof, is not probative against a third party, but the same must yet be instructed.

Which the Lords sustained, and ordained Grange to produce the instructions thereof. See PROOF. *Fol. Dic. v. 1, p. 265. Stair, v. 1, p. 671.*

No. 126. [3775] DUFF of Drummoir v. GORDON of Achintoul. June 12, 1707.

An execution of an inhibition was found null, because it bore only three knocks instead of six, to have been given at the most patent door of the debtor's dwelling-house.

Drummoir having purchased in the preferable rights upon the estate of Anderson of Westertown, he pursues a sale and ranking of the creditors; wherein [3776] comparison is made for Achintoul, and others, who alleged, 1mo, His rights purchased from Major Anderson, the debtor's brother, must be restricted to the sums duly paid out by the Major, because he was no more but trustee for Westertown, his brother, and so the eases and abatements got must accresce to him. 2do, He cannot ever charge the sums paid by him, because both the Major and his authors, from whom he derives right, had great intromissions with the common debtor's rents and estate, which would exhaust, satisfy and pay what is resting. Answered, To the 1st, The trust is denied, and no backbond is produced; and, to the 2d, It is *res jurata*, because the Major has deponed, That the debts to which he has right are yet truly resting and owing, and were not for the common debtor's behoof. Replied, No regard to that oath, for it is only taken to facilitate rankings by the Lords *ex officio*, and not *de jure adversario*, not being craved by the creditors; and such oaths never hindered the alleging, that the debts were simulate, or extinguished by payment, intromission, compensation, or the like. Duplied, Here it must be understood to be upon the creditors application; for they gave in interrogatories, upon which he depones, and after which there can be no more inquiry. The Lords remitted the trial of this matter of fact to Lord Minto, Ordinary in the ranking. In the third place, Drummoir objected against an inhibition produced by Achintoul v. Westertown, that its execution was null, because it only bore three knocks given at Westertown's dwelling-house door; whereas, the 75th act, 1540, requires six. Alleged, That act relates only to summonses, and not to inhibitions and other diligences. 2do, Though that act enjoins six knocks, yet the omission does not annul the execution, but only punishes the messenger-executor, as the act 74th, immediately preceding, inflicts deprivation on him, if he omit to stamp his executions; and so it was found in a parallel case, *Durie, 9th November 1624, Hope contra the Minister of Craighall, voce KIRK PATRIMONY*, in a

tack set by a churchman for his life, and five years after, without the patron's consent, that the penalty was not the annulling of the tack, but only deprivation of the setter ; because, where the act adjects another penalty, without annulling the act, there it subsists ; but the sanction only is inflicted and applied. Answered, to the 1st, The act not only relates to summonses, but to all letters passing the signet, and so must include inhibitions, as well as other writs. To the 2d, If the want of the six knocks did not infer a nullity, the party would be in a very bad condition ; for the depriving a messenger, or making him liable in damages, is but a very sorry relief. And the 5th act 1681, and 4th act 1686, regulating executions of hornings and inhibitions, taking away stamping, and introducing subscribing, and the date of the delivery, are all under the pain of nullity. And Hope, in his lesser practices, cap. 12, distinguishes *inter leges prohibentes et jubentes*, and thinks *ipsa prohibitio reddit ipsum actum, nullum et invalidum, sine clausula irritante*. The Lords did not regard these nice subtle distinctions, but found the bearing only of three knocks (it seems the messenger has been dreaming of the three oyeses in the publica-[3777]-tion of such letters), instead of six, was a nullity of the execution, and thereupon reduced the inhibition.

Fol. Dic. v. 1, p. 267. Fountainhall, v. 2, p. 370.

No. 3. [3818] The Earl of CRAWFURD, and HUGH CRAWFURD, Writer in Edinburgh v. MARY URE, and DUNCAN GLASFURD, her Husband, for his Interest. January 10, 1755.

General disponees, although not named executors, are entitled to the office of executor, preferable to the defunct's nearest of kin.

James Ure granted a general disposition of all the goods and effects he had, or should have, at this death, failing children of his own body, in favour of the Earl of Crawford and Hugh Crawford equally ; but the disposition contained no nomination of executors.

James Ure died without leaving children ; and, after his death, the disponees obtained themselves decerned executors-dative to him before the Commissaries of Edinburgh.

After extracting the decreet-dative, but before expeding the confirmation, Mary Ure, the sister of James, applied to the Commissaries by petition, praying, That she might be confirmed as nearest of kin, seeing the defunct had not named executors. The Commissaries reversed the decerniture in favour of the disponees, and preferred Mary Ure, as nearest of kin, to the office of executor.

The disponees complained, by a bill of advocation to the Court of Session ; and pleaded, That as, by the disposition, the goods to be confirmed belonged to them, they ought to have the administration of these goods, and were entitled to the office of executor preferably to the nearest of kin, who had no interest in them.

Answered for Mary Ure ; That by the instructions to the Commissaries, they are appointed to prefer the nearest of kin to the office of executor, when there is no executor nominated ; and, agreeably to these instructions, the Court of Session found the nearest of kin preferable to a general disponee, in a competition for the office of executor anno 1707, *Scot of Harden v. Lady Harden*, No. 1, p. 3809. It avails not to say, that it is improper to prefer the nearest of kin to the office, when he behoved immediately thereafter to account to the general disponee for the whole effects ; for the law has expressly made it a rule, That the nearest of kin is to be preferred to the office, when there is no executor nominated ; and the nearest of kin is entitled to judge whether the office be profitable for him or no : And, in many cases, it may be profitable ; for example, if he have grounds for reducing the general disposition.

Replied for the general disponees ; That the plain meaning of the instructions to the Commissaries is, to give the office of executor to the party who apparently has the preferable interest in the subject to be confirmed ; and, as the general disponees have not only a preferable, but even an exclusive right, in a competition with the nearest of kin, justice requires that they should have the management of their own

effects ; for it would be absurd to give the nearest of kin the possession of goods not belonging to another, or to entitle him to sell them against the will of the disponent, and make him only accountable for the [3819] appraised values, when perhaps he might yield more. By the instructions to the Commissaries, the nearest of kin was only to be preferred, when there is no nomination or testament made by the defunct, and, under the word testament, a general disposition may very properly be comprehended.

In the case of Scot of Harden, the nearest of kin was also the defunct's heir, and the moveables assigned were bygone rents ; and therefore he had an evident interest to apply for the office of executor, that he might have it in his power to protect the tenants, and prevent his lands from being thrown waste by too rigorous diligence against the tenants : But, whatever the Court may have found whilst it was held to law, That the dead's part did not vest in the nearest of kin without confirmation, and that the confirming of a part did not transmit the whole ; these decisions can be no longer now, when the matter of confirmations and of the transmission of moveables from the dead to the living, are established in a manner much more equitable than anciently obtained.

"The Lords remitted the cause to the Commissaries, with an instruction to prefer the disponees."

Reporter, LORD JUSTICE-CLERK.—Act. LOCKHART & J. DALRYMPLE.—Alt. FERGUSON & AND. PRINGLE.

Fol. Dic. v. 3, p. 189. Fac. Col. No. 125, p. 185.

No. 19. [3837] Legatars of Mrs. HANNAH v. HENRY GUTHRIE, Writer in Edinburgh. June 15, 1738.

An executor-nominate is liable to account for the residue of the free effects to legatars, if it appear, by his oath, the testator trusted to his faith to dispose of it in that manner.

Mrs. Hannah executed a testament, wherein she appointed Mr. Guthrie her executor, and burdened him with certain legacies to her relations ; signifying to him, at the same time, that, whatever residue of her effects should remain over and above her debts and legacies, and a reasonable gratification to himself for his trouble, was her will or pleasure he should make a fair distribution thereof amongst her friends in proportion to their legacies expressed in the testament.

Upon her death, the Legatars brought a process against Mr. Guthrie for the free balance of the effects, and referred it to his oath, Whether or not the testator [3838] had not trusted to his faith and promise to apply the same in that manner ? In consequence whereof, he deponed, That Mrs. Hannah told him, at the time the testament was executed, and he accordingly believed, that, after payment of the debts and legacies in the disposition, there would be some small thing over, which would be more than a gratuity for his own pains ; and that he understood, that, if the remainder, after paying the debts and legacies, should come out to be any thing considerable, that he, though named executor, was to have no more than a reasonable gratuity for his own pains, he being no ways related to the defunct, nor never having been acquainted with her till a short time before her death. And, further, he deponed, That, after Mrs. Hannah's death, he promised to a lady, who was a friend of hers, to dispose of the effects as she should direct, deducting a gratuity to himself, because such he understood to be the will of the defunct. Whereupon the Legatars pleaded, 1mo, That the testament sufficiently excluded the nearest of kin from the office of executor, by nominating the defender executor-testamentary, and from the benefit, by burdening him with the legacies partly expressed and partly committed to the faith and credit of his promise. 2do, That there was a sufficient active title in the pursuers to insist in this action, without any confirmation by the defender's promise made to the defunct ; whereby it was plain, this case was as directly a proper Roman

fidei-commiss. as any that possibly could occur ; the defender being fiduciary, and the pursuers the *fidei-commissary* heirs, as to the superplus of the defunct's effects above her debts and legacies. See § *ult. Inst. de fidei-com. hæred. T.* 23, and *ult. Cod. de fidei-com.* Neither ought it to be any objection, That this superplus may seem to be of the nature of verbal legacies, which, according to our law, cannot have effect above £100 Scots to each legatar, seeing, though we do not allow the effect of verbal legacies to be extended beyond £100 Scots, where the proof of them is rested, by the defunct, on the credit of witnesses, and not on the faith and promise of the executor-nominate, even though the executor acknowledge the verity of the bequeathment ; yet reason and justice require, that, where the defunct has depended on the faith and promise of the executor, and not on the credit of witnesses, the same should be made effectual, as all promises are, with us, whether made to the living or dead, they being proved, as here, by the oath of the party.

The Lords, in respect of the acknowledgment, on oath, of the executor (who, by the will, hath right to the residue of the effects, if any be, after payment of the legacies), That he understood it to be the will of the defunct, that he was to account to the Legatars proportionally to their several legacies, for the remainder of the effects, after payment of the legacies and a reasonable gratification to himself, found him liable to account.

C. Home, No. 95, p. 149.

No. 51. [3864] *L. CURRIEHILL v. Executors of CUMMING.* March 31, 1624.

After an action is raised against an executor, he is not at liberty to prefer another creditor, even though that creditor's debt is acknowledged by the defunct in his testament.

In the action pursued by *L. Curriehill*, whereof mention is made, No. 2, p. 2937, and No. 1, p. 3591, the Lady Cowie being convened as executrix to her husband, who was executor to umquhile *Walter Cowie*, debtor to the pursuer, for payment to the said pursuer of the debt owing to him by the said *Walter*, the Lords sustained the action against the defender, for so much of the said defunct's, viz. *Walter Currior's* goods and gear, as were intromitted with by the Laird of Cowie before his decease, or by his Lady, who is defender, at any time sinsyne allenary, and found process against her allenary, for her own and her husband's intromission, with any of the said *Walter's* goods, to make her answerable *pro tanto*, to the pursuer for his debt, and not to make her subject to pay any further than her and her husband's intromission extended unto, in respect that the said umquhile *Walter Currior's* testament was confirmed in July, shortly thereafter, viz. within a half year after *Walter's* decease, after which confirmation, the executor confirmed, viz. the Laird of Cowie, died in August that same year ; so that for the shortness of time intervening betwixt the confirmation and the executor's decease, he could not of reason be subject in any more than was intromitted with by him, and consequently, that his executor could be no further answerable than himself, except *pro tanto*, if she intromitted with any more sinsyne herself : And where the defender desired some defalcation of her husband's intromission foresaid, of some particular debts paid by her husband to *Walter Currior's* creditors, the Lords would not allow any article of defalcation for such debts alleged paid by him, after the time of the intending of the pursuer's first action, which was moved by him against the Laird of Cowie, in his own lifetime, and before the testament was confirmed by him ; albeit the defender alleged, that the saids debts were given up by the defunct with his own mouth, and contained in his testament, subscribed by himself ; and being a testament testamentar, whereby it was alleged that there needed no further warrant to pay the same, but the testament itself and the party's discharge, it being a true debt, which allegiance was repelled ; for the Lords found, that the executor being once summoned before payment, and before confirmation of the testament, the testament unconfirmed, albeit bearing the debts, could not be a warrant to exoner him, in his payment thereof, there being no sentence recovered thereupon against him, whereby to prejudice the pursuer of his debt, at

least of his proportion thereof, amongst the rest of the defunct's creditors, and by his citation, he had timeously interrupted the executor's voluntary payment.

Act. LAWTRIE.—Alt. NICOLSON, SENIOR.—Clerk, SCOT.

Fol. Dic. v. 1, p. 275. Durie, p. 125

No. 5. [3945] ISOBEL MONCRIEF and Her HUSBAND v. CATHARINE MONCRIEF
Relict of George Moncrief of Sauchop. June 20, 1713.

Funeral expenses, aliment of the defunct's family till the next term after his decease, the expense of confirming his testament, and the relict's mournings, do not affect the dead's part only, but come off the whole head of the executry; all the being considered as the defunct's debts, but the charges of building a monument to the defunct, by warrant of his testamentary deed, come off the dead's part only.

In the action at the instance of Isobel Moncrief and her Husband v. the Lady Sauchop, mentioned 27th January 1713, *voce* HUSBAND AND WIFE, the defendant claimed, *jure relictae*, the half of all the defunct's moveables, free of the expense of her husband's funeral, and the building a monument to him, and the confirmation of his testament, and her own mournings, and the aliment of the defunct's family till the next term after his decease, all which she alleged must affect the dead's part only, and could not lessen her legal share; because, 1mo, Nothing diminisheth the whole head, but what is due by the husband before his death, and he could not properly be debtor for his funeral charges before his decease, when these had no being, as there was not a creditor. Now, a relict hath right to her share of the husband's moveables at the moment of his death; not by any succession, but *jure proprio* by division of the goods that were in communion during the marriage, under the husband's administration; upon dissolution whereof, the wife acquires no new, but continues her former right *tanquam domina*, without necessity to confirm her share. And as she could claim no part of any thing that fell due to the husband at the moment of his death; so neither should she be burdened with debts to which his representative became liable by dissolution of the marriage. Sir John Nisbet, in his Doubts and Questions, tit. FUNERAL CHARGES, is clear of this opinion, That the funeral charges should affect only the dead's part, these not being a debt contracted during the communion. And therefore the husband's funeral charges must be paid out of the dead's part as the expense of the wife's funerals would come off her own share. 2do, The expense of building the monument falls to be considered and determined upon the same grounds of law with the funeral charges; the former having had no foundation till after dissolution of the marriage, and being of the nature of legacies or donations *mortis causa*, that are payable only out of the dead's part. 3tio, The expense of confirming the defunct's testament can burden only his executors, because it was not a debt of the defunct; for, if it were a debt of the defunct, it would be due whether there were a testament or confirmation, or not, which cannot be pretended. Confirmation is a deed of the executor, whom law obligeth to confirm, before he can have a title: And the relict, who has right to her part without confirmation, cannot be burdened with making up the right of a third party. As she hath right to her third of lands, and to her share of the moveables, without any burden of the expense of the heir's service, she can as little be burdened with the expense of the executor's confirmation, which is *aditio hereditatis mobilium*. 4to, The Lady's aliment to the term subsequent to her husband's death can affect only his executors, and the dead's part being due only by his representatives for the maintenance of his own family; seeing otherwise, the relict would be obliged, not only to maintain herself, but also her husband's whole family in that interval. My Lord Stair, in the close of his title, CONJUGAL OBLIGATIONS, says, "Wives have not only a half or third of their husband's moveables, but have their aliment till the next term after their husband's death"; which is the same thing as if he had said, their aliment is not payable out

of their own share of the moveables ; seeing otherwise, they could not be said to have their aliment over and above that share. The origin of aliments due to relicts, seems to have proceeded from the same cause that obligeth a husband's successors to pay the expenses of child-bed to them ; and, as the relicts themselves were never burdened with any part of the expense of the latter, neither can any part of the charges of the former lie upon them. 5to, The relict's mournings burden the husband's executors, and not herself, Stair, Inst. tit. CONJUG. OBLIG. § 10, November 12, 1664, Murray *contra* Neilson, *voce* HUSBAND AND WIFE, 7th July 1675, Wylie *contra* Morison, *IBIDEM* ; because, there were no debt due by the defunct when he died, and the relict's share of the moveables belongs to her from the moment of her husband's death, free of all subsequent debt. Nothing being ever claimed upon the account of mournings unless they be used and worn, shews that the [3947] price thereof is not the defunct's debt, which must be certain and fixed at the moment of his death. Again, where there are no moveables, mournings are due by the heir, which demonstrates these to be a burden only upon the defunct's successor ; and the relict draws her share without any passive title of representation. In fine, there being no civil obligation upon wives, children, or servants to wear mournings, and the same being used only *ex pietate*, out of deference to the defunct's memory, the burden ought to lie upon his successors, and not upon his relict.

Answered for the pursuer ; 1mo, Albeit the expense of the funerals falls not due till after dissolution of the marriage, yet it is properly the defunct's debt. *Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum hærede, L. 1, ff. de Religios. et Sumpt. Fun. and Momentum primum mortis annumeratur vitæ* : Therefore the defunct's whole moveables must be burdened with his funeral charges ; in the same manner as with a bond whereof the term of payment fell due after his decease ; especially considering, that funeral charges are a debt preferable to all other moveable debts : Nor can it be controverted, that, were not the dead's part sufficient to satisfy the funeral expense, whatever moveables are extant may be subjected to the payment thereof, before the heir can be reached. 2do, Since the expense of the monument arose from the defunct's will in his lifetime, and the relict occasioned the same, there is very good reason for laying it upon the whole head. 3tio, It is the universal practice of all the commissary courts in Scotland, to deduct the expense of confirmation off the whole head, founded on this good reason, because, though the wife needs not to confirm her share of the moveables for establishing a title thereto, yet it is impracticable to make the division till the subject be confirmed, and the whole moveables brought fairly in the testament, that creditors or others concerned be not injured. 4to, There is the same reason for deducting the aliment and mournings off the whole head, as for deducting the funeral expenses ; the former, as well as the latter, being a debt of the defunct. The question in the place cited out of the Lord Stair's Institutions for taking the relict's mournings off the dead's part, is not, Whether such debts shall come off the whole head of the executry, or the dead's part only ; but whether, seeing the wife received the goods from the furnisher, she be liable for the same *proprio nomine*, or if the executry be affectable ?

Replied for the defender ; The L. 1, *ff. Relig.* makes nothing for the pursuer. For the position appears to be a fiction in law from the word *creditur* ; and *qui contrahere creditur, de facto non contrahit*. This is further evident from the best gloss on that law, which adds, *Ab hærede tamen recipit, ut et a patre vel domino, L. 12, § 2, ff. eod.* And *datur hæc actio adversus eos ad quos funus pertinet, utputa adversus hæredem cæterosque successores* ; whereas the relict draws not her share by succession, or *tanquam hæres*. That the funeral charges are a preferable debt, cannot be applied to this case, where there is a valuable executry, and the question is not concerning the preference thereof, but only con-[3948]-cerning the fund of payment. So it is an amusement to pretend, that if the dead's part be not sufficient, the wife must bury her husband out of her share ; for that preferable debt falling first to be paid, if the dead's part come short, the wife can have nothing. Upon the whole, it may be noticed, That the learned Joannes a Sande says, *Quod apud Frisios Societas conjugalís non censetur continuata usque dum inventarium fuerit confectum, Senatusque noster hanc quæstionem definiendam existimavit ex jure Romano, L. 59, L. 63, § 8, L. 65, § 9, ff. pro Socio. secundum quam sententiam judicatum fuit in curia nostra, 7th October 1618.*

The Lords found, 1mo, That the funeral expense doth not affect the dead's part only, but comes off the whole head of the executry. 2do, The Lords found, that

the building of the monument, being by warrant of a testamentary deed, the expense thereof comes off the dead's part. But they seemed in their reasoning to be of opinion that a monument erected to a defunct, whose character and fortune deserved it, would be considered as a part of the funeral expenses; and so come off the whole head. 3tio, The Lords found, that the expense of the confirmation comes off the whole head. 4to, They found, that the expense of the aliment and mournings do not affect the whole head of the executry; because, they thought these to be debts of the defunct, for which the heir might be pursued, if there were no executry; and that the defunct was under an obligation for his wife's mournings, though the extent thereof was not known till after his death. See HUSBAND and WIFE.—QUOD POTUIT FACIT.—RECOMPENCE.—TESTAMENT. *Fol. Dic. v. 1, p. 280. Forbes, p. 683.*

No. 6. M'KAY v. FOWLER. June 2, 1744.

A bond of provision granted by William M'Quirth to his younger children, though found lying by him at his death, yet being executed in *liegie pousie*, and being a rational provision suitable to his circumstances, was found to affect the whole head of his executry, and not the dead's part only.

Fol. Dic. v. 3, p. 193. Kilkerran (EXECUTRY), No. 1, p. 178.

No. 2. [3954] WILLIAM ROGERS, Merchant in Virginia v. CATHCART and KER. July 25, 1732.

Constituents found liable to pay money borrowed by their supercargo, though neither did his commission bear any express power to borrow money, nor was it applied to their behoof. See APPENDIX. *Fol. Dic. v. 1, p. 280.*

No. 3. [3960] Captain of CRAWFURD v. The Laird of LAMINGTON. December 14, 1626.

In an exhibition of a contract of marriage, to which the pursuer was not a party, it was found that he must condescend on the clauses made in his favour.

In exhibition of a contract of marriage pursued by the Laird of Lamington, as heir to his goodsir, *contra* the Captain of Crawford, the Lords fand, that the pursuer behaved to condescend on the special causes of the contract conceived in his favour; seeing it was for marriage betwixt Grisel Maxwell daughter to the pursuer's goodsir, and the said Captain, and that the said Grisel was deceased long ago without children.

Fol. Dic. v. 1, p. 281. Kerse, MS. fol. 186.

No. 9. [3964] HEPBURN v. BARCLAY. February 25, 1637.

The Lords sustained process at the instance of a bankrupt's creditors against his mother, for exhibition of all writings belonging to him in her custody, though no particular writings were condescended on.

One Hepburn being creditor to Barclay, and Barclay being bankrupt, the said creditor pursues Barclay's mother, as haver of certain bonds and writs pertaining

to her son, for production thereof; that he may know and consider, what execution he might lawfully seek thereupon, after sight thereof; in which libel there was no special writs particularly libelled, being unknown to him, whereby he could comprise or arrest the same; in which process it being questioned, if such a general summons could be sustained, or if the defender could [3965] in law be holden to answer to such a libel, or to produce for founding of any either action or execution to the creditor,—the Lords sustained this action, in respect that the pursuer had a probable and excusable ignorance of his debtor's writs; as an apparent heir might call for production of his predecessor's writs, that he might advise, if he could enter heir or not to his predecessor, see No. 47, p. 2804.

Clerk, GIBSON.

Fol. Dic. v. 1, p. 281. Durie, p. 830.

No. 12. [3966] GEORGE-JAMES Duke of HAMILTON and his TUTORS, and DUNBAR Earl of SELKIRK v. ARCHIBALD DOUGLAS of Douglas, Esq. November 28, 1761.

No person can be obliged to show his charter-chest *per aversionem*, although any particular writing being called for by a person having interest, the defender may be compelled to produce it.

Archibald Duke of Douglas was infeft in his estate upon a charter from the Crown in 1707, in favour of himself, and the heirs-male of his body; whom failing, to the heirs called by deeds executed by his father.

In 1759, the Duke became bound to settle his estate upon the heirs-male of that or any subsequent marriage; whom failing, upon the heirs-female of the marriage; whom failing, to such heirs as he had named or should name in the settlements made or to be made by him; and failing thereof, to his own nearest heirs and assignees whatsoever.

Upon the 11th July 1761, the Duke executed an entail, in which he granted procuratory for resigning his estate in favour of himself and the heirs whatsoever of his body; whom failing, the heirs whatsoever of the body of the deceased James Marquis of Douglas, his father; whom failing, Lord Douglas-Hamilton, second son of the deceased James Duke of Hamilton; whom failing, certain other substitutes.

The Duke, of the same date, having no heirs of his body, nor prospect of any, made a deed of appointment of certain tutors and curators to Archibald Stewart, a minor, son of the deceased Lady Jane Douglas, his Grace's sister, as the person who was to succeed to him, failing issue of himself.

The Duke died before the end of that month; and the said Archibald Stewart, now Douglas, took out a brieve from the chancery, in order to be served heir of provision in general to him, upon the deed 11th July 1761; and this service having come before the macers in September said year, a proof was led of his propinquity, and compareance was made for the Duke of Hamilton and [3967] the Earl of Selkirk, the former of whom had purchased a brieve for being served heir-male and of provision to the Duke in his lands of the earldom of Angus, barony of Dudhope or Dundee, and Bothwell, and Wandell, as devised to heirs-male by the feudal investitures of the estate: The other competitor, Lord Selkirk, had also taken out a brieve, for being served heir of tailzie and provision to the Duke of Douglas in the estate of the earldom of Angus, and in the barony of Dudhope, which, he maintained, were descendible to him by the investitures.

Mr. Douglas having been served by the inquest as heir of provision, under the tailzie 1761, a protestation was entered on the part of the Earl of Selkirk, that the service should not be retoured by the macers to the chancery, till the Earl should be heard upon his claim to the estate.

The counsel, however, for Mr. Douglas moved, That his service should be retoured to the chancery in the common form; which was accordingly done; and Archibald Douglas having thereby acquired right to the procuratory in the tailzie 1761, put up a signature in the Exchequer for a charter of resignation of the whole estate, in order

that he might complete a feudal title thereto. He also entered into possession, appointing factors, and performing some other acts of property.

The Duke of Hamilton and Earl of Selkirk in the mean time raised actions of reduction and declarator before the Court of Session, for ascertaining their rights in the above-mentioned parts of the estate ; and having likewise brought forward the brieves to be served heirs in special upon the investitures as above, the same came before the macers, on the 13th November 1761, when compearance was made by Archibald Douglas, who objected to their service ; and the debate was reported to the Court of Session upon the 19th November.

While the above matter was in dependance, a petition was given in to the Court of Session for the Duke of Hamilton, and another for the Earl of Selkirk, praying to sequestrate the earldom of Angus, and other subjects in competition between them and Mr. Douglas ; and to appoint a factor for uplifting the rents till the issue of the competition : And to these petitions answers were put in for Mr. Douglas.

Argued for the petitioners ; There is neither reason nor justice, that, in question of this kind, where the right of succession is claimed by different parties, and the matter rendered litigious by a competition of brieves, the one party should be allowed so great an advantage over the other, as to be let into possession of the estate. All parties are upon an equal footing ; and, until the question of right is determined, the estate ought to be sequestered, and a *curator bonis* appointed. The usual form of procedure in such cases, is to raise and repeat in the service, summonses of declarator and reduction, to be the foundation of the Lords assessors reporting to the Court the debate upon the point of right. Such [3968] summonses have been accordingly raised in the present case, and the competition may be brought to a speedy determination ; but, in the mean time, it is not reasonable that either party should have the benefit of possession.

Answered for Mr. Douglas ; When the question of right comes to be debated in the proper shape, he will be able to show, that the former settlements and investitures stand in his favour : But, independent of these, he maintains, that, as heir of line and of provision, served and retoured upon the deed 1761, and lawfully in possession, he is entitled to hold that possession until the rights of the contending parties are finally judged and determined.

Mr. Douglas, in the first place, has, by his service as heir of provision to the Duke upon his last deed in 1761, carried right to the procuratory in that deed, and is vested in the personal right to the lands, which gives him a good title of possession against the granter of that right, and against every person claiming as heir under him. He is in the same case with a donee, whose want of infestment cannot be challenged by the disponent or by his heir. The disponent is obliged to put him in possession, though his right be only personal ; and therefore the disponent's heirs cannot dispute the possession with him.

Neither does it make any difference that the deed 1761 is said to have been on deathbed. A deed granted in these circumstances is not null by the law of Scotland, it is only liable to be challenged by the heir, who shall instruct a proper title so to do, and who brings a regular process for that purpose ; but, in the mean time, the deed is held to be good, and will afford an undoubted title to possess.

Further, Mr. Douglas is not only heir of provision served and retoured upon the last deed 1761, and whose titles will soon be completed by charter and infestment, but he is the apparent heir of line, called as such to the succession, by the contract of marriage 1759, failing any nomination ; and he is likewise in the possession of the estate, entitled to continue that possession till the same be evicted from him in the regular course of law, by some person having a better right.

"The Lords refused to sequestrate *in hoc statu*."

Thereafter, applications were made by the Duke of Hamilton and the Earl of Selkirk, for access to the charter-chests and papers of the late Duke of Douglas, and to have it found that Mr. Douglas had no preferable right to the keys and custody of the charter-room, and other repositories. It was answered for Mr. Douglas, That, as heir of line and provision, served and retoured to the Duke, and in possession of his estate, he had right to the custody of his papers, and that no man could be obliged to show his charter-chest *per aversionem* ; though, if any particular writing was called for by a person having an interest in it, he might be forced as a haver, or in a process of exhibition, to exhibit such paper ; case of Francis Scott *contra* Lord Napier, No. 11,

p. 3965 ; [3969] and cases of Hamilton of Dalziel, and competition for the estate of Balnagowan. See APPENDIX.

"The Lords refused the desire of both petitions." See SERVICE OF HEIRS.

For Mr. Douglas, HAMILTON-GORDON, BURNET, MONTGOMERY, GARDEN, M'QUEEN, RAE, ILAY CAMPBELL, ALEXANDER MURRAY.—For the Duke of Hamilton, LOCKHART, SIR JOHN STEWART, JOHN CAMPBELL, JUN., WALTER STEWART, WILLIAM JOHNSTON, SIR ADAM FERGUSON.—For the Earl of Selkirk, ADVOCATE, SIR DAVID DALRYMPLE, PATRICK MURRAY, WIGHT, CROSBIE.

I. C.

Fol. Dic. v. 3, p. 195. *Fac. Col.* No. 69, p. 158.

No. 13. The MINISTERS of EDINBURGH v. The MAGISTRATES and TOWN COUNCIL.
July 20, 1763.

Defenders in a process of augmentation of stipend, are bound to produce all grants from the Crown, or from private persons, towards the minister's sustenance.

The objections moved by the Magistrates and Town Council of Edinburgh to the jurisdiction of the Court, in the process of augmentation brought by the Ministers, having been over-ruled, see 19th January 1763, *voce* JURISDICTION ; the pursuers insisted, That the defenders should either produce or give inspection of the grants of the several funds that, from time to time, had been allocated for the sustenance of the Ministers of Edinburgh ; and also produce or give inspection of their books, that so the extent of the funds out of which their stipends fell to be modified might appear.

To this demand the defenders again objected, That, as the jurisdiction of the Court stands limited to the modifying and augmenting stipends out of the tithes of the parish only, the Lords could grant no augmentation out of the funds condescended on by the pursuers ; and, therefore, the defenders were not bound to exhibit any particular state of these funds, or of the grants by which they were constituted.

"The Lords, upon the 23d February 1763, before answer, ordained the Magistrates to produce all charters and grants from the Crown, or from private persons, towards the sustenance or maintenance of the Ministers of Edinburgh ; or, at least, full excerpts from the same, to be taken at the sight of the Clerks of Court."

Pleaded in a reclaiming bill, 1mo, No person is entitled to demand any inspection or exhibition of any other writings than such as he can specially condescend upon, and qualify an interest in. A general inspection or exhibition has always been refused ; nay, in such cases, the Court has even refused to oblige a defender to produce an inventory of his writings, though particularly [3970] condescended upon by the pursuer ; 13th January 1736, Francis Scott *contra* Lord Napier, No. 11, p. 3965.

2do, In point of expediency, the reason against a general production is stronger in this case than if the question related to a private estate ; for the writings of private persons are seldom bulky ; whereas those of the city of Edinburgh are extremely so. Besides, the defenders are little acquainted with the writings respecting the revenue of the city, as they have no inventory of them, and it would be necessary to employ a person well skilled in these matters to examine them, which would bring a considerable expense upon the town.

3tio, The interlocutor is broader than what was demanded by the pursuers, or suggested in their memorial, in which they condescended only upon particular grants.

4to, The pursuers appear to be well acquainted with the grants particularly condescended upon, as they have even recited the words of them. They would no doubt state them in the light most favourable for supporting their action ; and, as the defenders are willing to hold them to be of the import set forth by the pursuers, they cannot be obliged to exhibit them, unless the pursuers amend their condescendence, and say that they import something more favourable for their plea than they have hitherto alleged.

Answered to the first ; The pursuers' interest in the writings mentioned in the interlocutor of the Court, is obvious at first sight ; and nothing can be more contrary to the practice of the Court, or more repugnant to the principles of law and common

practice, than that a pursuer should be entitled to call for no paper of which he can give a particular description. Many cases may be figured, where the person having the only interest in writings may not have it in his power to condescend upon them particularly. In all such cases, it is sufficient for the pursuer to point out his interest in the writings called for; and the defender must declare upon oath whether he has such writings in his custody. Nor will the case of Scott *contra* Lord Napier avail the defenders. In that case, a pursuer in a reduction and improbation of land-right against whom prescription was pleaded, insisted, that Lord Napier should produce all writings that might tend to interrupt the prescription; but the Lords most justly found, that he was not obliged to depone without a special condescendence, as, otherwise, he would be under the necessity of deponing to a question *in jure*. Therefore the pursuer insisted that Lord Napier should produce the inventory of his writings, a demand equally absurd, as no man is obliged to lay open his charter-chest, to enable others to pick out flaws in his rights, and fish out claims against him; it was therefore justly rejected by the Court. But here the case is *toto coto* different; the defenders are only ordered to produce all grants towards the sustenance of the Ministers of Edinburgh; and so of course to depone to a fact, of which every man who can read is capable to judge.

To the second; A production, such as is required at present, could not be refused by a private person; and, as the expenses that may attend it, which is a [3971] burden that the meanest subject must bear, is an object not worthy the attention of the city of Edinburgh, so it is with a very bad grace that the defenders acknowledge their ignorance of the state of the town's revenue, and that they have no regular inventory of the writings relative to it. In whatever disorder or confusion a private person may keep his own writings, it certainly becomes the administrators of the funds of a community to keep the writings relative to those funds in proper order.

To the third; Although the pursuers condescended upon the whole funds which they at the time had been informed were subjected to their provision; yet it was never understood by them that they were to be confined to these funds, if others did truly exist; and so, in their first memorial, it is set forth, "That they would lay before the Court the several funds subject to their provision, in so far as they had been able to discover them; of which a more perfect knowledge will be had, when the defenders, who are masters of every document relating thereto, shall be ordained to give such inspection of the writings in their hands as may be necessary for that purpose."

To the fourth; The pursuers condescended, according to their best information, upon the several grants which, they believed, were subject to their maintenance, and upon the import of them. But, as the condescending upon these particular grants will not bar them from demanding production of every other grant which may be conceived in their favour; so, if the grants particularly specified shall be found to contain clauses of a different import from what has been set forth, the pursuers will still be entitled to found upon them; and have therefore an undoubted right to call for production of them, that their true import may appear.

"The Lords adhered to their former interlocutor; and ordained the Magistrates to produce the writs therein mentioned betwixt and the first sederunt-day of November next."

Act. GEO. WALLACE, DA. DALRYMPLE, M'QUEEN, FERGUSON.—Alt. RAE, GARDEN, JOHNSTONE, MONTGOMERY, ADVOCATUS.

Fol. Dic. v. 3, p. 195. *Fac. Col.* No. 115, p. 268.

No. 15. [3973] Lady MARY CAMPBELL *v.* GEORGE Earl of CRAWFURD.
August 8, 1783.

Where particular writings are called for, the haver is not at liberty to depone that they are of such a nature that they cannot benefit the pursuer.

The estate of Crawford, when disposed by William Earl of Crawford in the year 1678, to trustees for his creditors, stood devised to heirs-male by investitures completed in 1648.

In the year 1748, John, then Earl of Crawford, in order to bring the trustees to account for their intrusions, and to regain possession of the inheritance of his family, granted a trust-bond to Mr. George Ross, who, upon it, led an adjudication against the estate.

By the terms of the backbond granted by Mr. Ross, he became bound to denude in favour of Earl John and his heirs, or any other person or persons to be named him."—Upon the death of that Earl, therefore, it came to be doubted, whether the benefit of this obligation devolved to Lady Mary Campbell, his sister and heir of age, or to George Earl of Crawford, the heir-male.

For the purpose of determining this point, Mr. Ross called both these parties a multiplepoinding; in which the Earl of Crawford produced, as his interest, the investitures in 1648, already mentioned; and Lady Mary Campbell insisted for diligence against havers for recovering certain writings. In support of this demand, was

Pleaded; Lady Mary Campbell's title as heir of line to her brother, the truster, undoubted; nor is her interest in recovering the writings called for more questionable. The obligation on the trustees to reconvey, considered as relative to the investitures exhibited for the Earl of Crawford, it may be admitted in the present argument, transmits to the latter as heir-male. But as, on account of prior settlements and limitations, these investitures may have proceeded *a non habente*, it must be incompetent for Lady Mary to insist for exhibition of the contracts of marriage entered into by Earl William and his father Earl John, in which such limitations may be contained.

The merits of this competition farther may depend, in a great measure, on the intention of the truster, when stipulating, in the backbond granted by Mr. Ross, a reversion in favour of his heirs. They must be finally ascertained by a nomination, if such exists, executed by the truster agreeably to the powers contained in the same bond. It is therefore exceedingly material for Lady Mary to recover the contracts of marriage between the two Earls, her father and brother, and their respective ladies;—the nomination by the latter, in terms of the trust-bond, of the persons to whom Mr. Ross is to denude;—the testaments executed by him; the assignments and dispositions in favour of himself and his heirs;—together with all letters of correspondence, backbonds, and declarations of trust, occurring between him and the persons so employed in transactions respecting the estate of Crawford.

[3974] Answered; Demands of this sort, which may be made for the purpose merely of discovering the latent defects of title-deeds, are to be granted with the utmost circumspection, and under such restrictions as are requisite to the security of those whose writings are thus endeavoured to be exposed to public disquisition. On this principle no person is permitted to require inspection of a charter-chest *per aversionem*; but a condescendence must be given in, not in the unlimited and general terms here used, against which the same reasons may be urged as against a demand for a general exhibition, but specifying in a particular manner the dates as well as the designations of the writings called for, No. 12, p. 3966.

Nor is this alone sufficient. The tenor and import likewise of the writings must be so qualified, that their influence on the subject of debate, in favour of the person by whom the diligence is sought, shall be apparent and decisive; the other party being entitled to withhold the writings possessed by him, if he can swear that they do not answer the description.—Thus, by the investitures already produced, the estate in question being inheritable only by heirs-male, no antecedent settlements, unless guarded by strict prohibitory clauses in favour of heirs of line, can in the smallest degree aid Lady Mary's pretensions. Any exhibition, therefore, at her instance, must be confined to such settlements alone. Hence, too, with regard to those writings which are condescended on for the purpose of ascertaining the intention of Earl John in the backbond stipulated from Mr. Ross, the exhibition being measured precisely by the interest of the party demanding it, must here be limited to such as import a departure from the ancient investitures, in favour of heirs general.

Lady Mary likewise insisted for production of a decret of sale in 1724, of the house and parks of Struthers, part of the estate of Crawford, together with an heritable security granted over these subjects to Colonel Charteris. A great deal of argument too was introduced with regard to the effect of prescription as to the settlements anterior to the year 1648, and the efficacy of particular writings, such as testaments,

letters of correspondence, declarations of trust, etc., in regulating the succession of landed property. This last, however, being considered as premature, was disregarded by the Court.

A great majority of the Judges were of opinion, that the condescendence, although not accurate as to dates, was however sufficiently special, and that the writings called for were either such as might throw light on the question between the parties, belonged to Lady Mary as heir of line to her predecessors. No person, it was fairly observed, could with propriety give his oath respecting the legal consequences of the whole writings in his custody. To permit, therefore, a supposed haver, without naming particular writings, to be examined in general as to his possession of deeds of a certain effect and quality, was liable to the same objections with a demand for a general exhibition, which was now most justly reprobated in practice. On this ground, in the noted question between Mr. Scott and Lord Napier, No. 27, p. 358 the Court refused [3975] to compel his Lordship to swear, whether the writings in his custody imported an interruption of prescription, or a continuation of the trust alleged by his opponent. But when, on the other hand, particular writings were condescended on, to permit the holder to swear as to their tenor and import, by placing him in the situation of a judge in his own cause, would open a door to much pervarication and improper procedure.

Some of the Judges, however, were of a different opinion as to the extent of the exhibition. In every case, it was said, a party craving exhibition was under a necessity to rely on the faith of the supposed haver, in whose power it was, if he chose to perjure himself, to conceal the writings in his possession. Little prejudice, therefore, could arise from the restriction insisted for on the part of the Earl of Crawford, while a contrary practice tended to render insecure the titles of landed property, by giving occasion to disputes altogether foreign to that in which the exhibition was demanded, and to claims in favour of those who were parties to the action.

The Lords, before answer, granted warrant for letters of incident diligence against havers, for recovering the writings which have been mentioned.

Lord Ordinary, ELLIOCK.—For the Earl of Crawford, SOLICITOR-GENERAL CAMPBELL, MACKINTOSH, WIGHT, SIR JOHN W. BELSCHES.—For Lady Mary Campbell, LORD ADVOCATE DUNDAS, CROSBIE, HENRY ERSKINE, ALEX. FERGUSON, NEIL FERGUSON, MORTLAND, RO. DUNDAS.—Clerk, MENZIES.

Fol. Dic. v. 3, p. 195. *Fac. Col.* No. 118, p. 184.

* * This cause was appealed :

The House of Lords, 24th July 1784, pronounced the following judgement : "It is declared, *in hoc statu*, the respondents are entitled to the production sought for in the condescendence, without prejudice to any other question in this or any other cause between the parties ; and therefore, ordered and adjudged, That the interlocutors complained of be affirmed."

No. 2. [3982] NISBET v. WHITELAW. July 1, 1626.

Exhibition *ad deliberandum* may be pursued after the *annus deliberandi*.

One Whitelaw, being pursued at the instance of Mr. Patrick Nisbet and his heirs begotten upon his wife, daughter to Mr. John Arthur, for exhibition of certain writs and bonds, pertaining to the said Mr. John, and which they desired to be produced and delivered to them, to the effect that they might advise and deliberate, if they would enter heirs to their said umquhile grandfather, or not ; in this pursuit the defenders compearing, alleged, that this pursuit, for delivery of evidents to the pursuer, to the effect she might advise, if she would enter heir, ought not to be sustained, because albeit an apparent heir might call for production of writs, yet the delivery thereof, or decret being given for delivery, makes the pursuer heir ; so that the

iving of the writs to be delivered *ad hunc effectum*, viz. to advise, if she would enter heir, ought not to be sustained. This allegiance was repelled against the inhibition, and the pursuit was sustained by the Lords, to crave the production, to the foresaid act, albeit it was year and day past, since Mr. John Arthur's decease, whereby the defenders alleged, that the pursuer could not crave exhibition, for the foresaid effect, deliberate, seeing the time given by the law to advise was expired; and in respect hereof she could not pursue, but to the effect that she might enter heir, which was repelled as said is, against the exhibition, but was reserved after the evidents were produced, to be disputed against the delivery thereof.

Act. STUART.—Alt. HOPE.—Clerk, HAY.

No. 3. [3983] WAIRD v. WAIRD. January 8, 1675.

Exhibition *ad deliberandum* was not elided because the pursuer had renounced to be heir, in favour of a creditor, or because he had granted a bond, whereupon the heritage was adjudged from him.

Marion Waird pursues an exhibition of writs granted by one James and William Wairds, to whom she is apparent heir, and thereupon obtained decreet before the magistrates of Stirling, which being suspended, the suspender insisted on these reasons, 1mo, That the charger hath renounced to be heir. 2do, That she hath emixt herself with the defunct's estate, by granting bond, whereupon the same is adjudged from herself, and so *res non est integra*, she cannot deliberate, and ought not to put the defender to the trouble to produce these writs to her. It was answered, That the renunciation to be heir was only in favours of one creditor, and is not general, and may be satisfied, and doth neither hinder the pursuer to enter, or deliberate; and for the alleged emixation, it is not relevant to stop exhibition, neither hath the pursuer possessed thereby, and if it were true, may renounce the same.

The Lords repelled the reasons, and sustained the exhibition.

Fol. Dic. v. 1, p. 283. *Stair*, v. 2, p. 303.

No. 10. [3988] ISABEL SPARK v. BARCLAY of Ury and Others. June 30, 1715.

In an action of exhibition *ad deliberandum* at the instance of the said Isabel Spark v. Ury and others, the Ordinary having ordained them to exhibit all writs granted to or by the pursuer's predecessors, except those on which infeftment had followed, the dates of whose registrations they were ordained to condescend on, the defenders reclaimed on these grounds:

1mo, That, as the privilege was at first granted for encouragement of apparent heirs, so when they once behave as heir (as in the present case), the design of the privilege ceases, and *sublata causa tollitur effectus*, and if *privilegia* be *strictissime interpretanda* in general, much more here, where the privilege is contrary to the common course of law, and tends to diminish another's right; for, in an exhibition *ad deliberandum* (contrary to the nature of all other exhibitions), without qualifying that they have any direct interest, or that they can be in the least benefited thereby, apparent heirs may force any man to open his charter-chest, and expose his papers. 2do, The Lord Stair, lib. 4, tit. 33, § 7, says, That it will be a good defence in this action to say, that the pursuer is already actually entered and has no place for deliberation; but behaviour is equivalent to actual entering; and that it excludes the benefit of de-

liberation appears from *Voet. ad tit. ff. de jur. delib.* where he says, *denegatur tam ulterior deliberandi facultas, si probari possit hæredem jam adivisse, aut pro hærede gessisse, cum non possit desinere esse hæres qui semel hæres factus est.* 3tio, By a constant practice, apparent heirs can call for no writs, except those that are in favour of persons in the defunct's own family (which the defenders are not in the present case, as was found 6th December 1661, Forrester *contra* Tailfer, No. 29, p. 4006; which yet more fully cleared by a late decision, 10th June 1706, Buchanans *contra* Marquis Montrose, No. 34, p. 4010, where after a full debate, the Lords solemnly decided and declared, that finding that former decisions had varied in this point, they resolved to fix such a rule for the future, as apparent heirs might be as little vexatious as was consistent with the legal privileges; and therefore found the Marquis not obliged to produce any writs granted by the pursuer's predecessors, to strangers, or persons *extra familiam*.

Replied for the pursuers to the first and second, That though behaviour be a passive title competent to creditors, yet it is not relevant against this action; for, if it were so, defenders would always propone such defences; yet it is certain they were never sustained, which is expressly said by the Lord Stair in the above-cited tit. § 5. And the reason is, that it might be very prejudicial both to the heir, who could not enter until he had inspection, and to the creditors, seeing during a course of probation, the estate would be neglected. And therefore, as is observed by the Lord Stair in this place, no other passive title, but being actually entered, is a relevant defence against this action; and, as to the [3989] authority of Voet, it cannot be opposed to what is already mentioned, specially in point of our form. Besides, that *gestio pro herede* by the civil law, is not only a passive but an active title, and equivalent to actual entry; for with them an heir *adit hæreditatem, non solum preferendo se hæredem esse, sed etiam si facto aliquo tandem voluntatem declaraverit.* To the third replied, That seeing law gives apparent heirs this benefit, they ought also to have the necessary means thereof, by inspection, not only of the benefit, but also of the burden that may affect their predecessor's estate, that so they may deliberate; and this end can never be attained, unless all writs which may infer a liquid ground of debt be produced. And it must be acknowledged, that ordinarily the greatest part of any man's debts are owing to persons out of the family; nor can there any reason be assigned of the difference, since the heir, if he enter, will be equally liable to both debts *extra* and *intra familiam*. And so the Lords, by the current of decisions, have sustained this action against persons out of the family, as well those within it.

The Lords adhered to the Ordinary's interlocutor, with this alteration, that they found the defenders, though not being in *familia defuncti*, ought to exhibit all writs in their hands, whether infestment has followed thereon or not.

Act. FLEMING.—Alt. RO. GORDON.—Clerk, ROBERTON.

Fol. Dic. v. 1, p. 283. Bruce, No. 112, p. 138.

No. 15. [3993] Sir ANDREW CATHCART v. The Earl of CASSILIS. February 4, 1795.

The right of the heir of line, or of former investitures, to bring an exhibition *ad deliberandum*, found to be cut off by an entail made by his predecessor, in favour of the heir-male.

David Earl of Cassilis executed an entail of his estates of Culzean and others, in favour of himself and his heirs-male.

On his Lordship's death in 1792, Archibald Earl of Cassilis being the next heir called in the entail, got possession of the estates conveyed by it, with the title-deeds, which last, it as usual assigned to the heirs of tailzie. His Lordship, soon after, took infestment on the entail, and put it upon record.

Sir Andrew Cathcart was one of the heirs-apparent of line to Earl David, and also (as he alleged) heir of provision in part of the lands entailed by him, of which, in

consequence of certain destinations made by his Lordship's predecessor, Sir Andrew contended, that he could not be disappointed by the entail, which was gratuitous.

Sir Andrew, in these characters, brought an action against Earl Archibald, concluding for exhibition *ad deliberandum*, of all the writings in his possession relative to those lands, to which he alleged he had right as heir of provision.

In defence, Lord Cassilis

Pleaded ; Earl David's entail followed by infeftment, is *ex facie* a complete title for vesting the property of the whole lands and title-deeds in the defend-[3994]-er, and until it be set aside in a regular action of reduction, the pursuer, in neither of the characters to which he lays claim, can have any title or interest to insist in this action ; Erskine, b. 3, tit. 8, § 56 ; Harcarse, March 1683, Lady Yester v. Lord Lauderdale, No. 23, p. 3999. Its proper object is to enable the heir to deliberate whether he should enter, but there can be no occasion for such deliberation, where, as in this case, there is no estate to which he can enter.

Answered ; The deed of a predecessor, in order to deprive an heir-apparent of the privilege of pursuing an exhibition *ad deliberandum*, must be onerous, must be followed with infeftment, and must have completely denuded the granter ; Stair, b. 3, tit. 5, § 1 ; b. 4, tit. 33, §§ 4, 6 ; Harcarse, No. 482, No. 23, p. 3999 ; 483, No. 6, p. 3985 ; and 484, No. 25, p. 4000 ; Erskine, b. 3, tit. 8, § 56 ; Madowall, b. 3, tit. 5, § 7 ; Kames, 30th November 1756, Heron v. Herons, No. 37, p. 4019 ; Fac. Col. 12th January 1779, Macfarlanes v. Buchanan, No. 13, p. 3991 ; 8th August 1783, Lady Mary Campbell v. Earl of Crawford, No. 15, p. 3973 ; whereas the entail in question was not only gratuitous, but at Earl David's death was an undelivered personal deed, which he might have revoked at pleasure.

Replied ; None of the authorities referred to support the plea of the pursuer ; most of them indeed relate entirely to the question, What writings an heir, whose title is undisputed, is entitled to call for ?

The Lord Ordinary "assoilzied the defender."

On advising a reclaiming petition, with answers, it was

Observed on the Bench ; The deed of the late Lord Cassilis clearly excludes the present action. This point was determined both in the case of Duke Hamilton v. Douglas, 28th November 1761, No. 12, p. 3966 ; and in that of Hamilton of Dalzell v. Miss Hamilton of Rosehall in 1756 (not reported). The pursuer's object here is, not to get inspection of writs, in order to deliberate about entering, but to discover whether there are grounds for setting aside Earl David's entail. But for this purpose, he must make up titles, and bring a regular process of reduction and declarator, in which, after specially condescending on the papers wanted, he will be allowed a diligence for recovering them.

The Court unanimously "adhered."

Lord Ordinary, CRAIG.—Act. GEO. FERGUSSON.—Alt. DEAN OF FACULTY ERSKINE, ROLLAND.—Clerk, HOME.

R. D.

Fol. Dic. v. 3, p. 197. Fac. Col. No. 154, p. 352.

No. 29. [4006] TAILZIFER v. FORRESTER and SORNBEG. November 19 & 20, 1661.

Exhibition found relevant of all writs granted to the defunct, and of all obligations made by the defunct to his wife, children, and others in his family, at his death, but exhibition of writs granted to strangers was refused. Exhibition refused of writs on which infeftment had past.

Patrick Tailzifer, apparent heir to his brother Alexander Tailzifer of Redhouse, pursues his relict and her second husband, for exhibition of all writs made to her husband, and by her husband to any person or persons, to the effect he may advise whether he will be heir or not. It was alleged, That the defender was not obliged to exhibit writs made by the defunct, seeing they pertained not to the defunct ; and, as he could not pursue exhibition of them, so his apparent heir cannot, and *nemo*

tenetur edere instrumenta to his adversary ; and, if that were sustained, no man would secure his charter-chest, but might be forced to discover his weakness and secrets for pleasure, and many other in-[4007]-conveniences might follow. It was answered, That the hazard of an heir being so great in Scotland, not having *beneficium innocencie*, it was reasonable that *ad deliberandum*, the apparent heir should see not only what belonged to the defunct, but what deeds the defunct had done, else he should not know, whether the heritage were profitable or not ; especially considering, he wives, children, or servants, having power with the defunct, might clandestinely obtain rights, and keep them close till the apparent heir were served, by which he might be destroyed.

The Lords having seriously considered the matter, they sustained the exhibition for all writs made by the defunct to his wife, or any being in family the time of his decease, whereupon no infeftment followed before his death ; but not for any which upon infeftment followed : For they thought, that the infeftment being registrate, was sufficient to give information to the apparent heir.

Fol. Dic. v. 1, p. 284. Gilmour, No. 8, p. 8.

No. 33. [4010] JEAN BUCHANAN v. The Marquis of MONTROSE. January, 1683.

Major Grant having got from the Laird of Buchanan a disposition of lands redeemable by the granter's heirs, and the charter-chest delivered to him, he disposed his right to the Marquis of Montrose, against whom Buchanan's daughter pursued an exhibition *ad deliberandum*.

Alleged for the defender, That the pursuer could have no inspection of papers but such as contained clauses in her favour, or were in the defunct's possession at his death, which the charter-chest was not.

The Lords, in respect that Grant's right was redeemable, found the charter-chest was the common evidence both for the right to Grant, and the reversion in favour of the pursuer ; and therefore decerned. *Harcarse (EXHIBITION), No. 486, p. 133.*

No. 17. [4034] WEIR v. WHITE. February 24, 1747.

A reduction repeated *incidenter*, and not executed, can go no farther than the suspension (which was the present case) or libel of the other process into which it is repeated.

Expense of a refused bill of advocacy, is an instance of expense whereof the party aggrieved has no access to get reparation. See PROCESS.

Fol. Dic. v. 3, p. 199. Kilkerran (PROCESS), No. 7. p. 435.

No. 18. CRUICKSHANKS v. FORSYTH. June 16, 1747.

A defender was found liable in expenses, though he prevailed in part, the point which he gained not being that which occasioned the expense.

In the year 1744, James Cruickshanks, master of the grammar-school at Elgin, was employed to bleach some linen cloth for Alexander Forsyth, Bailie of that burgh ; and having carried the same to his shop, the Bailie carped at the cloth as ill whitened ; and, without any provocation from the answer made by Cruickshanks, after giving him hard names, gave him a stroke over the head with his ellwand. The Bailie was sensible of the crime he had committed, but, [4035] in place of endeavouring to make it up with Cruickshanks, he applied to his brother Magistrate, and got himself fined

in £30 Scots to the procurator-fiscal of the Bailie-court ; and Cruickshanks having brought his complaint before the next Circuit at Inverness, the Lords remitted the matter to be tried before the Sheriff of Elgin, with this instruction, That the Sheriff should have no regard to the decree of the Magistrates of Elgin, the same appearing to have been collusive.

In virtue of this remit, the process being brought before the Sheriff, and proof taken, on advising thereof, the Sheriff decerned the Bailie in £100 Scots to the procurator-fiscal, and in £350 Scots to the private party, in name of damage and expense.

Of this decree, the Bailie obtained suspension ; and at discussing, having not only insisted on the exorbitancy of the fine, as sufficient to open the decree, but, in order to a total absolvitor, alleged provocation, the Lord Ordinary turned the decree into a libel, and before answer, ordained the defender to give in a condescendence of the provocation, and the pursuer to give in a special condescendence of his damage. And the defender not being able to make any tolerable condescendence of provocation, nor the pursuer to condescend upon any special articles of damage, the Lord Ordinary " modified the sum of £350 of damage to £24 Scots, and the fine to the procurator-fiscal to £3 Scots, and found the defender liable for these sums, and for the expense of the process before the Sheriff ; and ordained the pursuer to give in an account of the said expense."

But the pursuer having reclaimed, the Lords, upon hearing parties upon the proof, " Adhered to the Lord Ordinary's interlocutor, finding the expense before the Sheriff-court due, and remitted to the Ordinary to tax the same ; and adhered also to the Ordinary's interlocutor, restricting the £100 decerned to the procurator-fiscal to £3 Scots ; but found the defender liable to the pursuer in £10 Sterling in name of his damage and expense in discussing the suspension."

The riot was considered as atrocious, as having been committed by a Magistrate, at the time in office, within his own house, and without provocation ; and though, strictly speaking, there was no damage other than the expense, yet when a man is affronted and beat, something was thought to be due *in solatium*, and for encouraging persons to seek redress in this way, rather than to take it at their own hand. And whereas it was said that the Sheriff's decree was extravagant, and therefore the defender was under a necessity to suspend, the answer was, That true the Sheriff's decree was extravagant, and, when the suspension came to be discussed, had the suspender only objected to the extravagance, and subjected the modification to the judge, he would have had much to say against being liable in the expense of the suspension ; but, instead of that, he pleaded a total absolvitor, on pretence of provocation, in which he failed, and thereby made his right a wrong.

[4036] The like happens every day, where one suspends because he is charged for more than is due ; if, when the suspension comes to be discust, he only plead that reason, he is safe ; but if he pleads other reasons and fails, he may be subjected to expense, notwithstanding his having been charged for more than was due.

Fol. Dic. v. 3, p. 199. Kilkerran (REPARATION), No. 3, p. 484.

No. 9. [4054] The YORK BUILDING COMPANY v. Sir JAMES CARNEGIE.
November 14, 1764.

A factor of the York Buildings Company having pursued a removing against a tenant, it was objected, that he had no proper title, as his factory was conceived only in general terms, authorising him to carry on and defend all suits and processes, but made no mention of actions of removing ; and that there was no evidence that the assistants had concurred with the governor in granting the factory, as his subscription only was adhibited to it. The Lords found, that the pursuer had produced no proper authority from the company to remove tenants.

The York Building Company having set certain lands to Sir James Carnegie for the term of nineteen years, with a clause in the tack, to remove from these lands at the expiration of the lease, without warning, they commenced an action of removing

against him in common form. In bar of which, it was pleaded, that the Company were destitute of any title to carry on such a process, being no longer proprietors but divested of the property of the estate by adjudications long expired, and judgments, one of which of a considerable extent was vested in the person of the defendant. That, in the case of a voluntary alienation of lands, there was no doubt that the lessees had a good right to disregard any action of this kind at the instance of the former proprietors, who were now denuded of the property since the granting of the tack. A tenant, who derives his possession, would not be allowed to quarrel with the title of his master, so long as the fee of the estate remains; but it has always been reckoned a sufficient defence against a removing at his instance, that he was denied by a voluntary sale. An adjudication is a legal sale, conducted under the authority of the Court; there is an absolute transfer of the property, though that alienation may be revoked in virtue of the clause of redemption. That, in the present case, there was no possibility, that the property of the estate would revert to the pursuers as the adjudications were now all expired, and the alienation was become irredeemable.

It was pleaded too, That the estate of the Company was under sequestration, and that they had been prohibited from granting leases without the authority of the Court of Session, and that it was a natural consequence of their being deprived of the power of giving tacks that they could not remove tenants.

[4055] To these defences it was answered by the Company; That whatever interest they might have in these lands, the defender was not entitled to quarrel with their right of insisting in this action, as his possession flowed directly from them, and that whatever title is requisite in an heritor, when insisting against tenants deriving right from him; yet it can never be controverted by his own tenants, that his title be never so lame. As to the estate being vested in creditors in consequence of expired adjudications, the fact was denied.

As to the prohibition of letting leases without the authority of the Court of Session, it seemed, with all submission, to be foreign to the present purpose; as tenants may be removed without new leases being granted, and as the sub-tenants of the defender in this question might be permitted to continue their possessions, which would be attended with infinite advantage to the Company. But the pursuers could not discover how the former prohibition could obstruct their carrying on processes of removing, as such seemed absolutely necessary to pave the way for the Company obtaining the authority of the Court of Session to grant new tacks.

It was also objected by the defenders, That the factory and power of attorney granted to Mr. Beveridge, who conducted these processes in the Company's name, was not authority sufficient for that purpose. The factory was conceived in too general terms, and empowered him only to carry on and defend all suits or processes which were then depending, or might afterwards be brought; but that there was not one word relating to actions of removing, which ought to have been particularly mentioned. That there was no evidence that the assistants had concurred, along with the governor, in granting this unlimited power, which was absolutely necessary. That their concurrence indeed was mentioned in the factory; but this was only supported by the subscription of the governor; whereas their subscriptions too were indispensably requisite. Neither was the appendage of the seal of the Company of any force, as that in all probability might be the sole act of the governor, as well as the addition of his own name; and that the after production of a new factory, wherein actions of removing are particularly mentioned, could be of no service to them, as this factory laboured under the same informalities with the former.

The Company on the other hand insisted, That there was sufficient evidence of every thing being conducted with the greatest solemnity, and the subscription of the governor, with the seal of the Company being appended, was all that could be required.

"The Lords repelled the objections to the pursuer's title to carry on the action of removing; but found, that Mr. Beveridge had produced no proper authority from the York Building Company to entitle him to insist on this action; reserving to the pursuers still to grant a proper authority for that purpose."

Act. D. DALRYMPLE, JUN.—Alt. ALEX. LOCKHART.

No. 17. [4064] JOHN RANKIN, Merchant in Ayr v. ROBERT MOLLISON, Collector of Excise there. February 17, 1738.

One who contracts *factorio nomine*, is presumed to bind his constituent only, unless the contrary be expressed ; and therefore is not personally liable to implement, but only to furnish a sufficient commission so as to bind his constituent.

Mr. Arbuthnot in Peterhead having wrote to Mollison, with respect to some meal he had to dispose of, Mollison, in consequence thereof, entered into a bargain with Rankin anent the purchase of the meal, and wrote a letter to him, wherein he says, That he had a commission from Mr. Arbuthnot to dispose of a certain quantity of meal for his account ; and then adds, " And I do agree with you, in his name, that betwixt, &c., he shall provide you 800 bolls good and sufficient oat-meal, &c., to be delivered either at Portsoy or Peterhead, in the option of the said Mr. Arbuthnot, who is to have his orders ready at Portsoy, if the ship calls for them." In consequence of which bargain, Rankin sent a ship for the meal ; and, upon its not being delivered, he brought a process against Mollison, founded upon the above letter, for the damage he sustained by the not delivery.

The defence pleaded for Mollison was : That, by the whole tenor of the letter, it was plain, he did not intend to subject himself to any personal demand at the pursuer's instance, as he declares therein, That he acted by commission from Mr. Arbuthnot, disposes of the meal for his account, and the place of delivery to be at his option ; wherefore, as there are no obligatory words upon the defender through the whole of it, the natural construction must be, that Mollison intended only to bind his constituent, and not himself. See Huber. tit. *Exerc. act.* § 6 ; Voet. *De Inst.* § 6 ; Sand. Decis. book 3, tit. 7, def. 1. The import of which authorities amounts to this, that the obligation of the party con-[4065]-tracting, is to be regulated by the character under which he acts ; and that a factor, or person acting by commission, is understood to bind his constituent only, and not himself.

Answered for the pursuer ; Though the letter bears the defender had a commission, yet the same was not shown to him at or before the bargain ; he relied solely on Mollison, and cannot be supposed to have acted on the faith of a commission not seen, which, now it is produced, is indefinite as to quantity, price, and date. 2do, Supposing the defender had acted *procuratorio nomine*, yet that could not free him, because, as such, he was bound as well as his constituent, See L. 13, ff. § 25 ; *De act. empt.* l. 1, § 17, *De exer. act.* 3tio, The letter or commission from Mr. Arbuthnot to the defender does not give him a power to conclude a bargain with any person, and therefore he cannot give a third party a legal action against his constituent, though, from his commission, the Court may find the defender has an implied relief.

The Lords found the defender was not personally liable, but only to furnish the pursuer with a commission. *Fol. Dic.* v. 1, p. 288. *C. Home*, No. 87, p. 141.

No. 19. AINSLIE and FACTOR v. ARBUTHNOT. June 6, 1739.

A factor taking bills in his own name from his constituent's debtor, the loss falls upon the factor.

Found that a factor having taken bills in his own name from his constituent's debtor, without any notice given to his constituent or any posting by the factor in his books, whereby it might appear that the said bills were in his name for his constituent's behoof, the loss happening by the after bankruptcy of said debtor, falls upon the factor and not upon the constituent.

This was afterwards altered, July 13, 1739, not upon the general point, but upon the *species facti* ; it being thought to appear from a book called a bill-book, that there was evidence of such posting as the former interlocutor had supposed necessary ; but this last judgment was reversed upon an appeal, the House of Peers having no regard to a bill-book as not *nomen juris*.

Fol. Dic. v. 3, p. 202. *Kilkerran* (FACTOR), No. 2, p. 182.

No. 28. [4070] ANDREW THOMSON, Factor appointed by The Lords upon the Estate of Crabston v. JOHN ELDERSON. July 9, 1757.

A factor named by the Court of Session on a sequestrated estate, has all the powers of management which belong to a proprietor infeft.

Between these two parties, this abstract question occurred, whether a factor upon an estate, sequestrated on account of a competition between two claimants, neither of whom are infeft, can remove a tenant who continues to pay the rent that he did to the original proprietor?

[4071] pleaded for Elderson the tenant, As the favour of possession is in law very great, so no tenant in possession can be removed but by a person who has a stronger right in him, viz. the property evinced by an infeftment. Besides, in the law of Scotland, a tack, if clothed with possession, is a real right; and therefore, added to the favour of possession, there is likewise the favour due to a real right, which nothing but a property and a possession can remove. Founded on these principles, the law of Scotland carries the rule, that only a person infeft can remove, so far, that even an apparent heir cannot remove, although in a manner the same person with his ancestor drawing the rents, living in the mansion-house, and with whom, at the distance of three years, creditors are in safety to contract.

Any exceptions from the general rule do only tend to strengthen it. An adjudger with a charge against the superior, may remove; but this is only because a particular statute has made a charge equivalent to an infeftment. A liferenter, by the court, or by the terce, may remove; but this is only because, by the general concession of law, the continuance of the possession in these cases is deemed to be a continuation of the property which the deceased husband or wife originally had. A tacksman may remove a subtacksman who was bound to remove; but this is only because the subtacksman cannot come against the right by which himself holds; and in a question between him and a person from whom he derives right, this last is, *quoad* him, a quasi proprietor.

Answered, A factor appointed by the Court of Session ought to have all the powers of a proprietor infeft, to enable him to manage the estate to the best advantage; and as he acts under the authority of the Supreme Court, and is tied down upon strict regulations, for the benefit of those who shall be found to have the preferable right, it would be absurd to control his power of setting the lands to the best advantage, on account of a maxim in law, which was calculated only to prevent intruders from removing tenants from the possession.

"The Lords decreed in the removing." See REMOVING.

For Thomson, GARDEN.—For Elderson, Jo. DALRYMPLE.

J. D.

Fol. Dic. v. 3, p. 203. Fac. Col. No. 41, p. 68.

No. 29. JAMES PATON, Petitioner. July 24, 1785.

Factor for an heir apparent appointed by the Court of Session, may make up inventories in terms of the act 1695, c. 24.

The petitioner having been appointed by the Court to manage, in the absence of an apparent heir, the heritable estate of a person deceased, applied to be authorized to make up inventories in terms of the act 1695, c. 24.

A difficulty arose from the manner in which this statute is expressed, enacting, "That for hereafter, any apparent heir shall have free liberty and access to enter to his predecessors *cum beneficio inventarii*, or upon inventory, as [4072] use is, in executories and moveables; allowing still the said apparent heir year and day to deliberate, in which time he may make up the foresaid inventory, which he is to make up, upon oath, full and particular, as to all lands, &c., to which the said apparent heir

may or pretends to succeed, which inventory, to be subscribed by him before witnesses, shall be given in to the clerk of the shire," &c. : From which words it might be thought that the legislature required, in the execution of this formality, the personal interposition of the apparent heir himself.

The Lords, however, were clearly of opinion, that the petitioner was, from the nature of his office, sufficiently empowered, in the place of the apparent heir, to fulfil the directions of the statute. But they refused the petition, considering this as an act of administration which the factor ought to perform, without any special authority from the Court.

For the Petitioner, RO. CRAIGIE.—Clerk, CAMPBELL.

C.

Fol. Dic. v. 3, p. 203. Fac. Col. No. 224, p. 350.

No. 1. [4075] MURRAY v. FLEEMING and Others. November 28, 1729.

A person disposed lands to his wife in liferent, and any relation she should name in fee. The wife named a fiar. This found a habile conveyance of the property.

A husband disposed his land-estate to his wife in liferent, and to any of his blood relations she should think most fit to be nominated, by a writ under her hand, in fee. A nomination was accordingly made after the husband's decease; and against the nominee, claiming right to the estate, it was argued, 1mo, That this was an unhabile way of transferring property, because a fiar cannot be created by the nomination of one who is not fiar. 2do, It is contrary to the maxim, that a fee cannot be *in pendente*, and yet here is a fee conveyed, a property established, but no proprietor until the wife chuse to exerce her faculty. Answered, to the first, There is nothing in reason, or in law, to bar a fiar to name his successor in what shape he pleases; it is not material who names, but whether the nomination be by the authority of the fiar; and this is not more than for one to give a mandate to sell his estate. To the second, The property is not transferred until the wife interposes her nomination; in the interim, the property remains with the disponent, and after his death is in *hereditate jacente*. The Lords found, that this disposition, granted by the husband to his wife, did sufficiently enable her to nominate persons to succeed to the subjects disposed, and that she having accordingly exerceed that power, the persons named by her have right to succeed. See APPENDIX.

Fol. Dic. v. 1, p. 289.

No. 2. [4076] CAMPBELLS v. CAMPBELLS. December 16, 1738.

A party delegated to third parties the power of making provisions on his children. This found competent.

Colonel Campbell being bound in his contract of marriage to secure the sum of 40,000 merks, and the conquest during the marriage, to himself and spouse in conjuncture and liferent, and to the children to be procreated of the marriage in fee, did, by a deathbed deed, settle all upon his eldest son, burdened with certain provisions to his younger children, to take place in case their mother should give up her claim to the liferent of the conquest, and restrict herself to a lesser jointure, otherwise these provisions to be void; in which event it was left upon the Duke of Argyle and the Earl of Islay to name such provisions to the children as they should see convenient. It being objected by the younger children upon the mother's refusal to restrict herself, That their father could not delegate his powers, and that such delegation was ineffectual, there being no compulsator upon the referees to determine; which brings the matter to the same as if the children were left entirely unprovided; and concluding from this, that the settlement should be voided *in toto*, and that each child should have an equal proportion as if no settlement had been made;—The Lords found the power and faculty given to the Duke of Argyle and Earl of Islay is lawful, and does

subsist; and in respect these referees have neither exercised their power, nor declared their will not to exercise the same, they superseded further proceeding in the cause the 5th of June next, that in the mean time either party might make proper application to the Duke of Argyle and Earl of Islay, to determine what sums should be paid to the younger children, or declare their non-acceptance of the power committed to them. See APPENDIX.

Fol. Dic. v. 1, p. 228.

No. 1. [4145] *GEORGE GIBSON v. THOMAS KER.* November 16, 1552.

In an action persewit be George Gibson v. Thomas Ker, for breaking of an arrestment, it was alleged be the said Thomas, That he might lawfully depart, notwithstanding the alleged arrestment, because it was done in time of fair, which gives immunitie in time thereof.—To the which George replied, That gif the arrestment had not been lawful, he should have tarried while it had been declared null; which reply was repelled.

Fol. Dic. v. 1, p. 294. Mailand, MS. p. 114.

No. 2. *BISHOP of CAITHNESS v. FLESHERS in EDINBURGH.* July 2, 1629.

If any buy any stolen goods in a market, the owner of the goods may pursue the buyer thereof, although the thief be executed, for repetition of his gear, but not have them punished in their persons. *Fol. Dic. v. 1, p. 294. Auchinleck, MS. p. 22.*

No. 4. [4146] *FALCONER of Glenfarquhar v. L. GLENBERVIE.* June 24, 1642.

A person was infeft with the immemorial privilege of a fair. A neighbour obtained subsequent grant of a fair which interfered with the former. Found, that the second could not keep his fair, except at the distance of a month from the other.

Mr. David Falconer being infeft in the lands of Glenfarquhar, with the privilege of an ancient fair, called Padie Fair, from Palladius, holden upon the said lands of — past memory of man, from the 1st of July to the 7th day thereof, pursues the Laird of Glenbervie, who had acquired from the King a late infeftment, anno 1635, of his lands, with the privilege of a fair to be holden on his lands of Dillivard, which lie within a mile, or less, of the pursuer's lands, whereon his fair holds, to be holden from the 24th of June to the 1st of July yearly, to hear it be found, that the said infeftment ought to be declared null, so far as concerns, or may be extended to the having of any fair on the said lands of Dillivard the time foresaid, as being a privilege privately purchased, and indirectly tending to take away the liberty and privilege of the pursuer's fair, in respect that the pursuer's lands and the defender's, which have the fairs, are not distant from others a mile of ground; and the time of the holding is so ewest, without any interval of time, that the defender's fair (which ends the very day when the pursuer's fair begins), must necessarily evert all privilege and use of his fair, and prejudice him of all commodity which he can have thereby, and tend manifestly to kindle trouble betwixt the parties, and to disturbe the quietness and peace of the country: Which action being heard in the Lords presence, and the parties and their advocates being heard to dispute thereupon, they found, That the defender's infeftment ought not to extend to the privilege of a fair, to be holden of such nearness to the said lands, for keeping of the same, within the time contained in his infeftment, which is in such vicinity, and immediately precedes the time of the pursuer's ancient fair; the defender having taken the same to end the same day when the pursuer's fair begins; for however he might take a right from the King of his lands, with the said privilege of a fair, yet that privilege ought not to have been sought, to destroy

the effect and use of that ancient fair, granted to, and bruiked immemorially by the pursuer, and his authors and predecessors of before ; and therefore they ordained that privilege, so far as concerns that time of the holding thereof, to cease, as impetrate in *œmulationem* [4147] *vicini* ; and found, that the said fair might be lawfully impetrated, and may be kept by the defender, upon his said lands, at any time after the end of the pursuer's fair, or at any time before, by the space of a month preceding the pursuer's beginning of his fair ; but found, that the defender cannot have any fair before the pursuer's fair begin, except there intervene the space of a month at least free, betwixt the end of the defender's fair, and the beginning of the pursuers ; and the Lords decerned accordingly.

Act. ADVOCATUS, NICOLSON & STEWART.—Alt. MOWAT, GILMORE & NISBET.

Fol. Dic. v. 1, p. 293. Durie, p. 895.

No. 6. [4148] The MAGISTRATES of the Town of STIRLING *v.* MURRAY of Polmais. February 7, 1706.

A gift from the King to a burgh, of the sole power of holding fairs within two miles of the liberties thereof, so denudes the Sovereign in favour of the burgh, as no posterior donatar could hold fairs within that bounds.

The said town obtains a charter from King Charles II. in 1678, giving them the sole right of fairs and markets within two miles of their burgh, and that none should have these privileges within that bounds ; and on it they pursued Polmais in 1679 in a declarator, and obtained a decret in absence against him in their favour. Polmais, in the last session of Parliament, in July 1705, procured a right to hold two yearly fairs ; but the burgh of Stirling protested against it, and, for asserting and maintaining their right, raised a new declarator against Polmais, that he has no right to hold a fair within that bounds to the prejudice of their prior right, especially seeing he may keep them on such parts of his barony as lie without the two miles, and not at the village of St. Ninian's, which is within a mile of the town. The defence was, the town's gift was, without hearing of parties, procured by subreption and obreption, *contra jus et utilitatem publicam*, to the prejudice of all the adjacent heritors two miles round about Stirling, and so was *periculo impetrantis*, and did not hinder the Crown to give any neighbouring heritor the right of keeping fairs and markets, who ought not to be prejudged by their situation near a royal burgh ; and King Charles was not so denuded, but he might have revoked it as in lesion to the Crown, and so may his successors ; and which *de facto* they have done, by granting Polmais this gift in Parliament ; and no such exorbitant gifts should be granted, without calling and hearing all the adjacent heritors interested and prejudged thereby ; and a gift in Parliament may be as good to Polmais as the town's gift and signature from King Charles. Answered, That the town of Stirling has no more by this gift but what the town of Edinburgh and many other royal burghs possess ; and that this, with other privileges, is given them on the account of the many burdens they support, and particularly the 6th part of all [4149] the taxations in the kingdom ; and to allow such fairs and markets near to them draws away all their tradesmen, or gives the hail profit to unfreemen, who bear neither scot nor lot within burgh, to their utter ruin and decay ; and this can never be called against public utility, seeing fairs are *inter regalia*, and may be given or not given by the Prince as he pleases ; and seeing he has the sole power of conferring them, if he once give them, he is so denuded that he cannot by a posterior gift frustrate or annul them ; even as when he erects a sheriffship or regality, he cannot in the same bounds erect a new one in prejudice of the former ; so that *prior tempore* is here *potior in jure* ; and that the King is uncontravertedly the fountain of such grants ; and whatever may be in the King's power of revocation, that is not the present question, seeing it is not actually revoked ; and fairs given in Parliament pass of course, falling under the act *salvo jure*, and can never prejudice the town's prior right, and must be reputed to have been sought merely in *œmulationem vicini* ; and their opposing it

was no wrong, for *qui jure suo utitur, nemini facit injuriam*.—The Lords, by a plurality of seven against six, found the King denuded by the prior gift to the town, and *sed jus quæsitum* thereby, that Polmais could hold no fairs within that bounds. Durie, 24th June 1642, Falconer of Glenfarquhar, No. 4, p. 4146.

On the 13th current, Polmais gave in a protest to the Parliament against interlocutor. See APPENDIX. *Fol. Dic. v. 1, p. 294. Fountainhall, v. 2, p. 321.*

No. 2. [4154] OGILVIE of Murthil v. LESLY of Glaswell. February 2, 1715.

A person disposed with warrandice from his own fact and deed only, and particularly against an infeftment in favour of Janet Millar. In a question betwixt the parties, whether the warrandice was incurred, as there was no such infeftment the one described, but there was another in favour of Jean Webster, the Lords found that the warrandice was not incurred.

The deceast Lesly of Glaswell having granted two bonds to the also deceast Ogilvie of Murthill, of the same date; there was a disposition granted by Murthill to Glaswell of some lands, with warrandice from fact and deed, and particularly against an infeftment in favours of one Janet Millar, proceeding upon a bond granted by a former heritor. Upon a charge to make payment, Glaswell suspends, and withal raises process of contravention of the warrandice, upon his being excluded from the lands and duties, by a liferent infeftment in favours of one Jean Webster, granted by the former heritor to his own son, and this Jean Webster in conjunct-fee and liferent.

Alleged for the charger; That the infeftment to be warranted from, was an infeftment proceeding upon a bond to Janet Millar, her husband, and her heirs; whereas the infeftment founded on by the suspender was a liferent infeftment in favours of Jean Webster, proceeding upon a contract of marriage; and, therefore, since the description of the incumbrance, of which the lands were to be purged, did not agree with the nature of the sasine founded on, it was in vain to pretend that the charger ought to purge.

Answered for the suspender; That it was plain, 1mo, that an infeftment was warranted against, which the disponent was expressly obliged to purge. 2do, It did not appear that ever there was such an infeftment as that mentioned in the clause of warrandice, in the person of one Janet Millar; it follows then, that the infeftment founded on and produced by the suspender in favours of Jean Webster, granted by the then heritor of the lands, must be taken for that which was understood by the parties in the clause of warrandice; *ut plus valeat quod actum est, quam quod simulatur concipitur*; since *falsa designatio*, or even error in *persona non nocet*, both which we are informed of in l. 17, § 1, *De Cond. et Dem.*

The Lords found, that the warrandice in the disposition by the charger's father to the defenders, was only against an infeftment in favours of Janet Millar, proceeding upon a bond granted by the heritor of the lands, and the incumbrance not purged, founded upon by the suspender, was an infeftment in favours of Jean Webster, proceeding upon a contract of marriage betwixt the heritor's son and her; therefore found the contravention of the warrandice not incurred.

Act. GRAHAME.—Alt. M'DOWAL.—Clerk, SIR JAMES JUSTICE.

Fol. Dic. v. 1, p. 294. Bruce, No. 51, p. 65.

No. 1. [4167] TARBET v. BOGLE. December 22, 1731.

Where a party has right to a ferry-boat, established by grant or prescription, it is not in the power of others who may have a right of fishing upon the same part of the water, to interfere with the proprietor of the ferry-boat, by carrying over passengers

for hire. Upon this footing the Lords found, That the other heritors might transport themselves and families, or others gratuitously, in their coble-boats, but not for hire. And in this, ferry-boats are upon the same footing with fairs ; both of them imply an exclusive privilege, otherwise they could not be kept up. See APPENDIX.

Fol. Dic. v. 1, p. 295.

No. 2. **MAGISTRATES of MONTROSE v. SCOTT of Rossie.** February 7, 1755.

The proprietor of a ferry-boat may, upon rational considerations, heighten the accustomed fare.

Scott of Rossie having a right to a ferry upon the river of South Esk, opposite to the town of Montrose, found it necessary, upon the increase of wheel-machines, and upon other rational considerations, to heighten the accustomed fare. And for that end he applied to the quarter sessions, and obtained their authority to exact the several sums contained in a table laid before them. A bill of suspension, offered for the Town of Montrose, being refused by the Ordinary, the matter was brought before the Court by petition, which, with the answers, being advised, the Court were pretty unanimous in the following points ; 1mo, That the grant of a ferry implies a power of imposing a duty *pro opere* ; 2do, That a ferry is a patrimonial right upon which moderate profits [4168] may be made ; 3tio, If exorbitant duties are laid on, they may be regulated by the justices, to whom the inspection of ferries, as well as of high-ways, is committed.

"Upon the whole, the duties in this case were not reckoned exorbitant ; and, therefore, the Court was of opinion, that the Ordinary did right in refusing the bill."

Sel. Dec. No. 82, p. 107.

No. 9. **[4180] NEIL MACVICAR v. COCHRAN of Hill and KER of Crummock.**
February 10, 1749.

Clause in a vassal's charter, exempting from legal irritancies, makes part of his real right.

Alexander Crawford of Fergushill, feued out to James Cochran, the lands of Hill for a duty of £24 Scots, and relieving him of the teind and dry multure payable out thereof ; disponing to him "all and sundry the casualties of the said lands, that might fall or become in the hands of the superiors thereof, either as liferent-escheat, non-entry, or by contingency of not timeous payment of the feu-duties thereof, by and through the said James and his heirs and successors, being put to the horn the space of year and day, or through the heirs of the said James, or his foresaids, lying out unentered to the samen, after the death of their predecessors, or by not timeous payment of the said feu-duty."

Dr. Thomas Crawford of Fergushill, sold these lands to Neil Macvicar, writer in Edinburgh ; "assigning him to all feu-rights or contracts, redeemable or irredeemable, past betwixt him, his authors and predecessors, and James Cochran ; and to the hail reddendos of the said rights, with the hail clauses, obligations and conditions therein mentioned, conceived in favour of him, his authors and predecessors, concerning the superiority and property of the said lands."

[4181] Neil Macvicar pursued James Cochran, and James Ker of Crummock, his real creditor upon the lands, in a declarator of tinsel of the feu, *ob non solutum canonem* ; who defended themselves on the quality of their right : And the Lord Ordinary, 21st July 1748, "repelled the defence."

Pleaded in a reclaiming bill ; The irritancy sought to be declared, is no natural consequence of superiority ; it is no part of the feudal law, and was only introduced into ours by statute 1597, "in the same manner as if a clause irritant were ingroist in infestments of feu-farm" : It cannot be doubted that it might be stipulated, a failure for ten years should be necessary in order to irritate the right ; and the

irritancy may as well be effectually discharged. Clauses of this nature in a charter were found effectual, 9th November 1748, *Nasmith of Ravenscraig v. Scott of Braco*, *voce HOMOLOGATION*; in which indeed, it was pleaded, that the succession in the superiority was expressly burdened with the feu-right; but the general principle was also argued; and the present case is similar in the specialty, the feu-contract with Cochran being assigned.

Answered; A feu cannot be so constituted as to be contrary to law, and subject to the prejudice of a successor in the superiority. By the nature of feu-holdings, irritancy is incurred by failing to pay the duty; and, it is no matter that this irritancy is peculiar to this country, and introduced by statute, as the feudal law is local. A feu cannot subsist without a duty; and it might as well be pleaded, that a duty might be constituted, but that it might be stipulated, there should be no action of pointing the ground for recovery thereof. This case is not similar to that of *Ravenscraig v. Braco*, where the superior's right was burdened with the feu-contract; but here, the contracts are assigned to the purchaser, in so far as conceived in the superior's favour.

The Lords found the clause in the defender's charter and sasine, exclaiming from the legal irritancy, *ob non solutum canonem*, was real, and therefore sustained the defence.

Act. LOCKHART.—Alt. MILLER.—Clerk, MURRAY.

Fol. Dic. v. 3, p. 206. *D. Falconer*, v. 2, No. 53, p. 51.

No. 1.

[4185] *ROLLO v. MURRAY*. March 26, 1629.

A superior cannot insist against an intromitter for the feu-duty of more years than those of his intromission. But bygone feu-duties may be followed out by pointing of the ground, against singular successors.

A Pensioner having a pension granted to him, by the Bishop of St. Andrews, and the feu-duty of some lands payable by the feuer to the Bishop, being assigned to the pensioner, for payment of the pension, whereupon the pensioner having charged the present feuer of the land, who had lately bought the same from the old feuer, for payment of the said feu-duty, resting unpaid diverse years before he had acquired the feu; it was found that the pensioner could not charge by any personal charge, or execution, the said feuer, for payment of the said feu-duties, of any years owing before the acquiring of his right, but prejudice to seek the same really against the ground, by pointing, or otherwise: Likeas the pensioner, July 8, 1629, pursuing for pointing of the ground, for the said feu-duty owing before that singular successor obtained the right of the lands; it was then found, that the ground was pointable for the years, not only since he acquired his right, but also for the years preceding, and that there was no necessity to pursue him who was then heritor, for payment of the same.

Act. —.—Alt. ROLLOCK.—Clerk, SCOT.

Fol. Dic. v. 1, pp. 296, 297. *Durie*, p. 442.

No. 7.

[4189] *HAMILTON v. LORD BURLEIGH*. January 22, 1712.

Found in conformity with *Rollo v. Murray*, No. 1, p. 4185.

Margaret Hamilton and Mr. David Orme her husband, having right from the late Marquis of Athol to some feu-duties due out of the Lordship of Falkland, pursue by Lord Burleigh, heritor of Freuchy and Newton, for payment of the feu-duties of these lands *personaliter actione* for many years bygone. Alleged, That for all the years since I bought these lands I am most willing to pay at the bar; but, for years preced-

ing my purchase, I can never be personally liable; neither is the superior at any loss, for he has two remedies; he can either summarily poind the ground for his by-gones, it being *debitum fundi* affecting the land, or he may adjudge, which will prefer him to all other creditors. I suppose, one acquires an infektment of annualrent; he can poind for his by-[4190]-goners, but he will not make a new intrant possessor personally liable for the years preceding his entry; even so with a superior; for all personal actions arise *ex aliqua personali obligatione*. But here there is no foundation for any such conclusion against a purchaser quoad feu-duties preceding his right. The superior's interest is real *contra fundum*, and against all intromitters with the rents quoad the years they possess, but no farther. Answered, Superiors besides the foressaid two remedies conceded them, have also a third, making the intromitters with the rents liable *ad valorem* of their intromission for all feu-duties resting, though prior to their right; and which naturally arises from the tenor of their feudal contract; for though poinding secures the superior abundantly, yet the personal obligation on the vassal is the *jus pinguius*, and brings them sooner to his purpose. It is true, apprisers and adjudgers may have some pretence to debate this, being successors *ex alienatione involuntaria*, and lie under a necessity to take what they can get for paying their debts; but voluntary purchasers are bound to see these bygoners paid and discharged, or retain a part of the price in their hands to purge them; and if they do not, they have themselves only to blame. Likeas, the clause *reddendo inde annuatim* ties the vassal as fully as if his charter were a bond; and the 4th act of Parliament 1669 has given the superior a farther privilege that he can poind summarily before the days of the charge are expired. The question is of no great importance as to vassals, seeing their ground must pay all bygoners; yet the Lords, by plurality, found the vassal personally liable, even for years preceding his purchase, the superior always proving he had intromitted with as many of the mails and duties as would pay these bygoners; so by this interlocutor 39 years' feu-duties may be cast upon one year's rent, if its extent be able to pay them, and the heritor has uplifted it.

The Lords altered this interlocutor upon a bill afterwards given in.

Fol. Dic. v. 1, p. 296. Fountainhall, v. 2, p. 708.

No. 8. [4191] BIGGAR v. SCOTT. July 13, 1738.

Personal action, for payment of feu-duties, against a tenant, falls upon the tenant's removal.

Though personal action be competent to the superior for his feu-duties, not only against the original feuer and his heirs *ex contractu*, but against their singular successors, the property being truly reserved in as far as relates to the superior's casualties, and therefore all intromitters being liable for the feu-duties, yet, in a process at the instance of the superior against the tenant of the vassal, the Lords found, "That the tenant being removed before the process was raised, there lay no personal action against him at the superior's instance for payment of the feu-duty."

The reason given was, that the personal action could only lie where the tenant's goods were attachable by action of poinding the ground, which they are not after his removal: Several of the Lords dissenting, who thought the distinction imaginary; for that if once action lay, it remained while the tenant was debtor in the rent to his master the vassal.

Fol. Dic. v. 1, p. 296. Kilkerran (FEU-DUTIES), No. 1, p. 188.

No. 9. [4195] WALLACE v. FERGUSON. June 29, 1739.

The vassal, by accepting of a feu-charter, containing the clause *reddendo inde annuatim*, becomes thereby liable personally for the feu-duties, whether the charter

is granted to him originally, or if he is a purchaser from the original vassal; and therefore, a feu-vassal was found personally liable for the feu-duties, even after he had sold his land, and the purchaser in possession, by a minute of sale, but without getting a charter from the superior. See APPENDIX. *Fol. Dic. v. 1, p. 297.*

* * Kilkerran reports the same case :

Found, That a vassal is by the feu-contract personally liable to the superior for the feu-duties, and that he remains so, even after he has sold the lands, until the purchaser shall be received by the superior.

Nor was there occasion to give judgment on an argument pleaded for the vassal, viz. That a vassal may, by our law, liberate himself by abandoning his right; and suppose the law stood so, where the vassal possesses *per alium*, it is the same to the superior as if he possessed himself. *Kilkerran (FEU-DUTY), No. 2, p. 189.*

No. 5. [4199] JOHNSTON v. CUNNINGHAM. June 19, 1667.

A bond being granted to a husband and his wife, and the heirs of the marriage, which failing, their heirs, was found to pertain to the husband after the death of the wife *in solidum*; and that these words (their heirs) ought to be understood *circum* of the heirs of the husband, as being *persona dignior*.

Fol. Dic. v. 1, p. 297. Dirleton, No. 85, p. 35.

No. 8. [4202] EDGAR v. EDGAR. June 1727.

A wife, during her marriage, having succeeded to some tenements and lands, did gratuitously dispose them to herself and husband in conjunct-fee, and to the heirs and bairns of the marriage, which failing, to the husband's other heirs and assignees whatsoever. Notwithstanding this was a disposition without any onerous cause, the Lords found the fee in the husband. See APPENDIX. *Fol. Dic. v. 1, p. 298.*

No. 9. FERGUSSON v. M'GEORGE. June 22, 1739.

A bond bore the sum of 1000 merks, to be received from the husband and wife, obliging the debtor "to repay the same to the husband and wife, and longest liver of them two, their heirs, executors, or assignees." The marriage having dissolved by the predecease of the husband without children, the question occurred betwixt the relict and the husband's children of another marriage, which of them was *fiar*? Pleaded for the Children, That the husband was undoubtedly *fiar*, and in *dubio* the *fiar's* heirs must be understood to be called. Answered, 1mo, *Esto* the husband had been *fiar*, the wife succeeded upon her survivance, and then her heirs are understood to be called, as being the heirs of the *fiar*. 2do, The meaning of the clause is the same as if the bond had borne, "and to the heirs of the longest liver." The Lords preferred the relict, and found that the bond belonged to her as longest liver. See APPENDIX. *Fol. Dic. v. 1, p. 298.*

No. 10. [4203] RIDDELS v. SCOTT. November 6, 1747.

A bond was granted to a man and his wife, and longest liver, in conjunct-fee and liferent. Each was to have power to dispose of a certain proportion of the sum. The husband was not to be entitled to discharge or assign without consent of his wife. Notwithstanding, the debtor was permitted to plead compensation against debts of the husband to him, exceeding the husband's own proportion.

In the year 1717, Walter Scott of Whitefield, now of Harden, granted bond, bearing him to have borrowed 1200 merks from John Nisbet, writer to the signet, and Agnes Riddel his spouse, and obliging him to repay the same against Whitsunday then next, to the said John Nisbet and Agnes Riddel spouses, and longest liver of them, in conjunct-fee and liferent, their heirs, executors, and assignees; but declaring, that notwithstanding the said conception of the fee of the principal sum, it should still be in the power of the said John Nisbet, and his spouse, to dispose thereof as follows, viz. the fee of 500 merks to be at the disposal of John Nisbet, and the other 700 merks at the disposal of Agnes Riddel, but that it should be noways in the power of John Nisbet to assign or discharge the premises, without the consent of Agnes Riddel.

Agnes, the wife, having survived John the husband, Christian and Jean Nisbets, her executors, brought an action against Harden, for payment of the 1200 merks, with the annualrent thereof resting. His defence was compensation by two bonds, granted by John Nisbet the husband, one for 500 merks, and the other for 200 merks, to both which Harden had obtained assignation after the death of John Nisbet the husband.

So far as related to the 500 merks, the compensation was admitted, as it was plain, that the husband was, by the conception of the bond, to that extent, fiar, to take effect from the wife's death; and higher it could not be pleaded, as the wife, by the conception of the bond, was liferentrix of the whole: But the point disputed was, Whether or not compensation was to be admitted upon the bond for 200 merks, which the pursuers objected to upon this ground, that by the conception of the bond the fee of the 700 merks was in the wife.

But as that general point could not be determined as between the pursuers and the debtor, further than to the effect of sustaining or repelling the compensation, and that in the mean time the heir of the husband appeared for his [4204] interest, the Lords, before determining upon the compensation, appointed the pursuers, and the heir of the husband, to be heard upon the general point.

And for the heir of the husband, it was argued, That by the obligatory clause in the bond, which bears to be payable to husband and wife in conjunct-fee and liferent, the husband was, agreeable to the established construction of such clauses, fiar, and the wife's fee resolved into a liferent: That the posterior clauses allowing each to dispose of certain portions of the money, did not alter the fee established in the husband by the obligatory clause: That they imported no more than a faculty to the wife with respect to 700 merks, which she might have exercised, but did not; and, the power given to the husband to dispose of 500 merks, could only be owing to the inaccuracy of the writer, as he had the power of the whole as fiar, except in so far as his fee was burdened with the faculty to the wife.

Notwithstanding this, the Lords found the heir of the wife preferable.

And in this they were unanimous, though they gave very different reasons for their opinion.

Some laid their opinion upon the special tenor of the bond, which bears the money to have been received from the husband and wife, and declares, that 500 merks of it should be at his disposal, and 700 merks of it at hers. These they considered as so many pregnant reasons to infer, that the money had originally belonged to the man and wife in those proportions, and so far as the money appeared to have come by the wife, she was to be held fiar.

Others put it upon this, that the husband was indeed fiar, such being the general rule in conjunct-fees to man and wife, but that the wife, as longest liver, came to take as substitute to the husband, and consequently her heirs, as heirs of provision to the husband, agreeable to what the Lords had found in the case, *Fergusson v. M'George*, 22d July 1739, No. 9, p. 4202.

Others again put it upon a still more general ground of law, namely, that those where a bond is taken to man and wife in conjunct-fee and liferent, the husband in law constructed fiar, contrary to what obtains in the case where a conjunct-fee is taken to two strangers, between whom it divides; yet, where a bond is taken to man and wife in conjunct-fee, and the longest liver, then the wife being longest liver becomes fiar by the survivance, and that in her own right, not as by a substitution to her husband, and in that view is not even subject to the husband's debt.

This point being fixed, that the heir of the wife was preferable, the compensation pleaded for the debtor was without further argument repelled; for, as the only argument that remained for the compensation could only lie upon the supposition of the wife's taking as substitute, which but very few of the Court had pointed at, the decision of this point, whether when laid on the particular conception of the bond or upon the more general ground, did of course determine the point of compensation.

Fol. Dic. v. 3, p. 207. Kilkerran (FIAR), No. 3, p. 190.

No. 11. [4205] Lord BOYD v. KING'S ADVOCATE. November 22, 1749.

A lease was taken to husband and wife, "and the survivor of them, and their heirs and executors." It was found that the wife, as survivor, came to have full right to the lease, and to transmit it to her heirs.

The York Buildings Company, in the year 1743, granted a lease for twice nineteen years of the estate of Linlithgow, to William Earl of Kilmarnock, and Anne Countess of Kilmarnock his wife, and the survivor of them, and the heirs, executors, and administrators of the survivor. The Earl suffered death for his accession to the rebellion 1745, and the estate of Linlithgow was surveyed by the Exchequer, as what he was interested in by the lease. After the death of the Countess, who survived her husband, a claim was brought by Lord Boyd her son, setting forth, that the Countess by her survivance, was entitled to this tack, and that the right descended to the claimant as her representative. It was answered in behalf of the Crown, That the husband was fiar of the lease, and the wife only liferenter in case of her survivance; that it was attachable by the husband's creditors, and therefore was forfeited to the Crown by the husband's attainder.

In the pleading, the point chiefly insisted on by the King's Advocate was, that property cannot be *in pendente*; that either the husband or wife must have been proprietor the moment the lease was executed; and, if it was in the husband, it could not go from him to his wife merely by her survivance. When the cause was advised, Elchies observed, that the maxim against a fee being *in pendente*, is not applicable to this case, in respect that a lease, though made real by statute against singular successors, is but a personal contract, conveying no property to the lessee, but only a right of possessing for a rent certain; and that for this reason, there is nothing in law to bar a tack to be granted to two conjunctly, neither of whom has the power of disposal without consent of the other. He added, that this was a different case from a bond where one must have a power of taking payment, because the debtor must always have a power to pay.

"Found the right to the lease was in the Countess of Kilmarnock the survivor, and therefore sustained the claim."

The distinction made by Elchies is no doubt just, but it was unnecessary. A land estate may be disposed to two conjunctly, and to the longest liver, and to the heirs of the longest liver. Here the intention is plain, that the property should be in the two during their joint lives; and that the survivor should have the sole property. Is there any thing in the nature of property to prevent such a settlement from taking effect? I cannot see that there is. A common property is well known in law, and a fee is not *in pendente* when it rests upon two, more than upon one. The English are well acquainted with this sort of right, which they term a joint tenancy, and which they distinguish from a right of co-partnery where the subject is also possessed in common, but the interest of each of the partners descends to his heirs, and not to the survivor. In a word, by such a settlement as that in question, each party has right

to the whole, *sed* [4206] *concurso partes faciunt* ; and therefore the survivor takes the whole in his or her own right, not as succeeding to those who predecease.

Fol. Dic. v. 3, p. 207. Rem. Dec. v. 2, No. 113, p. 227.

No. 12. [4207] WALTER WORDIE *v.* MARGARET SAMPSON. July 18, 1750.

A subject was disposed by a father in his daughter's post-nuptial contract of marriage, to her children in fee ; whom failing, to her heirs. The creditors of the husband having pursued a sale of this property, the Lords found, that the fee belonged to the wife.

Walter Wordie, writer in Edinburgh, pursued a sale of the estate of the deceased Robert Robertson feuer in Bruntston, wherein appeared Margaret Sampson his relict, and claimed, as belonging to her, and therefore to be struck out of the sale, a tenement of land in the Cowgate, and the tack of a shop set by the Town of Edinburgh ; for that, by her post-nuptial contract of marriage, Robert Robertson the husband's father, had disposed certain subjects to them in conjunct fee and liferent, and to the children of the marriage in fee ; which failing, to the heirs of the said Robert Robertson younger ; as also the said Robert Robertson bound himself to provide the conquest to themselves in conjunct fee and liferent, and children in fee ; which failing, to be equally divided betwixt their heirs ; for which causes, John Sampson, wright in Musselburgh, her father, disposed the said house and tack to the spouses in conjunct fee and liferent, and the children in fee ; which failing, to her heirs : And alleged, the fee behoved to be understood to belong to her, as the subjects came by her, and were destined to her heirs.

Answered, The fee belonged to the husband, as the subjects were given *nomine dotis* ; for though the expression is not used, they are so really, being dis-[4208]-posed for the which causes, that is, for the mutual provisions by the husband ; as was found 12th July 1671, *Gairns v. Sandilands*, No. 26, p. 4230 ; and 29th January 1639, *Graham v. Park and Garden*, No. 23, p. 4226 ; a husband being bound to lay out so much of his own money, together with the tocher, in conjunct fee and liferent to themselves, and the children in fee ; which failing, to their heirs equally, was found *fiar* ; and 23d January 1668, *Justice v. Stirling*, No. 25, p. 4228 ; a bond to a husband and wife, and the heirs betwixt them, which failing, to the heirs of the longest liver, was found to belong to the husband. It is not the last termination of heirs which settles the fee ; but where there are degrees of substitution, the person's heirs who succeed first, *Dirleton*, word *fiar*. Here the intention of the parties appears ; for a bond was taken from Robert Robertson and Margaret Sampson, to pay £50 Sterling to John Sampson's other daughter : As he was bound to pay this sum he behoved to get the subject ; and the obligation was ineffectual as to her.

Replied, The subjects are not disposed *nomine dotis* ; and there was a further tocher of 200 merks Scots given, which was agreeable to the quality of the parties. In the case of *Graham v. Park*, the money was given as tocher ; in that of *Justice v. Stirling*, it was money lent by a husband during the marriage ; and in that of *Garden v. Sandilands* there was no other tocher. *Mackenzie*, b. 3, t. 8, § 20, says the husband is *fiar*, because of the prerogative of the sex ; and he is *fiar* on whom the last termination falls : And *Stewart*, in his answers to *Dirleton*, word *Fee*, says, the last termination determines the fee, contrary to *Dirleton's* opinion, cited by the respondent ; which, however, applies not here, as the destination is first to the heirs of both, whom failing, to those of the wife : And it was found, 22d June 1739, *Fergusson v. Macgeorge*, No. 9, p. 4202, that a bond to a husband and wife, and the longest liver, their heirs, &c., belonged to the wife, as the longest liver. The intention of the parties cannot be gathered from the bond, as the wife is taken bound, and was believed so to be ; and it is not necessary now to argue whether it could be made effectual against her or not.

The Lords found the fee belonged to the wife.

Act. J. GRANT.—Alt. SCRÏMGEOUR.

Fol. Dic. v. 3, p. 207. D. Falconer, v. 2, No. 150, p. 174.

No. 14. [4210] ELIZABETH and ISOBEL GRAYS, Daughters of JOHN GRAY of Rogart deceased v. JOHN WOOD and Others, Creditors of said JOHN GRAY. February 1773.

The fee of lands, which, by a minute of a post-nuptial contract of marriage, the wife became bound to dispose to her husband in liferent, and to the heirs of the marriage in fee, not bearing to be *nomine dotis*, found to belong to two daughters afterwards existing of the marriage, and not to the husband.

The lands of Rogart belonged formerly to a family of the name of Monro; and Rachel Monro, the last of that family, had a personal right, by disposition from her father, to that estate; but she was not infeft thereon, nor did she ever make up a title in her person.

Rachel Monro was married to John Gray, by whom she had issue Elizabeth and Isobel Grays. After her death, her two daughters made up titles to the estate, and were infeft therein, first in 1741, and afterwards, upon more complete titles, in 1762.

In 1733, a minute of a post-nuptial contract of marriage had been entered into between the said John Gray and Rachel Monro, conceived as follows:

"For as much as there was no contract of marriage betwixt the said John Gray and the said Mrs. Rachel Monro before their marriage, and they being resolved, and desirous, that there be an ample post-nuptial contract extended betwixt them, with all clauses needful, have agreed to the following articles. 1mo, The said Rachel Monro is to procure herself served and retoured heiress in general and special to her said deceased father, and thereupon infeft and seized in all and hail the lands of Melika Rogart, with the mill and mill-lands thereof, &c. And being so infeft, to dispose the said lands, &c., to and in favours of the said John Gray in liferent, and to the heirs of the said marriage in fee"; and to assign and dispose to him the whole moveable subjects belonging to her. 2do, "The said John Gray is to secure the sum of £300 Sterling money upon land, or other good sufficient security, and take the rights thereof in favour of himself and his said spouse, and the longest liver of them two in conjunct fee and liferent, and to the heirs of the marriage in fee; and is also to provide his said spouse in and to the liferent of the town, mill-lands, and others above mentioned, with terce of moveables and conquest; and the children of the said marriage to be provided to such sums as the said John Gray shall please to provide them, at any time in his lifetime; and failing of such division, to such sum as shall be agreed on by two of their nearest relations, one upon the father's side, and another upon the mother's side."

On this foot, things remained at the time of Rachel Monro's death, and when the titles were made up in the person of the daughters; and who afterwards, in 1762, along with their father, granted a disposition of the lands of Rogart to the Earl of Sutherland, in pursuance of a previous minute of sale, on his giving a bond for the price.

In a multiplepounding brought by the purchaser, the Creditors of John Gray, who had used arrestments, contended, in the first place, that, by the conception of the minute of contract with his wife, their debtor John Gray was con-[4211]-stituted fiar of the lands of Rogart, at least of the personal right thereof; and, of consequence, that the price, while *in medio*, must be affectable for his debts. 2do, They founded on a contract between Gray and his daughter, purporting their concurrence to sell the lands to the best offerer; that the daughters were to have a sum certain between them; and the father to take the chance of the surplus in lieu of his claims.

Answered to the first plea; The husband could have no right to those lands which were the wife's property, other than her conveyance gave. She, however, conveyed nothing to him but a naked right of liferent, the fee remaining in her own person; descendible, however, by that deed, to the heirs of the marriage, as her heirs. Had no heirs of the marriage existed, as there was no destination in favour of the husband's heirs, nor no substitution by her to the heirs of the marriage; in short, as nothing was done to convey the lands in any series other than the legal succession, Mrs. Gray's heirs whatsoever, in the event of her death, would have succeeded to the fee of the estate, and had a right to make up titles thereto, as her heirs, subject only to the burden of her husband's liferent, which was all that she had habilely conveyed.

The words of the second article of the minute, which the creditors lay hold of, as

importing, that by that contract, the fee was conveyed to Mr. Gray, so that, to vest the liferent in his wife, a re-conveyance was necessary, appear to be inaccurately conceived ; but their supposition is ill founded ; for the property not being vested in Mr. Gray, by the preceding part of the contract, no conveyance of the liferent to his wife was necessary. On the contrary, that liferent remained with her in consequence of her absolute right of property, in case her husband predeceased her. The meaning of this clause appears to be truly this ; that the liferent of the sum of £200 Sterling to be placed on security, together with the terce of moveables and conquest, should be secure to her, besides what she drew from the town, mill-lands, and others, though the deed in this particular has been inaccurately expressed.

In answer to the second plea ; The contract 1762, between John Gray and his daughters, can have no effect. It was a most improper deed, impetrated from them, to their great prejudice, by unfair means, and which they would be entitled to set aside. And a condescendence of the facts and circumstances they offered to prove in support of their reasons of reduction of this contract, and also of their own ages, was exhibited by order of Court.

“ The Lords find, that the fee of the lands of Rogart belonged to Elizabeth and Isobel Grays ; also find, that the contract, of date February 18, 1762, is not a subsisting contract binding on them ; and remit to the Lord Ordinary to proceed accordingly.”

A reclaiming petition was refused without answers.

Act. CROSBIE.—Alt. BLAIR.—Clerk, KIRKPATRICK.

Fac. Col. No. 60, p. 148.

No. 15. [4212] MARY PATERSON and Others v. JAMES BALFOUR. December 6, 1780.

A husband bound himself in his contract of marriage, to settle a certain sum of money, furnished by himself, together with lands belonging to his wife, “ on himself and his spouse in conjunct-fee and liferent, for her liferent use allenary, and to the children of the marriage in fee.” The wife obliged herself to resign her lands “ for new infetment to be granted to her and her husband in conjunct fee and liferent, and to the children in fee.” Upon the death of the husband without issue, a question arose between his children of a former marriage and the widow, whether the latter was fiar or liferenter. The Lords found she was fiar.

By contract of marriage between John Sword and Jean Glasgow, Sword became “ bound to provide, and have in readiness, of his own proper means and effects, the sum of £500 Sterling ; which, with the sum of £360 Sterling of dote or tocher with the said Jean Glasgow, extending both to the sum of £860 Sterling, besides and over and above the lands hereafter likewise disposed by the said Jean Glasgow,” he obliged himself, his heirs and successors, to employ upon good security, and to take the rights thereof in favour of himself and the said “ Jean Glasgow, his future spouse, and longest liver of them two, in conjunct-fee and liferent, for the said Jean Glasgow, her liferent-use allenary, in so far as extends to the liferent provision or annuity conceived in her favour, as particularly after-mentioned.” The provision here referred to, was a free liferent annuity of £50 Sterling, which, with the conquest of the marriage, in case of no children, and the half thereof if there should be children existing, she accepted in full of all she could demand.

“ For the which causes, and on the other part, Jean Glasgow bound herself, her heirs and successors, to make due and lawful resignation of all and hail the eight shilling-land of old extent, of the lands of third part of Giffan, &c. in the hands of her immediate lawful superiors thereof, in favour, and for new infetment to be made and granted to the said John Sword and Jean Glasgow, in conjunct-fee and liferent, and to the children of the marriage between them in fee.” Then followed a procuratory of resignation, and an assignation of Jean Glasgow’s moveable subjects ; after which the contract provided and declared, “ That the liferent of the said lands of third part of Giffan, which by this contract is provided to the said Jean Glasgow, in case she shall survive the said John Sword, and that there shall be children, one or more, of the marriage, at the time of the dissolution thereof, shall impute in payment *pro tanto*,

to her, of the liferent-provision of £50 Sterling conceived in her favour, as being mentioned."

John Sword died without issue. His relict, within a year of his death, was confirmed executrix-dative; and in that character brought a multiple-pointhing against her husband's creditors. She afterwards sold the lands of Giffan, and conveyed the price to Mr. Balfour, as trustee, for behoof of herself and her relations. Upon her death, it became a subject of competition between the Creditors of her husband and the Trustee, in which it was

Pleaded for the Creditors; Wherever there is any difficulty in determining whether a husband or his wife is fiar, the fee is presumed to be in the husband, as the *dignior persona*; and so the Court have decided in a variety of cases, Dirleton, Stair, 11 June 1667, Johnston *contra* Cunningham, No. 5, p. 4199; Dalrymple, 21st November 1705, Creditors of Earnslaw, No. 21, p. 4223; Forbes, 23d July 1713, Edgar *contra* Sinclair, No. 7, p. 4201; June 1727, [4213] Edgar *contra* Edgars, No. 8, p. 4300; Stair, 12th July 1671, Gairns *contra* Sandilands, No. 26, p. 4230; Marcus, Contract of Marriage, 20th December 1682, Ramsay *contra* Ramsay, No. 28, p. 4234; Fountainhall, 19th January 1697, Laws *contra* Tod, No. 30, p. 4236; July 1720, Competition betwixt the Creditors of Elliot of Northsenton and Elliot of Borthwickbrae, No. 31, p. 4244.

In the present case, the circumstances tending to shew that the fee was meant to be in the husband are very strong. The whole that Jean Glasgow possessed was more than a moderate tocher: And, accordingly, both her money and her lands were conveyed by the contract, *nomine dotis*, and in consideration of the provisions made upon her; Sword obliging himself to lay out the £860 Sterling upon good security, "besides and over and above the lands hereafter disposed." The destination is absolute to the children of the marriage, without any substitution in favour of the wife's heirs; and, had the succession once been taken up by children of the marriage, the heirs of the father, not those of the mother, must have succeeded to them. The subsequent clause, declaring "that the liferent of the lands, which by this contract is provided to the said Jean Glasgow," should impute in payment, *pro tanto*, of her liferent-provision, clearly demonstrates, that her right was only a liferent, and that the fee was completely made over and vested in the husband.

Answered; Matters must be very equally balanced, indeed, before a fee can be found to be in the husband, merely as the *dignior persona*. Neither do the decisions quoted support any such doctrine. In the case of Johnston, 1667, the subject was money lent by the husband, which could not belong to the wife, *stante matrimonio*. In the case of the Creditors of Earnslaw, 1705, the termination was to the husband's heirs and assignees whatsoever; and to them the wife bound herself in absolute warrandice, reserving only her liferent. The decision, Edgar *contra* Edgars, 1727, proceeded on the same principle. And in that of Edgar *contra* Sinclair, 1713, the subject being moveable, fell to the husband *jure mariti*. The case, Gairns *contra* Sandilands, 1671, was a very singular one; but there, a little bit of land, being all that the wife brought with her, was provided to the longest liver in fee. The husband survived; yet his daughter, making up titles by precept of *clare*, as heir to her mother, and possessing the subject found to have belonged to her father, was assoilzied from the passive title. In the case of Ramsay, 1682, the subject was a sum of money, of which the conjunct-fee was not even nominally provided to the wife. The case of Laws, 1697, was very special, and turned upon a question of substitution; but the decision did not necessarily imply that the fee was in the husband. And in that of Elliots, 1720, as stated, it appears, that the last termination was to the husband, his heirs, and assignees, whatsoever.

But, in all questions of this nature, it is principally to be attended to, who is the party to whom the subject belonged before marriage; for there the fee must still remain, unless the contrary clearly appears. The words conjunct-fee [4214] and liferent, import no divestiture; and Jean Glasgow, by settling her lands in this way, did certainly not give up the fee, or limit her original right to a liferent.

The clause wherein the money and land are classed together, as conveyed *nomine dotis*, must be explained and limited by the terms in which these different subjects are afterwards made over. The bonds and bills are assigned absolutely "to John Sword, his heirs and assignees whatsoever"; and he is bound to take the new securities "to himself and his future spouse, in conjunct-fee and liferent, for her liferent-use allenary."

And, had it been intended to vest the fee of the lands in him, it is presumeable, that the right of his wife would have been limited in a similar manner.

It was altogether unnecessary to insert any substitution in favour of the wife's heirs; for the fee remaining in her, necessarily devolved to her heirs, failing of children of the marriage. And, had such children existed, they could have made up their titles in no other way than by special service to her, the person last infeft in the subject.

Neither is it of the smallest consequence, that, if the succession had once been taken up by the children of the marriage, the lands would afterwards have gone to the heirs of the father, in preference to those of the mother. This is owing to the genius of our law, which admits no succession through the mother of the deceased. But those circumstances, which regulate the succession after the failure of the first heirs, can have no influence in determining where the original fee was vested.

Nor is it more material, that, in one part of the contract, Jean Glasgow is said, *obiter et narrative*, to have the liferent of the lands provided to her. This, though certainly true, was not sufficient to deprive her of the fee inherent in her. It was plainly an *usus-fructus causalis*, which belongs, *optimo jure*, to every fiar, and which is not in the least repugnant to the idea of a fee in its purest signification; Clerk Home, No. 1, Frog, Div. 2, Sec. 4, *h. t.*

Replied; It is a principle maintained by every writer on the Law of Scotland, that, where a right is taken to a husband and wife, in conjunct-fee and liferent, and their heirs, the husband is the sole fiar, "unless the provision bear expressly a power in the wife to dispoise"; Stair, b. 3, tit. 5, § 51. And even "though the right have flowed from the wife, yet, if it was given her in name of tocher, the fee is in the husband; since whatever is given in tocher is the property of the husband"; Erskine, b. 3, tit. 8, § 36.

Observed on the Bench; That, if the subject in question had appeared to have been settled *nomine dotis*, the fee would have been in the husband; but, as a separate sum of money was provided in the name of tocher, the presumption in favour of the husband did not hold.

The Court adhered to the interlocutor of the Lord Ordinary, finding, "that [4215] the fee of the lands was in Mrs. Sword, and not in her husband; and, therefore, that the price of said lands is not affectable by his creditors."

Lord Ordinary, STONEFIELD.—For the Creditors, ILAY CAMPBELL *et* ALEXANDER ABERCROMBIE.—Alt. G. WALLACE.

Fol. Dic. v. 3, p. 208. *Fac. Col.* No. 4, p. 6.

No. 16. ROBERT BRUCE-HENDERSON *v.* Sir JOHN HENDERSON. January 20, 1790.

A husband understood to be a fiar of a subject provided to him *nomine dotis*, though the wife's heirs be called next after those of the marriage, the wife herself being named as a substitute.

Robert Bruce of Earlshall settled his estate "on the heirs-male of his body; failing these, on his four daughters successively; and they and their heirs failing, on his sisters."

The succession, under this destination, opened to Helen Bruce, the eldest daughter.

She was afterwards married to James Henderson. To him, by the marriage-contract, she became bound to pay a sum of money equal to the value of the estate; and probably from some doubt of the feudal right in her father, or of his powers to make the settlement, she prevailed on her sisters to concur with her in granting a trust-bond for a sum exceeding the value of the estate, for the sole purpose "of establishing a title by adjudication to the lands of Earlshall, and then denuding thereof in favour of James Henderson and Helen Bruce in conjunct-fee and liferent, and the heirs of his body to be procreated betwixt him and the said Helen Bruce; which failing, to and in favour of the said Helen Bruce, and the heirs of her body by any

subsequent marriage; and (after substituting her sisters and their heirs) of James Henderson, his heirs and assignees whomsoever."

An adjudication was accordingly led by the trustee, he having charged Helen Bruce and her sisters to enter heirs in special to their predecessors.

In order to denude himself, the trustee executed a conveyance, stating, that a bond had been granted to him for behoof of James Henderson, and that it was just he should convey to him the right created by the adjudication, the dispositive clause being as follows: "Therefore wit ye me to have disposed, &c., to the said James Henderson, and Helen Bruce his spouse, and longest liver of them two, in conjunct fee and liferent, and failing either of them by decease, to the heirs and assignees of the survivor, all and whole the lands," &c.

A charter of adjudication and resignation of the estate was afterwards expedited these terms: *Dilecto nostro Jacobo Henderson de Earlsall, ejusque heredibus assignatis quibuscunque.*

After taking infeftment, Mr. Henderson executed an entail "in favour of himself and Helen Bruce in conjunct-fee and liferent, and (after various substitutions) in favour of Sir Robert Henderson of Fordel, and the heirs of his body"; to which destination the following clause was subjoined: "In case any of the heirs of tail shall happen to succeed to, and be in possession of, the estate of Fordel, then the said heir shall be obliged to make up titles to the lands of Earlsall, and to convey the same to his second son, &c., whereby the two estates may be enjoyed by two separate and distinct persons, and the said lands of Earlsall not be absorbed in the estate of Fordel."

Helen Bruce survived her husband, and continued to possess the lands till her death; when Sir Robert Henderson served himself heir of tailzie and provision under this deed.

Upon his death, his eldest son, Sir John Henderson, entered into possession of the estates, both of Fordel and of Earlsall. He afterwards obtained a conveyance to the latter estate from the heirs of line of Helen Bruce, which was intended to form a right independent of that of James Henderson.

In virtue of the above-recited clause of devolution, Robert Bruce-Henderson, the second son of Sir Robert, instituted an action against his brother, in order that he might be decerned to make up titles, and then to denude himself of them, according to the injunction of that clause. It was

Pleaded for the defender, in the 1st place; The entail in question proceeded *non domino*, and the defender's right is independent of the entail.

By the conception of the trust-bond, the fee was not placed in James Henderson, but in Helen Bruce. In ordinary cases, the maxim of law no doubt is, that where a right is taken to husband and wife in conjunct-fee and liferent, and the heirs of their bodies, or their heirs indefinitely, the husband is deemed, from the prerogative of his sex, the sole fiar, as the *persona dignior*, and the right of the wife resolves into a liferent; for which reason, the words "their heirs" are interpreted to be the heirs of the husband. But to this rule there are exceptions; and, in particular, as (in conformity to Lord Stair, p. 502) it is expressed by Lord Bankton, "the person to the heirs of whose body the destination is made, failing heirs of the marriage, is presumed fiar, though failing those, the last termination should be upon the heirs of the other; for the rule is, that the person is fiar *cujus heredibus maxime providetur*, v. 2, p. 337." The same doctrine is laid down by Mr. Erskine. Now this was the predicament in which by the trust-bond, Helen Bruce stood.

On the other hand, the destination in the reconveyance was, "to the longest liver, and to the heirs and assignees of such survivor"; and Helen Bruce was the survivor. In her, therefore, the right of the adjudication was ultimately vested, agreeably to the decision 22d November 1749, Lord Boyd *contra* King's Advocate, Kames's Rem. Dec. No. 11, p. 4205.

Besides, as the estate of Earlsall stood devised to heirs-male, and Helen Bruce could only take the estate as heiress of provision under her father's settlement, it was inept to charge her and her sisters to enter heirs in special to their [4217] predecessors, as if all of them had been heirs-portioners to the estate, and the investitures of it had stood in favour of heirs whatsoever.

Answered; With regard to the terms of the trust-bond, there are two grounds, independently of the last termination being upon the heirs and assignees of the husband.

on which the fee became vested in James Henderson. One is, that the first substitution is to the heirs of his body, so that had there been children of the marriage, they must have taken up the fee by a service as heirs of provision, not to Helen Bruce, but to James Henderson. The other ground is, that Helen Bruce herself, and not her heirs, is called in the substitution next after the heirs of the marriage; and consequently she is to be considered merely as a substitute, and as having only an eventual right of fee, in case her husband should die without children existing of the marriage; and such eventual fee could have been taken up by her, in the character only of heir to her husband or children respectively. The character of institute then being solely applicable to the husband, a decisive answer arises from this circumstance to the arguments founded on the authorities quoted on the other side.

The terms of the reconveyance, so different from those of the trust-bond, would have required some other authority than the will of the trustee; but even these are not inconsistent with the fee being understood to have been in James Henderson. In conjunct fees, to make the wife fiar two requisites must concur; first, that the last termination be upon her heirs, which here it was not; and, secondly, that the subjects flowed from her or her friends gratuitously; whereas here the grant of the estate was not gratuitous, but in implement of the obligation in the marriage-contract, which *nomine dotis* provided the wife's interest in the estate, or what was equivalent to it, in Mr. Henderson's favour.

At the same time it is to be observed, that this question is superseded by the consideration, that the fee was certainly in Mr. Henderson during his lifetime. The estate could then have been adjudged by his creditors, and consequently was equally disposable by his deed, as in this case.

With respect to the objection made to the charge on which the adjudication proceeded; as a special service implies a general one *ejusdem generis*, so a special charge which is the substitute of a service, is held to include that kind of charge called a general special charge, and consequently the special charge in question was competent to carry the personal right, which Helen Bruce might have taken up by general service. Nor, however superfluous, could it invalidate this proceeding, to include unnecessarily her sisters.

Pleaded for the defender, in the second place; The entail being supposed not *ultra vires* of the granter, the clause of devolution, when strictly interpreted as it ought, will not aid the pursuer, as having no application to the actual circumstances of the case. The condition of this devolution is, "That the heir of entail shall happen to succeed to, and be in possession of the estate of Fordel"; but the case which happened, was that of a proprietor of Fordel suc-[4218]-ceeding as heir of tailzie to Earlshall. This latter situation cannot be included under the entail, except by implication, which would be an extension of its terms beyond their natural and proper import.

But this would be inconsistent with that strict interpretation of entails which is established by the concurring voice of all the writers on our law, whether ancient or modern. Stair, p. 614; Erskine, p. 556; also Craig, p. 340; Hope, p. 400; Bankton, v. 1, p. 588.

Besides, this devolving clause is unconnected with the prohibitory, irritant, and resolute clauses applied to the rest of the deed, and contains nothing but a bare injunction to convey.

Answered; Those authorities all refer to restraints upon such uses of property, as are not only adverse to the nature of the right, but to general expediency. The public interest requires, that their operation should be as much limited as justice will permit; and if the terms in which they are conceived be not express and significant, the law will not interpose to supply what is wanting, or to infer what is withheld.

But if, on the other hand, the question is merely which of two heirs shall succeed, a matter which concerns not the general interest; the testator's will is to be judged of according to the same rules that are employed in the interpretation of any other deed or contract, upon a complex view of the whole, and consideration of the object in view. Thus it was James Henderson's object to prevent "the estate of Earlshall from being absorbed in that of Fordel"; an event not more connected with the case in express terms described, than with that which in fact has occurred. A similar judgment was given in the case of Lockhart v. Gilmour, 25th November 1755, *voce* TAILZIE.

The Lord Ordinary reported the cause, when

The Court seemed to adopt most of the arguments of the pursuer, and

"Repelled the defences, and decerned and declared in terms of the libel, with respect to the pursuer's right to the lands and estate libelled, and the defender making up legal titles thereto, and denuding thereof in favour of the pursuer, in terms of the entail libelled."

And the Court adhered to that judgment, on advising a reclaiming petition by the defender, with answers for the pursuer.

Reporter, Lord ROCKVILLE.—Act. ROLLAND.—Alt. PARTY.—Clerk, MITCHELSON.

* * This cause was appealed. May 11, 1791.—The House of Lords "Ordered That the appeal be dismissed, and the interlocutor complained of, affirmed."

S.

Fol. Dic. v. 3, p. 208. Fac. Col. No. 101, p. 185.

No. 17. [4219] ARCHIBALD SETON v. The Creditors of HUGH SETON. March 6, 1793

When a subject is conveyed to trustees for a certain person in liferent, and his children *nascituri* in fee, the father is not fiar.

Charles Smith, in the contract of marriage entered into betwixt his son Hugh Smith afterwards Seton, and Mrs. Elizabeth Seton of Touch, obliged himself to have in readiness by Martinmas 1746 £8000, and to employ it on land, or other heritable security, and to take the rights in name of certain trustees for behoof of "Hugh Smith in liferent, and the heirs-male to be procreate of the marriage in fee."

Charles Smith in part fulfilled this obligation, by purchasing certain lands, and conveying them, together with an heritable bond to the trustees; but at his death there remained a balance of above £3000 against him.

The trustees conveyed the lands to Archibald Seton, the heir of the marriage, in terms of the trust.

The heritable bond was paid to Hugh Seton, who was himself one of the trustees, with consent of a *quorum*.

In the ranking of his creditors Archibald Seton claimed to be ranked as a creditor, 1st, For the said balance which his father owed as representing Charles Smith; and 2dly, For the amount of the heritable bond, which was paid to him as trustee, and had not been employed in terms of the contract,

The common agent, *inter alia*,

Objected; If Charles Smith, in a simple obligation, had bound himself to convey, or had actually conveyed a certain sum or subject to his son Hugh in liferent, and his children *nascituri* in fee, Hugh would have been fiar, and the claimant would have had no *jus crediti*; 1st March 1781, Cuthbertson v. Thomson, *infra h. t.*; 29th June 1786, Muir v. Muir, *infra h. t.*; 7th December 1780, Dicksons v. Dickson, *infra h. t.*; 23d June 1779, Porterfield v. Grahame, &c., *infra h. t.* The same would have been the case though the obligation had been contained in a contract of marriage; 3d June 1743, Gordon v. Sutherland, affirmed on appeal, *voce* FIAR ABSOLUTE, LIMITED; Strahan's Creditors v. Strahan, No. 105, p. 996; 15th November 1787, Children of Mactavish v. his Creditors, *voce* PROVISIONS to HEIRS and CHILDREN; unless the majority of the heir, or some other fixed period had been specified at which Hugh should be obliged to vest the right in his person. There seems no reason for a different construction of the right when it is taken to trustees for the heir, instead of being taken directly to himself. They were not taken bound to denude in his favour at any given time, nor were they prohibited from making a conveyance to the father in liferent, and the heirs-male *nascituri* in fee, which would have placed Hugh Seton in the same situation as a direct conveyance from his father Charles Smith.

Answered, The legal subtlety which prevents a fee from vesting in children *nascituri*, is completely removed by the appointment of trustees, who supply their place, and are, while the trust subsists, fiars of the subject. The case [4220] then comes to be precisely the same as if the obligation had been taken to the father in liferent, and the children *nominatim* in fee, when the father, beyond dispute, would have been only a naked liferenter.

The trustees could not denude themselves of the trust before the existence of an heir of the marriage. They then became bound to convey the funds in their hands to Hugh Seton in liferent, and the heirs *nominatim* in fee; and so far as Mr. Smith had not fulfilled his obligation, to convey it and the *jus exigendi* in the same terms.

The case is the stronger, that the obligation did not flow from the father, but from a third party, who vested nothing in the father, but a right of compelling the trustees to give him the liferent of the subject, they continuing fiars till the heirs of the marriage obliged them to denude in their favour.

The Lord Ordinary reported the cause on memorials.

The Court were unanimously of opinion, that the effect and sole intention of appointing trustees was to prevent the father from being fiar. The subject (it was observed) was vested in the trustees, who held the fee for behoof of the children, and the liferent only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald.

The Lords repelled the objection, and sustained Archibald Seton's claim.

Reporter, LORD SWINTON.—For Archibald Seton, DEAN OF FACULTY.—Act. SOLICITOR-GENERAL, PATISON.—Clerk, MENZIES.

D. D.

Fol. Dic. v. 3, p. 209. *Fac. Col.* No. 44, p. 92.

No. 20. [4222] BARTILMO v. HASSINGTON. February 2, 1632.

A wife disposed all her goods, gear, &c., to her husband, to be possessed by him and her during their lives, and after their decease to their heirs, executors, and assignees. There being no children alive at the dissolution of the marriage, the husband was found to have the liferent of the whole, and the property only of the half, the subjects being disposed in general; but an heritable right so provided would have pertained to the husband and his heirs, as *personæ digniores*.

In a contract of marriage betwixt Euphan Hassington and Patrick Bartilmo, the wife disposes her goods and debts, condescended on in the contract, to her said future husband, to be bruiked by him and her, and the longest liver of them two, during their lifetime, and after their decease to their heirs, executors, and assignees; and the wife dying, no bairns being begotten betwixt them being on life, her executors pursue the debtors of the wife, assigned in the foresaid contract for payment thereof; wherein the husband compearing, alleged, that the goods pertained to him, in respect of the disposition contained in the contract; and the pursuer answering, that he could have no right, but to his own just half thereof, in respect the clause of the contract bore, "the same to be disposed to their heirs"; which being in the plural number, imports division betwixt the husband's heirs and the wife's; and the husband answering, that the clause must be interpreted only of the husband's heirs *tanquam personæ digniores*, and which agrees with the practiques of this country, even as in heritable rights, and infeftments granted to the husband and wife in conjunct fee, or liferent, and to their heirs heritably, there is no division *hoc casu* betwixt their heirs, where they have no bairns; but the fee only belongs to the husband's heirs. The Lords found, in respect of the foresaid tenor of the contract, that the husband ought to have his liferent of the whole goods contained in the contract, which were extant the time of the wife's decease, and that he had no right to the property, but only to the just equal half thereof, and that the other half pertained to the wife's executors and heirs; for the contract being of goods and gear, and sums of money, and bearing the word, "their heirs," ought not to be respected, as infeftments of heritable rights, which by that clause imports no division, but pertains only to the husband's heirs, except it be more specially provided otherwise; for albeit the husband, while the wife lived, might have assigned and disposed the whole goods, yet after her decease, he had no more right than he had provided himself unto, by the said contract.

Clerk, HAY.

Fol. Dic. v. 1, p. 298. *Durie*, p. 617.

No. 21. [4223] The Creditors of EARNESLAW v. Mr. ALEXANDER and ROBERT DOUGLASES. November 21, 1705.

Provision by a wife to her husband, and heirs of the marriage in fee, reserving the wife's liferent, found to constitute the husband fiar, the meaning of the contract being cleared by subsequent clauses.

The lands of Earneslaw being adjudged from Mr. James Douglas, certain creditors of the adjudger who have now right to that adjudication, pursue a declarator, that the lands adjudged did belong to Mr. James Douglas the debtor, and that the legal title expired.

It was alleged for Robert Douglas, son to the said Mr. James, and for Mr. Alexander Douglas, That the said lands did not belong to Mr. James, but to Grace Greden, his wife, or John Greden her brother; and that the same did now belong to them, by virtue of an adjudication, led at the instance of the said Mr. Alexander, who adjudged from Robert, as specially charged to enter heir to his mother and uncle. And in clearing where the right of fee was lodged, there was produced the contract of marriage betwixt Mr. James and Grace Greden, whereby the lands were disposed in favour of Mr. James in liferent, and the heirs of the marriage in fee; which failing, to Mr. James his heirs and assignees, reserving Grace her liferent; by which contract Mr. James the husband had nothing conveyed to him, but the liferent, and the fee remained with the wife, seeing it could not be conveyed to the heirs of the marriage who were then not existent.

It was answered, The husband was undoubted fiar by the contract, and by the charter and sasine following upon it; and albeit the import of the first clause be dubious, yet the subsequent clauses do clearly determine the fee in favours of the husband; for the obligation to infeft is conceived in favour of the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage; which failing, to the husband's heirs and assignees; and the procuratory of resignation, charter and sasine following thereupon, are in the same terms, still preferring the heirs and assignees of the husband to the heirs of the wife, albeit descending of her body by any other marriage. And the clause of warrandice is yet more clear; for thereby the wife is obliged to warrant the lands disposed in favours of the husband, and his foresaids; which does demonstrate that the husband was the fiar, and his foresaids were his heirs, whether of that marriage, or his extraneous heirs; so that, if there had been no debt contracted by the father, Robert Douglas, the heir of the marriage, would have been heir to his father, and been creditor in that clause of warrandice, and had the benefit of the hail other obligations in favour of his father's heirs. The teinds are also by the same contract disposed to the husband and his heirs; and because the right of the teinds was redeemable, in case of redemption, he is bound to re-employ; and lastly, by the said contract she accepts the liferent of the teinds, and her conjunct infeftment of the lands, in full satisfaction of all liferent, &c.

[4224] It was replied, The defenders oppose the dispositive clause of the contract, which clearly expresses the husband's right to a liferent, and must regulate and interpret all the subsequent clauses, especially seeing they are capable of a reasonable interpretation consistent with the mother's fee and the father's liferent; for the obligation to infeft, and the procuratory of resignation, both in favour of the husband and wife, in conjunct-fee and liferent, does not constitute both fiars, but resolves into a liferent, either in favour of the husband or the wife; and the wife being the original fiar, and having disposed in favour of her husband in liferent, the conjunct-fee resolves in a liferent in favour of the husband, and reserves her own right of it. Neither does it alter the case, that the husband's heirs whatsoever are substitute to the heirs of the marriage preferable to the wife's heirs; because the wife being the fiar, the husband's heirs of line behaved to be heirs of tailzie and provision to the wife, and so represent her and not the husband, in these lands; and the warrandice imports no more than the former clause; and the disposing of the teinds to the husband in fee, in other terms than the lands are disposed, is an argument for the wife's fee of the lands; for why should the style have varied, if the design had been the same in both? And the wife's accepting the liferent of the teinds, and the conjunct infeftment of the lands, imports nothing, because she was indeed liferenter of the teinds; and the

conjunct infeftment of the lands determines not the wife to be the liferenter, but is still to be interpreted by the first and dispositive clause.

It was duplied, That the whole tenor of the contract clears the design of parties, which must undoubtedly be the rule of interpretation of the contract ; and the subsequent clauses do fully clear the meaning and intention of the first, whereof the sense was only dubious, by the inadvertency or ignorance of the writer, who did not consider that the fee could not be pendent till there were children procreated of the marriage, and that the heirs of the marriage must in due form either succeed to the father or mother ; nor had he any thought of contracting debts that might carry away the estate from the marriage ; but he frames the dispositive clause so, as both the husband and wife were designed liferenters, and the children fiars ; but that error was rectified and corrected by the subsequent clauses, in which there is no regard had to the wife's heirs by any other marriage, but the husband's heirs and assignees substitute to the heirs of that marriage, and she obliged to warrant the lands in favour of the husband and his foresaids ; in which clause the heirs of the marriage are comprehended under the husband's heirs. And the disposition of the teinds, in more clear terms than the lands were disposed in favour of the husband, does argue also the inadvertency of the writer ; but no imaginable reason could be afforded for disposing the fee of the teinds to the husband if the wife had been designed to be fiar of the lands. And lastly, the procuratory of resignation is the immediate warrant of the real right, and the charter and sasine being conform, creditors and all concerned finding the fee clearly constituted in the husband's person by the infeftments, were in *bona fide* to contract ; and creditors and pur-[4225]-chasers would be left in great uncertainty, if they might not safely deal with persons whose fees were clearly constituted by charters and sasines, and the immediate warrant thereof.

"The Lords found the husband was fiar." *Vide* 29th November 1705, *inter eosdem*, voce REGISTRATION. *Fol. Dic.* v. 1, p. 298. *Dalrymple*, No. 64, p. 82.

No. 22. [4226] JAMES RAMSAY of Cockpen *v.* JOHN MAXWELL of Conkaith. July 24, 1612.

Found, That the heritable right is not ruled by the last termination, but that it pertains to the heir of the first fiar. This found in an infeftment taken by Nicol Ramsay of Cockpen, and Elizabeth Rigg his spouse, in conjunct-fee, and to the heirs betwixt them ; which failing, to the heirs of his own body ; which failing, to the said Elizabeth, and the heirs of her whatsoever.

Fol. Dic. v. 1, p. 299. *Kerse, MS. fol.* 68.

No. 23. GRAHAM *v.* PARK and GAIRDEN. January 29, 1639.

The wife's tocher in a contract of marriage, was ordained to be paid to the husband and wife in conjunct-fee, and to their children heritably ; and failing of heirs betwixt them, to the wife's heirs. There being heirs of the marriage, it was found, that the property of the sum provided belonged to the husband, and was liable to be affected by his creditors, they finding caution to make the same forthcoming to the wife for her liferent, in case she survived her husband.

By contract of marriage betwixt one Park, daughter to another Park, burgess of Edinburgh, and William Gairden, her future spouse, the said Park, father to the woman contracted in marriage, is obliged to pay to the said Gairden the sum of 5000 merks in tocher, to which sum the said future husband obliged him to add other 5000 merks of his own money ; which whole sum, the husband is obliged by the contract to employ upon land or annualrent to himself, and his said future spouse in conjunct-fee, and to the heirs gotten betwixt them ; which failing, the one half to the heirs of the husband,

and the other half to the heirs of the wife ; according whereto, after the marriage, the father to the wife, having the said 5000 merks promitted in tocher, the same was paid to John Rind, merchant burges of Edinburgh, who by his obligation was obliged to pay that sum to the said husband, and to the wife, and to their heirs ; and failing them, to the wife's heirs, conform to the contract. This sum being thereafter comprised by one Graham an Englishman, for a debt owing to him by the said Gairns husband to the wife ; and upon this comprising pursuit being moved [4227] against John Rind, debtor of the sum, by his foresaid bond, for payment thereof to the creditor ; in the which pursuit the husband, who was bankrupt, being absent, his wife not appearing, and her father, the said Park, payer of the tocher, where they alleged, That the sum could not be comprised by the husband's creditors for the husband's debts, seeing the husband was not proprietor of the sum, but only liferenter ; and the contract and bond bore, " the sum to be paid to the husband, and the wife in conjunct-fee, and to their heirs betwixt them heritably ; and failing of heirs betwixt them, to the wife's heirs " ; whereby it is evident, that the wife is fiar, in respect of the termination of the security so declared, and that all the parties have thereto consented, and that the father has provided the money, and gave it after that manner to his daughter and son-in-law, who might affect it with what condition he pleased to annex thereto ; and therefore the most that can be comprised by the husband's creditors, is only his naked liferent, seeing no more right subsisted in his person. And the other creditor contending, That the fee remained in the husband's person, notwithstanding of the destination foresaid, and termination of payment in the wife's heirs, failing of heirs gotten betwixt them ; because, if there be bairns gotten betwixt them (as there are two bairns living betwixt them), they will ever exclude the wife's heirs ; which bairns so gotten, if they were to seek this sum after their parents decease, would seek it not as heirs to their mother, but as heirs to their father, and consequently the right must belong to the husband, and not to the wife ; and it were a dangerous preparative, tending to the prejudice of the whole country, if money conditioned to any man in tocher, after this manner, were not at the husband's absolute disposition.—The Lords found, That the property of this money pertained to the husband, and that he had full power and right to dispose thereupon at his pleasure with reservation only of the liferent thereof to his wife ; and consequently, that the creditor Graham, who had comprised the sum, had full right thereto, he always finding caution to make the same furthcoming to the wife, to be used by her for her right of liferent, in case she survive her husband ; and found, that the property subsisted not in the wife's person, notwithstanding of the termination thereof foresaid, that it should be paid to her heirs, failing of heirs begotten betwixt her and her husband.

Act. ADVOCATUS & STUART.—Alt. NICOLSON, BAIRD & JOHNSTON.—Clerk, Scot.

Fol. Dic. v. 1, p. 299. *Durie*, p. 870.

No. 24.

CRANSTON v. WILKISON. February 20, 1667.

A husband was obliged by contract of marriage, to take a tenement to himself and wife, and the longest liver of them two, in conjunct-fee, and their heirs betwixt them ; whom failing, to the heirs of the husband's body ; whom all failing, to the wife's heirs whatsoever. The husband was found fiar.

By contract of marriage betwixt Wilkison and his spouse, he is obliged to infeft her in a tenement, expressed therein, and in all the conquest during the marriage which infeftments were to be taken to them, the longest liver of them two in conjunct-fee, and their heirs betwixt them ; which failing, to the [4228] heirs of the man's body ; which failing, to the wife's heirs whatsoever ; after which the husband purchased a piece of land, but took the infeftment thereof to him and his wife, and the heirs betwixt them ; which failing, to his own heirs whatsoever, omitting the wife's heirs. The Cranston obtains himself infeft in this conquest tenement, as heir to the wife, and thereupon obtained decret for mails and duties. Wilkison, as heir to the husband

pursues reduction of the decreet upon these grounds ; 1st, That Cranston's infeftment, as heir to the wife, was null, because the wife was not fiar, but liferenter ; 2dly, The wife having accepted of an infeftment, posterior to the contract, without mention of her heirs, that innovates the provision of the contract, and excludes her heirs.—It was answered, first, That the man and wife being conjunct-fiar, the wife was fiar, and the husband but liferenter ; because the last termination of heirs whatsoever, terminated upon her ; 2dly, Albeit Cranston had taken his infeftment wrong, Wilkison cannot quarrel the same ; because he, as heir to Wilkison, was obliged to infeft him, as heir to the wife ; and to the posterior infeftment, it is contrary to the provision of the contract of marriage, and there does appear no accepting thereof by the wife ; 3dly, Cranston is not obliged to dispute the validity of this right, because he hath been infeft *qualitercunque*, and by virtue of his infeftment hath been seven years in possession, whereby he hath the benefit of a possessory judgment, ay and while his infeftment be reduced.

The Lords found, That even by the contract of marriage the husband was fiar, and not the wife ; but that the wife's heirs of line were heirs of provision to the husband, and that if there had been an heir of the marriage, or an heir of the man's body, they could never have been served heirs to the wife ; and that by the deficiency thereof, the condition of the fee cannot change ; and therefore they found that Cranston was wrong infeft ; yet they found the allegiance of his seven years possession relevant to give him the benefit of a possessory judgment, without disputing, whether the provision of the contract of marriage, in favour of the wife, was derogated, by the posterior infeftment, omitting her heirs. *Fol. Dic. v. 2, p. 299. Stair, v. 1, p. 444.*

No. 26. [4230] ADAM GAIRNS v. ISOBEL SANDILANDS. July 12, 1671.

In a contract of marriage, a tenement was disposed in name of tocher to the husband and wife in conjunct-fee and liferent, and the heirs betwixt them ; whom failing, the wife's heirs and assignees whatsoever. The husband was found fiar.

Adam Gairns pursues Isobel Sandilands, as representing her father, to pay a debt of his, and specially as behaving as heir, by uplifting the mails and duties of a tenement, wherein the father died infeft, as of fee, in so far as by contract of marriage betwixt Thomas Sandilands her father, and John Burn, and Isobel Burn his daughter, the said John Burn provided the said tenement in these terms, viz. after the obligations upon the husband's part, it follows thus, " for the which cause, the said John Burn binds and obliges him to infeft Thomas Sandilands, and the said Isobel Burn, the longest liver of them two, in conjunct-fee or liferent, and the heirs between them, which failing, the said Isobel her heirs and assignees whatsoever," by which provision her father being fiar and infeft, the defender is liable. The defender alleged absolutor ; because, by this provision of the conjunct-fee of this tenement, Isobel Burn, the defender's mother, was fiar, and her father was but liferenter, in respect the termination of the succession is to the mother's heirs, yea, and to her assignees, which necessarily imports, that she had power to dispoise. And it is a general rule in succession of conjunct-fiar, that that person is fiar upon whose heirs the last termination of the tailzie or provision ended, especially in this case, where the right of the tenement flows from the woman's father ; so that, if there were any doubtfulness, it must be presumed, that the father's meaning was to give the fee to his daughter, having no other children ; neither is this land disposed *nomine dotis*. And the defender stands infeft by precept of favour, as heir to her mother, and thereby bruiks *bona fide*, and her infeftment must defend her till it be reduced. The pursuer answered, That by the provision, the husband was fiar, and the wife was only liferenter, because though the last termination doth ordinarily rule the fee, yet this is as favourable a rule, that in conjunct provisions, *potior est conditio masculi*, and though the termination be upon the wife's heirs whatsoever, yet they are but heirs of provision to the husband, and he might have disposed, and his creditors may affect the land, which holds in all cases, except the lands had been disposed by the wife herself, without a cause onerous. But here the husband is first named, and it is but a small parcel of land, beside which there is no tocher ; so that though it be not disposed, *nomine dotis*, yet being disposed

"for the which causes" it is equivalent; and, in the same contract, the husband obliged to provide all lands that he shall acquire, or succeed to, to himself and wife, the longest liver of them two in conjunct-fee or liferent, and to the heirs betwixt them; which failing, the one half to the husband's heirs, and the other half to the wife's heirs and their assignees; and, it cannot be imagined, that the meaning of these clauses was, that the fee of the man's conquest and succession, should not be constituted in himself, but that the wife should be fiar of the half. And in like manner the father's meaning is clear, because the clause bears not only in contemplation of the marriage, but for sums of money received by the [4231] father, which albeit blank in the contract, yet it cannot be thought, that in such a narrative, he intended to make his daughter fiar. And as for the adjection of her assignees, it is only *stilo*, for assignees is ever added after the last termination of heirs, and does always relate to all the fiars, and would extend to the heirs of the marriage, their assignees as well as to the wife's heirs failing them. Likewise, assignees is in the same way adjoined to the clause of conquest, wherein there is no ground to imagine that the wife is fiar, and both bear the husband and wife to be infeft in conjunct-fee or liferent.

The Lords found that by this provision, and infeftment thereon, the husband was fiar, and the wife only liferenter, and found no necessity to reduce the defender to infeftment, as heir to her mother, not proceeding upon a retour, but a precept of favour; but they found, that the dubiousness of the case was sufficient to free her from the passive title of behaviour, but only for making forthcoming her intromission, *quoad valorem*; but, it was not debated nor considered, whether as *bona fidei* possessor by a colourable title, being infeft as heir to her mother, she would be free of the by-gones, before this pursuit.

Fol. Dic. v. 1, p. 299. Stair, v. 1, p. 753.

No. 30.

[4236] LAWS v. TOD. January 19, 1697.

A man in his first contract of marriage obliged himself to take the securities of a sum of his own, and of lands he got in name of tocher with his wife, to himself and her in liferent and conjunct-fee, and to the children of the marriage, whom failing, the same to be equally divided betwixt her and his heirs. The husband, as *dignior persona*, was found to be fiar of the whole, and that the wife's heirs came in as his heirs of tailzie.

George Tod, by his first contract of marriage with Mary Law, obliges himself to first take the securities of £1000 of his own means, and the ten acres of land he got with his wife *nomine dotis*, to himself and his wife in liferent and conjunct-fee, and to the heirs or bairns of the marriage; which failing, the said £1000 and ten acres to be equally divided betwixt the man's and wife's heirs. There is one daughter pre-created of the marriage, called Sophia; and the mother being dead, the father causes serve the said daughter, when an infant, heir in special to her mother in the half of the foresaid sum and acres; and then the child dying, he [4237] enters into a second marriage, and by the contract provides the whole ten acres to the bairns of that second marriage, of which he has only a daughter called Agnes, whom he also serves heir in special to her consanguinean sister; Sophia and the father dying last of all, a debate anent the succession fell out between the heirs of the husband, viz. his daughter Agnes, and the heirs of the first wife, viz. Isobel and Sophia Laws her sisters, who took out briefs for serving themselves heirs of provision to their sister's daughter, *quoad* the half of both the money and acres; and contended their sister was fiar of that half, and so they came in as heirs of tailzie and provision to her; which they enforced from these arguments: 1mo, That person is always reputed fiar on whose heirs the last termination devolves, as here it does on the wife *quoad* the half. 2do, They alleged, homologation on the father's part by serving his first daughter heir to her mother, and then the second heir to her sister. 3tio, They founded on a decret that it was *res judicata*. Answered, That rule has many *fallentiae*; for a conjunct-fee to a wife, though the last termination be on her heirs, does not make her fiar, but only liferenter and substitute to the husband, *ob eminentiam sexus*, as has been often found: Durie, 29th January 1639, Graham, No. 23, p. 4226; 20th Feb. 1667, Cranston, No. 24.

p. 4227 ; 12th July 1671, Gairns, No. 26, p. 4230. And as to the homologations, his mistake could never give his wife the fee ; and the services were only to debar her heirs ; and the decret was opposed to the *res judicata, ubi hoc non agebatur* who was the fiar. The Lords found, in the conception of such a clause, the husband, as *dignior persona*, was fiar of the whole ; and yet that the first wife's heirs came in as heirs of tailzie and provision, not to her (who was not fiar), but to the husband, and that the homologation did not take away his fee ; and that his providing the same in the second contract of marriage, being but a voluntary deed only, could not evacuate, frustrate, or take away the substitution in the first contract in favours of the wife's heirs *quoad* the half ; though it was urged by some of the Lords, that he being fiar, might have sold the acres, and spent them, and his creditors could have affected them by diligence notwithstanding of the substitution. They also found the substitution took place, albeit there was a child of the first marriage served heir, and that the clause *quibus deficientibus* or whilk failing, was to be understood, *quando-cunque* the same came to fail, then there was room to the next branch of the substitutes, and not to evanish on the existence of an heir as the substitutions in the Roman law did. See PROVISIONS TO HEIRS AND CHILDREN.—SUBSTITUTE AND CONDITIONAL INSTITUTE.

Reporter, FOUNTAINHALL.

Fol. Dic. v. 1, p. 299. *Fountainhall*, v. 1, p. 757.

No. 31. [4238] JAMES PURDIE, Merchant in Edinburgh v. DAVID ROSS, Merchant there. March 5, 1707.

A husband was obliged to provide the conquest to himself and his wife in conjunct-fee and liferent, and to the children to be procreated betwixt them ; whom failing, the one half to himself and his heirs, &c., and the other half to the wife's heirs, &c. There being no children, the husband's heir was ordained to procure himself infest in the conquest, and to dispoise the half with warrandice from fact and deed to the wife's assignee, though the husband was fiar.

It being provided by contract of marriage betwixt the deceased David Young, merchant in Edinburgh, and Katharine Mitchell, that all lands, heritages, annualrent, sums of money, and others to be conquest during the marriage, should accresce and pertain to them and the longest liver, and the bairns to be procreated betwixt them ; and failing these, the just and equal half should pertain to the said David Young, his heirs, executors, and assignees, and the other half to the wife's heirs, executors, and assignees ; and the said David being obliged to take the securities of the foresaid conquest in the terms above written, Katharine Mitchell, after her husband's decease, without heirs of the marriage, obtained a decret before the Bailies of Edinburgh v. David Ross, merchant there, as heir to the said David Young, decerning him to infest himself in the lands therein mentioned, and to dispoise the equal half, with warrandice from fact and deed, to the said Katharine Mitchell, her heirs and assignees, in the terms of her contract of marriage. This decret, with the whole clauses in the contract in her favours, being disposed by her in the 80th year of her age, to James Purdie, merchant in Edinburgh, for love and favour, and, as was alleged, in contemplation of marriage ; he thereupon charged David Ross with horning, who suspended upon this ground, that Katharine Mitchell by the conception of the clause of conquest had only a liferent right, and the husband was fiar ; seeing the provision, that failing children of the marriage, the one half of the conquest should belong to the husband's heirs, and the other to the wife's, did only make her heirs of line, heirs of provision to the husband in the one half ; January 29th, 1639, Graham *contra* Garden, No. 23, p. 4226 ; December 1st and 21st, 1680, Anderson v. Bruce, No. 3, p. 607 and No. 27, p. 4232.

Answered for the charger ; The husband being fiar, the suspender is liable as representing him, to perform his obligation in favours of the wife, her heirs and assignees, which was not performed by himself. For had the husband, in the terms

of the contract, taken the rights of the conquest, to him and her in conjunct-fee, and the heirs betwixt them ; which failing, the one half to his own heirs, and the other half to her's ; she surviving would have been liferenter of the whole, and a conditional substitute fiar in the half ; in which half she and her heirs might be served heirs of provision to the husband ; but since the rights of the conquest were not taken by the husband, the clause in the contract, in favours of the wife, her heirs and assignees, remained in the terms of a personal obligation, which the suspender, or heir, is obliged to perform.

The Lords found the letters orderly proceeded.

Fol. Dic. v. 1, p. 300. Forbes, p. 138.

No. 32. [4240] WILLIAM FEAD, Drover v. GEORGE MAXWELL of Dalswinton and Others. February 4, 1709.

A person in his daughter's contract of marriage having assigned to her and her husband and their heirs of the marriage, whom failing, the wife's heirs and assignees, all goods and gear belonging to the cedent at the time of his decease, the wife was found to be fiar.

In William Fead's contract of marriage with Helen Watson, daughter to John Watson in Dalswinton, John Watson obliged himself to pay to William Fead, his heirs, executors, or assignees, 900 merks of tocher betwixt and a certain term ; and further constituted the said future spouses and the heirs of the marriage, which failing the said Helen, her heirs, or assignees, his assignees to all goods and gear belonging to him the time of his decease. After the death of John and Helen Watsons, William Fead raised a process against John's relict, Dalswinton, and others his debtors, libelling and concluding exhibition, delivery and payment of all John Watson's debts and effects in their hands.

Alleged for the defenders ; The husband could claim no more than the liferent, the wife being fiar, in so far as the last termination is in favours of her heirs or assignees, and the subject came by her.

Answered for the pursuer ; According to the opinions of my Lord Stair, Instit. lib. 3, tit. 5, HEIRS, p. 481, and Dirleton, Doubts, p. 68 and 69 and 184, where there are diverse degrees of substitution of heirs of diverse persons, and a wife and her heirs in the last place, the person whose heirs are provided for in the first place, is understood to be fiar, and those in *secundis tabulis*, in a remote degree, to be only heirs of provision failing the former.

The Lords found the wife to be fiar ; not because the substitution did terminate upon her heirs, but because it was in favours of her heirs and assignees, and none but who is fiar can assign.

Fol. Dic. v. 1, p. 300. Forbes, p. 317.

No. 33. [4241] JAMES SINCLAIR, Writer in Edinburgh, pursuer v. ROBERT ANDERSON, and Others, Creditors of the deceased James Fraser, defenders. November 20, 1771.

Where an heritable subject was destined in a marriage contract to the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage, whom failing, to the heirs of the wife ; the fee found to be in the wife, though the provision was not gratuitous but reciprocal, and though nothing else was given in name of tocher.

James Fraser having, in the year 1705, entered into a marriage with Margaret Torry the pursuer's grandmother, a contract was entered into by the parties ; in which the husband became bound to make the following provisions :

1st, To secure 3000 merks to himself and spouse, and the longest liver in conjunct-

fee and liferent, and to the heirs to be procreated ; which failing, to the husband's other heirs and assignees. And for her farther security, he became bound to infest himself and her, and the heirs as above noticed, in certain heritable subjects, valued at 1400 merks.

2d, He obliged himself to provide the one half of the conquest to himself and spouse, and the longest liver in conjunct-fee and liferent, and to the heirs to be procreated ; which failing, to his other nearest heirs ; the other half was provided to himself and the heirs of the marriage ; which failing, to his own other heirs.

3d, He provided her to one third of the plenishing if there were children of the marriage, and to one half if there were none.

The contract contained a clause, by which the above provisions, " together with the liferent reserved of all the lands underwritten pertaining to the said Margaret Torry herself," were accepted of by her, " in full contentation and satisfaction of all conjunct-fee, terce, executry, &c."

Margaret Torry was possessed of an heritable subject ; and she accordingly became bound " to infest and seise the said James Fraser and herself therein, the longest liver of them two in conjunct-fee and liferent, and the heirs whatsoever of their body to be procreate betwixt them ; which failing, to the heirs whatsoever to be lawfully procreate of the said Margaret Torry her body in any other marriage ; which failing, to the children lawfully procreate or to be procreated betwixt Robert Anderson and Margaret Smith her mother, and their nearest heirs and assignees whatsoever, heritably and irredeemably." The contract contained a procuratory in the same terms, and thereafter a clause, constituting " the said James Fraser in liferent, her assignee, to the mails and profits immediately after her decease, in case he survive her, and yearly and termly during his lifetime." And she farther constituted her husband, and the heirs to be procreated betwixt them, her cessioners and assignees, to all goods, debts, and sums of money, falling to her through the decease of her father.

The heritable subject, conveyed by this contract, having been attached by the husband's creditors, and he having died, the pursuer, as in the right of Margaret Torry, by disposition from Margaret Fraser his mother, the only sur-[4242]-viving child of Margaret Torry, challenged the right of the creditors ; so that the question came to be, Whether, by the conception of the contract 1705, the fee of the subjects was vested in the husband or the wife ? Upon this point,

The pursuer pleaded ;

1mo, The decision of the question, as to who was fiar in provisions of this nature, depended upon certain legal distinctions, 1st, Whether the subject flowed from the wife or her friends ? 2dly, Whether it was conveyed to the husband gratuitously, or for an onerous cause ? and if conveyed onerously, Whether it was conveyed *nomine dotis* ? 3dly, Whether the heirs, first called in the substitution after the heirs of the marriage, were the husband's or the wife's ?

When the present case was judged of, according to these rules, the conclusion was obvious. The subject flowed from the wife herself. Though it had not been given gratuitously, it had not been given *nomine dotis* ; in the first place, as it was heritage, where the presumption did not hold ; 2dly, As there was another tocher stipulated, viz. the moveable succession, to which she had right by her father's death ; and as to the last criterion, not only were her heirs called immediately after the heirs of the marriage, but a series of her heirs and friends were substituted to these, and the husband's heirs nowhere called at all.

A number of authorities were referred to. 18th December 1611, Lord Kinnaird *contra* Lord Pitfoddles, No. 18, p. 4220. Stair, b. 3, t. 5, § 51. Stair, 12th July 1671, *Gairns contra* Sandilands, No. 26, p. 4230. July 1720, *Creditors of Elliot*, No. 35, p. 4244. Angus *contra* Ninian, No. 36, p. 4244. 24th July 1612, Ramsay *contra* Maxwell, No. 22, p. 4226. Stair, 20th February 1667, Cranston *contra* Wilkison, No. 24, p. 4227. Forbes, 21st November 1705, *Creditors of Earnslaw contra* Douglas, No. 21, p. 4223. 4th February 1709, Fead *contra* Maxwell, No. 32, p. 4240. June 1727, Edgar *contra* Edgar, No. 8, p. 4202.

2do, Independent of the conclusive inference to be drawn from the legal distinctions noticed, the after clauses of the deed were sufficiently explanatory, as to whom the fee was vested in. In the provision made by the husband, the destination was to his heirs and assignees whatsoever ; while, in the provision by the wife, it was to her heirs, &c. ; a difference of termination, which evidently indicated that the parties

meant to distinguish betwixt the effects of the two. The terms of the assignment to the mails and duties, which were conveyed to the husband in liferent, yearly termly during his lifetime, were, in like manner, perfectly decisive of the meaning to the parties.

Robert Anderson, and the other creditors, answered ;

Imo, It was generally understood, that clauses of conjunct-fee and liferent husband and wife, vested the fee in the husband as the *dignior persona*, unless [4243] there was a restriction of the husband's right ; which was done by expressing to be for his liferent use alienarily. Though this general rule had, in some cases, been departed from, where the settlement was gratuitous, and where the subject devolved from the wife, or was made to terminate on her heirs ; yet, when the settlement was executed for an onerous cause, as in view of reciprocal provisions by the husband, or where it was given as a tocher, whether expressly said to be so or not, the same rule, in favour of the husband as fiar, was observed.

In the present instance, there was no restriction of the husband's right. The settlement was not gratuitous, the reciprocal provisions by the husband being inadequate. The wife had no other tocher than this subject ; nor was any thing mentioned upon her part in the contract of marriage. The intention of parties was also evident from the contract : it was provided, that the liferent provision, "together with the liferent reserved of the lands under written, pertaining to the said Margaret Torry," were accepted of "in full satisfaction of all other conjunct-fee, terce, &c." ; which shewed that the interest received by the wife was only a liferent, and that the conjunct-fee in the settlement imported no more.

The following authorities are referred to. Stair, 227, 502. Bankton, v. 2, p. 330. 29th January 1639, Graham *contra* Park, No. 23, p. 4226. July 1720, Elliot, No. 35, p. 4244. Stair, 12th July 1671, Gairns *contra* Sandilands, No. 26, p. 4230. Fac. Col. 30th July 1766, Watson *contra* Johnston, Div. 3, h. t.

2do, It would be contrary to the rules of sound construction to interpret the clause assigning the mails and duties, in contradiction to every other clause in the deed ; and if it had been the intention of parties to restrict the husband's interest, it would have been done in the dispositive clause, which was the proper place.

November 20, 1771.—The Court was unanimous that the fee, in this case, was vested in the wife ; it was therefore found, "That the subject belonged to James Sinclair ; and it was ordained to be struck out of the sale accordingly."

Lord Ordinary, —.—For Sinclair, Jo. SCOTT.—For Anderson, &c., Cosmo GORDON.—Clerk, PRINGLE.

R. H.

Fac. Col. No. 109, p. 328.

No. 34. [4244] Earl of DUMFERMLINE v. Earl of CALLENDAR. June 27, 1676.

In a contract of marriage, the husband obliged himself to take the conquest to himself and wife in conjunct-fee and liferent, with an express power to the wife to dispose at her pleasure upon the half thereof. In this case the wife was found to be fiar of the half of the conquest ; which was inferred not only from this power of disposal, but also because she had an opulent fortune of more value than her husband's.

Fol. Dic. v. 1, p. 300.

No. 48. [4256] VEITCH v. ROBERTSON. July 9, 1630.

A husband disposed to his second wife an annualrent out of his lands, and to the children of that marriage in fee. He afterwards sold the lands, and a son of that marriage, as fiar, competing with the purchaser, the Lords found the sale effectual.

An husband giving infetment to his second wife in liferent, and to the heirs to be begotten of that marriage, of an annualrent out of his lands, which lands the husband

thereafter disposed, divers years after the procreation of a son in that marriage, and which son of the said second marriage being served heir of that marriage, and infest in that annualrent, disposes the same to another, who pursues poiding of the ground therefor against the heritor of the land, who had acquired the right from the father, as said is, after the said sasine of the annualrent, and whereby he alleged, that the pursuer nor his author, as being the heir of that marriage, had no right to the said annualrent, the father remaining still fiar, who disposed the land, and which disposition absorbed the said annualrent; and the pursuer answering, That after there was sasine given to the wife in liferent, and to the heirs of that marriage in fee, of the annualrent libelled, the bairns of that marriage became fiars thereof, how soon they were born; so that thereafter, albeit the father remained fiar of the heritable right of the lands, yet his right was affected with the burden of that annualrent, so that the father could never thereafter valuably dispose the heritable right of the lands, but with the burden foresaid, and wherewith the said disposition behoved to remain affected, even as if his eldest son of the first marriage, who was universal heir, if the said disposition had not been made by the father, as said is, would have succeeded to the right of the lands, but ever with the said burden; even so must the said disposition be affected therewith.—The Lords found the disposition made by the father sufficient to exclude this pursuit, and that the fee of the said annualrent subsisted in the father's person, notwithstanding of the sasine given to the wife, and heirs of that marriage, and consequently that the father's disposition of the land was not affected with the burden thereof; so that albeit the heir might have been compelled to warrant that annualrent personally as heir, yet it was not alike in a singular successor to affect the ground against him.

Act. STUART.—Alt. ADVOCATUS & TAYLOR.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 302. Durie, p. 528.

No. 51. [4258] THOMSONS v. LAWSONS. February 4, 1681.

A father disposed his lands to his son and spouse in liferent, and to the heirs of that marriage, whom failing, to certain persons named, reserving his own liferent. The son was found fiar.

Umquhile Robert Masterton did dispose some tenements in Edinburgh to James Masterton his son and his spouse, and longest liver of them two in liferent, and to the heirs of that marriage, which failing to Alison, Jean, and Margaret Thomsons, his oyes by his daughter, "reserving his own liferent," whereupon sasine was taken both for Masterton and his spouse, and for the three Thomsons who pursued the tenants for mails and duties. Compareance is made for Janet Lawson, who had right to a liferent of the tenements from Thomson, who had right from these Thomsons, who had right from James Masterton, and alleged preference, because by the foresaid disposition, James Masterton was fiar, and the Thomsons are but heirs of provision substituted, "failing James's heirs of that marriage," and therefore their infestment was unwarrantable, but they ought to have been "retoured heirs of provision to James Masterton," and whatever their sasine may operate, as to the superior who received them, yet it cannot alter the fee; for, if James Masterton had had heirs of that marriage, they would have excluded the Thomsons, and behoved to have entered heirs to James, for Robert was denuded, and could not be fiar, and his disposition does expressly reserve his liferent; and the Lords have found, in the case of the Children of Moor, No. 45, p. 4252, who upon a substitution like this were infest, "that they were but heirs substituted, and that their father might dispose at his pleasure." It was answered, That if the disposition had been to James Masterton and his spouse in conjunct-fee, the husband behoved to be fiar; but here it is only to them in liferent, which can import no fee, and though it could, yet Thomson being lawful administrator to his children, could not warrantably take a right from Masterton to exclude his children. It was replied, That in the common style of ordinary notaries, conjunct-fee and life-

rent, are equiparat terms, unless it bear "liferent" alienarly; but the disposition being to James and his wife, and the heirs between them, doth necessarily imply that they were in conjunct-fee, and the husband fiar, for their children could never be heirs to naked liferenters; and, seeing James was fiar, his heirs of tailzie could not quarrel his deed, not being upon a mutual contract, and it was his deed in disposition and not Thomson, the father's, that made the right, which coming to Lawson's wife, a singular successor *ex causa matrimonii*, the same is valid and preferable.

The Lords found, by the conception of the disposition, That James Master was fiar, and therefore preferred the liferenter deriving right from him.

Fol. Dic. v. 1, p. 302. Stair, v. 2, p. 654

No. 52. [4259] Creditors of PATERSON and ANDERSON v. DOUGLASSES.
November 21, 1705.

The dispositive clause by an heiress in her contract of marriage, in favour of her husband in liferent, and the heirs of the marriage in fee; which failing, to his heirs assignees, reserving her liferent, was found to make the husband fiar; the obligation to infeft, and the procuratory of resignation being to him and her in conjunct-fee as liferent, and to the heirs of the marriage in fee, which failing, to his own heirs and assignees; and the assignation to the writs with the obligation of warrandice, being conceived in favours of him, his heirs or assignees.

Fol. Dic. v. 1, p. 302. Forbes. Dalrymple.

No. 53. GEORGE FRASER, Brewer in the Canongate v. ANNA BROWN, Relict of John Gordon, Brewer in Edinburgh, and her CHILDREN. March 27, 1707.

An heiress, in her contract of marriage, disposed to her husband in liferent, and to their heirs, whom failing, his heirs or assignees. The husband found to be a naked liferenter. See SYNOPSIS.

Anna Brown, in her contract of marriage with John Gordon, brewer in Edinburgh, celebrated after the birth of their second son, disposed some lands, whereof she was heiress, to her husband in liferent, and to the heirs procreated or to be procreated in the marriage, which failing, to the husband, his heirs or assignees in fee, heritably and irredeemably, reserving her own liferent: Which contract contains an obligation to infeft, either by resignation or confirmation, as best should please her and her said husband, and their foresaids; and a precept for giving heritable sasine to him or his attorney; and gives, in the assignation to the writs, full power to him and his foresaids "according to the destination of liferent and fee above specified, with the reservation of her liferent above mentioned" to intromit with, uplift, &c., and mentions the writs and rights of the lands to be delivered to the husband to be kept and used by him for the use and behoof above-mentioned. The said Anna Brown suspecting her own interest not well enough secured by the contract, took from her husband a separate bond of the same date, whereby he obliged himself, failing heirs of the marriage, to denude in favours of her, her heirs or assignees. George Fraser, brewer in the Canongate, a creditor of the said John Gordon, having after his decease obtained an adjudication against Francis Gordon the defunct's son, upon a *cognitionis causa*, and his renunciation to enter heir, and pursued a mails and duties against the tenants; comparison was made for the said Anna Brown and the said Francis Gordon her son, who alleged that the rents in question belonged to them in liferent and fee respectively, by virtue of the contract of marriage aforesaid, and so could not be [4260] carried by the pursuer's adjudication for the debt of the defunct, who was but a simple liferenter.

Replied for the pursuer; John Gordon, the husband, was clearly fiar by the con-

ception of the contract, in so far as, 1mo, He is always named first as the *persona nobilior* ; and even where lands were disposed by a woman to her and her husband in conjunct-fee and liferent, and the heirs procreated betwixt them, the man was understood to be fiar, in the case betwixt Sir John Kennedy and Kennedy of Girvenmains.* 2do, John Gordon's heirs are mentioned in the last place ; and, by the current of decisions, *in dubio*, they are thought to be the fiars *quorum hæredibus maxime prospicitur*. 3tio, Seeing the fee could not be *in pendente*, it behoved to belong either to the husband or to the wife ; now, it could not belong to her, who, in all the parts of the contract, reserved nothing but her liferent ; nor could it be in the person of the heirs of the marriage, who would not have right without a service ; therefore it was in the husband allenary. 4to, In the precept of sasine, the wife orders her baillie to give heritable sasine to her husband, without any mention of liferent or heirs. 5to, The separate bond manifestly implies that the husband was fiar, in so far as the wife takes him obliged to denude and renounce in the event of no children of the marriage.

Duplied for the defender ; 1mo, The presumption lies for the husband *qua persona nobilior in casu dubio* ; but here there is no manner of dubiety, the subject disposed being the wife's heritage, and there being a son of the marriage extant at the time ; and, in all the material clauses, the husband's right being expressed as a liferent contradistinct to a fee. 2do, Albeit the substitution terminates in the husband's heirs, he must not be presumed fiar ; because, his heirs are substituted to the heirs of the marriage ; and, in the bond apart of the same date, which is *pars contractus*, as being *pactum ex incontinenti adjectum*, the last termination in favours of the husband's heirs is changed in favours of the wife's heirs. 3tio, As the wife reserves only her own liferent, so she conveys nothing to her husband but the liferent ; therefore, it is plain, the fee could not be in his person, but behoved to remain with the wife, who was frank tenementar and fiduciary as to the fee, for the behoof of the children of the marriage. 4to, The precept of sasine must be interpreted from the body of the contract, and the inserting of the word " heritable " ascribed to the error or ignorance of the writer, who also discovered egregious ignorance in misplacing the words " in fee " in the other material clauses. 5to, Suppose the wife *errore juris* had believed, by her taking the separate bond, that the husband had power to dispoise and renounce when he had not, could that have prejudiced her ?

The Lords found, That John Gordon was a naked liferenter by the quality of the disposition in the contract of marriage, and preferred his relict and children to his creditors.

Fol. Dic. v. 1, p. 302. Forbes, p. 162.

No. 54. [4261] Creditors of Lieutenant ROBERT PRINGLE v. JOHN ERSKINE of Balgoronie. June 2, 1714.

A bond was granted to a husband and wife in conjunct-fee and liferent, for their liferent use allenary, and to the heirs of their marriage in fee ; whom failing, to the longest liver of the spouses, their heirs or assignees, with this condition, that it should not be in the power of either of them to uplift or assign the principal sum, without the consent of trustees named in the bond. The Lords found the husband was not fiar, and that it was not affectable by his creditors.

John Erskine of Balgoronie, by his bond, dated April 18, 1710, granted him to be justly addebt to Margaret Erskine, his sister-german, and Lieutenant Robert Pringle, the sum of 4000 merks principal, which, with annualrent to the term of payment, he bound and obliged him, his heirs, &c., to them and longest liver of them two in conjunct-fee and liferent, for their liferent use allenary, and to the heirs and bairns procreated and to be procreated betwixt them in fee ; which failing, to the longest liver of the said Margaret Erskine and Lieutenant Robert Pringle, their heirs and assignees whatsoever, at Candlemas 1711 years, with this condition, that it should not be lawful for them, or in their power, or in the power of either of them, to uplift

* See General List of Names.

or assign the foresaid principal sum, or any part thereof, without the special assent and consent of two persons named in the bond. Lieutenant Pringle's Creditors arrested the money in Balgornie's hand, and pursued a furthcoming thereof belonging to their debtor, upon this ground, that he was fiar; because, there being no bairns of the marriage, and the money failing them provided to the wife and husband, their heirs and assignees, the heirs of the husband as *dignior persona* understood and he is fiar *prærogativa sexus*, and the wife is only liferenter, unless the contrary be expressly provided in favour of the wife; which rule of interpretation ought rather to hold in this case, where, by a provision in the bond, the husband is debarred from disposing of the fee, seeing that clause had been superfluous if the husband had no such power.

Answered for the defender; Tho' conjunct-tees to husband and wife do generally resolve but in a liferent to the wife, and make the husband fiar, that rule suffers an exception, that where the right was originally the wife's, she is understood to continue the property in her own person, unless the contrary appear from the tenor of the writ itself; for albeit, *in dubio*, law regards the husband as the *dignior persona* where other circumstances appear to influence the decision; that cannot hold in this case where the wife is understood to prefer herself, seeing *nemo præsumitur donare*; and besides, she is first named in all the clauses of the bond. Nor can any thing to the contrary be inferred from the clause restraining the husband's power of uplifting, if that were unnecessary if he were not fiar; because, Imo, Any such argument is expressly obviated and taken off by the tenor of the writ itself, declaring, that the money is payable "for their liferent use allenarly." 2do, That clause was necessary though the husband was not fiar, because, *jure mariti* he had the administration which is thereby taken away.

Replied for the pursuers; Imo, It imports not that the money came by the wife for that was not found to make her fiar, 12th July 1671, Gairns *contra* [4262] Sandilands No. 26, p. 4230. Nor doth it alter the case, that she is first named in all the clauses of the bond, as was decided, 23d July 1713, Edgar *contra* Sinclair, No. 7, p. 4232do, However the money might originally have belonged to the wife, yet it is presumed to have been a moveable sum, the same being lent out upon security during the marriage, and so belonged to the husband *jure mariti*, conform to the practice, 30 January 1681, Countess of Weems *contra* L. May and M'Kenzie, *voce* SURROGATUM.

Duplied for the defender; Imo, The decisions cited do not come up to the present case; for, in that betwixt Gairns and Sandilands, the conveyance being in a contract of marriage, where no other tocher was provided, it may be understood as given *nomine dotis*, which is onerous *ad sustinenda onera matrimonii*; and therefore, the fee was justly adjudged to belong to the husband, who is naturally obliged to provide for his family; whereas, in the present case, the sum in bond remained in property with the wife, or was a donation from the brother *suo modo*. As to the other practice betwixt Edgar and Sinclair, the donation there seems not to have been purely gratuitous in the granter, seeing the bond bears, not only "for love and favour," but also "for other onerous causes." Besides, that there it doth not appear, as in the present case, that the granter expressly designed to exclude the husband from the fee. 2do, If the money did originally belong to the wife, and was secured to her by bond bearing annualrent, the uplifting and re-employing in these terms, would not make it belong to the husband as moveable, 21st February 1679, Cockburn *contra* Burn, *voce* HUSBAND AND WIFE; so that no argument can be drawn from the case of the Countess of Weems *contra* L. May and M'Kenzie, unless the pursuers can instruct, that if the money did originally belong to the wife, it was not secured by a bond bearing annualrent, which is not probable, the sum being considerable.

The Lords found, that the fee of the principal sum contained in that bond, did not belong to the Lieutenant, the common debtor, and therefore cannot be affected by his debtors.

Fol. Dic. v. 1, p. 303. Forbes, MS. p. 43.

No. 55. The Creditors of ROBERT FROG v. HIS CHILDREN. November 25, 1735.

A disposition to one in liferent, and the heirs of his body *nascituri* in fee, found to resolve into a right of fee in the father, who was therefore found entitled to sell the subjects for payment of his debts.

The deceased Bethia Dundas did, for the love and affection she bore to Robert and James Frogs her lawful oyes, sons to the deceased James Frog her eldest son, and the other persons after named, "Dispone certain houses belonging to her in Edinburgh in favours of the said Robert Frog, her eldest oye in liferent, and to the heirs lawfully to be procreated of his body, in fee; and, failing of him by decease without heirs of his body; to the said James Frog, [4263] her other oye, also in liferent, and to the heirs lawfully to be procreated of his body, in fee; and, failing both her said oyes without heirs of their bodies, to John Frog merchant in Pennsylvania, her second son, in liferent, and the heirs of his body in fee; which failing, to Elizabeth Frog, her daughter, in liferent, and the heirs of her body in fee; which all failing, to her own nearest lawful heirs whatsoever."

In virtue of this deed, Robert Frog, who, at the date thereof, was about nine years of age, was infert; and having thereafter contracted several debts, in order to pay his creditors, he entered into a minute of sale as to part of the subjects contained in the disposition; however, before executing thereof it was objected, That the above settlement only conveyed a right of liferent to him, and therefore he had no power to sell, the fee being disposed "to the heirs lawfully to be procreated of his body"; and, it having been agreed of consent that the same should be discussed, it was urged for the Creditors of Robert Frog, That, wherever a right is granted to a father in liferent, and to the heirs of his body *nascituri* in fee, the father is always understood to be fiar, if no other restriction is expressed, and his children are only deemed heirs of provision. To illustrate which, it was observed, that it is a principle of law, that a fee cannot be *in pende*, but must be settled upon some person existing at the time of the disposition; the reason of which maxim is, that it would be inconsistent with common sense to suppose a property without a proprietor; and, if the contrary doctrine took place, many absurdities would follow. Thus, if the *dominium directum* were allowed to be pendent, the vassal could not be entered; if the *dominium utile*, the superior could not have a vassal; if the former proprietor had contracted debt, his creditors could not affect it, because there was no person from whom it could be adjudged; besides several others that might be mentioned. And, as this maxim has been considered as a fixed principle in law, it has followed, that parents, taking rights to themselves, or others settling them upon them with substitutions to their children *nascituri*, have promiscuously made use of the words "fee, conjunct fee, or liferent"; because both these, when applied to the parents, behoved to have the same effect; for, as the children *nascituri* could not possibly be vested in the fee when they were not in being, the liferent provided to the parent is understood to be an *usus fructus causalis* resolving into a real fee, as the children were capable of no other right but a succession to the fee after the father's decease; and, though nominally designed fiars, from the nature of the thing, it could import no more but a provision of succession. And in this manner have all our lawyers constructed such settlements. Thus, Lord Stair, Tit. INFERTMENT, says, "infertments taken to parents, and, after their decease, to such children and other persons named, the parent is understood to be fiar, and not liferenter, and the children and others to be heirs-substitute." Sir George M'Kenzie, p. 172, likewise observes, That, if a father disposes to children to be procreated, this will be considered only as a [4264] destination, and will not hinder the father to make posterior rights, or posterior creditors to affect by diligence what is so disposed. And Dirleton, Tit. FEE quest. 1, asks, "Where is the fee of a sum provided to husband and wife in liferent, and to the bairns in fee?" Shewing plainly, by the method he there proposes to secure the children, that it is his opinion, that, in the case stated, the fee is in the father; besides, this interpretation has been ratified by a variety of decisions. See 9th July 1630, Veitch, No. 48, p. 4256; 10th February 1672, Wemyss, No. 50, p. 4257; 4th February 1681, Thomson, No. 51, p. 4258. It is no wonder, therefore, after so many authorities, that the lieges have trusted to settlements expressed in that manner; and, that such clauses have been generally so understood, is evident by the excerpts produced from the records of Chancery; whereby

it appears, from a variety of instances, that children have been served heirs of provision to their parents who were only infeft in liferent, and their heirs to be procreated in their body in fee.

In the next place, when the special circumstances that attend this case are considered, it is by no means probable the granter designed to restrict her grandsons and the other children named to be liferenters, for the love of whom it is said the deed was made, and that she intended to give the fee to their children who were then unborn. 2dly, She disposes to them very near in the order they would have succeeded to her law; which therefore ought to be more extensively interpreted in favours of their heirs at law. 3dly, If she had intended to have given them a bare liferent, she would have added the word "allenary"; without which, in such settlements, it imports *usus fructus causalis*. Besides, several absurd consequences would follow from supposing the fee to be lodged any where else than in the person of Robert Frog; make out which, the case was put, that he had died leaving issue of his body, who had established the fee in their person; and that, thereafter, they had failed, whereby the substitution in favours of James in liferent and his issue in fee, came to take place; how could James make up a title to the liferent? It is unknown, in law, that a liferenter should serve heir to a fiar; and yet, it is believed, he could not come at it otherwise. 2dly, Suppose none of the substitutes had children, and that the disposer had left creditors who wanted to affect her lands, they behoved to have adjudged not from Robert or the other substitutes, if they were liferenters, but from the disposer's remoter heirs at law; nay, even the creditors of these remoter heirs could while there were no nearer heirs existing of the body of these substitutes, adjudge the lands for their debts; since, if the property is supposed to be devolved on them, nothing could hinder their creditors to affect it; all which are consequences, neither terrible in themselves, or any ways consistent with the meaning of the settlement.

To these arguments, it was answered for Robert Frog's Children—The maxim that a fee cannot be pendent, is, like most other rules in law, subject to exceptions; and so many have occurred, that it scarcely merits the name of one, as appears [4285] from the following decisions, 22d February, Bruce; 4th February 1726, Sir Edward Gibson (*voce* PRESUMPTION); 22d February 1724, Douglas. Besides, the case of an *hereditas jacens* is likewise an instance that a fee may be pendent; but, granting the brocard should take place, it does not apply to the present question, *scil.* Whether a disposition to a person in liferent of a certain subject, is to be explained a disposition in fee, contrary to the plain and obvious meaning of the words, which imports rights of a quite different nature. As to the quotations referred to, they do not come up to the point in dispute; for the passage from Lord Stair does not speak of infeftments taken to parents in liferent, but of infeftments in general to parents, without adjection of the words "in liferent." And it is true, in such a case the parent is fiar, because there is nothing to limit the right; but it is otherwise when the words "in liferent" are adjoined; for then the right cannot be extended beyond the restriction. Neither is what Sir George M'Kenzie observes any ways applicable; for the question that he determines, is not of a disposition made to a father in liferent, but of a disposition made by a father to children *nascituri*; which, he says, imports only a destination, not a present right denuding the father; which is true, but nothing to the purpose. And as to the quotation from Dirleton, he gives no opinion on the question stated, but rather seems to think the fee would belong to the children; though, for making this the clearer, he says, it would be better to take the right in trust in the father's person for the behoof of his children. 2dly, No argument can be drawn from that case to the present; as a sum in a contract of marriage is understood to be given *ad sustinenda onera*; therefore it ought to receive a more benign interpretation in favours of the father, than when the deed is a pure donation, such as the present. Neither is the instance of children's having served heirs to their fathers, who were only infeft in liferent, of any avail; seeing the opinion of an inquest can have no weight in determining a point of law; especially when it is considered, that the design of serving is only to cognosce the propinquity. With respect to the particular circumstances condescended on, they are of no force to induce a construction contrary to the natural and legal import of the words; for, as to the first, The disposition not only proceeds on the narrative of love and favour, but for other good causes and considerations; the import of which is, that, as the two grandsons were infants, and her second son in Pennsylvania, of whose return she had no hopes; therefore, it is probable, her intention

to secure the succession to her daughter Elizabeth ; yet so as those, who, by the force of law, fell to succeed, should have the benefit of a liferent, and their children fee ; with a view to which, the deed was devised in the manner it now appears, whereby none of the other heirs could prejudice the succession of her daughter who was the *dilecta persona*. As to the second, it is true, that, when the succession is made in the legal order, it is reasonable to interpret clauses favourably ; but then favour is not to be used to wrest words contrary to their genuine meaning. The third, There was no necessity to add the word "allanarly" in order to ascertain the import of the word "liferent ;" the simple expression of disposing in liferent made the fee, especially when the fee is expressly given to others. In the last place, as to the absurd consequences which, it is pretended, would follow from supposing the fee not to be lodged in the person of Robert Frog, it is answered to the effect, That the different grants of the different liferents are not substitutions to the liferent, but new grants of liferents ; and therefore there was no necessity to make any title to the prior liferenter, but only to prove that the former liferenter was dead, and that the condition of the second liferent existed. To the second, The gratuitous deed of the disposer would not prejudice her creditors, seeing they might be adjudged the fee from any who was next heir.

The Creditors replied, That, if there is any rule of law that can be said to hold universally and without any exception, it is, that the property of a subject cannot be vacant, but must necessarily belong to some person ; neither do the decisions referred to on the other side prove the contrary : For, as to the first, it has been since overruled by the decision 2d January 1708, Lord Montstewart, *voce* SUCCESSION. And, in the other two cases, the reasoning on both sides plainly supposes the certainty of that principle ; neither is the instance of an *hereditas jacens* an exception, seeing the parent heir sustinet personam heredis even before his service, he having the *jus redituatis delatum* from the moment of his predecessor's decease, although a service necessary to complete his titles. With regard to the answers that have been made to the opinions of our lawyers, they are noways satisfactory ; for, as to the passage cited from Lord Stair, it is probable that he supposes the case where no more is given in express terms to the father than a liferent ; because, if the fee were given him, it could not be the subject of a doubt. And Sir George Mackenzie's authority is directly in point ; for the reason why a disposition by a father to his children *nasciturus* does not denude him of the fee, is, that they are incapable to take it, on account of their not existing at the date of the deed ; which applies directly to this case, as the children were not in being when the disposition was made. It is also obvious from Johnston's opinion, that he did not think the fee could be taken directly to children *nasciturus* ; and therefore he proposes to vest it in the father for the behoof of the children, which there would have been no occasion for, if it could have been done directly to the children themselves. In the next place, as to the conjecture, that the settlement was intended to secure the fee to Elizabeth, it is without any manner of foundation ; as there is not a clause in the whole deed from whence the disposer's intention of her can be inferred ; and, if the granter's own word is to be credited, Robert is the *prædelecta persona*, and Elizabeth the least *delecta* of them all. Neither are the absurdities that naturally follow from the construction of this settlement by the children any ways removed ; for, as to the first, the continued succession of liferenters making up no titles by service, but only by a proof of the death [4287] of the former liferenter, and the existence of the condition of the second liferent, is a novelty unknown in law, and without any foundation in the analogy of law. And, as to the second, there is no sort of answer made to it.

Duplied for the Children ; That, if this case was to be determined by a jury, agreeable to the practice of other countries, there can be no doubt but the verdict would be in the very terms of the deed, "That Robert Frog has the liferent, and his children the fee" : for the whole of the arguments advanced by the creditors are founded upon this, that a fee cannot be pendent : As to which, it may not be improper to observe, that, if the disposition had been to Robert Frog in liferent allanarly, it would not have been pretended that he was fiar ; and yet there is not one single argument drawn from the pendency of the fee in the present question, but what would have applied with equal strength to that case ; therefore it must be evident, that either their principle is false or misapplied. At any rate, it is a maxim that does not hold universally. Thus, for instance, by the civil law, *Venter mittebatur in possessionem propter spem*

nascendi, which would not have taken place, if the brocard had obtained universon. But, granting it was a rule, it does not concern the present question ; for, in law, common to give dispositions and legacies under many different conditions ; and the pendency of which, the disponent, or his heir, is the fiduciary fiar. Now, to get this to the point in issue : Suppose there had been no provision of liferent to Robert Frog, it is plain, that the disposition, though pure, would have resolved into a condition, viz. if Robert Frog had children ; and, during the pendency thereof, if it is admitted that the fee was pendent, it must have remained with the disponent and heirs at law, fiduciary, for the behoof of the children, when they should exist. Need it vary the argument, that the liferent is disposed to Robert Frog ; for, *tantum cessum, quantum scriptum*.

The Lords having considered the right granted by Bethia Dundas to Robert her grandson, found, That thereby a right of liferent was only established in the person of the said Robert ; and therefore, that the creditors of the said Robert have interest in the price.

But, on petition and answers, " They found Robert Frog to be fiar," &c.

Fol. Dic. v. 1, p. 303. C. Home, No. 1, p. 5.

No. 57. [4268] CHRISTIAN CUMMING v. His MAJESTY'S ADVOCATE. February 1756.

A father took a charter of lands to himself in liferent, and to his son *nominatim* in fee. He reserved power of disposing the lands. On this charter infeftment was taken. After the son's death, the father executed his reserved faculty, by disposing the lands to his grandson. The grandson was forfeited. The widow of the son found not entitled to a terce of the lands.

In the year 1692, Adam Hay obtained a charter of the lands of Aslied, to himself in liferent, and to his son Andrew in fee ; whom failing, to certain substitutes.

By this charter there was reserved to Adam a power of contracting debt, and of disposing of the lands. Infeftment was taken upon this charter.

Andrew died ; and Adam, in the 1726, executed the reserved faculty, by disposing the lands of Aslied to his grandson Adam Hay ; whom failing, to the substitutes contained in the charter 1692.

This Adam, after the death of his grandfather, engaged in the rebellion 1745, and was forfeited. His estate was surveyed for the Crown. Christian Cumming, the widow of Andrew, entered her claim for a terce of the lands of Aslied, in the fee whereof her husband had died infeft.

Objected for His Majesty's Advocate ; The property of the estate of Aslied must, in respect of the reserved faculty, be held to have been in Adam ; his son Andrew was a nominal fiar only ; and consequently his widow is not entitled to a terce.

Answered for the claimant ; By the deed 1726, Adam meant to save his grandson the expense of a service to Andrew, not to recall the fee which had been vested in Andrew. Neither could he prejudice the right of the claimant which had already taken place by the predecease of her husband Andrew ; at least no personal deed of his could be effectual in competition with his singular successor's deriving right from Andrew, or with Andrew's creditors infeft. See the case, *Rome v. the Creditors of Graham*, February 1719, No. 17, p. 4113 ; and, by parity of reason, such deed cannot be good against the widow claiming a terce ; for that a widow, as to her terce, is upon the same footing as a creditor with infeftment.

" The Lords dismissed the claim." See TERCE.

Reporter, AUCHINLECK.—Act. BURNET.—Alt. M'QUEEN & KING'S COUNSEL.

D.

Fol. Dic. v. 3, p. 210. Fac. Col. No. 185, p. 276.

No. 59. [4269] ANNE DICKSON v. ALEXANDER DICKSON. December 7, 1780.

A bond was taken to a father in liferent, and to his son in fee, with power to the father, notwithstanding, to uplift and discharge. The bond was found to belong to the father, and to be part of the fund of the legitim of his children.

James Dickson, several years before his death, executed a deed, settling his heritable subjects upon his son Alexander, with a substitution in favour of his [4270] daughter Anne; reserving his own and his wife's liferent, and a power to alter and burden as he thought proper. By the same deed he nominated his son; whom failing, his daughter, to be his sole executor or executrix.

Soon after the date of this settlement, James sold his lands of Milltown; and, a few weeks before his death, he took a bond from the purchaser, in whose hands £600 Sterling of the price still remained, in favour of himself and his wife, and longest liver of them in liferent, for their liferent use alienably, and in favour of their son, his heirs, executors, or assignees, in fee; "without prejudice always to the said James Dickson, of suiting, and using all manner of execution and diligence, at any time in his lifetime, upon this bond, after the aforesaid term of payment, he shall see fit; and uplifting and discharging the principal sum, annualrent, and penalty foresaid, notwithstanding he is only provided to the liferent, as aforesaid."

Anne, the daughter, had been married previously to the date of the first of these settlements, and had £300 Sterling provided to her in name of tocher; but her contract of marriage, to which her father was party, declared, "That she should still remain a bairn of her father's house, and should have her legal share of his means and estate at his death, notwithstanding the above tocher."

Upon James's death, his daughter and her husband brought an action against Alexander, for payment, *inter alia*, of £400 Sterling, as the share she was entitled to of her father's effects, in virtue of her right of legitim; and, in the course of this action, the following question occurred:

Whether the defender, as executor, was accountable for the £600 bond above-mentioned?

Pleaded for the pursuers; It is a point, *triti juris*, that, where a father takes a right to himself in liferent, and to his children in fee, the fee still remains in the father, unless the tenor of the deed clearly show a contrary intention. In the present case, it is evident that the father did not mean to divest himself of the fee in favour of his son, but had the bond so conceived, merely to save expense in making up titles after his death; for he, at the same time, expressly reserved to himself a power "to uplift and discharge the principal sum, notwithstanding he was only provided to the liferent." It is clear, therefore, that the sum in this bond remained under the father's power till the last moment of his life; and that, while he lived, any right which his son had was pendent and defeasible.

But such is the nature of the right of legitim, that it operates with full energy the very moment the father ceases to exist; and, in some respects, even anticipates that period. Thus, no deed by the father, of a testamentary nature, or revocable, can so far divest him of the property, as to disappoint or diminish the right which every unforsifamiliated child has to a share of the goods in communion; Erskine, b. 3, tit. 9, § 16. The bond in question, therefore, remaining *in bonis* of James Dickson till his death, was from that moment subject to the pursuer's legal claims upon his executry.

[4271] Answered, The defender does not claim an exclusive right to the £600 in question, in virtue of any deed, either of a testamentary or of a revocable nature, but in consequence of the fee vested in him by a bond, which could not be revoked. From the moment that bond existed, his father had no more than a liferent-right, which ceased at his death; and the fee, which had all along been in the defender, continued burdened with the liferent provided to his mother, who survived her husband.

The clause in the bond, authorising the father to do diligence upon it, is of no consequence. It was properly thrown in, to prevent any dispute that might arise, in case it should be found expedient, for the security of all concerned, to insist for payment, while the defender, an officer in the army, might be abroad, or not present, to concur in the discharge; and, had his father uplifted the money, in consequence of

the power so reserved to him, he could, perhaps, have been compelled to lend it anew, on the same terms. But this case did not exist; the defender's right of remains untouched and entire; and, the bond still subsisting, it is not to be concluded that the debt must fall under the executry, merely because it might have done had the bond been discharged.

Observed on the Bench; As there was no obligation upon the father, in case should uplift the money, to re-employ it in the same way, the substantial fund remained in him.

The Lords found, "That the sum in dispute made a part of the divisible fund in the present accounting for the pursuer's legitim."

In the same action, another question arose from the following circumstance—A debt appeared to be due by the father to one Hamilton, who had not been heard of for many years. The question, therefore, was, Whether the defender was entitled to retention of a sum equivalent to that debt?

Pleaded for the pursuers; The existence of Hamilton's debt being very uncertain, it ought not to be sustained as a burden upon the executry. The pursuers are willing to find caution to indemnify the defender; and this expedient has been adopted by the Court in similar cases; Durie, 17th March 1636, *Weir contra Arnot*, *voce Presumption*.

Answered, The defender is clearly entitled to set apart, out of the executry, a sum corresponding to this debt. The caution offered by the pursuer, however unexceptionable, does not afford perfect security, or preclude the possibility of the defender's being disappointed in his relief. If even the debt should never be demanded, the defender, as executor, is entitled to reap the whole benefit arising from the creditor's neglect.

The Lords found, "That the defender was not bound to pay to the pursuers any part of the sum stated as due to William Hamilton, on their finding caution to repeat."

Lord Ordinary, ELLIOCK.—Act. WILLIAM WALLACE.—Alt. WIGHT.—Clerk, ORME.

L.

Fol. Dic. v. 3, p. 211. *Fac. Col.* No. 5, p. 10.

No. 66. [4277] MARGARET PORTERFIELD v. ELIZABETH GRAHAM, and Others.
June 23, 1779.

A bond was granted to a daughter in liferent and her children in fee, with power to the former to uplift and discharge. She was found to be fiar.

Doctor William Porterfield executed a deed, by which he assigned over to his only child Margaret Porterfield (wife to Mr. Grahame of Gartmore), in liferent, and to the heirs of her body in fee, certain bonds, and the interest remaining due upon them at the time of his death.—This deed contained the following clause: "With full power to my said daughter, and her fofoesaid, for their respective interests above mentioned, after my decease, to uplift and receive the fofoesaid sums of money; and, if need be, to sue therefor, and to grant discharges of the same, which shall be sufficient to the receivers; and, generally, to do every thing in the premises which I could have done in my life. But declaring always, that these presents are granted by me, and to be accepted of by the said Margaret Porterfield, with the burden of the payment of my just and lawful debts, and funeral charges, and all legacies that shall happen to be left by me at my death."

Mrs. Graham, at the time when this settlement was executed, had issue one child, a daughter, and, before her father's death, had other two children, likewise daughters. She survived both her father and her husband. After her [4278] husband's death, a doubt arose upon the construction of the above-mentioned deed, whether the fee of the sums thereby conveyed was in the mother or in the daughters; and this question was tried in a multiplepounding brought for that purpose, at the instance of a debtor in one of the bonds.

Pleaded for the mother ; It appears, from several parts in this deed, as well as the clause of destination, that the intention of the father was to give his daughter the absolute disposal of the money. She is, by the deed, entitled to uplift, to sue for, and to discharge the sums in the bonds conveyed. These are the powers of a fiar, and inconsistent with the mere right of liferent. She is subjected to the payment of the granter's debts, funeral charges, and legacies ;—burdens which can, with no propriety, be laid on a liferenter. These circumstances evidently discover the purpose of the father to give his daughter the fee of the subject. Though it were doubtful, therefore, what was the legal meaning of the words in the destination, the intention of the granter, apparent from the other parts of the deed, would regulate the interpretation which they ought to receive.

But the legal import of this conveyance “ to the daughter in liferent, and to the heirs of her body in fee,” is to vest the fee in the mother. This point has been determined in cases where the destination was in similar terms ; *Frog v. his Creditors*, No. 55, p. 4262 ; *Lilly v. Riddel*, No. 56, p. 4267 ; *Douglas v. Ainsly*, No. 58, p. 4269. On the faith of these decisions, and the general practice, settlements are daily drawn up by conveyances in this form of words, when the party intends to give the absolute disposal of the subject to the person nominally in the right of liferent. A seeming impropriety of language cannot be opposed to what has been thus generally understood by the country as the import of these words.

Answered for the children ; The terms of liferent and fee have each a separate signification, totally distinct the one from the other ; and, to maintain, that the fee is conveyed by a mere grant of the liferent, involves a contradiction in terms. In the case of land-estates, it has indeed been found, that, where the estate is conveyed to a person in liferent, and his heirs *nascituri* in fee, the fee must vest in the person provided to the liferent. But these decisions are founded on a mere subtilty in the feudal law : That the fee of the feudal subject cannot be *in pendente*. There does not seem to be very solid ground for this doctrine, even in the case of feudal subjects ; *Erskine*, b. 2, t. 1, § 3. But, when moveable subjects are conveyed in these terms, the principle does not apply. There is nothing to hinder the property of such subjects to be *in pendente* ; and, therefore, there is no reason for constructing the liferent into a fee. The obvious meaning of the words must govern the rights of the different parties in the subjects conveyed ; and it has been so found in the case of moveable subjects, *Turnbull v. Turnbull*, No. 41, p. 4248.

That the granter used the words liferent and fee in the plain and natural meaning, as expressive of two distinct interests in the subject, is evident from [4279] these words of the deed : “ With full power to my said daughter, and her foresaids, for their respective interests above mentioned, after my decease to uplift, &c.” It is here supposed, that his daughter had one interest, and her heirs another, at the time of his death.

The Court found, “ That the fee of the bond in question is vested in Mrs. Graham the mother.”

Lord Ordinary, KAIMES.—Act. WIGHT.—Alt. M'LAURIN.—Clerk, CAMPBELL.

* * This cause was appealed.

The House of Lords, 17th March 1780, “ ordered and adjudged that the appeal be dismissed, and the interlocutor complained of affirmed.”

Fol. Dic. v. 3, p. 210. *Fac. Col.* No. 78, p. 151.

No. 73. [4289] JOHN NEWLANDS and his TUTOR *ad litem* v. The Creditors of JOHN NEWLANDS. July 9, 1794.

Where heritable subjects are disposed to a father "in liferent, for his liferent-use allenary, and to his children *nascituris* in fee," the fee found not to be attachable for the debts of the father.

Alexander Newlands, on the 10th June 1771, disposed certain heritable subjects to Lieutenant John Newlands, "during all the days of his lifetime, for his liferent-use allenary, and to the heirs lawfully to be procreated of his body, in fee"; when failing, to his nearest lawful heirs whatsoever.

Alexander Newlands having, before the execution of this deed, contracted the disease of which he died on the 17th July 1771, it was reducible on the head of death-bed. Having however left no heirs, the disponent, who was his natural son, obtained from the Barons of Exchequer a gift of *ultimus hæres* of the subjects contained in it.

The gift was granted precisely in the same terms with the disposition, viz. "Joanni Newlands durant. omnibus suæ vitæ diebus, pro ejus vitali redditu solummodo, et hæredibus legitime ex ejus corpore procreand. in feodo; quibus deficien. propinquioribus legitimis hæredibus dict. demortui Alexandri Newlands quibuscunque."

Lieutenant Newlands afterwards became insolvent, and a process of ranking and sale of his heritable property having been brought, which included the subjects contained in this gift, John Newlands, his eldest son, presented a petition, stating, That his father, under the titles before mentioned, was merely a liferenter, or held only a fiduciary fee for his behoof, and therefore praying the Court, "to ordain the whole of the said heritable subjects to be struck out of the sale of the subjects belonging to Lieutenant Newlands, in so far as concerns the fee of the said subjects."

[4290] In opposition to this demand, the creditors of Lieutenant Newlands

Pleaded, It is an established maxim of the law, that a fee cannot be *in pendente*. Accordingly, when a right is granted to a father in liferent, and to his children, *nascituris* in fee an absolute fee is held to be in the father, although, *ex figura verborum*, he is only vested with the liferent; Clerk Home, 25th November 1736, Creditors of Frog v. his Children, No. 55, p. 4262; Kilkerran, p. 190, v. Fiar, 4th February 1741, Lillie v. Riddel, No. 56, p. 4267; Fac. Col. 29th June 1786, Mure v. Mure, No. 72, p. 4288; Bankton, v. 1, p. 658. The Court could not find the father to be merely a liferenter, because then the fee must either have been *in pendente* till the existence of the children, or must have remained with the disponent, which was clearly contrary to his intention; in order, therefore, to reconcile the will of the testator with the principles of our law, they necessarily determined that the fee became vested in the nominal liferenter.

Such being the principle of the decision in cases where the grant is to the father simply in liferent, it can make no difference that the subjects are given, as in the present case, to the father, "for his liferent-use allenary." Indeed, the word *allenary* is a mere redundancy of expression, adding nothing to the import of the destination, as the word *liferent* has a precise and definite meaning, which can be neither limited nor enlarged by the addition of an adverb.

But, further, even supposing it had been consistent with law, that Lieutenant Newlands should have only a liferent-right, or a fiduciary fee, it cannot reasonably be presumed, that such was the intention of his father by this destination. For, by the settlement in question, it is clear he intended that his son should marry, and it is therefore impossible to suppose, that he meant not only to exclude the terce, but even to deprive him of the power of making the smallest provision for his wife or younger children; yet these are the obvious consequences of reducing him to a liferent.

The effects which must follow from this interpretation, with regard to the subject itself, are equally anomalous. For instance, if a church or manse were to be built, it is not easy to ascertain who should pay the assessment. Not Lieutenant Newlands as liferenter, for in that character he could only be liable for the interest of the sum during his life; and the supposed fiar not being in existence, it could not be got from him. It may be said, that as fiduciary fiar he can grant heritable security on the property; but there is no clause in the deed authorising him to do so; and, besides, were he allowed to borrow money for alleged necessary purposes, there would be an end to the trust-fee, for, on pretence of one useful purpose, he might borrow the same

sum from many different persons, every one of whom might be in *optima fide* in lending to him, and of course all their debts would be good against the estate. On the other hand, to deprive him of the power of borrowing money for necessary purposes, would in many cases be extremely detrimental to the subject.

[4291] Farther, supposing the subjects thus settled to have consisted of an heritable or moveable bond, as no act of the disponent could alter the situation of the debtor, he would have been entitled to pay it to Lieutenant Newlands, who might have disposed of it as he thought proper, and thus entirely defeated the *voluntas testatoris*.

In the same way, if the estate consisted of a right to teinds, of a wadset, or of an adjudication, the purposes of the destination might have been entirely frustrated, by the heritor obtaining a sale of his teinds, and the reverser redeeming the wadset, or adjudged lands.

Many difficulties would even result to third parties from the petitioner's plea. For instance, if the former proprietor had contracted debts, his creditors, although their debtor had the unlimited property, could not affect the subjects by the ordinary forms of diligence, such as by charging the heir to enter, &c. ; for if the liferenter or fiduciary fiar should renounce his right, it is not easy to discover how matters could be settled between the superior and the fiar in expectancy.

Besides, a fiduciary fee is in no respect more favourable than an entailed one ; and, therefore, although old Newlands had intended to create such, as he has not done it in express words, it is not to be inferred by implication ; 24th November 1769, *Edmonstone v. Edmonstone, voce FIAR, ABSOLUTE, LIMITED*.

The petitioner's construction of his grandfather's settlement, appears therefore in every view to be attended with inextricable difficulties ; to avoid all which, it has been held in two very similar cases, that an absolute fee is vested in the nominal liferenter ; *Fac. Col.* 7th July 1761, *Douglas v. Ainslie*, No. 58, p. 4269 ; 1st March 1781, *Cuthbertson v. Thomson*, No. 67, p. 4279.

Answered, The maxim that a fee cannot be *in pendente*, owed its origin to the strict ideas formerly entertained respecting ward-holdings, where it was held that a superior could not be deprived of the personal services of his vassal. Even then, however, it was not without its exceptions, as in the period between the death of the vassal and the entry of the heir, or where the deceased had prohibited the entry of the heir *alioqui successurus*, while there remained a possibility of the existence of one more nearly related to him ; Dalrymple, 2d January 1708, *M'Kenzie v. Lord Mountstewart, voce SUCCESSION* ; its soundness has long been doubted, Dirleton, *voce FIAR*, No. 9, 10 ; a late writer has said, that it " has no foundation either in law or in nature ; " Erskine, b. 2, tit. 1, § 4, and no bad consequences arise to third parties from disregarding it.

It is sufficient for the interest of the superior, that a mere liferenter is entered ; and even if he should have no vassal, he gets the non-entry duties for his indemnification. The vassal suffers no hardship when the fee of the superiority is vacant, as he can get an entry from his next immediate superior ; and the creditors of the ancestor may attach the estate, by directing charges against the [4292] heir *alioqui successurus*. In the case, 12th February 1748, *Gordon v. the Creditors of Carleton*, reported by Kilkerran, p. 512, *voce SERVICE and CONFIRMATION*, it was found, that the fee remained with the disponent, when at his death the institute fiars were *nascituri*, and never afterwards existed. See also *Select Decisions*, 3d August 1756, *Forbes v. Forbes, voce SUBSTITUTE and CONDITIONAL INSTITUTE*. On the same principle, a charge given to the heir-at-law will be perfectly regular, even where there is a possibility of the existence of the institute fiars, as the fee remains *in hæreditate jacente* of the disponent, and is descendible, according to the ordinary rules of succession, till there is some person entitled to take it up, in virtue of the personal right created in favour of the fiars in expectancy. When such fiars exist, they will indeed be entitled to serve heirs of provision to the fee, or to take it directly under the disposition, or if the heir *alioqui successurus* is entered, to compel him to denude. But still the measures taken by the ancestor's creditors in the mean time will be effectual.

Even if it were admitted that a fee cannot be *in pendente*, it is clear, that in the cases in which it was found that a grant simply in liferent conferred an absolute fee on the father, the judgment did not proceed on this principle, but upon established practice, and the presumed will of the disponent. For although the Court, on account of a *necessitas juris*, had been obliged to find that an absolute fee remained with some person in existence, subject merely to a burden of the liferent, surely the heir *alioqui*

successurus was the person entitled to it, and not the liferenter, had it not been known that this was the form of expression uniformly used by conveyancers to vest the fee in the latter. If the fee had been given to the liferenter, as the respondents argue merely because it could not be *in pendente*, it is equally clear, that he must have been bound to denude in favour of the donees *nascituri*, immediately on their birth. In no case however has this right been so restricted.

But, on the other hand, when a subject is granted to a person in liferent alienarily, or for his liferent-use alienarily, and to his children *nascituri* in fee, then, in consequence of this taxative word alienarily, no further substantial interest than that of a liferent in the common acceptation of that term, is conferred on the father. Long established practice has given it this technical meaning; and upon the faith of its receiving this effect, many family-settlements have been framed; Stair, 4th February 1681, *Thomsons v. Lawson*, No. 51, p. 4258; Fac. Col. 14th June 1781, *Gerran v. Alexander*, voce FIAR, ABSOLUTE, LIMITED; 8th March 1791, *Ross v. Rosses*. See APPENDIX.

It is evident, that the petitioner is under no necessity of maintaining that a fiduciary fee was vested in his father for his behoof. But were it even necessary to have recourse to a fiction of this sort, no bad consequences would follow. Such trust fees were very common in the law of Rome, *l. penult. et l. ult. cod. [4293] commun. de leg*; they are often resorted to in our practice, and still more frequently in that of England, in order to accomplish the views of proprietors.

The Court advised the cause after a hearing in presence.

The whole Bench were clear, that the intention of old Newlands was, that his son should not have the disposal of the fee. They also in general agreed in the principle, that a fee cannot be *in pendente*. There is no subject, it was observed, without a proprietor. An estate descending from ancestor to heir, or conveyed by family deeds, can never be *res nullius*, though it may for a time remain *in hereditate jacente*; and by the law of Scotland, if it can find no other owner, it will belong to the King.

A majority of the Court were, nevertheless, of opinion, that the *voluntas testatoris* must decide this and every other question of succession, whether the subject be heritable or moveable, provided he expresses his will in a legal manner, which they thought old Newlands had done in the present instance. No abstract principle of law, it was observed, could have the effect of giving an estate to a person, upon whom the donor has declared he did not intend to bestow it. The maxim, that a fee cannot be *in pendente*, never produces any such necessity. In the present case it is to be held *fictione juris*, that a fiduciary fee was vested in Lieutenant Newlands, but which substantially is no more than a liferent, as it excludes the power of disposal, either onerously or gratuitously.

Several judges, on the other hand, thought, that the word "alienarily" made no difference on the question. Even without it, it was said, the simple destination to Lieutenant Newlands in liferent, and his children in fee, would have implied a prohibition from alienating the subject gratuitously. But the addition of the word "alienarily," or of any similar one, cannot prevent his onerous debts and deeds from being effectual against it. In the case of moveable rights, the will of the testator ought always to receive full effect. But, when the subject is heritable, and the question comes to be with creditors and onerous purchasers, the will of the donor can be regarded only in so far as it coincides with the principles of our feudal law and the security of the records. In this case, the fee cannot be held to have been *in hereditate jacente* of old Newlands, because it is not disputed, that in making up titles his grandchildren must have served themselves heirs of provision, not to him, but to their father. As a fee of some sort therefore is vested in Lieutenant Newlands, and as it is not fettered by a strict entail, it must be subject to his onerous debts and deeds, however much he may be personally bound to give effect to the intended limitation. Indeed, the notion of a fiduciary fee, in cases like this, is not only repugnant to feudal principles, but highly inexpedient in itself, as, if once allowed, such fees might be continued through many generations and substitutions, and thus become a worse species of entails than any hitherto known, in so far as they neither would require irritant and resolute clauses, nor to be recorded in the re-[4294]-gister of tailzie. nor would they be limited by the regulations of the 10th Geo. III. c. 51.

The Court (7th February 1794), by a considerable majority, "ordained the whole heritable subjects specially described in the gift of *ultimus hæres* to be struck out of

the sale of the subjects belonging to Lieutenant Newlands, in so far as concerns the fee of the said subjects."

On advising a reclaiming petition, with answers, the Lords "adhered."

For the Petitioner, G. FERGUSSON, HAY, MACONCHIE.—Alt. LORD ADVOCATE DUNDAS, M. ROSS, C. HOPE, TURNBULL.—Clerk, SINCLAIR.

R. D.

Fol. Dic. v. 3, p. 211. Fac. Col. No. 128, p. 287.

* * * This case was appealed :

April 26, 1798. The House of Lords ordered and adjudged, That the appeal be dismissed, and that the interlocutors therein complained of, be affirmed.

Although such was the fate of this case, the Lord Chancellor (Loughborough) in delivering his opinion, expressed great doubt. The following was the import of his speech.—

"When I had first occasion to consider this cause, upon the case of the appellants, and a very accurate written Note of the opinions delivered by the Judges, I was very much impressed with the importance of the case, and entertained great doubts as to the grounds upon which the decision had been given. I therefore thought it proper that the hearing should be postponed until the judgement could be supported on the part of the respondent. A case had accordingly been put in for him, and the result of the argument which followed upon it had not been to remove the doubts, which the first consideration of the case had raised in my mind."

"To state this question as distinctly as it is capable of being stated, these propositions have been agreed on in the argument which has been maintained; if a conveyance is granted to a person in liferent, and thereafter to the heirs of his body in fee, then such person must of necessity be fiar. It is also an agreed principle recognised by the law of Scotland, that a fee cannot be *in pendente*, or in abeyance. But the distinction that has been contended for by the respondent is, that if words are used which go beyond a mere declaration of a liferent, if the word 'allenary' is added after the words 'in liferent, for his liferent-use,' then a mere liferent takes place in regard to the first dispositive, and the fee is to be, I cannot tell, according to the argument, distinctly, where. It is, by implication, a fee in the first taker, which gives him some species of interest, coupled with some species of trust for his children, when they come into existence."

"This distinction, which the counsel admitted could not be maintained in reasoning or on principle, does not add one distinct idea to the limitation; yet the Court of Session thought that such affect had very generally been understood to [4295] be given to that word; and particularly a very learned Judge, of great authority, who had commenced practice at a very early period of life, had declared, that such had been the understanding ever since he remembered any thing, and that individuals had acted upon this supposition, ever since. It was also observed that though such understanding could not be stated to have been come up to by any express decision upon this particular point, yet it had been a familiar idea upwards of a century ago, that there was such a difference as had been contended for in the present case. In a case reported by Lord Stair, in the year 1681 (No. 51, p. 4258), this distinction was mentioned. I do not take it that it was there stated as the mere argument from the bar; but I conceive, that in this, as in other cases reported by Lord Stair, where a principle, adverse to the decision, was stated, it was an opinion thrown out by the Court."

"These things considered, and that the judgment gives effect to the intention of the testator, which, in equity, ought always to be supported, as far as it can be done consistently with the rules of law; though I feel no conviction, though my mind incline to doubt exceedingly that the judgment proceeded on safe grounds; yet I have not courage to venture on a reversal, when I am told by a person of high authority, that the effect of such reversal would be to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would, therefore, have it understood, that this consideration alone restrains me, and I would wish that the Court would; in some future case proper for the purpose, re-consider the principle of their judg-

ment in this case, which, in consequence of this high authority, I think it more for the present, to let remain unaltered, in the hope that the question may afterwards come again before the Court to be maturely settled."

. It cannot well be conceived how, in any future case, the Court could be at liberty to decide, in opposition both to their former precedents and practice, and this decision of the House of Lords. The influence of the causes which induced the decision in this case, must remain undiminished in any future instance. 8 No. 75, p. 4297.

No. 74. MARGARET SHANKS v. The KIRK-SESSION of CERES and Others.
January 27, 1797.

The fee of a subject being vested in one person by the dispositive clause of a charter and in another by the precept and instrument of sasine, the former was found to be fiar.

John Howie, mason in Ceres, purchased a few acres of land from Sir Thomas Bruce Hope. In the dispositive clause of the charter obtained by Howie, the land was conveyed to him and his wife in conjunct-fee and liferent, and their son Thomas in fee; whom failing, to the heirs and assignees of John Howie. But, in the precept of sasine, warrant was given for infefting John and his wife simply in liferent, and their son Thomas in fee.

The instrument of sasine was in terms of the precept.

[4296] John Howie was heir to his father in certain houses and yards, which likewise held of Sir Thomas Hope, as to which the charter of the lands contained a precept of *clare constat* in his favour, and, subjoined to the instrument of sasine as to the lands there was a declaration by the notary, but not signed by John Howie, that the latter had, *propriis manibus*, given infeftment of the houses and yards to his wife in liferent and his son Thomas in fee.

Thomas Howie died before his father, who disposed the subjects to himself and his wife in liferent, and his other two sons equally in fee.

One of the sons, after John Howie's death, sold his half to the kirk-session of Ceres; against whom, and the proprietors of the other half, Margaret Shanks, widow of Thomas Howie, brought an action in order to have her right to a terce out of the subjects declared; and the question came to be, Whether Thomas Howie was fiar of the subjects during his father's lifetime?

As to the lands purchased from Sir Thomas Bruce Hope, the defenders

Pleaded, By the dispositive clause of the charter, the fee was clearly vested in the father, and the name of the son introduced merely to save expense in making up titles in case he should survive him, Stair, p. 286; Dict. voce FIAR; Bankton, v. l. p. 576; Erskine, p. 561. Nor is there any reason to presume, that the precept of sasine, the object of which is solely to carry the dispositive clause into effect, was meant to alter the nature of the right, and therefore the discrepancy between them must have arisen from an oversight of the writer: Indeed, as the dispositive clause is the principal, and the other the accessory, wherever they disagree the right must be regulated by the former. Originally, when the superior gave a verbal mandate to his bailie to grant infeftment to his vassal, the terms of the infeftment could not have varied the right conveyed by the charter. The same must have held when afterwards the precept came to be in writing, but on a paper apart; nor can it make any difference, that the precept is now engrossed in the body of the charter.

Answered, When a father conveys a subject to himself in liferent, and his son *nominatim* in fee, the fee is vested in the latter, and it depends merely on the intention of parties, whether the expression "conjunct-fee and liferent," gives the father a fee or a liferent. His intention to confine himself to the latter, is here established by the terms of the precept and instrument of sasine, and by his afterwards disposing the same subjects to his younger sons, reserving his own and his wife's liferent.

thereafter disposed, divers years after the procreation of a son in that marriage, and which son of the said second marriage being served heir of that marriage, and infet in that annualrent, disposes the same to another, who pursues pointing of the ground therefor against the heritor of the land, who had acquired the right from the father, as said is, after the said sasine of the annualrent, and whereby he alleged, that the pursuer nor his author, as being the heir of that marriage, had no right to the said annualrent, the father remaining still fiar, who disposed the land, and which disposition absorbed the said annualrent; and the pursuer answering, That after there was sasine given to the wife in liferent, and to the heirs of that marriage in fee, of the annualrent libelled, the bairns of that marriage became fiars thereof, how soon they were born; so that thereafter, albeit the father remained fiar of the heritable right of the lands, yet his right was affected with the burden of that annualrent, so that the father could never thereafter valuably dispoise the heritable right of the lands, but with the burden foresaid, and wherewith the said disposition behoved to remain affected, even as if his eldest son of the first marriage, who was universal heir, if the said disposition had not been made by the father, as said is, would have succeeded to the right of the lands, but ever with the said burden; even so must the said disposition be affected therewith.—The Lords found the disposition made by the father sufficient to exclude this pursuit, and that the fee of the said annualrent subsisted in the father's person, notwithstanding of the sasine given to the wife, and heirs of that marriage, and consequently that the father's disposition of the land was not affected with the burden thereof; so that albeit the heir might have been compelled to warrant that annualrent personally as heir, yet it was not alike in a singular successor to affect the ground against him.

Act. STUART.—Alt. ADVOCATUS & TAYLOR.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 302. Durie, p. 528.

No. 51. [4258] THOMSONS v. LAWSONS. February 4, 1681.

A father disposed his lands to his son and spouse in liferent, and to the heirs of that marriage, whom failing, to certain persons named, reserving his own liferent. The son was found fiar.

Umquhile Robert Masterton did dispoise some tenements in Edinburgh to James Masterton his son and his spouse, and longest liver of them two in liferent, and to the heirs of that marriage, which failing to Alison, Jean, and Margaret Thomsons, his oyes by his daughter, "reserving his own liferent," whereupon sasine was taken both for Masterton and his spouse, and for the three Thomsons who pursued the tenants for mails and duties. Compearance is made for Janet Lawson, who had right to a liferent of the tenements from Thomson, who had right from these Thomsons, who had right from James Masterton, and alleged preference, because by the foresaid disposition, James Masterton was fiar, and the Thomsons are but heirs of provision substituted, "failing James's heirs of that marriage," and therefore their infetment was unwarrantable, but they ought to have been "retoured heirs of provision to James Masterton," and whatever their sasine may operate, as to the superior who received them, yet it cannot alter the fee; for, if James Masterton had had heirs of that marriage, they would have excluded the Thomsons, and behoved to have entered heirs to James, for Robert was denuded, and could not be fiar, and his disposition does expressly reserve his liferent; and the Lords have found, in the case of the Children of Moor, No. 45, p. 4252, who upon a substitution like this were infet, "that they were but heirs substituted, and that their father might dispoise at his pleasure." It was answered, That if the disposition had been to James Masterton and his spouse in conjunct-fee, the husband behoved to be fiar; but here it is only to them in liferent, which can import no fee, and though it could, yet Thomson being lawful administrator to his children, could not warrantably take a right from Masterton to exclude his children. It was replied, That in the common style of ordinary notaries, conjunct-fee and life-

No. 1. [1] Children and Grandchildren of DAVID LINDSAY v. ROBERT DOTT
December 9, 1807.

An heritable subject being disposed, to a grandfather in liferent, and on his death to his daughter in liferent, and to her children by a certain marriage in fee, with express reservation in favour of the grandfather of power to alter the destination and dispose of the subject, and no such reservation in favour of the mother, yet on his death, the fee is in her not in the children.

Janet Lamberton, having received money from her father William Lamberton in trust for that purpose, purchased a tenement of houses, and took the disposition "To and in favour of the said William Lamberton, during all the days of his life, and after his decease to the said Janet Lamberton, also in liferent during all the days of her life, and to the children already procreated or to be procreated of the marriage between her and David Lindsay, equally among them in fee." A clause was added in these words: "As also providing and declaring, that it shall be in the power of the said William Lamberton by himself alone, without consent of the said Janet Lamberton, or his said spouse, or their foreshaids, to alter or innovate the destination contained in this present disposition, and to sell, burden, or dispose of the foresaid subjects, either in whole or in part, to any other person or persons by deed under his hand, at any time during his life, as fully and effectually as if the names of his said wife and daughter had not been herein mentioned."

William Lamberton died.—Janet took possession of the tenement; and after some years, her husband being then dead, she disposed it to Robert Somerville, who disposed it to Robert Dott. On the death of Janet Lamberton, her children and grandchildren (one child being dead and represented by grandchildren), brought an action of declarator and reduction to establish their own right to this tenement, and set aside that of Robert Dott.

The interlocutor of the Lord Ordinary was, "Repels the reasons of reduction, and assolizies the defender."

The cause came before the Inner-house by petition and answers.

Argument for pursuers.

[2] 1st, It is admitted, that in competitions between the rights of parents and children, a parent, though *ex figura verborum*, only a liferenter, yet is often found to be fiar. But this has not been found where the parent liferenter is only an interjected person between the original party and the ultimate fiar. 2dly, In this case, the meaning of the term liferent, in the conception of William Lamberton the testator, is quite clear and unequivocal from the clause which he has added in relation to his own right. He reserves to himself, *per expressum*, the right of disposal, plainly understanding, that if not so reserved, it would not have been retained under the term liferent. But he uses the very same term in the same way in bestowing the right given to his daughter, so that it must have the same meaning; and as there is no reservation in her favour, she can have nothing more than a liferent, without any power of disposal. This clause, therefore, is just equivalent to the use of the term *allenary*, which it was decided in the case of Newlands, 9th July 1794, No. 73, p. 430, did restrict the right of a parent to a liferent, in circumstances similar to the present in all other respects. The principle of that case was just this, that the *voluntas testatoris*, where clearly expressed, must be effectual to restrict the right of the parent to a liferent, even though the children be *nascituri*; and that the principle, that a fee cannot be *in pende*, must give way to the will of the donor, where that will is quite unambiguous.

But in this case the children were not *nascituri*. All of them but one were born before the deed was executed, so that there was no legal difficulty in vesting the fee in them.*

Argument for defender.

The interpretation of a clause devising heritage to a parent in liferent, and his or her children in fee, is perfectly established. It is past all question that it gives the

* There were some specialties also insisted on, but the Court did not pay any regard to them.

ception of the contract, in so far as, 1mo, He is always named first as the *persona nobilior*; and even where lands were disposed by a woman to her and her husband in conjunct-fee and liferent, and the heirs procreated betwixt them, the man was understood to be fiar, in the case betwixt Sir John Kennedy and Kennedy of Girvenmains.* 2do, John Gordon's heirs are mentioned in the last place; and, by the current of decisions, in *dubio*, they are thought to be the fiars *quorum hæredibus maxime prospicitur*. 3tio, Seeing the fee could not be *in pendente*, it behoved to belong either to the husband or to the wife; now, it could not belong to her, who, in all the parts of the contract, reserved nothing but her liferent; nor could it be in the person of the heirs of the marriage, who would not have right without a service; therefore it was in the husband allennarly. 4to, In the precept of sasine, the wife orders her baillie to give heritable sasine to her husband, without any mention of liferent or heirs. 5to, The separate bond manifestly implies that the husband was fiar, in so far as the wife takes him obliged to denude and renounce in the event of no children of the marriage.

Duplied for the defender; 1mo, The presumption lies for the husband *qua persona nobilior in casu dubio*; but here there is no manner of dubiety, the subject disposed being the wife's heritage, and there being a son of the marriage extant at the time; and, in all the material clauses, the husband's right being expressed as a liferent contradistinct to a fee. 2do, Albeit the substitution terminates in the husband's heirs, he must not be presumed fiar; because, his heirs are substituted to the heirs of the marriage; and, in the bond apart of the same date, which is *pars contractus*, as being *pactum ex incontinenti adjectum*, the last termination in favours of the husband's heirs is changed in favours of the wife's heirs. 3tio, As the wife reserves only her own liferent, so she conveys nothing to her husband but the liferent; therefore, it is plain, the fee could not be in his person, but behoved to remain with the wife, who was frank tenementar and fiduciary as to the fee, for the behoof of the children of the marriage. 4to, The precept of sasine must be interpreted from the body of the contract, and the inserting of the word "heritable" ascribed to the error or ignorance of the writer, who also discovered egregious ignorance in misplacing the words "in fee" in the other material clauses. 5to, Suppose the wife *errore juris* had believed, by her taking the separate bond, that the husband had power to dispoise and renounce when he had not, could that have prejudiced her?

The Lords found, That John Gordon was a naked liferenter by the quality of the disposition in the contract of marriage, and preferred his relict and children to his creditors.

Fol. Dic. v. 1, p. 302. Forbes, p. 162.

No. 54. [4261] Creditors of Lieutenant ROBERT PRINGLE v. JOHN ERSKINE of Balgoronie. June 2, 1714.

A bond was granted to a husband and wife in conjunct-fee and liferent, for their liferent use allennarly, and to the heirs of their marriage in fee; whom failing, to the longest liver of the spouses, their heirs or assignees, with this condition, that it should not be in the power of either of them to uplift or assign the principal sum, without the consent of trustees named in the bond. The Lords found the husband was not fiar, and that it was not affectable by his creditors.

John Erskine of Balgoronie, by his bond, dated April 18, 1710, granted him to be justly addebted to Margaret Erskine, his sister-german, and Lieutenant Robert Pringle, the sum of 4000 merks principal, which, with annualrent to the term of payment, he bound and obliged him, his heirs, &c., to them and longest liver of them two in conjunct-fee and liferent, for their liferent use allennarly, and to the heirs and bairns procreated and to be procreated betwixt them in fee; which failing, to the longest liver of the said Margaret Erskine and Lieutenant Robert Pringle, their heirs and assignees whatsoever, at Candlemas 1711 years, with this condition, that it should not be lawful for them, or in their power, or in the power of either of them, to uplift

* See General List of Names.

No. 17. [4325] EDGAR v. JOHNSTON. July 6, 1736.

Where one had provided his estate in his contract of marriage to the heir-male of that marriage; which failing, to his heirs-male of any marriage; which failing, to the heirs-female of his present marriage; there being no heirs-male of that marriage it was found, that the heir-male of his second marriage might gratuitously alter the succession in prejudice of the heir-female of the first marriage.

In a simple substitution, one substitute is not creditor to the other.

Fol. Dic. v. 1, p. 306. Kilkerran (FIAR, ABSOLUTE AND LIMITED) No. 1, p. 192.

No. 22. [4332] SMITH and WALLACE v. SMITH. December 14, 1710.

A party having granted bond to his younger children, as a competency for their better living, wherein he obliged himself to pay particular sums to each of them at the first term after his decease; "and that the same should be in satisfaction of all portion-natural, or what else they could claim by his death, and that the portions of any of them happening to die without heirs of their own body, should be divided equally among the survivors"; and one of the children having conveyed his provision to the heir, out of a grateful sense of good offices and services received from him, the Lords found that he might dispose of his portion for causes reasonable, though not onerous, notwithstanding the substitution.

Fol. Dic. v. 1, p. 307. Fountainhall.

No. 31. [4343] Duke of DOUGLAS v. LOCKHART of Lee. February 18, 1717.

Part of the family estate of Douglas being given away "to the heir of a second marriage, and the heirs of his body; which failing, to return to the right heir of the family of Douglas," it was found, that this estate could not be gratuitously alienated in prejudice of the clause of return, it being argued, That here the proprietor was giving away an estate from his successors for a special use, in which this reasonable condition is implied, that when the use is at an end, himself or his heirs should have back the estate. See APPENDIX.

Fol. Dic. v. 1, p. 308.

No. 54. [4398] GORDON v. SUTHERLAND. June 3, 1748.

The fee of an estate was provided by contract of marriage to the heir, with absolute warrandice. It was found, that an inhibition used on the contract by the heir against the proprietor, could not prejudice onerous creditors contracting with the proprietor after the inhibition.

Gordon of Ardoch pursued a sale of the lands of Little Torboll and others, which belonged to the deceased John Sutherland of Little Torboll his debtor, in which process William Sutherland, now of Little Torboll, the eldest son and heir of the debtor, compeared, and produced the contract of marriage between his father and mother, whereby the father became bound to infest his future spouse in liferent, and the heir-male to be procreated of the marriage in fee, in the lands of Little Torboll, and which he obliged himself to warrant to be safe and sure to his future spouse, and heir-male foresaid, for their respective interests of fee and liferent, from all private infeftments, liferent-annuities, &c., at all hands, with an inhibition on this contract raised by Ros

No. 55. The Creditors of ROBERT FROG v. HIS CHILDREN. November 25, 1735.

A disposition to one in liferent, and the heirs of his body *nascituri* in fee, found to resolve into a right of fee in the father, who was therefore found entitled to sell the subjects for payment of his debts.

The deceased Bethia Dundas did, for the love and affection she bore to Robert and James Frogs her lawful oyes, sons to the deceased James Frog her eldest son, and the other persons after named, "Dispone certain houses belonging to her in Edinburgh in favours of the said Robert Frog, her eldest oye in liferent, and to the heirs lawfully to be procreated of his body, in fee; and, failing of him by decease without heirs of his body; to the said James Frog, [4263] her other oye, also in liferent, and to the heirs lawfully to be procreated of his body, in fee; and, failing both her said oyes without heirs of their bodies, to John Frog merchant in Pennsylvania, her second son, in liferent, and the heirs of his body in fee; which failing, to Elizabeth Frog, her daughter, in liferent, and the heirs of her body in fee; which all failing, to her own nearest lawful heirs whatsoever."

In virtue of this deed, Robert Frog, who, at the date thereof, was about nine years of age, was infert; and having thereafter contracted several debts, in order to pay his creditors, he entered into a minute of sale as to part of the subjects contained in the disposition; however, before executing thereof it was objected, That the above settlement only conveyed a right of liferent to him, and therefore he had no power to sell, the fee being disposed "to the heirs lawfully to be procreated of his body"; and, it having been agreed of consent that the same should be discussed, it was urged for the Creditors of Robert Frog, That, wherever a right is granted to a father in liferent, and to the heirs of his body *nascituri* in fee, the father is always understood to be fiar, if no other restriction is expressed, and his children are only deemed heirs of provision. To illustrate which, it was observed, that it is a principle of law, that a fee cannot be *in pendente*, but must be settled upon some person existing at the time of the disposition; the reason of which maxim is, that it would be inconsistent with common sense to suppose a property without a proprietor; and, if the contrary doctrine took place, many absurdities would follow. Thus, if the *dominium directum* were allowed to be pendent, the vassal could not be entered; if the *dominium utile*, the superior could not have a vassal; if the former proprietor had contracted debt, his creditors could not affect it, because there was no person from whom it could be adjudged; besides several others that might be mentioned. And, as this maxim has been considered as a fixed principle in law, it has followed, that parents, taking rights to themselves, or others settling them upon them with substitutions to their children *nascituri*, have promiscuously made use of the words "fee, conjunct fee, or liferent"; because both these, when applied to the parents, behoved to have the same effect; for, as the children *nascituri* could not possibly be vested in the fee when they were not in being, the liferent provided to the parent is understood to be an *usus fructus causalis* resolving into a real fee, as the children were capable of no other right but a succession to the fee after the father's decease; and, though nominally designed fiars, from the nature of the thing, it could import no more but a provision of succession. And in this manner have all our lawyers constructed such settlements. Thus, Lord Stair, Tit. INFERTMENT, says, "infertments taken to parents, and, after their decease, to such children and other persons named, the parent is understood to be fiar, and not liferenter, and the children and others to be heirs-substitute." Sir George M'Kenzie, p. 172, likewise observes, That, if a father disposes to children to be procreated, this will be considered only as a [4264] destination, and will not hinder the father to make posterior rights, or posterior creditors to affect by diligence what is so disposed. And Dirleton, Tit. FEE quest. 1, asks, "Where is the fee of a sum provided to husband and wife in liferent, and to the bairns in fee?" Shewing plainly, by the method he there proposes to secure the children, that it is his opinion, that, in the case stated, the fee is in the father; besides, this interpretation has been ratified by a variety of decisions. See 9th July 1630, Veitch, No. 48, p. 4256; 10th February 1672, Wemyss, No. 50, p. 4257; 4th February 1681, Thomson, No. 51, p. 4258. It is no wonder, therefore, after so many authorities, that the lieges have trusted to settlements expressed in that manner; and, that such clauses have been generally so understood, is evident by the excerpts produced from the records of Chancery; whereby

Little Torboll, 3d June 1748, it was found, that the inhibition on the contract of marriage could not prejudice the onerous creditor.

Such of the Lords as remained of opinion for the former judgment, were not satisfied why even an obligation to transmit a succession, with a clause of warranting, may not by the force of an inhibition upon it, be rendered of the same effect against all and sundry the lieges, as it is against the granter. It must at the same time be owned, that the last judgment is more agreeable to the notion that every body has had, and which even the Court has formerly entertained (*vide* January 24th 1677, *Grahame contra* Rome, *voce* PROVISION TO HEIRS AND CHILDREN) and is the most expedient of the two, as the giving such force to the inhibition would be in effect to make a common contract of marriage, with an inhibition on it, equal to an entail.

N.B. Both the above judgments were, upon an appeal to the House of Lords, affirmed on the 7th March 1751.

Fol. Dic. v. 3, p. 215. *Kilkerran* (FIAR, ABSOLUTE AND LIMITED) No. 6, p. 197.

No. 55. [4402] CATHARINE GERRAN and her Husband *v.* JOHN ALEXANDER of M'Kilston. June 14, 1781.

A last will was expressed in the following manner: "I leave to Catharine Gerran, spouse to James M'Ghie merchant in Stranraer, the sum of £300 Sterling in *liferent* alimentary, and to be divided by her among her children at any time before her death; and, failing of her dividing the above sum, it is to be divided by the heirs and representatives of the said John Alexander, the testator, as they shall think proper."

It became a question upon this clause, how far the mother could affect the legacy! and "the Lords found unanimously that she had only a right of *liferent*."

The Lord reporter observed, that by many decisions, it had been found that the fee was really in the parents, though the destination bore only in *liferent* to them, and in fee to their children; but that this was not *ex necessitate*, as had sometimes been supposed, lest the fee should be *in pendente*. It was upon the presumed will of the granter, who only meant a *spec successionis* to be in the children; and, therefore, whenever there appeared to be intended a right of property in the children, the parent's right was either limited to a mere *liferent*, or considered as a trust fee, which could be defeated.

Reporter, LORD BRAXFIELD.—Act. —.—Alt. JAMES BOSWELL.

D.

Fol. Dic. v. 2, p. 215. *Fac. Col.* No. 56, p. 96.

No. 56. ANDREW MACREADIE *v.* The Executors of JAMES MACFADZEAN.
November 15, 1752.

Found, that a mutual substitution in a bond granted by a father to his two daughters, one of whom was married at the date of the bond, under a prohibition to alienate, except in a contract of marriage, could not be disappointed by the married daughter's general disposition in her prior contract of marriage, of all heritage acquired, nor by her posterior gratuitous alienation to her husband.

Janet Macreadie, in her contract of marriage with James Macfadzean, does, with advice and consent of Provost Macreadie, her father, convey to her husband all and sundry lands to which she has now right, and to which she may hereafter succeed, in virtue of any deed made by her said father to her, or to any other of his children." And further, "she makes her said husband and his foresaids, her cessioners and assignees in and to all debts due to her, and [4403] in and to the whole writs concern-

was to secure the succession to her daughter Elizabeth ; yet so as those, who, by the course of law, fell to succeed, should have the benefit of a liferent, and their children the fee ; with a view to which, the deed was devised in the manner it now appears, whereby none of the other heirs could prejudice the succession of her daughter who was the *dilecta persona*. As to the second, it is true, that, when the succession is settled in the legal order, it is reasonable to interpret clauses favourably ; but then that favour is not to be used to wrest words contrary to their ge-[4266]-nuine meaning. To the third, There was no necessity to add the word "allenary" in order to ascertain the import of the word "liferent ;" the simple expression of disposing in liferent excluded the fee, especially when the fee is expressly given to others. In the last place, as to the absurd consequences which, it is pretended, would follow from supposing the fee not to be lodged in the person of Robert Frog, it is answered to the first, That the different grants of the different liferents are not substitutions to the first liferent, but new grants of liferents ; and therefore there was no necessity to make up any title to the prior liferenter, but only to prove that the former liferenter was dead, and that the condition of the second liferent existed. To the second, The gratuitous deed of the disposer would not prejudice her creditors, seeing they might have adjudged the fee from any who was next heir.

The Creditors replied, That, if there is any rule of law that can be said to hold universally and without any exception, it is, that the property of a subject cannot be pendent, but must necessarily belong to some person ; neither do the decisions referred to on the other side prove the contrary : For, as to the first, it has been since over-ruled by the decision 2d January 1708, Lord Montstewart, *voce* SUCCESSION. And, in the other two cases, the reasoning on both sides plainly supposes the certainty of that principle ; neither is the instance of an *hereditas jacens* an exception, seeing the apparent heir *sustinet personam heredis* even before his service, he having the *jus hereditatis delatum* from the moment of his predecessor's decease, although a service is necessary to complete his titles. With regard to the answers that have been made to the opinions of our lawyers, they are noways satisfactory ; for, as to the passage quoted from Lord Stair, it is probable that he supposes the case where no more is given in express terms to the father than a liferent ; because, if the fee were given to him, it could not be the subject of a doubt. And Sir George Mackenzie's authority is directly in point ; for the reason why a disposition by a father to his children *nascituri* does not denude him of the fee, is, that they are incapable to take it, on account of their not existing at the date of the deed ; which applies directly to this case, as the children were not in being when the disposition was made. It is also obvious from Dirleton's opinion, that he did not think the fee could be taken directly to children *nascituri* ; and therefore he proposes to vest it in the father for the behoof of the children, which there would have been no occasion for, if it could have been done directly to the children themselves. In the next place, as to the conjecture, that the settlement was intended to secure the fee to Elizabeth, it is without any manner of foundation ; as there is not a clause in the whole deed from whence the disposer's *prædictio* of her can be inferred ; and, if the granter's own word is to be credited, Robert is the *prædicta persona*, and Elizabeth the least *delecta* of them all. Neither are the absurdities that naturally follow from the construction of this settlement by the children any ways removed ; for, as to the first, the continued succession of liferenters making up no titles by service, but only by a proof of the death [4267] of the former liferenter, and the existence of the condition of the second liferent, is a novelty unknown in law, and without any foundation in the analogy of law. And, as to the second, there is no sort of answer made to it.

Duplied for the Children ; That, if this case was to be determined by a jury, agreeable to the practice of other countries, there can be no doubt but the verdict would be in the very terms of the deed, "That Robert Frog has the liferent, and his children the fee" : for the whole of the arguments advanced by the creditors are founded upon this, that a fee cannot be pendent : As to which, it may not be improper to observe, that, if the disposition had been to Robert Frog in liferent allenary, it would not have been pretended that he was fiar ; and yet there is not one single argument drawn from the pendency of the fee in the present question, but what would have applied with equal strength to that case ; therefore it must be evident, that either their principle is false or misapplied. At any rate, it is a maxim that does not hold universally. Thus, for instance, by the civil law, *Venter mittebatur in possessionem propter spem*

second son, and the heirs-male of his body ; whom failing, to Charles Edmonstone third son," &c. He reserved his own liferent, with power to alter, *etiam in vita mortis*. He then provides, that "the said Archibald Edmonstone, and the other heirs of entail above named," shall discharge his debts, &c., and the provisions to his younger children.

The entail goes on to declare, "That it shall not be lawful, nor in the power of any of the heirs of tailzie and provision above named," to alter the order of succession, contract debt, &c. And then it provides, "That it shall be lawful to, and in the power of the said heirs of tailzie, to burden and affect the said estate with the sum of 40,000 merks, Scots money, which I the said Archibald Edmonstone do hereby provide and ordain my heir of tailzie to pay my younger children unprovided," &c.

It then orders, that all adjudications on debts which shall be contracted by the entailor, or "by the foresaid heirs and members of tailzie," shall be redeemed, and "And that the said Archibald Edmonstone," or "the first heir who shall succeed," shall cause register the entail, &c.

The precept to infest, is, "to seize the said Archibald Edmonstone, and heir above named ; whom failing, the other heirs of tailzie and provision above mentioned," &c. The warrandice and the assignation of the mails and duties is "to Archibald Edmonstone, and the other heirs of entail." The deed was properly recorded.

On the entailor's death in 1768, Archibald Edmonstone brought a declarator against his brother, and the other substitutes in the entail, to have it found, that he, as disponee and complete fiar, was not subject to any of its limitations or restrictions.

The argument for the defenders amounted to this ; the powers of the entailor to bind the pursuer are indisputable ; and both the general import of the settlement, and the particular expressions used, prove, that it was his intention to subject him to the same fetters with the remoter heirs. The several limitations to the pursuer and his brother, are declared to be "always with, and under the burden of the provisions, conditions, &c., after expressed ;" and the mode of expression, "Archibald Edmonstone, or other heirs of tailzie," so often repeated, demonstrates, that the pursuer was considered in no other light than [4410] first heir of tailzie. The clause respecting the provision to the younger children, was particularly urged in this view.

As to the decisions quoted for the pursuer, it was observed, that the case of Leslie of Findrassie, 24th July 1752 (See TAILZIE), turned on a deed nearly unintelligible, and a deed where the institute was never coupled with the other heirs of entail ; and that, in the case of Balfour of Randieston, No. 58, p. 4406, the question was with onerous creditors, and not among donees, between whom the will of the common donor is the only rule of decision. Then the case of Gordon of Pitlurg, 29th July 1761, *voce* TAILZIE, was stated as an authority for the defenders.

On the other side, the pursuer argued, that the statute authorising strict entails, supports only restraints laid on the heirs of tailzie, not on persons vested with the whole fee ; that the fiar possesses the full exercise of property ; and that no sort of restriction of his powers will be received at common law, without the clearest intention of the donor signified in the most precise terms, applying directly to the disponee, without there being a possibility of doubt ; that prohibitory, irritant, and resolute clauses, owe their authority to positive statute, and not to common law. By not only limiting the rights of the proprietor, but exposing him to an entire forfeiture of them ; by excluding the just claims of onerous creditors ; and, by checking the improvement of the country in throwing lands *extra commercium*, they are not only in the situation of ordinary restraints on the fiar (requiring clear evidence of intention to constitute them, and admitting only of strict interpretation when constituted), but they are held to be *strictissimi juris*. The intention of the donor must not only be indubitable, but the restrictions will be of no avail, unless that meaning is expressed in the proper place (not gathered from particular expressions, nor from the general scope of the deed), and in legal technical language. That it was true, even in entails, the will of the donor was, in some cases, to receive a liberal interpretation ; but those were only where the matter directed was attributed to the absolute disposal of will by the common law. Thus, in a question, which of two claimants should take the succession, a liberal interpretation of the will of the entailor would very properly direct the determination.

The destination to the pursuer, in the entailor's marriage contract, was mentioned

as an argument, to show, that there could not, *in bona fide*, have been any intention to fetter him ; and the omission of his name in the restraining clauses, was urged to prove, that this must have actually been the case. The decisions of Hepburn of Keith and Sinclair of Carlowrie were quoted, *voce* TAILZIE, as ascertaining the distinctions in construing entails which the pursuer contended for ; and those of Leslie and Balfour were urged as directly in point, since there could be no doubt of the intention of the entailer, in both these cases, to impose the restraints on the disponent ; and yet that intention was disregarded. As to the objection, that the case of Balfour was decided on a question with creditors, it was observed, that this circumstance made no difference [4411] in point of law, since it was only in right of the disponent that the creditors could claim ; and, in all cases like the present, the favour due to creditors must operate against entails as much as if creditors were actually litigating. The interlocutor of the Court was as follows :

“ The Lords find, that, in respect it appears from several clauses in the entail executed by the pursuer’s father, that the pursuer is comprehended under the description and designation of heir of entail, he is thereby subjected to the limitations and restrictions of the said entail ; and therefore sustain the defences, and assoilzie, and decern.”

This cause was appealed. The House of Lords, April 15th, 1771, ordered and adjudged, that the interlocutors complained of be hereby reversed. And it is hereby declared, that the appellant being fiar, or disponent, and not an heir of tailzie, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolute clauses laid only upon the heirs of tailzie.

N.B. The account of this decision is only taken from the appeal cases.

Fol. Dic. v. 3, p. 216. *Fac. Col.* No. 114, p. 386.

No. 2. [3] ROBERTSON v. The Duke of ATHOLE. November 20, 1806.

A father having disposed an estate to his third son, “ in liferent, for his liferent-use, and in fee to the heirs-male of his body,” whom failing, to his fourth and fifth sons, and the heirs-male of their bodies respectively, in the same terms, the third son is not prevented from selling the estate by the subsequent destination.

The Reverend James Robertson (18th December 1775) conveyed his whole property, and especially certain lands, to trustees for behoof of his children. With regard to these lands, the settlement proceeds in these words : “ And for portion to the said James Robertson, my third lawful son, I hereby recommend to and appoint ” (his said trustees), “ to dispoise, transfer, alienate and make over in favour of the said James Robertson, my son, upon his arrival at the age of twenty-one years complete, and behaving well, and to the satisfaction of said trustees, and that in liferent, for his liferent-use, and in fee to the heirs-male of his body ; whom failing, in liferent to said Charles Robertson (his fourth son), and in fee to the heirs-male of his body ; whom also failing,” to his fifth and sixth sons successively in liferent, and in fee to the heirs-male of their bodies ; “ whom all failing, to my own nearest lawful heirs and assignees whatsoever, All and hail the foresaid lands,” &c.

The trustees (31st October 1785) disposed the lands exactly in terms of the above settlement.

James Robertson having sold the lands to the Duke of Athole, his power of doing so came to be questioned. This point was tried by the purchaser presenting a bill of suspension ; and the case was reported to the Court on memorials.

It was held, that the substitution of the younger children did not alter the case, nor limit the power of disposal which the disponent would have had if there had been no such substitution ; for it was thought to import nothing more than a simple destination ;—and the disponent’s right not being restricted by the use of the term, “ for his

liferent-use alienably," or words of the same import, to a fiduciary fee, any sale of property made by him must of course be effectual.

The Court (20th November 1806) remitted to the Lord Ordinary to refuse the

Lord Ordinary, ARMADALE.—For Charger, MONYPENNY.—Agent, W. MACKENZIE.
W.S.—Alt. FORBES.—Agent, RO. GRAHAM, W.S.—Clerk, SCOTT.

F.

Fac. Col. No. 259, p. 589.

No. 8. [4443] LAMINGTON v. KINCAID. March 2, 1627.

Extract of a bond made in Bourdeaux, subscribed only by the Tabellion, which bears, that a party subscribed a bond insert in his register, is sustained by the Lord to furnish action, because it was known to the Lords that it was the custom of that part to make the bond after that form;—and because the bond bore damage and interest, the Lords modified and restricted the interest and damage to the annuities of 10 for each hundred, so long as the principal sum was unpaid.

Fol. Dic. v. 1, p. 317. Auchinleck, MS. p. 15.

No. 19. [4453] The Earl of SELKIRK v. GRAY. July 22, 1708.

In a competition between an arrestment and assignation after the English form, which requires no intimation, the Lords preferred the arrester, because, though a deed established according to the forms of a foreign country may be effectual here, yet with regard to all steps of diligence in Scotland, the law of Scotland must be the rule. This judgment was reversed, on appeal.

The Duke of Hamilton being debtor by a double bond, in the English form, to Captain Alexander Gavin, in £1030 Sterling, he assigns this to Sir James Gray, by a writ of attorney *in rem suam*, in the English manner; whereon Sir [4454] James writes to the Duke, acquainting him of his right, who returns an answer promising payment; but after this, Charles Earl of Selkirk being creditor to Captain Gavin he arrests this money in the Duke his brother's hands; and a competition arising, it was alleged for Gray, the assignee, That he was not bound to debate any preference, but insisted against the Duke on his letter promising payment, which was as sufficient to make him liable as if his assignation had been formally intimated, seeing this assurance given him made him forbear any further legal intimation, and was as good as if he had given a bond of corroboration. Answered for the Duke, There never was a more extravagant notion pleaded, than to assert, that because the Duke promised payment, therefore, though a better right supervene before payment, which the Duke could not foresee, yet he must pay it to both; which shocks common sense, and is destitute of all foundation in law; and Stair, lib. 3, tit. 1, condemns it. See both Stair and Dirleton, 11th December 1674, Elphinston, *voce* PROOF; as also Spottiswood, page 229. The Lords found this superveniency could not involve the Duke in double payment, and therefore found him only once liable. Then Gray pleaded this second ground, I must be preferred to your posterior arrestment, for my assignation needed no intimation, because, being in the English form, it summarily transmits the property, without any such solemnity as an intimation. Answered, *non constat* this is the law of England, which being matter of fact to us, must be proven by a declaration of their judges; but 2do, *esto* it were, it cannot regulate this case, which is betwixt Scotsmen, and pursued before a Scots judicatory. The Lords repelled the allegiance, and found it behoved to be regulated by the law of Scotland, which requires intimation as a necessary solemnity. 3tio, It was contended for the Earl of Selkirk, That the holograph missive letter founded on, could not prove its own date,

against an arrestment, bearing a date posterior thereto, as was found, 14th Jan. 1662, Dickie, *voce* PROOF; 21st June 1665, Braidy, *IBIDEM*; and 5th February 1678, Mackenzie, *voce* PERSONAL AND REAL. Answered, This brocard, that *holographa non probant datam*, holds as to heirs, that they are presumed to be on deathbed, unless it be proven they were read and seen before; but in matters of common business, letters are probative without the solemnities of witnesses, and are amongst the strongest of writs, as Stair observes, because most difficult to be imitated; and as such writs would not militate against a donatar of escheat, so neither can they against an arrester, a third party, however pregnant and probative they be against the party writer, betwixt him and the receiver, to whom it was directed. The Lords found it could not prove against the arrester, and so preferred my Lord Selkirk to the money. It was likewise alleged, That after Gray's assignation, Gavin, the cedent, received two years annualrent, which seemed to presume the assignation was not onerous; but the Lords abstracting from this, decided on the above-mentioned grounds.

Fol. Dic. v. 1, p. 318. *Fountainhall*, v. 2, p. 456.

[4455] * * This case was appealed :

The House of Lords ordered, that the judgment should be reversed.

See *Journals of the House of Lords*, v. 18, p. 660.

No. 25. [4464] Earl of DALKEITH v. BOOK. February 1729.

A disposition of an heritable jurisdiction in Scotland, made in England after the English form, was not sustained even against the granter, to oblige him to grant a more formal disposition; though it was pleaded, that such a disposition must at least have the force of an obligation good against the granter and his heirs, though it would not avail in a competition with a more formal right; and, if such a disposition would produce action in England against the granter, to renew a more formal right, it might be also a good ground of action in Scotland, seeing obligations of whatever nature, executed *secundum consuetudinem loci*, are effectual in Scotland. See APPENDIX.

Fol. Dic. v. 1, p. 319.

No. 32. [4473] HUGH LAWSON and Others v. ALEXANDER MAXWELL.
February 12, 1784.

Medicines furnished by a surgeon in London to a Scotsman, sent thither for his health, and returning afterwards to Scotland, where he died, though they would have been considered as a privileged debt, if furnished in Scotland, were not held so by the Court, in an action at the instance of the English surgeon.

A person affected with a violent paralytic disorder, having been carried from his house in Scotland to London, was put under the care of Mr. Maxwell, a surgeon in that city; who continued his attendance upon him during ten months, while he remained there. He never convalesced, his disease having thrown him into a state of insanity; though he did not die for six months after his return to Scotland, where he received the assistance of another surgeon.

In a competition of his creditors, Mr. Maxwell claimed a preference for his account of medicines and attendance during those ten months, as being a privileged debt. The other creditors objected to this demand, and

Pleaded; The privilege claimed is due to medicines furnished to persons on deathbed only. The legal interpretation of that term limits it to sixty days preceding death. It is during that period alone that physicians fees are to be presumed not paid; 7th February 1717, Dr. Russel *contra* Sir James Dunbar, *voce* PRESUMPTION; 7th Feb-

ruary 1755, Dr. Park *contra* Langlands, *IBIDEM*; and in practice surgeons do require their privilege to be extended farther. If indeed it were not so defined, funds of persons consumptive, paralytic, or insane, and others afflicted with disease of the duration of years, would often be wholly exhausted by the demands of the surgeons.

Answered; That persons afflicted with disease may not want any possible means of relief, is, in all civilized society, a natural object of the law. Hence, to encourage those by whom medicines are administered, to give their aid to the sick, it assumes them of a recompense out of the moveable effects of their patients, even though they should not live to be in a capacity of bestowing the reward. Happily the continuance of such incapacity is seldom so long as 60 days. Nor is it the claimant who pleads that mankind should, in behalf of his profession, be presumed, *presumptio juris de jure*, to have been in that state during the whole last two months of their lives, though a doctrine which, if admitted, might prove highly beneficial to the medical practitioners. This curious argument comes from the other side; and the temptation which led to it seems to have been a notion that the *presumptio juris et de jure* of incapacity or deathbed-sickness during that period, implied a like presumption of sufficient capacity or perfect health prior to it. So strange an idea needs not to be refuted; and as this claim is founded even on the admitted incapacity of the patient in question, it ought to be sustained. The practice of surgeons in making the demands, corresponds to the principle by which these are authorised. To limit them to sixty days, would be to indicate blame for permitting their patients to live so long. As for diseases of very long continuance, insanity excepted, it is rare that they should be accompanied with incapacity; but it is certainly just that in them, as well as in more acute distempers, the sick should enjoy the benignity of the law.

The Lord Ordinary sustained the above-mentioned claim of preference; and

The Lords adhered to the interlocutor of the Lord Ordinary.

In a reclaiming petition Mr. Lawson farther argued, That the debt having been contracted in England, it ought to be judged of by the law of that country; and as there it was no wise privileged, so neither was any preference due to it here. To this plea Mr. Maxwell answered, that it was difficult to conceive why a person should have forfeited the protection of the law of this country, merely by going into our neighbouring one, and for the most necessary of all causes too, the recovery of his health; and yet that this consequence seemed to be implied in depriving him, on that account alone, of so very important a privilege.

On advising that reclaiming petition with the answers, in which the foregoing arguments were likewise repeated,

The Court, without paying more regard than before to the above argument about deathbed, seemed to alter their opinion of the point formerly determined. All the Judges now considered that, besides what results from the incapacity of the patient, there should be some other limitation of the period during which surgeons' accounts are to be deemed privileged. Some of them, however, thought it might be allowed to extend to many months; others mentioned three or four months; and some viewed even 60 days as a proper period, though not from its having any relation to the law of deathbed.

The argument founded on the *lex loci contractus* seemed to be unanimously adopted by the Court.

The Lords therefore altered their former interlocutor, and rejected the claim of preference. See PRIVILEGED DEBT.

Lord Ordinary, ANKERVILLE.—For Lawson, CORBET.—Alt. DALZELL.—Clerk, ORME.

No. 58. [4504] JEAN THOMSON and JOHN HAY, Executors of JOHN HAY, Taylor in London v. The Earl of LINLITHGOW and his Curators. July 16, 1708.

An accompt, though contracted in England, was found to prescribe according to the Scots law, where payment was pursued for.

In a pursuit on the passive titles at the instance of the Executors of John Hay v. the Earl of Linlithgow and his Curators, for an account contracted by the late Earl at London, whereof the last article is in the 1695, it was alleged for the defender, That the account was prescribed, not being pursued within three years.

[4505] Alleged for the pursuers; 1mo, Prescription was interrupted by the execution of a general charge to enter heir in January 1697, within two years of the last article of the account, with a summons for payment executed in May 1698; which summons must be an effectual interruption; because, deducting a year's time after the late Earl's decease, during which the pursuers could not insist *cum effectu*, in respect of the defender's privilege of *annus deliberandi*, there are not three years betwixt the citation and the last article of the account. 2do, The triennial prescription cannot be obtruded, because the debt pursued was contracted in England, where no such prescription takes place; for in personal contracts, the law of the *locus contractus* must be the rule; merchants or tradesmen who trust foreigners, not being obliged to know the municipal law and customs of the place, where the debtors reside.

Answered for the defenders. The execution of the general charge could have no effect of interruption, because it mentions no particular debt, nor contains any conclusion for payment; nor yet could the summons interrupt, not being executed within three years. The *annus deliberandi* is not to be regarded; in respect the defender was served and retoured heir to the late Earl within a few months after his decease. 2do, A pursuit in Scotland against a Scotsman, can only be determined according to the Scots law.

The Lords sustained the defence of prescription. See PRESCRIPTION.

Fol. Dic. v. 1, p. 321. Forbes, p. 268.

* * Fountainhall reports the same case :

The Relict and Children of John Hay, taylor in London, as his executors, pursue the Earl of Linlithgow, as heir to his uncle, for payment of £40 Sterling of a taylor's account owing to them by the last Earl, and offered to prove the furnishing of the work by witnesses. Alleged, The account is prescribed, the last article not being within three years of raising the process, and so can only be proven *scripto vel juramento* by the act 1579. Answered, Ought to be repelled, because an account taken on in England, where no such law takes place. 2do, Interrupted by a general charge to serve heir, executed long within the three years. 3tio, I could not legally pursue within his year of deliberation; and if that be deducted, both the charge and the summons are within the three years. Replied to the 1st, The law of Scotland introducing a triennial prescription of tradesmen and merchants accounts *quoad modum probandi*, must only regulate this matter, being betwixt Scotsmen, and pursued here. To the 2d, The general charge cannot interrupt, *eo ipso* that it is general, and does not bear a special condescendence of the debt for which it was sought, and then it might have done, as was found in Preston's case *contra* Lord Ballantyne, for supporting an inhibition served on such a charge. To the 3d, The *annus deliberandi* can never be deducted here, for two reasons, 1st, because the Earl was served heir to his uncle within the year, which was a plain renunciation of [4506] the benefit of that delay. 2dly, You could have pursued me within the year upon the other passive titles of behaviour as heir, vitious intromission, &c. Replied, A general charge may not be a sufficient interruption, where the party libels more grounds of debt than one; but here the summons contains nothing but this single account of £40 Sterling, and so the charge can be applied to no other subject but to this allenarly. And as to the *annus deliberandi*, I was not bound to know you were served heir; and the most this argument could operate, was to deduct these months after the service, but *quoad* the months before, they cannot be counted in the prescription. Though these three points were

very considerable, and that minority does not stop these shorter prescriptions, but the Lords repelled them all, and found the account prescribed *quoad probandum* witnesses. See PRESCRIPTION. *Fountainhall*, v. 2, p. 454.

No. 80. [4542] ARCHIBALD SINCLAIR of the Island of Jamaica, and WILLIAM SUTHERLAND his Attorney v. MRS. FRAZER, and her Husband ALEXANDER FRAZER, Younger of Strichen, Esq. July 14, 1768.

Found, that a foreign decree, bearing to have been *in foro contentioso*, had not the effect of a *res judicata* in Scotland, but entitled the party claiming under it, to plead that the *onus probandi* rested on his opponent.

Mrs. Frazer having succeeded, when under age, to an estate in Jamaica, her tutors appointed Archibald Sinclair, and one Mr. Archdeacon, attorneys for managing it. Mr. Sinclair, however, alone acted.

When Mrs. Frazer came of age, another gentleman was appointed in Mr. Sinclair's place; but no settlement of accounts appears to have been made with Mr. Sinclair.

The estate was sold in 1763; and, in 1767, Mr. Sinclair brought an action in this Court against Mrs. Frazer for a specific sum, awarded by a judgment of the Supreme Court of Judicature in the island of Jamaica, as a balance due the pursuer upon an account current with the defender. The record produced was certified by the clerk of court; his subscription by the secretary of the island, [4543] a notary public; and the secretary's subscription was confirmed by that of the governor; and the great seal of the island was appended.

The defender made some objections to the contents of the decree in point of form; but, when the cause went to the House of Peers, they were considered as arising entirely from unacquaintance with the nature of the English process.

An objection, however, of another sort was offered, viz. That the comparence made for the defender in Jamaica was not with her knowledge or authority. She therefore argued, that the decree was to be considered as a decree in absence, and ought to be opened up in course, as decrees of absence usually are, when the grounds of them are questioned: And she accordingly craved, that the pursuer should produce the vouchers of the debts he claimed, in order to introduce a fair count and reckoning between the parties.

"The Lord Ordinary ordered the vouchers to be produced."

The pursuer reclaimed to the inner-house, and argued, 1mo, That the decree of a Supreme Court was to be held *pro veritate*; so that, if the decree he produced was not disputed to be, in fact, the decree of a tribunal over which the courts in Scotland had no jurisdiction, it was as incompetent for them to examine into the grounds of decision, as to open up a judgment *in foro*, of their own; 2do, That, if the decree is not to be acknowledged as a *res judicata*, it ought, at least, to throw the *onus probandi* upon those who object to it.

He particularly urged, that decrees of foreign courts of justice were every where put in execution *ex comitate*; but that, in a case like the present, where the decree was pronounced by a British Court, there was even a necessity to give it effect; since, otherwise, the commerce and due connection between the different parts of the empire could not be preserved.

The authorities the pursuer founded on were, *Voet, de re judicata*, § 41; *Huber, in rat. ad leg.* 75, *De Jud.*; *Mynsingen observat. cent. obs.* 69; Justice of the Laws of the Sea, p. 427; 1 *Rolls ab.* 929; *Molloy de jure maritimo*, l. 3, cap. 8, § 8.—Decisions, *Edwards v. Prescott*, No. 79, p. 4535; *Wedderburn v. Keith* in 1760;* and *Laycock v. Clark*, No. 85, p. 4554. He likewise set forth, that decrees of the Court of Session were received in the Court of Chancery in England, and execution decreed upon them. It does not appear from the appeal cases, out of which alone this report is collected, that any authorities were quoted by the defenders.

"The Lords unanimously adhered to the Lord Ordinary's interlocutor."

* See General List of Names.

This determination was reversed in the House of Lords ; and the principle of the decision is given in the judgment ; the terms of which were,

March 4, 1771.—“ It is declared, that the judgment of the Supreme Court of Jamaica ought to be received as evidence *prima facie*, of the debt ; and that it lies upon the [4544] defendant to impeach the justice thereof, or to show the same to have been irregularly obtained. It is therefore ordered and adjudged, That the several interlocutors complained of be, and the same are hereby reversed.

Fac. Col. No. 13, p. 384.

No. 102. [4591] JANET MACCULLOCH *v.* EDWARD MACCULLOCH of Auchenguill.
February 10, 1759.

Cohabitation in a foreign country, will not constitute a marriage in Scotland.

Janet Macculloch commenced a process of declarator of marriage, before the Commissaries of Edinburgh *v.* Edward Macculloch ; in which a proof was allowed. The general import of the evidence was, That she was a person of good character, and nearly related to the defender himself : That in the year 1749, and beginning of the year 1750, she resided in the family of Lady Ardwall, the defender's sister, as an assistant in the education of her daughters : That the defender resided in the same house, and was younger than her by some years : That it was discovered in the family, that the pursuer had, upon several occasions, in the night-time, gone from her own apartment, where she slept with the children, to the apartment where the defender slept : That, in summer 1750, she discovered herself to be with child, and went from the house of Ardwall to her mother's house ; where, after staying a short time, she accompanied the defender to the Isle of Man, and there resided for about six months, and was delivered of a child ; That the defender was very attentive to her at this time, and was understood by the people of the house to be her husband ; and that upon several occasions, in conversing with the people of the house, he called her his wife, and was understood by his own brother to be married to her, who came to the Isle of Man to make enquiry : That he procured the child to be baptized by the parish-minister, and its name was entered in the register as a lawful child : That during this period, the defender went several times from the Isle of Man to Scotland about his private affairs, and returned again ; upon the whole, had resided with her in the Isle of Man above three months : That upon their return from the Isle of Man, the pursuer returned to her mother's house, and the defender to the house of Ardwall : That during the space of a year thereafter, he made four visits to the pursuer, and upon some of these occasions slept with her, with the knowledge of her sisters, who were persons of good character : That there was a report in the country, after his return, that he was married, and he never expressly contradicted that report during the first year after their return.

The Commissaries “ found the facts, circumstances, and qualifications proved, not relevant to infer marriage ; and therefore assoilzied the defender.”

In a bill of advocacy for the pursuer it was contended, That the judgment of the Commissaries in this case proceeded from an opinion, that no cohabitation as husband and wife, however strongly supported by the acknowledgment of the parties that they were married, was sufficient to constitute a marriage by the law of Scotland, if that cohabitation happened in a foreign country, by the laws of which, cohabitation alone was not sufficient to constitute a marriage : That this point of law had, however, been overruled in a late noted case between George Forbes and the Countess of Strathmore (See APPENDIX) ; where [4592] the marriage was chiefly supported by the proof of a cohabitation and acknowledgment during the residence of the parties in Holland.

That by the law of Scotland, the serious and deliberate acknowledgment, that a child is lawfully begotten, and the mother a lawful wife, is a sufficient proof of a private marriage between the parties, whether that acknowledgment be emitted in this country, or any where else. And this is not peculiar to the proof concerning a private marriage ; for the evidence, that any other private deed or transaction had happened

in Scotland, may arise, in a great measure, or altogether, from facts and circumstances occurring in a different country. If it should be proved against a person accused of any crime, that, in a foreign country, before witnesses, he fully confessed the matter laid to his charge, or committed, in this country, this would be good evidence of the fact, without enquiring what would be the consequence of such confession by the law of the country where it was made.

That in this case, from the character and rank of the pursuer, there was the strongest reason to presume, that there had been a promise of marriage, and that she had trusted to the faith and honour of the defender : That this was further confirmed by his open acknowledgment of her as his wife in the Isle of Man, and his solemn and deliberate acknowledgment that the child was lawfully begotten, at the sacrament of baptism : And though he made use of several pretences to delay avowing the marriage in Scotland, yet his visits to the defender at her mother's house were evidently upon the footing of an acknowledged husband ; and his never contradicting the report which prevailed after their return from the Isle of Man, even to his own particular relations, must be held as the strongest acknowledgment of the fact.

Answered, Cohabitation as man and wife does, by the law of Scotland, establish a marriage ; but such cohabitation requires the open and repeated acknowledgment of the parties, and must appear to be the result of a deliberate intention to avoid each other as man and wife. The writers on the civil law require that it should subsist for ten years ; and Craig, as well as Lord Stair, requires that it should subsist a considerable time ; but none of these requisites occur in the present case.

It appears by Sir George Mackenzie's observations upon the act 77th Parl. 1503, that the proof arising from cohabitation, is capable of being redargued by a contrary proof ; and here there is not only no proof of an actual marriage, but the strongest presumptions of the contrary.

It is an essential requisite of cohabitation, that it should be open and public. This appears from the civil law, l. 9 et 22, *Cod. De nuptiis*. But here the cohabitation was clandestine, and concealed in a solitary place ; and occasioned merely by the necessity of assuming that appearance, that the pursuer might be treated in a proper manner during her delivery and inlying.

The cohabitation in the Isle of Man cannot establish the marriage, for another reason : The legal import and effect of a man's actions must be judged of [4593] according to the law of the country where he is residing at the time. Thus, intromission by a Scotsman with goods in England belonging to a Scotsman who died in Scotland, without confirmation here, was found no passive title ; but only to subject the intromitter *in valorem*, agreeable to the law of England, where the intromission happened ; Archbishop of Glasgow *contra* Brunsfield, No. 16, p. 4449. If a different law were to prevail with respect to marriage, this absurdity would follow, that parties might be held as married in one part of the united kingdom, and not in the other.

In the case of Forbes *contra* the Countess of Strathmore, the cohabitation in Holland was not held sufficient to establish the marriage ; for not only was the acknowledgment of the parties in that case much stronger and more explicit than in this, and their cohabitation of a longer continuance ; but there was also strong presumptive evidence, that an actual marriage had been celebrated in Scotland.

There is here no proof of an actual marriage, but strong presumptions to the contrary. There is no proof of any acknowledgment or cohabitation, except what happened in the Isle of Man ; and the whole of the defender's behaviour, both before he went to that island, and after his return, was contradictory to the supposition of a real or an acknowledged marriage. It was not necessary for him to contradict every idle report, or to set every one right who had conceived a false opinion.

"The Lords remitted the cause to the Commissaries, with instructions to find the marriage proved."

Act. GARDEN, LOCKHART.—Alt. ALEX. MURRAY, HAMILTON-GORDON, MILLER.

This judgment was reversed by the House of Lords, and the marriage found not proved.

107. [4601] COLIN MORISON and Others v. JAMES KER. February 25, 1790.

An English administrator, living in Scotland, may be sued here.

Alexander Ker, having his residence in England, bequeathed the liferent of his estate, which consisted of moveables, to his sister Janet Ker, and, after her death, to next lawful heir or heiress of blood.

Upon the testator's death, Janet Ker took out letters of administration in the prerogative court of Canterbury, and obtained possession of the whole effects.

Those effects Janet Ker delivered over to James Ker, who after her was one the nearest of kin to Alexander Ker, and who also claimed to be his heir, if the provision in the will already mentioned should have the effect of excluding the next of kin.

Janet Ker having also died, James Ker, who had his residence in Scotland, was, her representative, sued in the Court of Session by Colin Morison and others, claiming, as the nearest in kin of Alexander Ker, a rateable share of the effects left by him. In the course of this action, it was

Pleaded; A person to whom an office of trust is given by the judicial act of a particular court of law, is not obliged to render an account of his administration in any other. Least of all can he be compelled to defend himself against those suits that may be instituted in another country, where the nature of his office, and the claims resulting from it, cannot be understood or explained. This is exemplified in the case of a factor named by the Court of Session, who cannot be required to account for in that Court, and who surely could not be sued in England, if he should happen to be found there.

In the case of an English administrator, who is merely the officer appointed in a proper court for managing the moveable estate of a person deceased, this rule seems peculiarly applicable. In taking out letters of administration, the party and his sureties become bound to produce, in the prerogative-court, a just inventory of the effects which "are to be distributed and disposed of in such manner and form as shall be limited by the direction of the Ordinary." This obligation, it is evident, cannot be fulfilled but in the same prerogative court, from whence the letters of administration have issued; neither can the administrator, or his sureties, obtain a proper discharge elsewhere.

Thus the point has been repeatedly decided; and in the present case, where, owing to the peculiar construction of the will, it becomes a question, who are, by the law of England, entitled to the succession? to adopt a different rule would be exceedingly inexpedient. It may be said, that the administrator being dead, while those who have succeeded to her reside in Scotland, no effectual action could be instituted in the English courts. But as the defender is ready to appear in any action that may be brought against him in England, and as he is possessed of sufficient funds in that country, that circumstance does not seem to be of any importance. *Harcarse, voce Executor*; March 1684, *Dryden contra Elliot*, *voce FORUM COMPETENS*; *Barrough contra Grant*, No. 131, p. 2661; 22d November 1770, *Blackstocks contra Mackay*. See APPENDIX.

Answered; It is a mistake to imagine, that an English administrator can only be sued in the prerogative-courts. His authority indeed is derived from thence, as that of a Scots executor is from the Commissaries; but this does not hinder him, any more than it does a Scots executor, from being sued in any of those judicatories where an ordinary action of debt could be brought against him.

If, after taking possession of the whole effects, a Scots executor were to retire to England, justice requires that the obligations he has come under to the creditors and nearest relations of the deceased should accompany him. In the same manner, where an English administrator brings the effects to Scotland, those for whom he is trustee must have a power of suing him here. Indeed it is more necessary in the latter case than in the former, there being no method in the law of England, by which an action can be instituted against a party who is not within the kingdom.

The decisions which have been resorted to must have been founded on specialities which do not here occur; or if they rest on a broader foundation, they are manifestly erroneous. As to the ambiguity of the words used by the testator, that can prove

no obstacle to the interposition of the Scots courts, if they be not wholly incompetent the judges in this country being in the daily use of deciding on the principles of foreign law, where it is necessary for doing justice to the parties.

Several of the Judges, moved by the former decisions, were at first for dismissing the action. But the judgement of the Court sustaining the jurisdiction was at length pronounced with considerable unanimity.

The Lords sustained the action.

Reporter, LORD ALVA.—Act. J. W. MURRAY.—Alt. SOLICITOR-GENERAL, FRASER TYTLER.—Clerk, GORDON.

Fol. Dic. v. 3, p. 230. *Fac. Col.* No. 121, p. 233.

No. 108. DOUGLAS, HERON, and Company v. The Trustees of ANDREW GRANT
November 19, 1793.

Found, that an English administrator having a domicile in Scotland, might be sued in the courts of this country. This judgement was reversed on appeal.

Mr. Baron Grant, on the 16th of May 1772, accepted two bills drawn on him by John Fordyce, payable 65 days after date.

The bills were indorsed to Douglas, Heron, and Company, by whom they were protested on the 23d July 1772, being the last day of grace.

A sequestration having by that time been awarded against Mr. Fordyce, the bills were, in August 1772, produced for Douglas, Heron and Company, at a meeting of his creditors, as their grounds of debt.

[4603] In 1775, they, in common with Mr. Fordyce's other creditors, accepted of a composition, and granted him a discharge.

On the 23d July 1778, a summons was executed against Andrew Grant, as representing his brother the Baron, for payment of the balance still due upon the bills. Andrew Grant died while this action was in dependence, after having conveyed his estate in the West Indies to trustees, by a deed in the English form, upon which they afterwards obtained letters of administration in the Prerogative Court of Canterbury.

In an action brought against the Trustees, who, though they resided chiefly in England, had a domicile in Scotland; they, *inter alia*,

Pleaded; 1mo, The trust-estate is subject to the law of England; the deed is executed in the English form; the trustees have found caution for their intromissions, in the Prerogative Court, where they are liable to account, and therefore they cannot be sued in this country; *Burroughs v. Grant*, No. 131, p. 2661.

2do, The bills are prescribed. The sexennial prescription runs from the time when the bills became exigible, *i.e.* from the day of payment; 12 Geo. III. c. 72, § 35. The days of grace were introduced, not for the sake of the debtor in the bill, but in order to regulate questions of recourse; *Ersk. b. 3, tit. 2, § 33*. Diligence may be raised before the days of grace are elapsed, *Charles v. Skirving*, No. 172, p. 1614; and interest, as well as the six months allowed for registration, run from the day of payment.

Answered; 1mo, The Trustees are personally liable for the debts of the trust, to the extent of the funds in their hands. The taking out letters of administration, and finding security, are intended only as an additional safeguard to creditors and others interested in the succession, and the trustees notwithstanding may be prosecuted in any court having jurisdiction over them; *Morison v. Ker*, No. 107, p. 4601.

2do, The days of grace, or of respite, as they have been sometimes called, have been introduced in favour of the debtor in the bill; *Forbes on Bills*, p. 140, § 7; *Kames*, 6th July 1743, *Ramsay v. Hog*, No. 140, p. 1564. The last day of grace is uniformly considered by merchants as the period when payment becomes exigible. Thus in an account of bills, payable and receivable, it is always stated as the time when payment is to be made, or received: When payment is made on that day, interest is never demanded; and from it the rates of discounting, or of exchange.

are always reckoned. No legal authority warrants diligence against the acceptor before the days of grace are elapsed in this country; and the contrary is established in England; 4th vol. Termly Reports, Hilary term 1791, *Brown v. Harraden*.

The Lord Ordinary sustained the plea of prescription.

At advising a reclaiming petition, with answers, the Court seemed to be of opinion, that to interrupt the sexennial prescription, the action ought to have been commenced within six years from the day of payment.

[4604] The Lords, however, 19th February 1793, repelled the plea of prescription, in respect of the claim entered upon the bills in question in *Fordyce's* sequestration; and repelled also the objection to the competency of the court.

Upon advising a second petition and answers, the Court, influenced by the understanding and practice of merchants on the subject, found, "That the time requisite for completing the prescription in question, only began to run from the third or last day of grace, and therefore repelled the plea of prescription." See *PRESCRIPTION*.

Lord Ordinary, ALVA.—Act. SOLICITOR-GENERAL BLAIR, and M. ROSS.—Alt. TAIT, JOHN CLERK.—Clerk, SINCLAIR.

D. D.

Fol. Dic. v. 3, p. 231. Fac. Col. No. 72, p. 157.

* * This cause was appealed :

The House of Lords, 11th November 1796, ordered and adjudged, That the several interlocutors complained of in the appeal be reversed, except as to so much of the interlocutor of 19th November 1793, as finds, that the time requisite to completing the prescription in question only began to run from the third or last day of grace, and therefore repel the plea of prescription; without prejudice to any claim which Douglas, Heron, and Company may make for payment of the two bills out of the estate of Baron Grant, or out of such part thereof as have come to the hands of Andrew Grant, and for which he ought to have accounted in a suit for carrying into execution the trusts of the will of the said Andrew Grant.

No. 120. [4631] *GEORGE ROSS and Others, Representatives of the late RICHARD LOUTHIAN v. SARAH AGLIANBY.* January 20, 1797.

A widow having accepted a conventional provision out of landed property in England, is not entitled to claim a terce out of her husband's lands in Scotland.

Richard Louthian died possessed of considerable landed property in England and Scotland. On the 17th September 1782, he executed a settlement [4632] of his Scotch property, and in October following, he made a will, by which, after narrating, that "I have, by a deed under my hand, bearing date 17th September, in the year 1782, settled every thing relative to my affairs in Scotland," he disposed of his whole English property. By these deeds he settled the greater part of his fortune on his wife Sarah Aglianby.

The settlement with regard to his Scotch property was afterwards set aside, in an action at the instance of Mr. Louthian's heirs-at-law, on grounds of fraud and undue execution.

Sarah Aglianby, on thus losing the property of the lands in Scotland, claimed her terce out of them.

She was opposed by Mr. Louthian's Heirs, who stated, that as she still held her husband's English property, in virtue of his will, her claim of terce was excluded by the act 1681, c. 10.

Mrs. Louthian

Pleaded; The sole object of the act 1681, was to operate a just distribution of the husband's property in Scotland, and can have no effect upon a provision made on his wife from lands in a foreign country. The Court cannot judge of the validity of such provision, and will not deprive her of her terce on account of it. As the heir

might claim a share of the moveable succession, without collating lands situated in foreign country, so may Mrs. Louthian her terce, without renouncing her right to property in England.

2dly, It is evident from the preamble of the act 1681, that it was not meant to apply to cases where the husband intended that his widow should have her legal share as well as conventional provisions. Now, as Mr. Louthian, besides the English estate, gave his wife the property of the lands in Scotland, it must be presumed, that he knew that his settlement as to them was to be found ineffectual, he would at least have been desirous that she should have had her terce from them; 29th Nov. 1731. *Jankouska v. Anderson, voce TERCE.*

Answered; 1st, The statute 1681 enacts, in general terms, that any provision made by the husband on the wife, and accepted by her, shall exclude her from her terce, unless the contrary be expressed; the lands in England, given in this case to Mrs. Louthian, must therefore have this effect.

If Mrs. Louthian is afraid that her provision from the English estate may prove ineffectual, on her renouncing it, the opposition to her present claim shall be withdrawn.

2dly, From the grounds on which Mr. Louthian's settlement was reduced, it cannot be considered as his deed, or as affording any evidence of his intention.

The question came to be tried in an action of count and reckoning, at the instance of Mr. Louthian's heirs-at-law against his widow.

The Lord Ordinary found, "That in order to bar a claim to the terce, it is necessary that the conventional provision should be constituted over lands in Scotland: Found it acknowledged that the defender is possessed of a settlement made by her husband in her favour of an estate belonging to him in Eng-[4633]-land; and in respect it is not alleged by the defender that any other person is in possession of the estate, or competing with her for it, or that she herself is not in possession of it, in terms of her said settlement; and farther, in respect that she does not offer to convey her right to that estate in favour of the pursuer, or even to repudiate her husband's settlement thereof, found, That she is not entitled to claim a terce out of the lands in Scotland."

On advising a reclaiming petition, with answers, one Judge thought that in reference to Mr. Louthian's will to the disposition of his lands in Scotland, together with the whole other circumstances in the case, afforded evidence, that her husband truly intended to give her a provision, equal at least both to the terce and to the land in England; and that on this ground, the judgment should be altered.

The Lords "adhered."

Lord Ordinary, JUSTICE-CLERK BRAXFIELD.—Act. G. FERGUSSON.—Alt. HONTMAR.—Clerk, MENZIES.

R. D.

Fac. Col. No. 10, p. 21.

No. 10. [4648] MARY COLLINS v. Lord BOYD. February 6, 1759.

A person residing without the jurisdiction of the Court, cannot be received as a judicial cautioner.

In the question betwixt Mary Collins and her trustees against Lord Boyd, 2d July 1755, *voce PAPIST*, the Court ordered Lord Boyd to pay the whole sum to the pursuer, on her finding caution, that Janet Boyd, the nun, would never claim her share due by Lord Boyd.

Lord Boyd objected to the cautioner, That he did not live within the jurisdiction of the Court; and that as this was a judicial act or obligation, the cautioner being ordered by the Court, no cautioner could be received who was not amenable to it.

Answered, This is not a *cautio judicio sisti et judicatum solvi*. It is not properly a judicial act or obligation. It is a common cautionary obligation, that a person living in a convent shall not claim her share of the money due by Lord Boyd; and therefore any responsible person may be received as cautioner, whether amenable to this Court or not.

[4649] "The Lords refused to accept of a cautioner residing out of the kingdom."

This question was advised upon a report, without any pleading, or any papers given into Court upon it.

For Lord Boyd, LOCKHART.

J. C.

Fol. Dic. v. 3, p. 231. Fac. Col. No. 161, p. 288.

No. 11.

ANN STEWART v. SOPHIA HOOME. May 18, 1792.

A person born in America, while that country was subject to Great Britain, and domiciled there, is not to be considered as an alien, but a subject of Great Britain residing in a foreign country.

David Hooime Stewart of Argaty, by a deed of entail, in 1768, disposed to George Stewart his brother, residing in Annapolis in Maryland, and to a series of substitutes, his lands, under "the following conditions, appointed to be ingrossed in the infeftments to follow thereon; viz. That the said George Stewart, and his foressaids, shall be burdened with and obliged to pay the whole just and lawful debts that shall happen to be resting and owing by me at the time of my death, in so far as the same shall not be paid out of my moveable subjects, and also to pay an annuity of £25, provided by me to each of Janet and Jean Stewarts, my sisters, during their joint lives after my decease, and £35 to the survivor of them, and likewise to pay £500 to James Stewart, my younger brother."

George Stewart succeeded, and made up titles under this deed. After his death, Ann Stewart, his widow, having claimed from Sophia Hooime, his granddaughter, then in the right of the estate, a terce out of the lands in which he died infeft, it was objected, That the estate having been settled on her husband and the other heirs, under the burden of the provisions granted, and debts contracted by the entailer, these burdens must have the effect at least of limiting her claim. In support of it she

Pleaded, Where lands are disposed as burdened with debts or particular sums of money, such debts or sums are considered to be real *liens*; but where the disponee or heir is only taken bound to pay, they remain personal.

Thus, "a purchaser of lands having obliged himself to pay a certain sum to any person his author should please to nominate, this clause, though in the infeftment, was found not real to affect singular successors"; Stair, 25th June 1664, Canham *contra* Adamson, *voce* PERSONAL and REAL. So also, Fountainhall, 19th November 1685, Lord Ballenden, *IBIDEM*. Fountainhall, 14th June 1687. Home, July 1687, Creditors of Marjoribanks, *IBIDEM*. 19th July 1780, Allan v. Cameron's Creditors, *IBIDEM*.

Now, by the clause mentioned above, the burdens in question, though appointed to be ingrossed in the infeftments, being laid, not on the lands, but on the heirs, are therefore merely personal. As it is clear they could afford no ground of competition with purchasers, or real creditors secured by infeftment, so they can as little affect the claim of terce, which, as it is founded on the husband's sasine, can only be made to yield to rights preferable to it.

[4650] Answered, It has been frequently decided, that if a disposition of lands be granted under the burden of the payment of the granter's debts, these are constituted real *liens* on the subjects; July 1719, Creditors of Coxston, *voce* PERSONAL and REAL; 18th February 1729, Geddies, *IBIDEM*; 10th January 1738, Creditors of Smith, *IBIDEM*. Also the case of the Creditors of Marjoribanks, quoted on the other side.

As to the rest of the cases appealed to by the opposite party; in those of Canham, and of Ballenden, the conveyances were not granted under that burden, the disponees being only taken personally bound to pay certain sums. And the same observation applies likewise to the case of Cameron's Creditors.

The deed in question having been in like manner granted under the burden of certain debts, for it bears to be executed "under the provisions and conditions after expressed," they are rendered real *liens* on the lands, effectual even against the claims of real creditors, much more that of terce, which has been erroneously compared to these.

It resembles more the right of an adjudger or appriser, who, as Mr. Erskine said, "when he uses diligence consults no records, but affects the subjects appraised *et tale* as it was vested in his debtor," b. 2, tit. 12, § 36; an opinion recognised by the Court in the case of Thomson, 15th November 1786, *voce* PERSONAL and REAL, when it was found, "That the allegation of fraud was not relevant against heritable securities and infeftments, but that it was relevant as to creditors-adjudgers." Being then the husband's lifetime subject to his power of disposal, it vests in the widow on death, by the kenning or adjudication of the inquest, *tantum et tale* as the right on which it arises "was vested in him."

The Lord Ordinary found, "That whatever annuities or debts upon the lands of any kind, are mentioned in the deed of entail, as a burden upon the estate entailed, must in so far restrict the claim of terce, which the Lord Ordinary found must be exigible from heritable subjects in which her husband died infeft, after deducting the burdens above-mentioned."

The Court were clearly of opinion, That by the conception of the deed, the burdens were personal on the heir, and not real on the lands. Some attention was paid to the argument of *tantum et tale*, as in some degree countenanced by an opinion that seems once to obtain, but which, it was observed, was now corrected by the decision in the case of the Creditors of Kerse, 13th January 1792, *voce* PERSONAL and REAL.

The Lords therefore repelled the objection.

The widow being a native and an inhabitant of America, it was further objected That as a subject of the United States, owing no allegiance to Britain, she was to be deemed an alien, and so to be excluded from a claim of terce as much as from a claim of property.

The Lord Ordinary found, "That the claimant having been born in America while that country was subject to Great Britain, is not to be considered as [4651] an alien, but as a subject of Great Britain, residing now in a foreign country; therefore repels the objection of alienage to the claim of terce." In this judgment the objectors acquiesced. See PERSONAL and REAL.

Lord Ordinary, MONBODDO.—For the Widow, WIGHT.—Alt. MACLEOD-BANNATT.—Clerk, COLQUHOUN.

S.

Fol. Dic. v. 3, p. 231. *Fac. Col.* No. 210, p. 440.

No. 12. JAMES MILLER and his Attornies v. JOHN ALLEN. June 8, 1792.

An alien cannot sue, in the Courts of this country, as a tutor-at-law or curator for an insane person resident in Scotland.

Miller, a subject of the United States of America, as curator-in-law of his brother, a fatuous person, residing in Scotland, brought an action, by his attornies, against Allen, for monies due to his brother.

Allen did not dispute the justice of the debt; but contended, That the pursuer, being an alien, could not be allowed, as a curator-in-law, to uplift sums of money due by, and belonging to a person residing here.

The lords sustained the defences.

Reporter, LORD HENDERLAND.—Act. CULLEN.—Alt. HAY.—Clerk, MENZIES.

C.

Fol. Dic. v. 3, p. 232. *Fac. Col.* No. 216, p. 455.

No. 1. [4653] The Marquis of ATHOL v. The Laird of FASKELLIE. June 24, 1680.

Import and privileges of a gift of forestry. See Synopsis.

The Laird of Faskellie having obtained from the King an erection of his lands into a forestry, the Marquis of Athol, as heritable forester of a forest of the King's

adjacent to Faskellie's lands, supplicated the Exchequer to stop Faskellie's signature, as prejudicial to the King and the lieges. The Exchequer recommended to the Lords to hear the parties, and to give their opinion what the import and privilege of a forest is by law, and whether it be prejudicial to the King's forestry that a new gift of forestry be past. The matter being heard and reported this day, it was alleged for Faskellie, That his signature being under the King's hand, ought not to be stopped, it being beyond question that the King hath power to erect forestries, and that he hath done it, and it were *mali exempli* to stop the King's free grants, upon pretence of inconveniency to other parties. 2do, There is produced a charter granted by the King to the Laird of Strowan of his estate, containing both in the dispositive clause and in the *novodamus, cum nemoribus, forestis, &c.* ; and Faskellie's estate is a part of that which was Strowan's. 3tio, Athol and others having forestries already, they do thereupon confiscate all goods of his tenants that come within the bounds of these forestries, whereby they are obliged to herd their cattle in these vast bounds both summer and winter ; nor can they thereby prevent, but they may go over the march, and so be confiscated ; and therefore, Faskellie having also the privilege of a forestry, either party will permit the other to come and go upon the march. It was answered, That the point in debate is not what the King may do, but what, upon good information, he would do ; so that it is most proper for the Exchequer to know the point of law from the Lords of the import of a forestry, and of the interest of the King and lieges in erecting of new forestries ; as to which, it is clear, that forestries have been erected by our Kings upon their own property, and that they are *inter regalia*, and belong to no subject in property ; but subjects have only the heritable right of keeping of forestries, which are the King's [4654] property ; so that the King, upon information, would not erect forestries upon other men's property, to the prejudice of his circumjacent vassals, who, having the rights of their estates from the King, without any burden but the *reddendo*, the King would never burden them by erecting new forestries, to herd their cattle all the year over, and by losing them by passing over the march, which is a heavy servitude, of which all the lieges are free ; and, though the King's prerogative, as to his own property, might allow forests for deer, or where forests have been in constant possession and are past prescription ; but to give new forestries to induce so great a burden, would never have been done by the King upon information. And as to Strowan's right of forestry, 1mo, *Non constat*, that these lands are a part of the lands in Strowan's charter, and if they be, they may make use of Strowan's right, but cannot thereon demand a new erection. But Strowan's right imports nothing, being only a right of his lands *cum forestis*, which doth not erect the lands in forestry, but gives the lands with any forest that was on them before, in the same manner as the other articles in that clause, of "coal, woods, fishings, mills," &c., which imports no more, but that the lands are given with these, if they be upon the lands, and are ordinarily repeated in charters, where no such things are ; so then the Marquis of Athol being only keeper of the King's forest, he hath good interest to oppose the erection of this new forest adjacent.

The Lords having considered the debate, with the acts of Parliament anent forestries, viz. act. 11, Par. 1535, and the 84th act, Par. 1579, and act 130, Par. 1592, they ordained a report to be made to the Exchequer, to this effect, that the import and privilege of forestries is, "That all cattle put in the King's forests be taken and brought to the King's prison to be escheat, two thirds to the King, and one third to the keeper of the forest" ; and if other landed men have hained forests of their own, they may escheat the goods to their own use ; and, by another act, there is a jurisdiction to the keeper of the King's forests, but no forests are allowed to private persons upon their own property, but such as have hained woods or forests (which must be inclosed with dykes) by the said first act ; and, by the second act, instead of escheating the goods, other penalties are imposed against those whose goods come into inclosures, orchards, or parks of private persons ; and that the opinion of the Lords is, that representation be made to the King against the granting of new forests, as prejudicial to the King's old forests, and to his lieges. *Fol. Dic. v. 1, p. 325. Stair, v. 2, p. 775.*

No. 19. [4669] ELIZABETH FARQUHAR v. HIS MAJESTY'S ADVOCATE.
February 9, 1753.

A husband's forfeiture does not transfer to the Crown the rents of his wife's land.
The *ratio decidendi* of this case was, that the husband having been banished for life, the wife was to be considered as a *femme sole*.

Elizabeth Farquhar laid out the price of her own estate in purchasing the lands of Pitscandlie, and took the disposition in favours of herself in liferent, for her own rent use alienably; and, in the case of her predecease, to James Stormont her husband in liferent, for payment of an annuity of 500 merks Scots; and to Francis Stormont their son, and the heirs-male of his body in fee. James Stormont the husband, being attainted of high treason in January 1747, was transported to the plantations in America, in pursuance of a condition inserted in his Majesty's pardon to that purpose. And this banishment was confirmed by act of Parliament passed in the 22^d year of his Majesty's [4670] reign, entitled, "Act to prevent the return of such traitors and rebels concerned in the late rebellion, as have been or shall be pardoned on condition of transportation"; where it is enacted, That if any of those persons shall return or come into any part of Great Britain or Ireland, he shall be guilty of felony and shall suffer death without benefit of clergy.

The lands of Pitscandlie being surveyed by the Barons of Exchequer in pursuance of the late vesting act, a claim was entered in the Court of Session by Elizabeth Farquhar to the liferent, and by her son to the fee of the lands. The son's claim was admitted to be good; but to Elizabeth Farquhar's claim to the liferent, it was objected. That the liferent provided to her, could not entitle her to the possession of the lands during her husband's life, in respect of his *jus mariti* which is forfeited to the Crown. In support of this objection it was urged, That the husband gains a freehold of his wife's estate during the coverture, and may dispose of the profits as he pleases. See Abridgment of the Law, vol. 1, p. 286; and that upon the husband's attainder, the King has the freehold during the coverture; for which several authorities were appealed to. Hales, Placit. Cor. 8vo. edit. vol. 2, p. 251. Hawkins, P. C. vol. 2, p. 44, § 6. Coke's Instit. vol. 3, fol. 19.

It was answered, 1mo, That the only case where a husband is said to gain a freehold in right of his wife, and that freehold forfeitable by his attainder, is where the wife is seized in the fee of lands. But the claimant has discovered no authority from the English law-books, that supposes that the husband is possessed of a freehold because his wife has a life-estate, or that his attainder vests any right in the king with respect to such estate. It was answered, 2do, That a person who is banished the realm for life, is considered as dead with regard to every benefit he enjoys by the municipal law of his country; and his wife is considered as a *femme sole*, and entitled to her jointure.

"The Lords sustained the claim upon the medium of the husband's banishment."

Sel. Dec. No. 40, p. 45.

No. 26. [4685] General DALZIEL v. The TENANTS of CALDWELL.
January 28, 1674.

Tacks let for grassums received by the vassal, and cases granted to the detriment of the superior, fall by the forfeiture of the vassal; but tacks let for a sufficient rent are valid against forfeiture.

General Dalziel, as donatar to the forfaulture of Muir of Caldwell, pursues the tenants of Caldwell to remove; who alleged absolvitor, because they bruiked [4686] by tacks from the forfault person, clad with possession before the forfaulture or crime, whereof there are terms to run. It was answered, That the defence is not relevant, for forfaulture returns the fee to the King, in the same manner as he granted it, without the burden of either infektment, tack, or servitude, not consented to by him; for, by the nature of all feudal rights, there is implied the fidelity of the vassal as a legal

mutative clause, and therefore contrary deeds do annul and resolve the same, & *de jure dantis resolvitur jus accipientis*; the vassal's right being void, all rights ring from him fall therewith, which holds not only in forfeiture, but in recognition, disclamation, &c. And forfeiture in this case is not as a statutory penalty, but is in effect as recognition by the delinquency of the King's immediate vassal against him by rebellion; for, if a sub-vassal of the King's had been forfault, the feus or tacks granted by him would not fall, but the King would have right by the forfeiture to the sub-vassal's fee, burdened as it was the time of the rebellion; because, by the forfeiture, the right granted by the King to his immediate vassals, did not become void, neither the sub-vassal's right, nor any right from him, but was adjudged to the King as his moveables were; and the King would present a sub-vassal to his vassal the same condition as the former sub-vassal was, with the burden of infeftments and tacks granted by him before the crime. But here the King's immediate vassal being forfault, his right, and all depending on it, is void. And it cannot be denied, that in the case of ward, the tacks could not defend against the superior, but up till the ward be ended, and then revive, because the vassal's right revives; but forfeiture or recognition are simply void, because the vassal's right can never revive; so that, as solemn infeftments fall by forfeiture or recognition of the immediate vassal, granter thereof, so much more tacks, which are but contracts of location, which are personal, and no real rights. And albeit, by the statute of King James II. tacks are declared valid against buyers or purchasers, whereby they become real rights against them; yet that statute had no effect against superiors who do purchase or succeed to their vassals. It was replied for the Tenants; 1mo, That tacks clad with possession before the crime are real rights *in suo genere*; and there is no reason to extend forfeiture against them, nor is there any parity from the extending of infeftments given by vassals, which carry away the property or servitudes which have no remuneratory cause profitable to the superior; but tacks are profitable both to vassal and superior, and for public good; for thereby tenants are induced to plant and improve their grounds, whereof they will be altogether careless if they have not standing tacks, nor will they acquire them, if they be not secure against forfeiture and recognition; and it is a public interest not to incite tenants to follow their masters in rebellion, which they will the more easily be induced to do, if their masters rebellion shall not only forfeit but his right his tenants right; wherein if they find themselves secure, they will not be induced to follow him, but rather suffer him to forfeit himself alone; seeing he cannot prejudge them if innocent; [4687] and that this hath been the constant practice and opinion of this kingdom, is clear from this, that it cannot be shown that a donatar of a forfeiture of recognition did ever remove a tenant by any sentence; and, on the contrary, Craig, l. 2, dieg. 10, §. 206, asserts, that tenant's tacks are valid, albeit the setter *in jorisfacturam incurret*; and Lethington observes the same to be so found in the case of Home of Manerston v. the Tenants of Oldhamstocks, in anno 1570, No. 24, p. 4684, as appears by the decision produced, bearing the debate from the parity of infeftments, and in that case he mentions another decision before to the same effect. Neither is there any way to validate tacks against forfeiture or recognition, seeing there is neither custom nor style of confirmation of tacks, as there is of infeftments. 2do, Whatever might be pretended against lucrative tacks for an inconsiderable duty, to the great prejudice of the superior, in the same way as he is prejudged by infeftments; yet tacks set for a competent avail of the lands, as they were worth the time of the set, or upon grassums equivalent to the ease, must stand effectual against the superior; because as to these they are *necessariæ et ordinariæ administrationis*, wherein the vassal, before any crime, acts profitably both for himself and his superior; and without which lands cannot be improved, as in the case of tacks set by a tutor, which stands valid after the tutory is ended, if set for a just avail. It was duplied, That nothing can be pretended here from custom, but we must recur unto the ground of law, *resoluto jure dantis, &c.* And though tacks have not been called in question, that was the favour of donatars, and custom is not inferred from negatives; and as to the practice, it is old and not authentic; and Balfour, whose practices are known, hath observed a contrary decision; * and there is good reason to extend forfeitures in a time wherein rebellion hath been frequent. It was triplid, That Lethington's

* All that appears in Balfour, relative to the case alluded to, will be found p. 4685.

practiques are as authentic as Balfour's, which doth not mention any debate, whether the tack there in question was for a small duty to the prejudice of the superior and all the reasons adduced for tacks, militate for all tacks, although for an elms duty, which have not been accustomed to be confirmed, yet no doubt they may be confirmed.

The Lords found, that tacks set to tenants, who were innocent clad with possession before the crime, and set for a just avail, as the lands were worth the time of the set, and for an ordinary endurance, were valid against forfeiture, but sustain not tacks set for grassums, received by the vassal, and easements granted to the detriment of the superior; and for instructing whether the tacks in question were for the just avail, the Lords granted mutual probation to either party.

Fol. Dic. v. 1, p. 313. Stair, v. 2, p. 258.

No. 4. [4788] JOHNSTON v. JOHNSTON. March 7, 1579.

The pursuer and defender being in the same jurisdiction, action may proceed before their own judge, though the thing in question be within another jurisdiction.

There was an supplication given in be one Johnston, burghess of Edinburgh; that where he was persewit be another Johnston burghess in the samen, before the Provost and Bailies of the said burgh, to flit and remove frae certain field land not in the jurisdiction of the said Provost and Bailies, therefore desyrit the matter to be advocatit. It was reasonit be the Lords, that in respect they were both burghesses, *et quod actio sequebatur forum rei*, there should no advocacy be grantit, because the parties were not prejudgit when everie ane of them was convenit before their awne Judge competent. To this was answerit, That albeit the parties were both of one jurisdiction, yet the lands lay not in the same jurisdiction whereof the parties were, *et sic ratione rei de qua agitur* the action ought to be persewit before the Judge in whose jurisdiction the lands lie, *prout in cap. licet extra de foro competenti, et multo clarius et specialius, C. 3, tit. 19, in L. ultima, ubi in rem actio exerceri debet*. The Lords would not grant advocacy, and ordainit the parties to use their defences, and fand that the Provost and Bailies might be Judges competent in such causes.

Fol. Dic. v. 1, p. 326. Colvil, MS. p. 280.

No. 12. [4791] LEES v. PARLAN. November 12, 1709.

A soldier may be cited at the place where he resides, though he has not been 40 days there.

James Parlan having been entertained at bed and board for three years together, by James Lees, merchant in Cashel, in the county of Tipperary in Ireland, and afterwards taking on to be a soldier in Colonel Ferguson's Cameronian regiment; and Lees having got no payment, he pursues him before the bailies of Perth in March 1702, where the regiment then lay quartered, for £32 Sterling, as his aliment foresaid; and Parlan being personally apprehended, is holden as confessed, and decreet pronounced against him, and thereon an adjudication is led of some acres belonging to him, lying near the town of Glasgow, dated in November 1703. Parlan the debtor, dying in Flanders, one Duncan Parlan, his cousin, serves heir to him, and pursues a reduction of the foresaid two decreets, one constituting the debt, and the other of adjudication; and against the last, offered to prove he was dead long before the pronouncing of it; and a commission being directed to Flanders, it was this day found proven by the clear testimonies of his fellow-soldiers in the same company and regiment with him, that he died in June 1703, and they were at his burial; whereupon

the [4792] Lords reduced the adjudication, as pronounced after he was dead, and so null. But Parlan, the heir, was nothing the better of this, so long as the decret of constitution of the debt stood ; for, though Lees lost the bygone accumulations, yet he could adjudge the same land of new. So Parlan repeated his reasons of reduction against the first decret, and *primo loco* insisted on this, that he offered to prove that he was *alibi* the time of the said decret ; and Lees offered to prove he was actually then at Perth, and accordingly led a probation, which amounted to this, that the town officer deponed, he cited him personally apprehended, and his procurator declared, that he was employed to compear for him, and did take up the process, and acquainted him that the debt and account were referred to his oath of verity, and he refused to go to the court and swear, so that decret went out against him. Some contended his being there was not sufficient to found the bailies' jurisdiction over him, but it was still *a non suo iudice*, unless it were proven he was there 40 days before, which makes a domicil ; but the Lords thought soldiers had no fixed dwelling, but must remove at their Captain's order, unless they be in garrison or winter quarters ; and therefore found it sufficiently proven, that, at the time of the citation and decret, he was at Perth. Then he repeated his other reasons of reduction, 1mo, That the decret was null, being by an inferior judge in time of the vacance, without a dispensation from the Lords. Answered, 1mo, Magistrates of royal burghs need no dispensation, but hold courts all the year, as is known in Edinburgh and many other places. 2do, By custom they sit without dispensation till the 20th of March and August, and this was on the 7th of March, and so needed none.—The Lords repelled the nullity. 2do, Objected, this was a pursuit at the instance of one out of the kingdom, and no mandate, commission, or factory from him. Answered, Ought to be repelled, for, 1mo, The account subscribed by Lees was produced, which was a sufficient mandate, and Perezius *ad tit. cod. de postulando et de procuratoribus* says, the having and producing the pursuer's writs implies a tacit mandate. 2do, There is a factory now produced, which, if it had been called for, would have been given in to the process.—The Lords repelled the objection. 3tio, Alleged, the account was most exorbitant, being £10 Sterling a year for this poor man's aliment, the half being enough for him.—The Lords would not loose the decret for this, but declared they would restrict and modify it. 4to, Objected, that the Bailies committed manifest iniquity in refusing to ordain the pursuer to give his oath of calumny on the libel and account. Answered, 1mo, This was plainly sought *animo protelandi*, the pursuer not being on the place, but living in Ireland, and being *in facto proprio*, it could not be an oath of calumny, but of verity ; and he being made judge of the account, by being referred to his oath, it was more just he should have compeared and deponed, than humorously to insist on the pursuer's oath ; and yet he shunned to appear himself, because he durst not upon oath deny the verity of the account. 2do, The pursuer produces a second extract of the same decret, making no mention, that the oath of calumny was so much [4793] as sought.—The Lords found this no nullity, unless he had been cited to give his oath of calumny ; but taking notice of the disconformity of the two extracts, contradicting one another, they ordained the solicitors to cause cite Graham, the clerk of Perth, to answer for that malverse in his office ; and if he cannot clear himself, then to be fined and censured by the Lords.

Fol. Dic. v. 1, p. 326. Fountainhall, v. 2, p. 525.

No. 22.

[4812] LAMB v. HEATH. March 11, 1624.

Action to affect heritable subjects belonging to an Englishman situated in Scotland, may be prosecuted in Scotland.

In an action of improbation pursued by James Lamb v. Ietitia Heath, who was an Englishwoman born, and ever remaining in London, for improving of her right of a tenement of land in Edinburgh, whereto she claimed right by comprising and sasine ; the Lords sustained this process against her, albeit she was a stranger born and bred, and dwelling ever in England, because the subject of the action was for land within

Scotland, whereto she claimed right, which could not be decided but by the Judges in Scots causes, and so *ratione rei* found that she was subject to the jurisdiction of this realm. The action here was real, but if it had been personal, they had not been Judges competent.

Act. NICOLSON & LAWTRIE.—Alt. HOPE & MOWAT—Clerk, SCOT.

Durie, p. 130.

No. 25. [4814] HEPBURN v. MONTEITH. July 3, 1627.

A Scotsman, residenter in another country, and remaining there *animo remanens*, if he have goods or gear or lands in Scotland, he may be convened at a creditable instance in Scotland.

Auchinleck, MS. p. 314.

No. 27. [4815] WILLIAMSON v. HAIGIE. November 28, 1635.

Magistrates of towns and other inferior judges have jurisdiction *ratione rei sitæ* as to the right of lands and houses within their bounds, though the defender dwell not within their jurisdiction, he being cited by letters of supplement granted by the Court of Session.

One Williamson having obtained decret against Haigie, indweller in Perth, before the Bailies of Cupar, for removing from a dwelling-house in Cupar; which being suspended, because it was *a non suo iudice*, seeing the defender dwelt in St. Johnston, and so was not subject to the jurisdiction of the Bailies of Cupar; and it being answered, That the process and sentence should be sustained, being for removing from a house within burgh, to the which the Magistrate of the burgh is sole and only Judge, albeit the party defender therein dwelt not within their liberty; seeing they had summoned the defender, by virtue of the Lords letters, granting them warrant to summon the parties, albeit they dwelt not within their territories; for *ratione rei* they are Judges to them, and this is the inviolable custom within burgh, so to proceed in the like cases; and in respect of the warrant foresaid of the Lords letters, and perpetual custom of the burgh, the decret ought to be sustained. And the other answering, That the Lords letters are impetrated *periculo petentis*, and cannot be a warrant to an act, which otherwise in law is reprobate; for, albeit *ratione rei*, the Magistrate *ubi res sita est* may be Judge; yet that holds in law only, when the [4816] party is apprehended within the territories of that Judge, and is not kept by the laws of this kingdom, where there is a sovereign and superior supreme judicatory, where such actions may be pleaded, and where all parties, within whatsoever subaltern judgment in the realm, may be both convened and sentenced; and, if this ground were maintained within burgh, then of the like reason outwith burghs in all sheriffdoms, one Sheriff may proceed against parties in other sheriffdoms not subject to his court, which were to confound all judgments, and greatly should prejudice parties; notwithstanding of all which, the decret was sustained, and the custom within burgh, and warrant of the Lords letters was allowed.

Act. MOWAT.—Alt. BARCLAY.

Fol. Dic. v. 1, p. 327. Durie, p. 779.

No. 32. [4818] JOHN HALDANE, Esq., Collector of his Majesty's Customs at Prestons v. The YORK BUILDING COMPANY. December 29, 1 .

In an action at the instance of a Scotsman against the York Building Company, the defenders objected to the competency of the jurisdiction. The Lords, in respect of the Company's having an estate in Scotland, repelled the objection.

Mr. Haldane having borrowed £3000 Sterling from the York Building Company, and as a security deposited with them £6000 Sterling of their own capital stock; he made an agreement with the Company about the time the £3000 became payable, that if that sum should be paid in Scotland, such payment should be accepted in discharge of the above-mentioned security. A bill was in consequence of this agreement accepted by Mr. Haldane, and duly paid to the Company's managers in Scotland; but the Company not having transferred the £6000 capital stock to Mr. Haldane or his trustee, he brought an action before the Court of Session against the Governor, Directors, Managers, and Assistants of the said Company for the value of the said £6000 capital.

The defenders excepted to the competency of the Court, upon the following grounds.

1mo, That they did not reside within the territories of the jurisdiction of the Court of Session, but at London, and were thereby subjected to the Courts of England, according to the rule, *actor sequitur forum rei*.

2do, Since the pursuer in this case was insisting for a transference to a share of the Company's stock, this by their rules could not be done but in their books; and therefore it ought to be craved only in that place where these were.

3tio, The defenders being pursued as administrators to a Company, they were not obliged to answer but in the place where the administration was committed to them, as in the case of tutors, executors, and others entrusted to offices; [4819] and they adduced a late decision, the Marchioness of Annandale v. her Husband's Creditors.*

It was answered by the pursuer, to the first, That the Company's acts and contracts are as effectual in Scotland as in England: The agents authorised by the directors treat for and in behalf of the Company in Scotland, and have a proper office there; the Company have purchased a considerable property in Scotland, and thereby are become vassals mediate or immediate of the Crown, and in consequence convenable before the Courts in Scotland, wherever they may happen to reside, and that whether the question immediately concerns their estate in Scotland or not; otherwise no debt contracted by the Company in England could be recovered upon their estate in Scotland, since decrees in England are no manner of foundation for adjudications, arrestment, or poinding in Scotland.

To the second it was answered, That the action was not for delivery of stock, but damages for not delivery, which are prestable here; and though the action were for delivery, yet it might be executed in England, by transferring in the books according to the decree given.

It was answered to the third, That the Company were pursued, and as a body corporate, in point of suing or being sued, have the same capacity as any person in the realm, and so daily sue and are sued here. As to the case of the Marchioness of Annandale, she was convened as administratrix of a subject of moveables, for which she could only be exonerated in the court where she had found caution to be accountable.

The Lords sustained process at the pursuer's instance.

Reporter, LORD POLLOCK.—Act. DUN. FORBES & RO. CRAIGIE.—Alt. J. BOSWELL & WILL. GRANT.

Fol. Dic. v. 3, p. 239. Edgar, p. 137.

* See General List of Names.

No. 49. [4835] MESSRS. ASHTON, HODGSON, and Co. of London, Merchants, and their Attorney v. SARAH MACKRILL, Widow, and CATHARINE MACKRILL, Daughter of the deceased John Mackrill of London, Woolstapler, and their Attorney June 17, 1773.

Arrestment *jurisdictionis fundandæ causa* of effects in this country, belonging to a foreigner, at the time of his death, used by another foreigner, his creditor, to which he brought an action of constitution and payment against the deceased widow and daughter, as his representatives, held to found a jurisdiction to the Court of Session, to pronounce decree of constitution against the widow, executrix appointed in her husband's will, who, in pursuance of it had taken out letters of administration; and, though not confirmed according to the Scots form, was maintaining actions against the debtors to the executry in this country, and likewise was a party in multiplepointings brought by them.

The pursuers being creditors upon certain receipts, or notes, granted to the said John Mackrill of London, which were due at the time of his death; and [4836] finding that there were sundry sums due to him by different persons in Scotland; in order to affect this fund, they used in the hands of these debtors an arrestment *jurisdictionis fundandæ causa*. The letters of arrestment narrated their grounds of debt, and that they were about to bring an action before the Court of Session against Sarah Mackrill the widow, and Catharine, the daughter of the said John Mackrill, as being his executrix, or otherwise representing him; but, as Sarah and Catharine Mackrill were not natives of this country, and not subject to the jurisdiction of the court here, therefore it was necessary to have letters of arrestment *jurisdictionis fundandæ causa, &c.*

Thereafter, the pursuers brought their action against the said Sarah and Catharine Mackrills, and again arrested on the dependence. The action concluded, that it should be found and declared, that the debts therein narrated are just and lawful debts due to the pursuers; and also, that the defenders ought to be decerned to pay them: But, when the pursuers came to insist, they stated, that their debt, though ascertained by writing, needed, however, a constitution by decree; till which was obtained, they could not confirm, nor get a preference in any way established upon the goods in question; and they confined their demand at present to such decree of constitution, *cognitionis causa contra hæreditatem jacentem*.

Objected by the defenders; Although arrestments *jurisdictionis fundandæ causa*, for the purpose of entitling the user of such arrestments to bring an action against the owner of the goods so arrested, are authorised by the practice of this country; yet, as this form of arrestment was an innovation, introduced on grounds of expediency, it ought not to be extended further than it can be shown to be supported by practice and precedent; *Peckius, de jure sistendi*, cap. 2, § 7. No instance has occurred of an arrestment of that kind being used after the death of the person to whom the goods arrested belonged, in order to found an action against his representatives; and the defenders do maintain, that such arrestments can have no manner of effect until, at least, the goods so arrested shall be taken out of the *hæreditas jacens* of the defunct, and the property of them be legally and completely vested in the said representatives, against whom the action is intended to be brought; for it is the right of property in the goods arrested that alone determines against whom an action may be brought in consequence of such arrestment.

In the present case, the defender, Catharine Mackrill, does in no shape represent her father, either active or passive; and, although the other defender, Sarah Mackrill, was appointed sole executrix of her husband, by his last will, and may, in consequence thereof, proceed to vest these effects in her own person; yet, until the necessary steps for that purpose are taken, it cannot be said that she is the proprietor of these effects: they still remain in *hæreditate jacente* of the defunct; and, as it is not pretended that she can be brought before the courts of this country on any other medium, than that of her property being arrested *jurisdictionis fundandæ causa*, it is clear, that the present action, which [4837] only proceeds on an arrestment of debts due to her husband, is totally incompetent. Though these debts might have been arrested prior to his death, for the purpose of bringing an action against himself, the arrestment sub-

quent to his death can have no effect to found an action against another person, whatever right that person may have to make up a title to them.

Answered ; In the first place, supposing the property not to be vested in the defender, as it is clear that, if Mr. Mackrill himself were alive, the pursuers would have been entitled to use arrestment, and obtain decree against his goods found in this country, so they must be equally liable to such arrestment, and such decree, after his death ; as a man's effects must be equally liable to be affected by the diligence of his creditors after his death as well as before it. In the case of a native, no doubt, his death makes a variation as to the form of procedure, though his effects remain as much subject to his debts after his death as during his life. But, in the case of a foreigner, his goods, when found in this country, can only be attached by such an arrestment as the pursuers have used, whether he be dead or alive. After his death, and before his effects are taken up by his representatives, these goods are by no means *nullius* ; they are in his *hæreditas jacens*, and that, in the eye of law, *sustinet personam defuncti* ; the consequence of which is, that they must be affectable by his creditors ; and, as the only method of affecting them during his life was an arrestment, *jurisdictionis fundandæ gratia* ; so that must be the only method of affecting them after his death, while his representatives abstain from them, and at the instance of a creditor whose debt needs constitution. If such arrestment were not competent after death, the consequence would be, that no goods in this country belonging to foreigners deceased, could be attached by their creditors, which would manifestly be both inexpedient and unjust.

Again, supposing the defenders were not amenable to this Court, that would be no reason for refusing the decree which the pursuers now desire. In this case, the jurisdiction of the Court is founded by the arrest, or, to speak more properly, by the effects being in this country. The daughter and widow of the defunct have been called in the usual form, that they may have an opportunity to object to the debt ; as they have not done so, the pursuers ought to have a decree *cognitionis causa*, because the want of jurisdiction in this Court over the defenders, is no objection to such decree going out, as it will not contain any thing personal against them.

But, 2do, Though the pursuers have hitherto argued on the supposition, that the property of the debts in question were not vested in the person of the defender, the widow, that is truly not the fact ; for she was appointed executrix by her husband's will, has proved that will in England, and administered in consequence of it. As, by her husband's will, the widow is appointed executrix and administrator of the whole estate, partly for behoof of her daughter, and partly for her own behoof, it is clear, that the property of the effects is vested in her, without the necessity of confirming here ; and so it has been [4838] found by this Court, particularly in the case of Lawson *contra* Kello, No. 48, p. 4497 ; and that the defender herself is of that opinion, will appear from her own conduct.

3tio, The defender, the widow, is amenable to the jurisdiction of this Court, at the instance of the pursuers, and which she cannot be permitted to decline, on the principle of reconvention. She has brought actions in this Court against all the debtors her husband had in this country, and, among others, those in whose hands the pursuers have used arrestments ; whereon, they have raised summonses of multiplepoinding, in which they have called both her and the pursuers. As, therefore, the widow has brought actions as a pursuer, she cannot decline the jurisdiction of this Court, when actions are brought against her as a defender ; at least, it is clear, she cannot decline it in the process of multiplepoinding, at the instance of any of the debtors whom she herself has attacked ; nor at the instance of the pursuers, against whom she has occasioned a process of multiplepoinding, by bringing process against the debtors in whose hands they had arrested. In this multiplepoinding, it is certain she cannot avoid to appear and compete ; and it is a consequence, that this Court must have a jurisdiction over her in the pursuers' process of constitution against her ; and that she cannot elude that decree, by pretending that has she no *forum* in this country.

Replied ; This argument proceeds totally upon a mistake of the meaning of the *jus reconventionis*, which can never take place, except where the parties to both suits are the same. It may be safely admitted, that, if the persons against whom actions have been raised before this Court, in the name of the executrix, had any counter-claims against her husband, they may insist upon her answering to these claims before

this Court; but the pursuers are in a very different situation: She has brought action against them, nor has she chosen any Judge in this country to determine questions between her and them. It is impossible, therefore, that they can establish any *forum* against her *ex jure reconvencionis*; and it is of no consequence, that, in character of executrix to her husband, and trustee for the purposes of his will, she has brought actions in this country to recover debts due to him by persons living to whom she had not in her power to call to an account in her own country. That by no means put it in the power of a third party to force her to appear before the courts of this part of the kingdom, unless it shall appear, that some other steps have been taken sufficient to subject her to the jurisdiction.

"The Lords repel the objection to the jurisdiction of this Court to pronounce the decree of constitution craved against Sarah Mackrill, the widow; and remit the Ordinary to proceed accordingly."

Reporter, MONBODDO.—Act. WIGHT.—Alt. M'LAURIN.—Clerk, ROBERTSON.

Fol. Dic. v. 3, p. 240. *Fac. Col.* No. 71, p. 171

No. 55. [4845] ROBERT SCOTT v. MARA ELLIOT, and her Husband for his interest
December 9, 1797.

An English administrator residing in Scotland may be sued there.

Charlotte Armstrong, in 1760, prevailed before the Commissaries in a declaration of marriage, legitimacy, and divorce, against John Elliot, brought in her own name and that of Mara Elliot, their infant daughter. The defender was likewise found liable in £10 a-year for the aliment of the latter, till she should attain pupillarity.

About this time John Elliot went to England, where he afterwards resided, till his death in 1786. He left some personal property there, which, in consequence of letters of administration from the Prerogative Court of Canterbury, was vested in Mara Elliot, who had always lived in Scotland.

Robert Scott, the second husband of Charlotte Armstrong brought an action against Mara Elliot, as representing her father, and her husband, for the sum awarded by the decree in 1760 for her aliment. The defenders, *inter alia*, objected, that as the only ground of action against Mara Elliot was her having administered to her deceased father in England, she could only be called to account in the courts of that country where the defenders offered to appear in any action to be brought against them. 11th November 1796, Douglas, Heron, and Company v. Grant's Trustees, No. 10, p. 4602. They farther stated, that there was the more reason for sustaining the objection, that, from John Elliot's long residence in England, every claim against him and consequently against his representatives, ought to be decided by its laws.

"The Lord Ordinary repelled the objection to the competency of the action."

On advising a petition against this interlocutor, it was

Observed on the Bench; The judgment of the House of Lords, in the case of Douglas, Heron, and Company v. Grant's Trustees, was not meant to alter the rule fixed by the case, Morison v. Ker, No. 107, p. 4601, but went on special circumstances, the trustees being chiefly resident in England, the trust-estate subject only to the law of that country, and a Chancery suit actually in dependence for the distribution of it.

The Lords unanimously refused the petition, without answers.

Lord Ordinary, CRAIG.—For the Petitioner, D. DOUGLAS.—Alt. MONTGOMERY.
Clerk, HOME.

D. D.

Fac. Col. No. 50, p. 115.

No. 2. [2] ELISABETH ANN WYCHE, and ATTORNEY v. CHARLES BURREL BLOUNT.
June 27, 1801.

The jurisdiction of the Commissaries sustained in a process of divorce for adultery, the summons having been executed against the defender personally, when resident with his regiment quartered in Scotland; although the marriage had been irregularly celebrated at Gretna Green; the parties were English; had lived together only in England, and the crime was committed there. An improbative certificate subscribed by the celebrator and parties, with a reference to oath of the defender, that the certificate was genuine, held competent evidence of marriage.

Elisabeth Ann Wyche raised an action of divorce before the Commissaries of Edinburgh, against Captain Charles Burrel Blount, which was executed against him personally when residing at Musselburgh, where his regiment was quartered, founded on the following statement.

The parties are English. Their parents being mutually averse to their union, they were married at Gretna Green in 1786. They immediately returned to England. Their parents were reconciled. They lived openly, and were universally considered as man and wife, and had four children. In 1792, the defender deserted the pursuer, and has since been guilty of adultery.

No appearance was made for the defender.

The Commissaries allowed a proof, which was taken by commission in England, and established the cohabitation of the parties; the birth of the children; the desertion and subsequent conduct of the defender, all as libelled. Upon advising the proof, "The Commissaries (20th February 1801) having considered and compared the libel with the proof, found it not proved, either that the marriage of the pursuer or defender, who are not Scotch but English by birth, was celebrated in Scotland, or that they cohabited in Scotland, as husband and wife any time after their marriage, or that the defender has had any sufficient or settled residence in Scotland, or even that the crime on which the divorce is founded was committed in Scotland; therefore found, that the action is not competent in Scotland, and ought not to have been brought before this court; and dismiss this process for want of jurisdiction."

[3] Along with a petition, the pursuer produced the following certificate of the marriage:

Grtnay Green, June 10th, 1786.

"This is to sertfay to all persons, that may be scurned, That Charles Blount from Salisbury, and Elisbith Ann Wycihe from the same plesse, both comes before me, and declares themselves to be both single persons, and is now mareyed be the way of thee church of Scotland, as day and det abuve mentioned, by me.

"DAVID M'FARSON.

"C. B. BLOUNT.

"ELIZTH. ANN WYCHE."

The Commissaries, not considering this as sufficient evidence of marriage, "allowed the petitioner to prove her allegation, that a marriage was actually celebrated between the parties in Scotland."

The pursuer referred this fact to the oath of the defender, and also that the certificate was genuine.

The Commissaries, "In respect of the particular circumstances of the case, which are fully explained by the interlocutor, of date the 20th of February last, found the mode of proof offered in this minute incompetent."

But the Lord Ordinary, after reporting a bill of advocacy to the Court, remitted to the Commissaries, with instructions to sustain their jurisdiction in this case, in respect the summons was executed against the defender when resident in Scotland, and possessing a domicile there: Find it competent to refer to the oath of the defender, the authenticity of his subscription at the certificate of marriage produced, and that said certificate is genuine; admit the said reference, and grant commission accordingly."

Lord Ordinary, MEADOWBANK.

No. 4. [4860] WARDROP v. FAIRHOLM and ARBUTHNOT. December 19, 1744.

An assignation of a claim of damages, after arrestment of the same claim before it was liquidated, held to be fraudulent.

James Grierson and James Gairns, merchants in Edinburgh, brought an action in the Court of Exchequer against John Macnaughton collector of the customs at the port of Anstruther, for an unlawful seizure made by him of some goods belonging to them, and obtained a decree for damages and costs of suit; which fund became the subject of a competition amongst their creditors.

[4861] Their cause came on in Candlemas term 1741-2, and the verdict and final determination was obtained in Whitsunday term 1743.

In August 1742, Fairholm and Arbuthnot arrested in the hands of Macnaughton on June 14th, 1743, Grierson and Gairns assigned their claim of damages, with all the might follow thereon to John Wardrop, writer in Edinburgh, for the behoof of the creditors therein mentioned; and this was intimated on the 15th, and Alexander Arbuthnot and Company arrested on the 17th.

Mr. Macnaughton raised a multiplepoinding, in which the Lord Ordinary "preferred Fairholm and Arbuthnot *primo loco*, and Arbuthnot and Company *secundo loco*, both in the sum decreed for damages, and that for costs of suit."

Pleaded, in a reclaiming bill for Mr. Wardrop, The arrestments were laid on before the judgment in the Exchequer, by which only Mr. Macnaughton became debtor, and before the costs were incurred, and consequently longer before they were taxed by the proper officer. Arrestments do not affect *acquirenda*; and here the damages were plainly a posterior acquisition by the decree of Exchequer, and which Grierson and Gairns could have given up at any time, by desisting from the action; and as the costs were not laid out at the time of the arrestments; so to insist for a preference on them, is a manifest injustice to the other creditors, since these costs were taken out of the debtor's other subjects not arrested, and which ought to have gone amongst his whole creditors. A parallel case occurred, *Menzies v. Graham*, No. 95, p. 770, where the Lords preferred an assignation, posterior to an arrestment, of a subject confirmed by the cedent after the arrestment.

Answered, That an arrestment is proper during a dependence; every subject of a debtor is affectable by diligence; and here arrestment was the only proper diligence; and it were odd that the same subject should be capable of being assigned, and not of being arrested. The decision cited does not apply; an executor till confirmation has no right; and therefore the assignee after confirmation, was justly preferred to the arrester before it.

2dly, The assignation was by a bankrupt *in fraudem creditorum*; he was under diligence by horning and caption at the instance of the respondents; and by the tenor of the assignation, all creditors that arrested, or did not pass from their arrestments, are excluded from any benefit thereof. It was found, that a bankrupt could not bring in all his creditors alike, in prejudice of other diligence, *Snee and Company v. the Trustees of Michael Anderson's Creditors*, No. 242, p. 1206; and *Earl of Aberdeen v. the Trustees of Blair*, No. 244, p. 1208.

"The Lords found the assignation reducible on the act of Parliament 1621, there being diligence by horning at the instance of Fairholm and Arbuthnot, and Arbuthnot and Company, prior to the granting the assignation; and therefore adhered."

For the Assignee, CROSS.—For the Arresters, MAITLAND.—Clerk, GIBSON.

D. Falconer, v. 1, p. 30.

No. 13. [4874] DRUMMOND of Logie-Almond v. the KING'S ADVOCATE. July 18, 1749.

A disposition not delivered, had no clause of dispensation. It contained several clauses said to infer simulation. The disponent was afterwards attainted. The disposition was not sustained.

James Drummond, commonly called Duke of Perth, disposed his estate, 11th June 1743, in trust, for uses mentioned, to Thomas Drummond of Logie-Almond, and died 11th May 1746.

An act of Parliament past 19th Geo. II. attainting the said James Drummond of high treason, from and after the 18th of April 1746, if he did not surrender himself to justice on or before the 12th of July that year.

His estate was surveyed by the Barons of Exchequer, and claimed by Logie upon the disposition; for that he not having lived till the day appointed for surrendering, when the attainer was to take place, never was attainted, and consequently his deed effectual for carrying it.

Answered, 1st, The disposition was never delivered, nor contained any clause dispensing with delivery, and was conceived in terms conveying the estate immediately, not on the death of the granter, and is therefore not a valid deed, but the estate, if James was not attainted, past from him to his brother John, and is forfeited by his attainer contained in the same act.

[4875] 2dly, James was attainted, from the 18th of April, if he did not surrender, which he did not; and this resolute condition being fixed upon by the statute, cannot be supplied by any equivalent. It will not be pretended, that captivity or grievous sickness during the time limited, would have barred the effect of the attainer; and yet these, as well as death, would have made his surrender impossible.

Replied, The condition was suspensive of the attainer, which was to take place on the 12th of July, if he did not then surrender, as from and after the 18th of April; all attainders drawing back to the date of the treason whereon they proceed, which for that reason is laid in the indictment, whatever be the time of pronouncing the sentence; and here the statute has fixed upon that day as the date of the treason.

The Lords found, That James Drummond having died on the 11th day of May before the 12th of July 1746, on or before which day he was allowed by the said act of attainer to surrender himself, and submit to justice, he the said James Drummond was not attainted by the said act; and therefore found that the Court had no jurisdiction to proceed further in judging of the validity or effect of the disposition from James Drummond to Thomas Drummond the claimant *in hoc statu*; leaving the claimant to follow forth his right thereupon as accorded.

December 1, 1750.—It having been found, as is observed 18th July 1749, That James Drummond of Perth was not attainted; and therefore the Court had no jurisdiction to proceed further in judging of the validity, or the effect of the disposition from him to Thomas Drummond of Logie-almond the claimant, in that state, leaving him to follow forth his right as did accord; the Barons of the Exchequer caused the estate to be surveyed, as having fallen by the death of James to his brother, commonly called Lord John Drummond, and so forfeited by his attainer, in the same act of Parliament.

Drummond of Logie-almond claimed again on the disposition made, 16th June 1743, to him for the uses therein-mentioned.

Answered, The disposition was not delivered, but left in the hand of Mr. James Graham of Airth the disponent's lawyer. The claimant had acknowledged he never saw it, though the disponent had told him, in the year 1745, as he thought, that he had either granted, or was to grant such a disposition; and Mr. Graham told him there was a disposition in his name. That a copy was sent him in 1747, as he thought, by Lady Mary Drummond, the disponent's sister, and it was proposed to him, that an exhibition should be used in his name, which he agreed to. By this exhibition the deed was recovered. It contained no clause dispensing with delivery. It assigned the mails and duties from the Martinmas following; so that, of its nature, it needed delivery for its completion, and was ineffectual without it.

[4876] 2do, It was a simulate deed, to evade a forfeiture for the rebellion, which disponent had then conspired to raise ; it proceeds on this narrative, that he was of a tender constitution, and had thoughts of retiring from the world, to prepare a future state, and that his only brother was a soldier in a foreign service, whereby capacity of succeeding might be uncertain ; and that he was owing considerable sums of money ; and disposes the estate for the payment of debts, which were or might be owing by him, or his predecessors ; providing that the disponent should pay to him an annuity of £200 Sterling during his life, and after his death to his brother during his life ; the remainder after which is disposed for the use of his uncle, called John Drummond, and his heirs ; whom failing, of his sister and her heirs ; whom failing, of the disponent ; provided that if he should alter his resolution, and marry, there should be paid to his Lady an annuity of 10,000 merks Scots, exclusive of his *jus mariti*, the estate redeemable by the heirs of his body, and the heirs of his brother's body for £200 Sterling. This deed was kept in his own power ; and the possession of the estate retained ; he continued by it proprietor of the estate, which was redeemable by his children, and the profits whereof were to be payable to his Lady, exclusive of his *jus mariti*, that they might not be affected by his forfeiture ; and as it was also redeemable by the children of his brother, whereby the succession was preserved in its order ; it was not a giving away, but retaining the estate.

Pleaded for the Claimant, first, in objection to the survey, it was without foundation proceeding on the act vesting the forfeited estates in the King ; whereas, if the disposition were out of the question, and this the undoubted estate of John Drummond, it was not forfeited, though the King might claim it as escheat, which was a different title ; for he having failed to surrender, stood attainted from the 18th of April 1746, after which his brother dying, the estate, which never was his, was never forfeited ; but as he was incapable of holding it, became escheat ; for so the English lawyers distinguish, Coke 1, Inst. f. 13, and Hales H. P. C. part 1, c. 27, f. 356. New Abridgement of the Law of England, part 2, title Forfeiture, f. 585. This is more than a distinction of expression, the effects being different ; forfeiture accruing to the King, but escheat to the superior. If an estate should fall by descent to the children of an attainted person, after his death, there could be no forfeiture, but yet it would be escheat, as they could not succeed through him whose blood was corrupted ; but if the attainder was for a felony or treason, from which no corruption of blood did follow, they would be capable of succeeding, and there would be no escheat.

Pleaded for the Advocate, Whether this estate is forfeit or escheat, will not give the claimant any title ; he is pleading not only *super jure tertii* but *super jure adversarii*, for the King takes by both titles ; he is in this case superior, and may chuse which title he will use. Supposing the estate were held of a subject, and escheat, the property would fall to be determined by the law of [4877] Scotland, as it is only with regard to forfeitures that the English law obtains ; and by the Scots law escheats likewise fall to the King ; but this estate is forfeited ; it being enacted 26th Hen. VIII. that all effects belonging to a person guilty of treason, at the time thereof, or any time after, should be forfeited ; and by many acts to the same purpose, particularly the late vesting act. 2dly, John Drummond, according to what was pleaded and found, with regard to the attainder of James his brother, was not attainted till the 12th of July, before which it was competent to him to have surrendered.

Replied, The claimant is entitled to plead, that the estate was not forfeited ; for then the survey will be found to have been irregular ; and he will be left to avail himself of his disposition at common law ; and it will be his interest so to do ; as if it labour under any defect, it may be found sufficient to bar an escheat, though not a forfeiture ; for the Lord only takes escheat for want of a tenant ; and a deed will be sustained to entitle to take the estate, that would not exclude the complete right of another. If an infant grant a feofment, the deed is not good against his heir, but will exclude the Lord claiming by escheat, Coke's Reports, part 4, f. 250, and 251, and part 8, f. 538. But in forfeiture the King takes in his own right, and will not be barred by a defective disposition. The act 26th Hen. VIII. makes several subjects fall under forfeiture, which before did not, but does not make an estate be considered as forfeited, which before was escheat ; and has not been so understood by any lawyer since. The mention of subjects that should belong to the attainted person at any time after his treason, is made with regard to the time intervening betwixt that and his attainder, and comprehends also subjects acquired by him after that, by singular titles ; for

though succession falling to him is escheat, these are forfeit, Coke, 1st Instit. f. 2, A. & B. The vesting act regards future trials, and so vests in the King subjects that should fall to the persons that might be attainted before their respective attainders. James Drummond was rightly found not attainted, and yet John was attainted from the 18th of April; for during the time allowed for surrender, it could not be said whether a man was attainted or not; but when that was determined, the 18th of April was by the statute put for the date of the attainder.

Duplied, The Claimant's insisting that the date of the attainder was the 18th of April, does not agree with his interpretation of the 26th Hen. VIII. that subjects which should belong to a person at any time after, should be forfeit, was to be understood of the time intervening betwixt his treason and attainder, since attainders at common law draw back to the commission of treason; and therefore, by his way of arguing, a succession opening after the treason, is after the attainder.

Triplied, A traitor forfeits his personal estate, from his being found guilty; but his lands upon attainder, which is drawn back to the treason in the indictment; and lands acquired by singular titles, even after attainder, are forfeited, as has been said.

[4878] Observed, That the Court of Exchequer was supreme; and the Court of Session had no jurisdiction to determine whether they had made an illegal survey; that there was no need of finding it, for that the estate fell to John before his attainder, and was forfeited; that if this estate were not forfeited, it might be doubted if the Crown could come at it at all; for as escheats of this sort were not known in the law of Scotland, there was not consequently any method for taking them up; that it had not been shewn the distinction of escheat and forfeiture obtained, when lands held of the Crown; probably it did not; as no examples appeared in the books, of estates being taken up after the removal of the incapable person; which else probably would have occurred: That a personal right excluded not forfeiture, as no incomplete right did in England.

Pleaded for the Claimant, The deed needed not delivery; it was of the nature of a settlement of succession; it was delivered to Mr. Graham, who was lawyer for all the parties benefited, and had the custody of no other of James Drummond's papers; it can be proved a scroll of it was laid before him in 1742, so that there was no need of delivering it to him for his advice; and the subsequent delivery could only be for the use of the disponees. It can also be proven, that when James Drummond wanted afterwards to borrow money, Mr. Graham objected he could give no security after that deed, and other circumstances to shew the intent of the delivery.

Answered, The necessity of delivery to complete the deed, appears from the nature of it mentioned above; and the claimant does not condescend on any thing relevant whence to infer it was delivered; but if it had been, it cannot be effectual, from the marks it carries of simulation; and even in 1742, it can be proved the disposer was in a conspiracy.

Replied, There ought to be a distinction betwixt a deed's being simulate or collusive, and done from a criminal motive; the motive might be James Drummond's treasonable intentions; but yet it was no simulation, when he really on that account gave away the estate; which would have been good against his own forfeiture, if it had not been for the act annulling these deeds; but he was not attainted, and so there can be no pleading on his treason; and it was no criminal motive to take means that his estate should not be forfeited by any treason of his brother.

Duplied, If James had been loyal, he could have effectually provided that his brother's forfeiture should not carry his estate; but when he was in the same conspiracy, the making this deed, with the clauses it contains, was one act of simulation, and cannot be effectual.

Observed, The question depended on the point of delivery, which by our law was necessary to give effect to a deed, but presumed, if it was out of the granter's possession; that there might be presumptions from which the contrary would be inferred, and such there were in this case; that the condescendence offered to be proven was not relevant, as the intent of delivery to Mr. Graham was not probable by witnesses.

[4879] The Lords found that John Drummond, now attainted of high treason, was, upon the 11th day of May 1746, when James Drummond his elder brother died, capable to take by descent from his said elder brother; and that the estate of Drummond in question, did then descend by James's death to John Drummond now

attainted, and was forfeitable and forfeited by the treason and attainder of the John Drummond; and found that the trust disposition to Thomas Drummond Logie-Almond claimed upon, was not sufficient to exclude the forfeiture of the John Drummond; and therefore found the estate acclaimed, forfeited by attainder, and dismissed the claim.

Act. R. CRAIGIE, FERGUSON, & *alii*.—Alt. THE KING'S COUNSEL.—Clerk, GIBSON.

D. Falconer, v. 2, No. 87, p. 93, and No. 169, p. 199.

* * This judgment affirmed on appeal. See No. 74, p. 4766. See APPENDIX.

No. 22. [4892] JAMES WATSON v. DAVID MAULE. January 19, 1743.

A purchaser of lands at a voluntary roup, is not liable to a personal creditor arresting the price; if he prove that the purchase was made on account of the seller.

Hepburn of Keith having exposed his estate to a voluntary roup, he prevailed on David Maule to offer on his account, for the same, to a certain extent, and by a letter obliged himself, if the lands fell into Mr. Maule's hands, to relieve him of the same.

It happened that Maule was the highest offerer, so the lands were declared to belong to him; and, in terms of the articles, he enacted himself to pay the price. James Watson being creditor by two bills of Mr. Hepburn's arrested the price of the lands in Maule's hands.

[4893] In the furthcoming Maule laid his defence upon the above letter; and insisted that he was only a name, an interposed person for Mr. Hepburn himself; and as the letter would stand in bar of any claim that Mr. Hepburn himself could have made on his account of this fictitious sale, it behoved to be equally available against any of his creditors.

Answered, The defence was of the nature of an extrinsic and personal exception, that the defender was bound by the enactment to pay the price; and though, in a question betwixt the parties themselves, they may be mutually repelled *personali exceptione, quia in pari casu potior est conditio possidentis*; yet, where third parties are concerned, the law ought to give no countenance to any paction or agreement that is *contra bonum et æquum*, for that would be establishing wrong by law. And upon this principle it is, the pactions of this kind, *contra fidem tabularum nuptialium*, have never been deemed effectual. But, supposing the defence should be sustained, it ought not to be admitted, but upon a full indemnification, and payment of the damages and expenses the pursuer has sustained. No man can avoid the obligation to repair the damage which his own fraudulent practices have occasioned to third parties; and it is not upon the arrestment he pleads to be thus indemnified, because the decret of furthcoming can go no further than the debt upon which the arrestment was used; but that the defender ought not to be allowed to plead this defence, but upon payment of the pursuer's expenses.

Replied, The demand of expenses was contrary to form, and the nature of the action itself; by which nothing can be recovered, but the debt for security whereof arrestment was used; and surely the expense of this process is no part of that debt; nay, if the defence were repelled, there could be no ground for claiming expenses, unless the defender were found calumnious in making it. Besides, there is no reason to believe the defender acted out of any wrong view in the matter: He did not so much as know Mr. Hepburn's circumstances, or that the necessity of his affairs required a sale of his estate; neither can the pursuer suffer any thing by what the defender did; for Mr. Hepburn is more than able to pay all his debts; and, so far as the pursuer has expended money for recovery of a just debt, he has good action against his debtor for such expenses; nay, he offers to prove, that the pursuer knew, before the date of the arrestments, that the defender had only offered at the roup on account of Mr. Hepburn; so that the expense the pursuer has laid out since that time, must be considered as owing to this mistake in law.

The Lords sustained the defence, but ordained the reclaiming petition to be answered as to the expenses.

C. Home, No. 222, p. 365.

No. 31. [4909] *The Creditors of JOHN POLLOCK v. POLLOCK.* January 21, 1669.

In a reduction of a bond of provision, in favour of a son at the instance of a creditor, whose debt was posterior to the delivery, the Lords refused to sustain the reasons of reduction upon the act 1621, but ordained the pursuer to condescend, if he had any particular ground of challenge on the head of fraud; and he having condescended that the son was forisfamiliarized and sufficiently provided before; that the term of payment was after the father's death, bearing no interest in the interim; and that the bond remained latent betwixt the parties; the Lords reduced the bond, and preferred the creditors, and even the relict, in so far as she was an onerous creditor.

The Relict and Creditors of John Pollock having intended a reduction upon the act of Parliament 1621, of a bond of 5000 merks granted by the defunct John, to his son; it being alleged for the son, That the pursuers were only constituted Creditors by decreets recovered against the Relict and executors after the death of John; the Lords found, that where by the decreets the debt was proven to have been prior to the bond in question, they might reduce upon the act of Parliament; but where the debt was posterior to the bond, they found that they had no interest to pursue a reduction thereupon; but prejudice to the Creditors to reduce or declare the same null upon any special reasons, as that the bond was latent, and never made known, or not delivered, or was *donatio mortis causa*.

February 12, 1669.—The foressaid reduction, mentioned 21st January last, being again called, the pursuer did insist for reducing of the said bond granted to the son of the first marriage, upon this reason, That it was a latent deed [4910] granted by a father to a son who was otherways sufficiently provided; and notwithstanding thereof, Creditors were *in bona fide* to lend their money to the father, who could not be prejudged by any such deed, albeit it was prior to their bonds. The Lords did sustain the reason at the instance of true and lawful creditors, upon these specialities, that the bond was only granted before the father's death, and that it was only payable after the father's death, and was neither registrated nor inhibition served thereupon, but kept latent during that time; so that if such bonds were sustained, it would open a door to all fraud, and the undoing of all trade and commerce; and therefore preferred lawful creditors; but likewise found, that the son, upon this bond, was preferable to the Relict and bairns of the second marriage, as to what they might crave *jure relictii*, or bairns' part of gear; but not in so far as they were creditors by the contract of marriage; and the Lords ordained this to be inserted in the books of sederunt, to be a leading cause in all time coming.

Fol. Dic. v. 1, p. 334. Gosford, MS. No. 91, p. 33, and No. 115, p. 42.

No. 32. [4911] *STREET v. MASON.* February 27, 1672.

A disposition by a merchant to his infant son of his whole estate, without a reserved liferent or power to burden, was found fraudulent, and presumed to have been done of purpose to cheat his correspondents, who had traded with him before the alienation; and their debts, though posterior to the disposition, were found to affect the estate. The defence, that the son's sasine was registered, was repelled, the defenders being foreigners.

James Mason, merchant in Edinburgh, having begun a correspondence and traffic with William Street, merchant in London, did, after the said correspond-[4912]-ence infest his eldest son James Mason, a child of two years old, in certain lands belonging to him in the country, and did thereafter continue the commerce with Street till the year 1665, and then gave bond for £500 Sterling, with a clause of infeftment in an annualrent out of these lands, whereupon Street was infeft; but finding that the son was infeft before him, he raised reduction on this reason, that the son's infeftment was

a most fraudulent deed, done by contrivance and machination of the father, to ensnare and deceive this pursuer; who was under correspondence and commerce with him in an uninterrupted tract of trade, begun before the son's infetment, and continued till Mason broke. It was answered, That the reason of reduction is no ways relevant, because the ground of reduction is more than two years after the son's infetment; and though the law of this kingdom hath been most favourable to secure creditors against fraudulent alienations by the act of Parliament 1621; yet it is justly limited to creditors who were creditors the time of such alienations; but no fraud can be said to be done to those who then were not creditors; and if posterior creditors might quarrel anterior rights, though granted to children, it would utterly incapacitate parents to provide their children, either for livelyhood, employments, or marriages; and there never hath been an example sustained of this kind in this kingdom. It was replied for the pursuer, 1mo, That there being a continued tract of traffic between the pursuer and old Mason, begun before the disposition to the son, it may justly be taken jointly; as the Lords have ordinarily interpreted the statute, of excluding probation by witnesses, of merchant accounts after three years; if it continued in a current account, it was to be esteemed as one account, and that the three years were to be reckoned from the last furnishing, though the beginning of the account might have been for many years before; so here the credit given by the pursuer to Mason at the beginning of the correspondence, is the cause of all the posterior furnishings; in the same way as if at the beginning Mason had given a bond, mentioning the credit he had received from Street, and obliging him as an honest correspondent, thankfully and honestly to pay all furnishings he should receive. 2do, Albeit this reduction could have no ground from the act of Parliament 1621, yet that act is not derogatory to the common law of nations; whereby all deeds done by fraud, contrivance, and machination, whereby parties have been ensnared and deceived, are null and void; and by the civil Roman law, such fraudulent deeds are annullable *per actionem paulianam*, as done *in fraudem creditorum*, though they be posterior creditors; neither doth the pursuer pretend that all dispositions in favours of children are quarrelable by posterior creditors, but only such dispositions as can have no rational ground for which they are granted, and are evidently presumed to be done of design to ensnare persons, and induce them to give credit, and yet be excluded by these fraudful deeds; and there was never a grosser fraud or machination than this in question, as appears in these points. 1mo, It is by a father to his apparent heir. 2do, Upon no convenient occasion for the son's use, he being an infant of two [4913] years old. 3tio, The disposition produced does neither reserve the father's liferent, nor a power to affect or burden, as is ordinary in such dispositions; and it is most probable, that there hath been another disposition, of the same clauses, of the same date, that the sons' infetment might equally relate to either, and to be made use of as the father saw cause. 4to, The pursuer is a stranger, and could not in the continuance of a trade, be always searching registers. 5to, Mason a few years after this disposition became a most notorious bankrupt, his debt doubling his estate; so that there is no doubt but at the very time of the son's disposition, the father knew himself insolvent; and therefore the disposition could have no other interpretation or design, but to be a reserve when his credit should be broken; and thereby parties continuing to trade with him were ensnared. 6to, The father continued in possession, and granted infetment both to this pursuer and others, as if the son's infetment had never been granted, or it had been in his power; all which evidence the fraud to be exceeding gross; and upon far less grounds the Lords reduced a bond granted by John Pollock to James his son, payable at the father's death, though the son was no infant, but out of the family; and preferred the father's posterior creditors, who continued to trade with him till then; and found the bond, and an adjudication thereon null, as a fraudulent latent deed, upon the 12th of February 1669, No. 31, p. 4909. The defender duplied, 1mo, That there is nothing here to shew an anterior debt; and that though *actio pauliana* did extend to posterior creditors, yet that was only in case of a contrivance betwixt the disponent and acquirer, which cannot be in this case, the acquirer being an infant. 2do, This kingdom having public registers, by which parties that contract may know their debtor's condition, even strangers ought to have constituted a procurator here to enquire into the condition of their correspondent; especially seeing the ground of this reduction is a bond bearing infetment in land, and not in the ordinary way of traffic; and these registers, not being among the Romans, or elsewhere, though they extend fraud to

posterior creditors, we ought not, who have a special statute fixing the limits of fraud ; neither can the son's disposition here be called a latent deed, as Pollock's bond was, it being a public infeftment holden of the superior, and the sasine registered.

The Lords laid hold upon two points in this debate, viz. That the father knew himself insolvent at the time of granting the son's disposition, and yet continued his traffic with the pursuer as before ; and that it was probable that the father had another disposition of the same date, reserving his liferent, and with a power to burden ; and therefore they ordained Mason's count-books to be produced, that it might appear whether his debt did exceed his credit ; and allowed witnesses *ex officio* to be adduced for instructing the condition of his estate at that time ; and likewise the writer and witnesses in this disposition, and any other witnesses ; whether there was another disposition than this produced, having reservations therein contained.

[4914] July 2, 1673.—Mr. Street and Mr. Jackson being creditors to James Mason elder in sums extending to above £2500 Sterling of principal, which became due by a trade and correspondence that was entered into, and begun before his granting a right of the lands of Ponbeath and others, in favour of Mason's son, pursue a reduction and declarator of the son's infeftment, as being made and granted by a most gross and fraudulent contrivance, in defraud and prejudice of the pursuers, who of before were entered into a public trade and correspondence with Mason elder, and by the result and product whereof, he is debtor to them in the foresaid sum.—It was alleged for Mason younger, That the pursuers' reduction and declarator cannot be sustained, because the ground of their debt being founded upon a bond, and the furnishing of merchant-ware, it appears both by the date of the bond, and by the furnishing of merchant-ware, that the same was posterior to the infeftment quarrelled ; and the Lords, by their former interlocutor, did go the utmost length in sustaining the bonds, albeit posterior, in so far as it could be proven that they were granted for furnishing of merchant-ware prior to the son's infeftment. 2do, The law of this kingdom hath fully provided for the interest and security of creditors, by the act of Parliament 1621, and which does only proceed in the case of anterior creditors, to whose fraud and prejudice rights are made, without true, just, and onerous causes ; and besides, public registers are established, that every one may know the condition of him with whom he contracts ; and it is evident, by an account produced, that Mason elder was not debtor to the pursuers the time of the granting of the infeftment to his son, except £49 Sterling ; and Mason elder not being debtor, nothing could impede why he might not have granted a public infeftment in favour of his son, of all, or any part of his estate ; and besides, it is known that the foundation of credit betwixt merchants is not in contemplation of real estates.—To which it was replied, That the pursuers' reduction and declarator ought, notwithstanding, to be sustained ; and the pretences insisted on are of no weight to justify or defend such a detestable, fraudulent, and unheard-of contrivance, as Mason elder hath made use of in settling and conveying his estate in favour of his son, and in the mean time drawing in his hands the means and estate of the pursuers, and of others who were acting *bona fide* upon the faith, assurance, and credit of a public trade and correspondence, that was begun before the pretended infeftment granted to the son, and continued without any interruption ; and by the result thereof, the vast debts and sums that are due to the pursuers become justly due ; and of which there can be no ground of law or justice to sustain the son's fraudulent infeftment upon the reasons after-mentioned, which your Lordships are desired seriously to consider, with regard to the pursuers, their private interest, and to the public credit, honour, and justice of the kingdom, and to the security of trade and commerce ; and with regard to that equity, candour, and ingenuity which the laws and customs of all nations have owned, allowed, and established in cases betwixt merchant and merchant. And therefore it was replied, 1mo, [4915] That albeit by a former interlocutor, your Lordships sustained the bonds, in so far as it could be proven they were granted for anterior furnishing ; yet upon a new debate, principally upon this ground, that the pursuers debt was the result and produce of a trade and correspondence begun before the son's infeftment, your Lordships, by a new interlocutor, did ordain, before answer, Mason elder his count-books to be produced, that it might appear what his condition was the time of making the disposition to his son, and if the same was granted of design to frustrate his creditors ; as also, that witnesses should be adduced by either party, for proving the continued

trade betwixt the pursuers and Mason elder before the son's right ; and granted a commission to Sir Robert Murray and Mr. Erskine, John Young and Mr. Donaldson, take inspection of the pursuers their count-books ; and accordingly, there is a report under the hands of the said commissioners, and witnesses have been adduced at the points of the said interlocutor ; by which it is supposed, it is clear and evident that there was a trade and correspondence entered into betwixt Mason elder and the pursuers, before the son's pretended infetment ; and that Mason elder, before the granting thereof, was a person of no visible fortune, but on the contrary was under great difficulties to maintain any appearance of credit, and which he struggled with for a time, upon a fraudulent design to ingross the means and estate of the pursuers ; and as to what methods, frauds, and contrivances, and other circumstances and qualifications thereof Mason elder made use of to conceal the son's pretended infetment, and in the mean time, to act and behave himself as heritor, the pursuers refer to the report and depositions, and humbly desire your Lordships seriously to consider and peruse the same ; and from which the pursuers do shortly insist upon the grounds of law and justice after-mentioned, why no regard ought to be had to the son's pretended infetment, in so far as the same may be any ways prejudicial to the payment of the pursuers their just debts ; for, 1mo, Mason elder having entered into, and being stated in a public trade and correspondence with the pursuers, which was not interrupted nor broken off ; although, as is obvious, the method and state of accounts behoved to alter ; whatever is the result and product of the said correspondence, is in law to be considered with regard to, and dependence upon the beginning of the said correspondence ; whereupon to question all fraudulent infetments made by Mason elder in favour of his son ; and which is no incroachment upon law, or upon the act of Parliament 1621 ; but on the contrary a just, rational and necessary interpretation thereof, and whereby the pursuers are to be looked upon, and reputed as in the case of anterior creditors ; in regard the natural quality of the debt is a result and product of a correspondence, and was entered into, and begun before the son's infetment. 2do, It was obvious and apparent, that in such trade and correspondence, the state, condition, and method of accounts do often and necessarily vary, according to the several payments made ; but which is not respected where the said trade and correspondence continue and are not interrupted nor broken off ; it being certain, and may appear by the [4916] report, that former payments are still the foundation of new credit ; so that what can be more absurd and prejudicial both to private and public interest, and to the security of trade, and to the faith, and trust, and ingenuity of merchants, than to allow, that after the entering upon such public trade and correspondencies, it should be lawful betwixt the payment of old debts, and taking credit for new, to make and grant fraudulent rights and infetments in favour of children ; which, if it were sustained, it would inevitably tend to the ruin and subversion of all trade and commerce ; and would lay such a foundation for fraudulent contrivances, as no man could be secure against the same. 3tio, Cases of this nature should be judged with regard to natural equity, and the laws and customs of nations, and the exuberancy of trust that is necessary and usual betwixt merchant and merchant, and without which the freedom and interest of trade and commerce cannot be maintained ; and upon which account your Lordships, in other cases, have so interpreted the laws and customs of this kingdom, as might be consistent with the laws and customs of nations, and equity and interest of trade ; as, for example, the act of Parliament anent prescription of merchants accounts, hath been found not to proceed, where the case was a continued trade and correspondence ; and bills of exchange have been sustained to be obligatory, without the solemnity of witnesses ; and orders for payment thereof sustained without the solemnity of intimation against posterior assignees and arresters ; and annual rent sustained betwixt merchant and merchant, without paction ; and many others that might be instanced ; and there is much more reason in this case, and which indeed is no unwarrantable extension, but a just, necessary, and rational interpretation of the act of Parliament 1621 ; and wherein both the public justice of the kingdom, and the security of trade and commerce are absolutely concerned. 4to, By the laws and customs of all nations, and by the common law, to which the act of Parliament 1621 relates, and which in itself was most just, and founded upon excellent reason : albeit *actio pauliana sive revocatoria*, which is the same with our reductions upon the act of Parliament 1621, was only competent to anterior creditors ; yet both that

law, and natural reason and justice, did extend the remedy of that action to posterior creditors, wherein it did appear that their means and estates were ingrossed *animo fraudandi*, and that prior rights were made of design to secure their estates, that posterior creditors might have no way to get satisfaction of their just debts; and as to which the common law is clear, as may appear by Jason in his *Tractat de actionibus Rubr. de actione Pauliana*; and where both he and others condescend upon the presumptions and adminicles that are sufficient to evince that the posterior debts were contracted *animo fraudandi*; but indeed all the presumptions that any lawyers ever thought on, are far short of the pregnant and unanswerable qualifications of fraud and contrivance, which are made appear in this case, "That Mason elder did, after the granting of the son's infettment, ingross the means and estates of the pursuers *animo fraudandi*," which will be evident upon consideration and perusal of the report and depositions of the witnesses; and [4917] if the common law and natural reason did think fit to allow and grant a remedy in the case of posterior debts, that were absolutely posterior to the rights quarrelled, how much more in this case, where the pursuers' debts cannot be looked upon as in the case of posterior debts, having a dependence *ex causa præterita*, and being the result and product of a correspondence that was entered into before the granting of the son's infettment. 5to, Besides the grounds above-mentioned, which beyond doubt are more than sufficient in law and justice to canvel and redargue such a fraudulent infettment, the pursuers do add and conjoin this ground farther, that it will appear by the probaton, that Mason elder was a person that had no visible estate, and that he was not in a capacity to buy lands, and it cannot be made appear that he had any means and estate the time he bought the same; and seeing it appears by the probaton, that his great trade was about the year 1662, law and reason presume, that seeing it cannot be otherways condescended upon, what way he did pay and satisfy the price of the lands, which he hath fraudulently conveyed to his son, that therefore he hath paid and satisfied the same with the pursuer's means and estates; and as the seller being creditor, the pursuer would have good interest to have reduced the son's infettment, upon the act of Parliament 1621, even so the pursuers, out of whose means and estates it is satisfied, have good interest to pursue a declarator, that the son's infettment may be burdened and affected with the debts. To which it was duplied, 1mo, That the son's public infettment is opponed. 2do, Though the common law did allow *actio pauliana* to posterior creditors, yet that was only where the receivers of such rights were *participes fraudis*; and besides, there is *dispar ratio*, seeing in that law posterior creditors had no remedy to prevent or discover their hazard against latent, private, and fraudulent rights made of before; whereas by our law there is a clear remedy, viz. the public registers; and it doth not concern Mason younger what fraudulent contrivances were made use of by Mason elder to conceal the infettment after it was granted, seeing by the granting thereof he had *jus quæsitum*, and which the pursuers might have known. 3tio, It cannot be pretended for Mr. Jackson, that he is so much as in the case of a trade and correspondence entered into before the son's infettment, as will appear by the report; and though he was, it is not relevant, since it appears the time of the granting the son's infettment, Mason elder was not debtor to the pursuers, and that merchants turn bankrupts, to the frustrating and disappointing of their just creditors, is no novelty in this and other kingdoms; and the act of Parliament anno 1621, is the only remedy, and doth only proceed in the case of anterior creditors; and it were a dangerous preparative to extend the same upon points and circumstances of favour, which may occur in many cases as well as in this. Whereunto it was triplied, That the pursuers repeat and oppone the solid grounds of law and reason after mentioned. For 1mo, Albeit the law of the kingdom hath introduced public registers, yet that is for further security, and doth noways derogate from any remedy that was introduced by the common law, to which [4918] the act of Parliament 1621 relates, and is founded upon evident reason, and natural justice. 2do, The act of Parliament 1621, doth not less militate in this case, than in any other case whatsoever, in respect the debts pursued for were the result and product of a correspondence begun and continued before the fraudulent infettment granted to the son, as is evident by the report, both as to Mr. Street and Mr. Jackson. 3tio, Even by the common law, it was necessary and requisite, that there should be *insinuatio donationum*, which was judicially made, and was more solemn than the case of public registers, and was no less recorded than these; and yet that law upon natural

reason and justice did allow a remedy to posterior creditors against fraudulent right where it appeared the posterior debts were contracted *animo fraudandi*; so that pretence of registers is of no weight, and of as little weight in this case as any, the father and son's names being the same, so that little could be known from public registers; and how little was known even to his Majesty's subjects living within the kingdom, and his door neighbours, will appear by the probation, where the son pretended infetment was not so much as known to any; but on the contrary the father represented heritor, and behaved himself as such, by all deeds of property and possession, and by granting infetments to these pursuers and others, and was by a detestable contrivance he did under disguise, pretending that it would wrong his credit, if any did know that he granted the same infetments, making use of the fraudulent contrivances in the way and manner of granting thereof, as will appear from the probation. 4to, It is a groundless and ridiculous assertion, to pretend that by the common law, *actio pauliana* was not competent to posterior creditors, except where the receivers were *participes fraudis*; because then persons might have had a clear way to have defrauded the law, by making of rights in favours of pupils, idiots, and furious persons; and the argument is retorted, for there is here much more reason, seeing Mason elder was the sole actor and contriver, the son being a pupil, and not capable; and the distinction in the common law, as may appear by any common paratitle, is singly this, that where the alienation was *ex causa onerosa*, it could not be questioned, unless the receiver had been *particeps fraudis*; but where it was *ex causa mere lucrativa*, *fraus in eventu* was sufficient, whether there was *animo fraudandi*, or not, which is in itself most just and consonant to the act of Parliament 1621, and to the practise thereupon. 5to, The pretended infetment granted to the son, was by a most detestable, gross, and unwarrantable contrivance; and if this preparative were sustained, it were impossible there could be any faith, or trust, or security for trade or commerce; and albeit in this and other nations it is not denied but there be too many instances of broken merchants, yet that is in regard of the secret and fraudulent contrivances of their estates, which cannot be discovered; but it is without all example, that a visible estate should be conveyed, and enjoyed by a bankrupt's son, upon pretext of such a fraudulent infetment, to the prejudice of the father's just creditors; and your Lordships would consider the ho-[4919]-now, interest, and public justice of the kingdom; and there can be no case of greater consequence to the trade of this kingdom, as is known, being chiefly founded upon credit; and if such a hellish contrivance as this should be sustained, it behoved to break off and subvert all hope and expectation of credit; and upon the matter it were to authorise and give encouragement for the committing of fraudulent contrivances; persons being secure that they might settle their estates in favours of their children, without being liable to their just creditors; and as the inconveniences both to public and private interest, are very great on the one hand, so there is not the least shadow of any inconveniency upon the other; the case being very singular betwixt merchant and merchant, and depending upon an anterior trade and correspondence; and the circumstances and qualifications of fraud and contrivance so high and violent; that they cannot concur in any case wherein law and reason, and the public justice of the kingdom, are not concerned to give redress against the same.

The Lords having considered this debate, and the writs and testimonies produced, they found that there was a trust and correspondence betwixt Street and Mason elder, begun in anno 1660, and constantly continued till the furniture and bonds whereupon this pursuit was founded; and likewise that the same correspondence was begun betwixt Jackson and Mason a day before Mason's disposition to his son, and a month before the son's sasine; and that Mason did produce no count-book to instruct that he had any means to purchase this right for his son, and pay his creditors, or any means to satisfy the pursuer's debts, but that he was commonly looked upon as having no such estate; and therefore the Lords found that the reasons of reduction upon this gross fraud and contrivance, viz. that the disposition by the father to his son was done by a merchant, who carried on a public trade and correspondence, and could have no rational intent, but to deceive the pursuers, being strangers, and his correspondents, the son being an infant, and no obligation upon the father to infet him, neither being provided for his marriage, or for a stock when he were of age; and being almost the father's whole estate, and more than he had free, without reservation of the father's liferent, or power to burden, and the father

carrying constantly himself as creditor ; therefore the Lords reduced the disposition, and declared Mason the father infamous for so great a fraud ; but the Lords did not decide severally upon any of the grounds, either upon the account that these debts were to be drawn back to the first trust, or upon any other, but upon all jointly. See No. 111, p. 1003. See REDUCTION. *Stair*, v. 2, pp. 79, 197.

No. 33.

[4923] REID v. REID. January 9, 1673.

A disposition by a father to an infant son, even reserving the liferent, and although the son's sasine was registered, was found fraudulent, and in prejudice of posterior creditors ; the father having continued ostensibly proprietor, and the public register not having at the time been regularly kept.

Reid of Ballochmilne pursues a reduction against Reid of Daldilling, of an infeftment granted by his father to him (when he was an infant) of his estate, reserving his father's liferent, upon this reason, that the father continued in possession as proprietor, and that the infeftment to the son was a latent fraudulent right ; so that the father thereafter having borrowed money from the pursuer, and his cedent's, who neither knew, nor was obliged to know any such private latent right ; as to them the said right is null, being base, never clad with possession, and did never become valid till after the father's death, that the son entered into possession ; so that the creditors having contracted *bona fide*, before the right to the son became valid, the same cannot prejudice them : And albeit it were not null till possession, yet it is fraudulent, in so far as it is latent ; for the father's possession reserved hath never been accounted sufficient to validate a base infeftment to a child in prejudice of creditors. The defender answered, That a base infeftment is a valid right in its own kind, and is not null till possession ; albeit by statute a more public right, though posterior, be preferred thereto ; for, without all possession, it would exclude creditors arresting. It was also found to exclude the terce, in the case of *Bell v. Lady Ruthersford*, January 27, 1669, No. 2, p. 1260. And as to the reason of fraud, because it is latent, the law hath never taken notice of creditors contracting after infeftment, but only of anterior creditors, as is clear by the act of Parliament 1621. 2do, There can be no reason of reduction upon fraud, as being latent, because the son's sasine produced is marked as registrate in the register of sasines of the shire of Ayr ; so that the said register being appointed for publication of rights, and being a more competent way to publish it than a proclamation at the cross, it cannot be said to be latent ; and if such infeftments were found simply null against posterior creditors, the great mean of preserving the families of the kingdom, and providing of second children, should be overthrown, and all the settlements made thereupon annulled ; for, where there is an improvident heritor, the ordinary remedy for preserving his family, and pro-[4924]-viding his children is, that friends prevail with him to infeft his eldest son, reserving his own liferent, which hath been always thought sufficient by a base infeftment, and is more easily procured than a public infeftment, which casts that heritor out of the remembrance of his family ; whereas a base infeftment hinders not his heir to enter heir to him, as to the superiority : Neither will parties be easily induced to interdyte themselves ; nor is that so secure for the family, and is very disgraceful for the party ; and it is much more frequent for fathers to infeft their younger children in parcels of land, reserving their own liferent ; and if posterior creditors can annul the same they signify nothing. It was replied, 1mo, That the base infeftment is always called and reputed in law a private infeftment, albeit it be registered ; and that creditors are neither obliged nor accustomed to search registers when they lend their money ; and that this reason is not founded upon the act of Parliament 1621, but upon the common law, that all fraudulent rights are null ; and if such infeftments to children were sustained, it would open a door to all fraud of creditors ; neither is this method necessary, for, if parents would secure their children, they may do it by a public infeftment. 2do, The registration of this sasine can be no ground to take off the latency thereof ; because, by the sasine produced, it is clear that there is no leaf of the register whereunto it relates, as it ought to do, and that therefore it hath not been registered ; and it is well known that Mr. William Caldwell, who

hath marked it as registrated, did for many years make no register of sasines, that he was turned out by the English, and Mr. James Weir put in his place, was not authorised by the Clerk-register after the King's return; so that this pretended registration did neither oblige nor capacitate the creditors to know the same and so it remained still latent and fraudulent.

The Lords found, that seeing the sasine produced related to no leaf in the register, that the marking thereof did not take away the fraud and latency; unless the defender would instruct that there was a register book, wherein this sasine was registrated before contracting of the debts in question; or that the creditors, before they lent their money, knew that the son was infest: And as to the general reason of being a base infestment to a son not clad with possession; if it had been duly registrated, the Lords found no necessity to decide the same; but if it behoved to be decided, many were of opinion, that, as was done in the case of the Earl of Nithsdale,* who possessed his estate upon an adjudication for a bond granted by himself, such infestments as preceded that interlocutor were found valid; but the Lords declared, that all such infestments thereafter should not defend the heirs, if they possessed thereby: So in this case, that anterior infestments to children should not be void, lest the settlements already made were overturned; but that all such infestments in time coming, if they were not public, should exclude no creditor contracting before possession; and others thought, that that required a law, that the lieges were obliged to know; but none were for annulling of bygone infestments upon that ground.

[4925] December 4, 1673.—Reid of Ballochmilk for himself, and as assignee by several other creditors, from whom umquhile Reid of Daldilling had borrowed several small sums of money in anno 1660, and thereafter finding that they could not overtake this Daldilling as heir to his father, because he was infest by his father before the contracting of their debts, and so neither heir, nor lucrative successor *post contractum debitum*; therefore they pursue a reduction of the disposition and infestment granted by umquhile Daldilling their debtor to his son, *ex capite fraudis*, as being a fraudulent contrivance, to infest the son in fee of his whole estate, the son being then an infant, and the infestment latent, whereas the father continued thereafter to set tacks, cut woods, and do all other deeds as fiar, and not as liferenter; and yet in the mean time he borrowed these sums from persons who knew not he was denuded, and saw him act as absolute fiar; which sums he borrowed when it was known to him, and all the country, that the registers of the shire were carried out of the country by Mr. William Cadwell keeper thereof into Ireland; so that by these circumstances it appears, that the son's infestment was granted by fraud and machination to deceive the creditors, and the infestment itself is base; and it was found in the case of Street v. Mason, No. 32, p. 4911, that even a public infestment taken originally by a father to his son, then an infant, was fraudulent to deceive the strangers, he having left no means or estate whereby to satisfy his credit to them; and was reduceable *ex capite fraudis*, though their debts were posterior to that infestment; and if it were otherways, a door were opened to deceive all creditors; and albeit the act of Parliament against fraudulent alienations reacheth only in favours of anterior creditors, yet it is not exclusive of a reason of fraud founded in *jure communi*, as was found in Mason's case. It was answered, That the reason of reduction is not relevant, because fraud and circumvention is never pursued, where there can be any rational or probable intent of the deed done; but here there was a most rational motive for infesting of this child in fee; because the father having received a great portion, was by his contract of marriage obliged so soon as a son should be born, to infest himself, and the son as heir of the marriage; and the father being commonly known to be a lavish prodigal, his wife's father and other friends did very justly induce him to secure his estate, by infesting his son, reserving to himself the liferent of the lands, which was above 2000 merks; and which was a sufficient ground of credit for these small sums; which liferent might have been affected by the creditors, and paid all their debts, the father having lived for several years thereafter; and the son's infestment was registrated in the register of the shire, and an extract thereof is produced; and the creditors, if they had rested on a land estate, ought to have inquired if there were registers in the shire, and if therein this infestment was registrated, and if they found no register

* See General List of Names.

they should not have lent their money without personal surety ; and as there are pretended inconveniences for creditors by sustaining such infestments, so the inconvenience is far greater on the contrary ; this being the ordinary way to preserve families, when they fall into the hands of unthrifths, who will not be induced to inter-[4926]-dict themselves, or to grant public infestments to their apparent heir, which will obliterate their memory ; whereas a base infestment will necessitate the apparent heir to enter heir to them, the superiority being retained ; nor is this case any thing like to Mason's ; who before he acquired the land to his son, had begun a trust and correspondence with the strangers, and left nothing to himself wherewith he might pay, having not so much as reserved his own liferent ; and the infestment being taken to James Mason, without mentioning son or father, and having still acted as proprietor.

The Lords found the reason of reduction by the circumstances condescended relevant to infer fraud, and to reduce the disposition, in so far as it is prejudicial to posterior creditors, viz. that the infestment was granted to a son when infant, and that the contract of marriage provided the son only to be infest as heir, and not in fee ; and that the father continued to act as fiar, and not as liferenter ; and that the registers were out of the country the time of borrowing of these debts.

Fol. Dic. v. 1, p. 334. Stair, v. 2, pp. 144, 234.

No. 34. [4927] BLAIR v. WILSON, Minister of Cultlie. January 24, 1677.

An intention to defraud creditors was found to be inferred, by granting a bond payable after the obligant's decease, if he had no heirs of his body, and redeemable for an elusory sum.

James Bisset grants bond for love and favour to the Laird of Ardblair, that in case Bisset and his brother died without heirs of their body, their heirs should pay to Ardblair the sum of two thousand and five hundred merks, redeemable by Bisset himself in his life, for payment of a penny. Thereafter Bisset borrows a sum of money from Wilson, and Blair pursues a decret *cognitionis causa* against the heir of Bisset for establishing of the debt, that he might adjudge, because Bisset redeemed not, and he and his brother died without heirs of their bodies. Wilson is also going on in diligence for adjudication, and raises reduction of Ardblair's bond, in so far as it might be prejudicial to him, a lawful creditor, on this reason, That this bond is a fraudulent contrivance and latent, which might disappoint and exclude all lawful creditors ; for by that preparative, any person may give bonds to his friends equivalent to his estate, only to take effect in case he had no heirs of his own body, whereby all creditors would be excluded, who neither did nor could know it.—It was answered, That defraud of creditors can only be extended to anterior creditors, according to the act of Parliament.—It was replied, That the remeid by that act doth not exclude the common remeid by fraud, which therefore was sustained at the instance of posterior creditors, in the cases of Street and Mason, No. 32, p. 4911, Pollock, No. 31, p. 4909, and Reid of Ballochmilne, No. 33, p. 4923.

The Lords found, That bonds of this nature could not exclude posterior creditors, and therefore decerned in favour of Ardblair, with preference to Wilson the creditor.

Fol. Dic. v. 1, p. 334. Stair, v. 2, p. 498.

* * Gosford reports the same case :

There being a mutual adjudication pursued at the instance of the Minister and Ardblair v. the Heirs of James Bisset of the lands of Balleonie, it was alleged for the Minister, That he ought to be preferred, and Ardblair ought not to come in *pari passu* with him ; because George Bisset the common debtor having bought the same lands, and not being able to pay the price, he did borrow from the said Mr. Thomas four thousand five hundred merks ; whereof he made payment to the disponers of the said lands ; and for which he did grant a bond, bearing a precept of infestment ; whereas the bond granted to Ardblair was only for love and favour ; and was most fraudulently

purchased for no onerous cause; and was only payable after the decease of Bisset, his brother, with-[4928]-out heirs; and was redeemable during their lifetime, payment of a small sum; and therefore he could not crave adjudication to come *pari passu*, unless it were with the burden of his debt and adjudication.—It was answered for Ardblair, That, notwithstanding, he ought to come in *pari passu*, because he was a prior creditor by his bonds; and albeit the term of payment was not until after the decease of Bisset, his brother, and their heirs, yet the same granter being dead, he ought to secure the same by adjudication, that he may recover payment in case of their deceasing without heirs; and so his diligence being within year and day of Mr. Wilson, they ought to come in *pari passu*, but prejudice to reduce his right upon the act of Parliament, as accords.—The Lords having considered this case, with the two bonds granted to the competitors, did find, That Mr. Thomas Wilson, as true and lawful creditor, was preferable, and that Ardblair's bond was only *pro causa*; and being for no just and onerous cause, albeit it was prior to the Minister's bond, yet that the Minister's adjudication should be decerned. And if Ardblair should insist to lead his adjudication, it should be affected with preference of the Minister's sum, and that he should only have thereby right to the superplus.

Gosford, M.S. No. 945, p. 623.

No. 36. [4929] The Creditors of WILLIAM ROBERTSON v. His CHILDREN.
February 10, 1688.

A bond of provision to children, more favourable to them than stipulated by contract of marriage, reduced at the instance of posterior creditors.

The reduction pursued by the Creditors of William Robertson of his Children's bond of provision was reported by Harcarse, viz. that it was a latent deed, never known till he broke, and so presumed not to have been delivered. 2do, It is disconform to the contract of marriage, which is in favours of heirs, and only payable after his decease; whereas this is to bairns, and adds 10,000 merks more, and is payable at their age of twenty-one, and so wants an onerous cause. Answered, They offered to prove its delivery; and that the creditors' debts are all long posterior to it. The Lords decerned in the reduction of the bond, and preferred the creditors to the children. They cited for the creditors, 10th January 1668, Bothwell of Glenconae, *voce* WRIT; Pollock, No. 31, p. 4909; 11th July 1673, Street, No. 32, p. 4911; 4th December 1673, Reid, No. 33, p. 4923.

Fol. Dic. v. 1, p. 135. Fountainhall, v. 1, p. 497.

No. 38. [4931] ROBERT M'CHRISTIAN v. WALTER MONTEITH, Merchant in London, and WILLIAM CUNINGHAM his Factor. February 10, 1709.

A reduction of a disposition of lands granted by a nephew to his uncle, was raised at the instance of a creditor of the granter, whose debt was contracted after the disposition, upon presumed fraud, that the disposition being betwixt conjunct persons, did not prove its onerous cause, but must be presumed to have been granted to protect the subject from the disponent's debts, and to have been kept latent to ensnare creditors. The Lords assolizied the defender.

David M'Christian, apparent heir in a piece of land called Monkhill, disposes the same to Robert M'Christian his uncle in 1699, and turns a merchant-chapman in England; and taking ware to the value of £40 or £50 Sterling from William Monteith, factor in London, he takes bond for the same; whereupon he causes charge him to enter heir special to his grandfather, who died last vest and seized in these lands of Monkhill; and thereon obtains a decreet of adjudication against him in February 1707. This awakens Robert, who, in July thereafter, compleats his disposition, and infests David his author by hasp and staple, and himself on the procuratory of resignation; whereupon Monteith, the adjudger, and he competing about the main

and duties of the said lands ; it was objected by Monteith, that Robert M'Christian's right was *inter conjunctos*, uncle and nephew ; and so did not prove its own narrative to be onerous, till it were otherwise instructed ; and was a latent right kept up *animo decipiendi creditores* ; and was never compleated till I had fully denuded him by my adjudication, which is some months prior to your infettment ; and so intervening betwixt your disposition and sasine, it was a *medium impedimentum* to hinder the retrotracting of your sasine to the date of your disposition ; and the Lords, on the 21st January 1669, Pollock's Creditors *contra* Pollock, No. 31, p. 4909, found the latency a great presumption of fraud ; and, although the act of Parl. 1621, against the alienations of bankrupts, mentions only anterior creditors, yet the Lords, from the common law, have allowed posterior creditors to quarrel the same, as was found in the case of Street and Jackson *contra* Mason, 2d July 1673, No. 32, p. 4911 ; where the Lords reduced a disposition he had made to his son, though their debt was contracted thereafter, and declared him infamous. Answered, You Monteith was not so much as creditor at the time of my disposition, nor for several years after ; and though you have inhibited and adjudged, yet this is all but personal, because you neglected to infett yourself thereupon ; so I having the first compleat real right, must be preferred ; and Street and Mason's case *toto cælo* differs from this ; for there a long tract of correspondence in trade preceded his infetting his son, an infant, of the same name with himself, which ensnared his creditors ; and the current trade continued after, which made them upon the matter creditors *ab ante*, [4932] though the date of their bond was posterior ; but here, David M'Christian had no trade nor dealing with Monteith for several years after his disposition to his uncle ; and so the deed could never be reputed to be done in defraud of Monteith, whose debt was not then in being. The Lords preferred the disposition to the adjudication, though perfected after the same.

Fol. Dic. v. 1, p. 334. Fountainhall v. 2, p. 490.

No. 39.

PRINCE v. PALLAT. February 24, 1680.

Found, that if a person, knowing himself to be insolvent, buy goods, which shall afterwards be arrested by his creditors, the contract will be reducible as fraudulent, and the seller will be preferable to the arresters.

In the competition betwixt Peter Pallat and Thomas Wilson his factor, and Magnus Prince, which of them had best right to some wines Peter Pallat had consigned and sent home to Arthur Udny, and which Arthur had assigned to Magnus Prince for onerous causes ; it was debated, and taken to the Lords answer, if a factor loading wine at Bourdeaux for a merchant, merely following his credit and faith, without having any effects in his hands, and the merchant breaks before tradition of the wines, whether the factor may revoke his mandate, or if the property of the wines be so fully transmitted (though they are not as yet delivered), that the same is irrevokable ; or if the seller and furnisher hath a tacit hypothec in the goods where the merchant-buyer breaks before the delivery, so as he may countermand the delivery. It seems upon the one hand that such a revokable dominion were against the liberty of commerce, and with us the seller hath no pledge in the thing sold for the price of it ; and here the factor had a remedy, if he had used it, viz. to arrest the wines until the price should be paid him. Yet on the other side, it appears very hard to hinder factors wanting effects, before tradition to alter their bills, and ordain the said wine to be delivered to a third person at their own disposal ; and there is difference betwixt *mandatum et emptio venditio*, and even *non est perfectus contractus donec de pretio convenerit, pr. instit. de emptione*, M'Gill's Practiques, 11th January 1650, Scott. See APPENDIX.

December 24.—In Peter Pallat and Thomas Wilson his factor's competition with Magnus Prince (24th Feb. 1680), the Lords found, that so soon as Pallat the factor had delivered the wines at Bourdeaux to the skipper, upon Arthur Udny's account, the *dominium* of the wines became Udny's, the factor [4933] having followed his faith, unless they can make appear that Pallat the factor was *animo doloso* induced to trust Udny and answer his bills ; and that either by Udny's oath, or by his compt-books,

he was then bankrupt and *lapsus bonis, et quod debita excedebant bona*. For the Law from thence would gather *animum fraudulentum* to cheat the factor, there being *in re*. The words were, "the Lords find that there is no hypothec by the Law of Scotland in the ware or goods for the price thereof; and repelled that allegation of Udney's turning bankrupt within three months thereafter. But find it relevant either by Arthur Udney's oath, or his compt-books, that he was then insolvent, and that his debts exceeded his estate. And find that if the wines had been bought from Udney by way of commerce, and the price paid for them, before the arrestment, in that case there could have been no vindication of the wines, unless the buyer had been *particeps fraudis*." This was for the freedom of commerce. Then Thomas Wilson offered to prove that he was bankrupt at the time; but his surest method had been to have laid on the first arrestment on the wines for the price, ere they had come ashore. I think a bankrupt's oath should not prove. He must be proved to have been bankrupt, because every one is presumed solvent and responsible till the contrary be proven.

November 7, 1682.—The competition betwixt Thomas Wilson and Bailie Prince (mentioned 24th December 1680) being this day advised, "The Lords found it not proven that Arthur Udney was, the time of the commission, bankrupt; and therefore preferred Bailie Prince."—Arthur, on his own oath, denied that he was then insolvent, and the Lords had recommended to Bailie Baird to examine his accompt-books, and to consider his condition of debt and credit; and he had reported, that he was not for some months thereafter bankrupt, and upon these grounds the Lords went.

Fol. Dic. v. 1, p. 335. Fountainhall, v. 1, pp. 87, 123, and 192.

No. 41. [4936] Sir JOHN INGLIS of Cramond v. ROYAL BANK. June 16, 1736.

All transactions of a bankrupt within three days of bankruptcy were presumed to be fraudulent.

In October 1734, a bargain was made betwixt Sir John Inglis of Cramond and Joseph Cave, for Sir John's barley of that crop; in pursuance of which bargain, Sir John sent his barley to Mr. Cave by parcels, in the months of November and December, and beginning of January thereafter. Mr. Cave's circumstances going into disorder, he made a disposition of his effects to his creditors, upon the 21st January 1735; whereupon Sir John insisted in a process, claiming the subject upon this medium. That the contract was fraudulent upon the part of the purchaser, who was at the time insolvent, and incapable to pay the price, and therefore was null *quia datus dedit causam contractui*, and the property was never transferred. Appearance being made for the creditors, it was answered for them, Fraud is not to be presumed; and a merchant, though [4937] at many periods his debts may exceed his effects, yet his continuing to trade is not *eo ipso* fraudulent, because he may entertain reasonable hopes by carrying on a profitable business, to emerge out of his difficulties, and to do justice to every one of his creditors. The Lords found it not relevant to reduce the bargain for the purchase of the barley in October 1734; that it appeared by the common debtor's books, that, at the time of the bargain he was insolvent, since he continued his trade till the 21st January, and his bankruptcy was not discovered till that time.

December 8, 1736.—The pursuer thereafter insisted, That the date of the delivery is the only period that is to be considered as to this question; for, supposing the contract fair, yet if, at the time of the delivery by which the property is transferred, the bankrupt is thinking *cedere foro*, and of giving up his effects to his creditors, it is fraudulent in him to receive the subject sold when he has no prospect of doing justice by paying the price. The Lords found the time of delivery must be the rule.

The question next occurred, What period ought to be fixed before the *cessio*, at which it may be presumed the bankrupt was meditating *cedere foro*, after which all purchases made, or delivery accepted by him, must be understood fraudulent? The pursuer insisted, That it ought to be sixty days by analogy of the act 1696. The

defender insisted, that it could not go beyond the bounds of three days, building upon the authority of several foreign lawyers, particularly Simon Van Lewen in the following words : *E contra tamen nec fides de prætio habita venditori obstat, quo minus rei suæ dominus maneat, et adhuc rei suæ vindicationem instituere possit ; si scilicet emptor dolose, biduo aut triduo antequam foro cedat, emendo merces, cum venditore contraxit, ut eum fallat.* The Lords found, that the presumptive fraud must be confined to three days before the *cessio bonorum*, and therefore found the pursuer preferable as to any barley delivered during that period. See APPENDIX. See BANKRUPT.

Fol. Dic. v. 1, p. 335.

No. 49. [4949] ALLAN, STEUART, and Company v. Creditors of JAMES STEIN.
December 4, 1788.

An insolvent person having purchased goods on credit, within three days preceding his bankruptcy, such purchase was presumed in law to be fraudulent ; but with respect to goods purchased before the *triduum*, the Lords judged it incumbent on the party desiring restitution to prove actual fraud. On an appeal, the first part of this judgment was reversed.

On 31st October 1787, Allan, Steuart, and Company, corn-dealers, entered into an agreement with Stein, a distiller, by which they engaged to purchase for, and furnish to him, as much grain as he should have occasion to consume in his distillery, for the price of which, on the other hand, he was to grant bills. Stein then, though reputed as in good credit, was in reality insolvent ; and on 23d February following he stopped payment. During the intervening period, continually, down to the day of the bankruptcy, quantities of grain, to the value of £20,000, had been furnished according to the contract, but none of the bills of lading were transmitted later than 4th February.

Immediately after Stein's failure, Allan, Steuart, and Company, preferred a petition to the Court, stating, That by concealment of his insolvency he had fraudulently got possession of their property, and therefore craving restitution, so far as the grain was still extant in Stein's custody. To this claim Stein's other Creditors objected, and (the Court having appointed the matter to be argued in informations),

Pleaded ; If the claimants, by the bankruptcy of the debtor, have suffered loss, their fate is the same as that of all his other creditors, whose misfortune any interval of time between the credit given and the subsequent bankruptcy can never alleviate. Their pretended preference then has not equity for its basis ; nor does the circumstance of the goods being still in existence, found this restitution in law.

By the sale and delivery the property was completely transferred ; the sellers' right of *rei vindicatio* ceasing, and they in lieu of it becoming personal creditors for the price. The maxim of law no doubt is, that *dolus dans causam contractui, reddit contractum nullum* ; and there was a time when the insolvency of a purchaser was held by the Court to constitute such *dolus* as to annul the sale ; as in the case of Prince *contra* Pallet, No. 39, p. 4932. But that idea is truly inadmissible in a commercial country, where it must often happen, that the fairest traders owe their prosperity and opulence to perseverance in maintaining their credit at particular periods, when, by some emergency, they may have become actually insolvent. It was therefore rejected in the case of Sir John Inglis *contra* the Creditors of Cave, No. 41, p. 4936. And from that time downwards it was never understood that the buyer's insolvency alone could void a bargain.

By a subsequent judgment in the same case, indeed, the Court annulled the sale with respect to goods furnished within "three days" preceding the bankruptcy ; but the ground of this distinction may be questioned. It is the supposition, that the determination to stop payment must have been made "three days" before that event. No precise time, however, it is plain, can *a priori* [4950] be justly allotted for such an interval, the length of which must ever vary according to circumstances, and these frequently the most unforeseen and casual. A general regulation of that kind might no doubt be expedient for saving the expense of legal discussion, in the same manner as that with respect to the sixty days antecedent to bankruptcy, during

which period no valid deed can be done in favour of any particular creditor. Such regulations are the province of the legislature, not of courts of law; and hence arose the necessity of the statute of 1696. Among the numerous instances in which the Court has decreed restitution of goods sold and delivered to persons who afterwards become bankrupt, this judgment respecting the *triduum* has not been regarded as a precedent. Nor is any similar rule known in the practice of other countries, as of England, for example, or of Holland.

At the same time it is to be observed, that as bills of lading of the whole goods were indorsed and transmitted to Stein, 19 days before his failure, there was thus a virtual and legal delivery of the goods prior to the *triduum*. For by the indorsation of bills of lading, an effectual tradition of goods on shipboard is in law understood to be made; Select Decis. 13th June 1764, Buchanan and Cochrane *contra* Swan, 10th SALE. Judgment of House of Peers in Hastie and Jamieson *contra* Arthur, 16th April 1770, *IBIDEM*; Fac. Col. 2d February 1787, Bogle *contra* Dunmore and Company, *IBIDEM*.

Answered; This claim is founded not only on the fraud of the bankrupt, but on the practicability of restoring goods still extant; an advantage of which the claimants are not to be deprived, because it is not possessed by every other creditor. Nevertheless, as their goods were delivered more on the eve of the bankruptcy than the rest, the fraud with respect to them is more glaring. It has been admitted, that fraud is a legal ground for decreeing restitution after sale and delivery; a proposition which both in general, and likewise as relative to the particular case of insolvency in the buyer, is established by numerous authorities; Stair, b. 1, tit. 9, § 14; Bankton, b. 1, tit. 10, §§ 6, 117; Erskine, b. 3, tit. 3, § 8; Principles of Equity, p. 222; Mackay *contra* Forsyth, No. 44, p. 4944; Crawford Newal *contra* Mitchell, No. 45, p. 4944; Sandeman and Company *contra* Kemp's Creditors, No. 47, p. 4947.

If however it be granted, on the other hand, that mere temporary insolvency is not a legal indication of fraud, the concession will not afford an apology to an insolvent man, purchasing on credit, at a crisis when he can entertain no reasonable expectation of retrieving his affairs. It is possible, no doubt, that supervening bankruptcy may result on a sudden from some accidental or unforeseen occurrence; but as, in the nature of things, that will comparatively but seldom happen, it is a just presumption, when this event closely follows the purchase, that it has been fraudulently in the purchaser's view. In the case of Cave's Creditors, the Court held it as a *præsumptio juris*, that fraud was committed with respect to goods delivered *intra triduum* of the bankruptcy; a rule [4951] which ever since has been considered as established, and in particular, contrary to what is said on the other side, was recognised in the above-cited cause of Crawford Newal *contra* Mitchell.

The claimants argue, that thus the Court, by making a regulation not authorised by law, would assume powers of legislation similar to those exercised in the statute of 1696. But it is perfectly agreeable to law, to judge by presumption in default of more complete proof, and here is only one instance, among the many legal presumptions which are still subject to be overthrown by superior evidence. The presumption of the statute referred to, is one, *juris et de jure*, and such as warranting a judgment in opposition to complete evidence, could not but require for its sanction an act of the legislature.

Neither do the cases that have been quoted establish a legal delivery of goods by indorsation of the bills of lading. The judgment of the House of Peers, in that of Hastie and Jamieson, was only to find "a special property" vested in the indorser, as distinguished from a full transference of the right; and the other instances respect merely grounds of preference among competing creditors.

The opinion of the Court, agreeably to the decision in the case of Cave's Creditors, which was considered as an established precedent, was, that a legal presumption of fraud, such as to annul the transaction, takes place with respect to purchases made within three days of the purchaser's bankruptcy, on whom therefore, or on those in his right, the *onus probandi* of fair dealing lies; while prior to that *triduum*, it is incumbent on the sellers to support a relevant charge of fraud.

The idea of transference by indorsation of the bills of lading seemed not to be admitted.

"The Lords found the claimants entitled to restitution of the grain delivered by them into the granaries of James Stein, within three days of 23d February 1788,

when he stopped payment, and which then remained in his possession unmanufactured."

A reclaiming petition was presented, but being advised with answers, was refused. See *SALE*.

For the claimants, *Ross et alii*.—Alt. BLAIR, MACONOCHE.—Clerk, HOME.

S.

Fol. Dic. v. 3, p. 243. *Fac. Col.* No. 48, p. 84.

* * December 23, 1790.—In this cause, in which there were cross appeals, The House of Lords "Ordered, That the interlocutors of the 11th December 1788, the 4th March 1789, and 5th March 1789, complained of in the original appeal, be reversed, without prejudice to the respondents in the said appeal, producing evidence to shew, that they were entitled to stop and retain the grain consigned to them by James Stein the bankrupt: Ordered, That the cause be remitted back to the Court of Session, to take such evidence, and hear the parties: Ordered, That the interlocutor of 5th March 1789, complained of by the cross appeal, be affirmed."

No. 59. [4963] BARBARA MACKIE and Husband v. MAXWELL, &c.
November 24, 1752.

A disposition of land was reduced, upon the dissoluteness and profligacy of the disponent, and upon the great inequality in the bargain, tho' there was neither fraud nor circumvention.

Jean Mackie, heiress of Maidland, being quite abandoned to drunkenness, which made her an easy prey to sharpers, and having thereby involved herself in much debt, was persuaded to divest herself of her lands in favours of her younger sister Barbara, who was the next heir, upon condition of undertaking the burden of her debts, and securing her in an yearly annuity. Barbara, reckoning that by this transaction she had paid the full value of the lands, brought a reduction against several persons, mostly innkeepers in Wigton, of [4964] dispositions they elicited from Jean Mackie of parcels of land lying about the town, before the pursuer's purchase. By the proof it came out, 1mo, That Jean Mackie was a habitual drunkard; that she sold her very clothes to purchase liquor, scarce leaving herself a rag to cover her nakedness; and that it was in any person's power, by bribing her with a few shillings, to make her accept of a bill for any sum, or to make her dispoise any part of her lands. 2do, That the dispositions challenged were granted for no adequate cause.

Upon these and other facts, the Court had no difficulty to find the reasons of reduction upon the head of fraud and circumvention, relevant and proved.

The singularity of this case is, that however well founded the reduction was, there was no ingredient of fraud or circumvention in the case. There was not the least evidence that Jean was imposed upon, or circumvented in any manner, nor was there a necessity for such indirect dealing. Five shillings to buy drink would have tempted her at any time, drunk or sober, to give a disposition to any subject that belonged to her. And she herself being called as a witness, deposed, that she granted these dispositions voluntarily, knowing well what she did.

Therefore fraud and circumvention must be laid aside; and then where lies the ground of reduction? It is certainly unjust to take advantage of weak persons, who cannot resist certain temptations; and to make use of such temptations to rob them of their goods. Let us examine the foundation of a judicial interdiction. It is nothing but a notification to the lieges of the weakness of the person interdicted, and to caution them against dealing with that person, unless upon an equal footing. It was therefore wrong in the defenders to take advantage of the known facility of Jean Mackie, and to elicit from her dispositions for a song, at least far under the true value.

Where a weak person makes a deed, perhaps foolish, but voluntary, in favour of any person who is entirely passive, such a deed admits of a very different construction. It is not reducible, however strong the lesion may be.

Elchies observed, That, for ought he knew, the disposition in favour of the party might be under the same challenge ; but that, as there was no reduction of it, the Court were not called upon to take it under consideration.

Fol. Dic. v. 3, p. 245. Sel. Dec. No. 22, p. 25.

No. 2. [4981] The Lady ORMISTON v. HAMILTON of Bangour. February 9, 1709.

Actio funeraria competent only for expenses that were necessary and decent, with regard to the defunct's quality, and estate descending to his heirs and executors ; but where so much free effects do not come to them, as is sufficient to bury him, the expenses of his funeral, in so far as decent and necessary, should come off the legacies.

In the count and reckoning betwixt the Lady Ormiston and Bangour, the Lady craves allowance of considerable sums paid to Sir Robert Blackwood, and others, for accounts furnished to the defunct. Alleged, No process for these, because prescribed by the 83d act 1579, not being pursued for within three years ; and seeing they were not instructed by writ, and the defunct's oath not taken thereon, law now barred them from being proven by witnesses ; so all [4982] manner of probation perishing, they were wholly extinct. Answered, Merchant accounts prescribe from the last article of the furnishing, but *ita est*, the process was raised and executed within three years of the last articles ; for, though the account was prescribed, if you reckon from the last article in my Lord Whitelaw's lifetime, yet that is not the method of calculation ; for, after his decease, there were sundry articles furnished to his funerals and family, and the last of those articles is within the three years, and so not prescribed, seeing it must be reckoned still a current account what was furnished only on his account for his servants mournings, and other funeral charges, though he was dead. Replied, His death certainly interrupted the currency of the account ; for to make the account current in construction of law, it must be *inter easdem personas*, whereas the articles here founded on to preserve its currency, are, after his death, furnished to his relict, and by her order, and so begin a split new account ; otherwise widows might prejudice their husband's heirs and executors in making them liable to accounts, which law had *præsumptione juris, et de jure*, extinguished by the triennial prescription ; whereas, *factum cuique suum sibi nocere debet non alteri*. See 12th Feb. 1680, Ross *contra* Master of Salton, *voce* PRESCRIPTION ; and this would shake a most excellent security given us by law against merchant accounts, that, after three years, they cannot be proven, otherwise than *scripto vel juramento* ; and even the commencing the prescription from the last article is not from the statute, but by mere custom, and inconvenient enough ; but to extend it further, where the account is finished by the death of the ontaker, that it shall be still current, is a most dangerous preparative, and overturns the very foundations of that good law. Duplied, What was furnished on the defunct's account was all one, as if furnished to himself, as the lawyers observe, l. 1, *D. de religioſi qui propter funus aliquid impendit cum ipſo defuncto contrahere videtur magis quam cum hærede*, and is reputed furnished in the last moments *quæ vitæ annumerantur* ; and it is no strange thing in the analogy of law, that the currency is connected, though *inter diversas personas* ; for, § 8, *instit. de usucap.* the possession *emptoris et venditoris continuatur* to make up the prescription ; and, by our act of prescription 1617, more sasines either of heirs or singular successors, are conjoined and connected together, though a considerable space (besides the *annus deliberandi*) intervene between them ; and the presumption of three consecutive discharges, liberating from all precedings, holds, though they be not all granted by one person ; and so the Lord Whitelaw's death did not break off the currency of the accounts. The Lords thought the case new, and therefore ordered it to be argued in their own presence. See HUSBAND AND WIFE.—PRESCRIPTION.

February 18, 1709.—The case mentioned *supra*, 9th current, between Bangour and the Lady Ormistoun, being this day advised, the Lords, by plurality, found the account not prescribed, but that it only commenced from the last article, albeit it was furnished after my Lord Whitelaw's death to his funerals, [4983] and neither

to his heir nor executor, in which case there was more ground to plead the currency of the account, but only to his widow, seeing it was for defraying the funeral expences, which the Lords reputed all one with my Lord's own debt.

November 11, 1709.—The Lords (*supra* at the 9th and 18th of February 1709) found Sir Robert Blackwood's merchant accounts partly furnished to my Lord Whitelaw, and partly to his funerals after his death, not prescribed, though pursued without the three years; because the furnishing after his death kept these articles before it as current, and were to be connected together to make up one collective account. This interlocutor being reclaimed against, and a new hearing granted, it was contended for Bangour, that by the 83d act of Parliament 1579, there was no such currency or connection permitted, but every article, if neglected to be sought in for three years after, prescribed; and if a year or other large interval of time should intervene betwixt furnishings, the doctrine of that new article's preserving the rest from prescribing ruined families, and enervated the benefit of that excellent act; and the first time ever this currency was sustained, was fifty years after, viz. 2d July 1630, *Herries contra Scott*, *voce* PRESCRIPTION; but there it bears, in respect there was a counting within the three years, and that the defender had promised payment. The next case where it came to be sustained, was on the 16th December 1675, *Somerville contra* the Executors of Muirhead, marked both by Stair and Dirleton, *voce* PRESCRIPTION; but even there it was reserved to be considered, whether the account was current or not; and Dirleton marks that several of the Lords thought the decision not very consistent with the acts of Parliament. However, it seems now to be a fixed rule, that they only prescribe from the date of the last article. But what is now determined is far more strange, that articles furnished to the widow after Whitelaw's death shall be conjoined with the former to preserve it from prescribing, as if it were a continued count; whereas it is not so much as *inter easdem personas*, and is an *extensio extensionis*, and a *fictio fictionis* which is reprobated in all law. Answered, The last being funeral charges, it is the defunct's debt, and preferable to the debts of the heir, and so it is no absurdity to connect it with the former; and there is nothing more ordinary in law, than to draw Acts of Parliament, though correctory, *de casu in casum, et persona in personam*, upon similitude, and parity of reason; and so the triennial prescription of spuilzies and ejections is extended to intrusions and succeeding in the vice; and the extension here is to the manifest advancement of trade and merchandizing. The Lords, by a plurality of six against five, altered their former interlocutor, and found the furnishing after my Lord Whitelaw's death could not be continued with the former, so as to hinder the articles which were before his death, and without the three years of the citation to prescribe.

[4984] Nov. 17, 1709.—In the process depending betwixt the Lady Ormiston and Hamilton of Bangour, the Lady craving allowance out of her intromission with the executry, of the funeral charges in burying Lord Whitelaw, her last husband, extending to £5189 Scots, which she had paid to the furnishers, and taken assignations from them; and it being objected by the heir, that they were out of all measure extravagant, the Lord Grange Ordinary found, that she could have only action for such funeral charges as were necessary and decent, according to the defunct's quality and estate, and not for such as were sumptuous and magnificent beyond necessity, and a suitable inevitable decorum; and having considered the particular articles, he found some of them wholly needless, such as the heralds, trumpeters, &c., others of them too high stated, as the mourning coach, dead linens, and black cloath for the servants, besides the pall, &c. Therefore he modified and restricted the account to £3000 Scots, which defalked about £2189 off the Lady's account. Against this interlocutor, the Lady gave in a reclaiming bill, complaining of the said modification, seeing the Lady was in the merchants and tradesmen's place; and if nothing could be abated of what they had truly furnished, no more could it be detained off her; and they were not concerned with the extravagancy and unsuitableness of the expense, if any was, which is denied; and as they were actually furnished, so she did as truly pay them; and they were not exorbitant, considering either his fortune, or character, as Justice-clerk, and so an officer of State; and therefore was no pomp nor solemnity here, but what my Lord Philiphaugh as Clerk Register had, in July 1708, at his burial. Answered, That my Lady having got so large a donative as £7000 Sterling from her husband,

law and reason presume that she did it *ex pietate*, and noways *animo rependi*, and she had protested and declared at the time that she intended to seek repayment the l. 14, § 7, *D. de religios.* requires; and though she was liable to the furnishers *ex mandati et quod jussu*, yet that can never afford her an action to recur upon the heir who had little or no benefit by the succession. For the Roman law not only considers in the funerary action, what the dignity of him *qui funeratus est* required, *ex eo tempore et bona fide*; but likewise that all which was expended, was not to be allowed *si immodice facti essent sumptus*; but that respect was to be had *ad ejus facultatem et illius substantiam, quæ ultram modum sine causa consumebatur*, dict l. 14, § 6, *de religios.* And humanity being the foundation of this funerary action, it could not go no farther than decency, and not to idle pomp and ostentation, which is very much restrained by the act of Parliament 1681; and such vanity is not to be encouraged by the Lords decisions. It was first stated, whether the Lady's payment of these accounts without a decret, or seeking an abatement where extravagant, was so *bona fide* made, as to preclude any objection against the exorbitancy of the prices, and the Lords, by plurality, found it was yet entire to quarrel the prices, where was it reasonable? The next vote was, that *esto* the whole [4985] furnishing and payment was, what my Lord Whitlaw's quality might bear, yet, if his relict might go to the utmost extent of what he might have had by custom, considering how small a part of his fortune devolved to his heir, the rest being absorbed and swallowed up by his vast donative; for, suppose my Lord Whitlaw had left £8000 Sterling of estate, whereof only £1000 Sterling came to the heir, and all the rest to his relict, shall £400 or £500 Sterling of funeral charges exhaust his small remnant, and the widow go free. The Lords found, by plurality, that the funeral expenses must be allowed to the utmost of what his character and quality would admit, without regard to what small part of his fortune came to his heir, seeing they were by the collateral line, and the estate was of his own purchasing and acquiring; though the law says, that, in modifying the funeral expenses, *ratio facultatum defuncti* is mainly to be noticed. There was another point touched, viz. that the heir could not quarrel these accounts, because he was present at the burial, as the chief mourner, and no ways reclaimed, but was silent and acquiesced; but the Lords did not determine this at this time.

The Lords, on a reclaiming bill, altered this interlocutor, 14th December 1703, and allowed only decent and necessary expenses. See HUSBAND AND WIFE—PRESCRIPTION. *Fol. Dic.* v. 1, p. 338. *Fountainhall*, v. 2, pp. 489, 495, 525, & 527.

No. 3. [4992] Marquis of TWEEDALE v. HUGH DALRYMPLE, and Others. March 3, 1778.

No person is entitled to hunt upon the inclosed grounds of another, without the consent of the proprietor.

The Marquis of Tweedale brought an action against Mr. Dalrymple, and others, in which he charged them with having broke into his park of Yester with horses and hounds, either in pursuit of game, or to search for it. The chief object of the action was to have it found and declared, "That neither they, nor any person, has right to hunt game within said inclosures without leave of the pursuer."

The defenders admitted, That they were liable for all damages done by them on the grounds of others, in the course of the sport; but insisted, that, as they were possessed of the legal qualification, they were entitled to hunt on all grounds without restriction. In support of this defence,

Pleaded for the defenders; Animals *feræ naturæ* are *res nullius*, and, wherever they are found, every one is equally entitled to acquire a property in them by occupancy. Hunting these animals, therefore, without express enactment in its favour, is free and common to all, in as far as municipal law has not denied or restricted the use of it.

The ancient law of Scotland left the exercise of hunting, without restriction, to the whole inhabitants; M. T. C. B. c. 52. Forests and warrens are mentioned as exceptions, into which game could not be pursued; and the exception confirms the general rule, that game could be followed on every other property.

Hunting and hawking are favourites of the law, and considered in our ancient statutes as the only lawful method of killing the game. The old acts for preserving the game proceed on this principle.—Guns, bows, and all other methods, are prohibited, act 1551, c. 9; 1555, c. 58; act 1597, c. 270. And, when killing game by fowling-pieces and pointers was admitted of, yet it was under the severe restrictions of the act 1685, c. 20. But hunting, encouraged by law as a manly exercise, was not denied to those excluded by this statute from fowling. No qualification is at this day necessary to hunting, but that required in the act 1621, c. 31, ratified by the act 1685, c. 20, viz. the having a plow of land in heritage.

[4993] Where a right is given by the law, what is necessary to make it effectual is presumed to be given. To render effectual the right of hunting, thus recognised by the statute, it is necessary that the qualified persons should at least be entitled to follow the game into the fields and inclosures of others, where the chase leads, if not to search for game there. This is requisite to any exercise whatever of the sport. If it is denied, the right of the qualified persons to hunt is entirely defeated.

Usage supports the plea of the defenders. During the many ages in which hunting has been universal, no such challenge as the present has ever been made.

It was pleaded, as a favourable speciality, that the defenders were in pursuit of a fox; and only hunted foxes, which are noxious animals.

Answered for the pursuer; The right of property in a subject implies the exclusive use of it. No one is entitled even to range over open fields, if the owner refuses to allow him that use of his property, still less to enter inclosures. The proprietor by inclosing his grounds, *rebus ipsis et factis*, prohibits the entering into them without his leave. These are the general principles flowing from the nature of property. The question is, whether common law, or statute, has established an exception in favour of hunting?

In the Roman law, it is expressly laid down, that no one has a right to hunt on the grounds of another, without the owner's leave; l. 1, § 1, ff. 9, A. R. D. The owner of the lands had no property in the game itself. But hunting game on his lands was an use of them, which his right of property entitled him to prohibit any person from usurping, without his consent.

The common law of Scotland is the same; Craig, l. 2, dieg. 8, § 13; Stair, b. 2, t. 3, § 76. Hunting was no doubt common to all in this respect, that, where the proprietors of the lands gave no obstruction, the law made no distinction of persons. High and low were equally entitled to hunt, until the act 1621, c. 31.

This statute deprives the excluded persons of the exercise of the sport itself, so that they cannot hunt even on their own grounds. But no new right is bestowed on the qualified persons. The benefit of the act, as to them, is entirely negative, in not depriving them of what right they had at common law, previous to the act. But, as they had none to hunt on the grounds of others without their leave, they have as little to insist for that privilege after the act as before it. Nor is it any argument, that, without being allowed to pursue the game into the property of others, the sport may be baffled. All that follows from this is, that, besides the permission of the legislature to the sport itself, it is necessary, in order to the effectual exercise of it, to have the permission of the proprietor of the grounds where it is to take place. This is requisite where even the most useful occupations favoured by law are to be exercised on the property of others.

[4994] As hunting is a favourite amusement, it meets with no obstruction from proprietors. But no right can be founded on such permission. Were it a known servitude, hunting on the fields of one could never establish any right over the fields of another. But no such personal servitude over lands is known in the law, or acquirable by usage. The proprietor is, at any time, entitled to prohibit this trespass on his property, however much he may have formerly overlooked it.

In so far as respects the hunting within inclosures, property is not only protected by common law, but by statute. The act 1555, c. 51, anent hunting and hawking, ratified by act 1685, c. 20, provides, "That no person range other men's woods, parks, hainings, dikes, or brooms, without licence of the owner of the ground." Penalties are annexed by the act, for the transgression of it; and it is renewed and ratified by the act 1685, c. 20.

It is of no consequence that the fox is a noxious animal. The object in hunting is the sport, and not the destruction of these animals, for which other means are more

effectual. The statute 1555, c. 51, makes no distinction whether it is fox or hare that is hunted.

Where inclosures are broke into in this manner, the pecuniary loss may be but a small part of the injury sustained. Mischief done to favourite objects of improvement and ornament, young plantations, &c., cannot receive an estimation. Reparation of the pecuniary damage, therefore, is not sufficient. The pursuer is entitled to have this invasion of his property declared unlawful. He can then take such measures to prevent it for the future, as every one has a right to use in defence of his property.

Replied for the defenders, to the pursuer's argument from the act 1555; That although it might meet the defenders claim, in so far as relative to the searching for game within inclosures, yet, it ought not to be extended to the following game thence to which it was said the word "range" in the statute did not apply.

This cause was advised on memorials, and a hearing in presence.

The Court were of opinion, That the act 1555 extended to the following, as well as searching for game; and, being a subsisting statute, ratified by act 1685, c. 2, was sufficient for the decision of the present question, relative solely to the right of hunting within the inclosed grounds of another, against his will. The Court found "That the defenders were not entitled to enter or come into the deer-park, or other inclosures of the pursuer, without his consent, either for hunting or following game, or drawing cover, and searching for game."

Act. SOL.-GENERAL, ILAY CAMPBELL.—Alt. CROSBIE, BROWN, M'CORMICK.

Fol. Dic. v. 3, p. 248. *Fac. Col.* No. 17, p. 30.

No. 6. [4999] *Earl of BREADALBANE v. THOMAS LIVINGSTON.* June 16, 1790.

No person, however qualified by law, is entitled to hunt or kill game on the grounds of another without his consent, though open and uninclosed.

Mr. Livingston, a gentleman of considerable landed property, having for several days taken the diversion of killing game on some muirs belonging to the Earl of Breadalbane, but without having previously asked his Lordship's permission; the latter instituted against him an action of declarator.

The summons set forth, that, by the common law of Scotland, every person was debarred from searching for, hunting, shooting, or killing game on the property of another, without the leave or consent of such proprietor; and concluded, that it ought to be found and declared, that the defender had no right to come upon the pursuer's grounds, or to search for or kill game thereon without the pursuer's leave.

Pleaded for the defender; The determination of this question is not left to general inquiries into the common law. From a series of our statutes, the right of persons qualified to kill game, instead of being limited to their own private property, appears evidently to extend over the whole kingdom, with the exception of inclosures, and a few other particular places.

Though in some countries, as England or France, game is *inter regalia*; in Scotland, the animals that come under that denomination being *res nullius*, they, according to the principles of the Roman law, *cedunt occupanti*. Hence the right of killing game, prior to certain statutory restraints, was here universal. Of those restraints the object was twofold; both the preservation of the game itself, and the general benefit of the community.

Prior to the time of Robert III. the exercise of hunting, "except in forests, warrens, or parks," appears to have been perfectly unlimited; *Mod. ten. cur. baron.* c. 52. The first restriction that occurs, is one by stat. 10th of that Prince, against the killing of hares "in the time of snow," under the penalty of a fine to the owner of the ground; which plainly implies, that at other times the hunter had right to kill hares, and undoubtedly not less all the different sorts of game, on the grounds of any of the people.

The same inference is to be made from the next act of Parliament that has a direct reference to the point in question, viz. that of 1474, cap. 60. It prohibits hunting

or shooting "in others closes or parks." But if this only was unlawful, to hunt or shoot in open grounds must have been permitted to all the subjects.

In like manner, when the statute of 1555, cap. 51, ordains, "that no person shall range other men's woods, parks, hainings within dikes or brooms, with-[5000]-out license of the owner of the ground," it imports a virtual declaration of the lawfulness of that liberty when taken in places of a different description.

The act 1600, cap. 23, which establishes certain regulations, both for the preservation of the game, and for the advantage of the people, sets forth the importance of hunting, "as the only means to keep the hail lieges bodies from becoming altogether effeminate." But had it depended on the caprice of individual landholders, whether or not those means could be employed, hunting would not have been considered as an object of general police; much less one of so great consequence.

By the statute of 1621, cap. 31, the possession "of a ploughgate of land in heritage," is declared to give an exclusive title to hunt; which however would have been mockery, if the person so qualified had been confined in the exercise of his right to the narrow limits of his own property.

The last of the game-laws passed by the Parliament of Scotland, is the statute of 1707, cap. 13, which contains this enactment, "That no fowler, or any other person whatsoever, shall come within any heritor's ground, without leave asked and given by the heritor, with setting dogs and nets, for killing fowls by nets"; an enactment which plainly supposes that in other cases no such allowance is necessary, because in persons qualified, hunting is then a matter of right.

Thus the idea of the Scottish legislature is apparent, and in conformity to it has always been the general sense of the country. Nor can a single instance be pointed out, where the pursuing or killing of game, in open or uninclosed grounds, has been found by any court of law to be a trespass in qualified persons. In the case of *Watson of Saughton contra the Earl of Errol*, No. 2, p. 4991, an interdict was indeed pronounced, prohibiting the latter to hunt within the inclosures, or upon the ground of the former, until the issue of the question; but it was never brought to a determination. That of the *Marquis of Tweeddale contra Dalrymple*, No. 3, p. 4992, was an action entirely confined to trespassing within inclosures, which shewed the pursuer's sense of the right, in respect of the grounds that lay open.

The pursuer therefore had no more right to prohibit the defender from hunting in his muirs, than he would have had to forbid the entrance there of the officers of the law engaged in the pursuit of a criminal, or of the people of the neighbourhood in the act of destroying a mad dog, a fox, or other noxious animals, *Colquhoun contra Buchanan*, No. 5, p. 4997.

Answered; Exclusive possession is implied in the very nature of property. In all cases therefore where no servitude has been constituted, or statutory restraint imposed, and where the public safety does not interfere, a man has the same right to exclude all others from access to his landed property, that he has to debar them from entering into his house, or from using his furniture or clothes.

[5001] Nor because animals *feræ naturæ* belong to the occupier, does it follow, that any person is entitled to pursue or kill them on the grounds of another. This obvious distinction is noticed in the Roman law. *Non est consentaneum*, says a Roman lawyer, *ut per aliena prædia, invitis dominis, aucupium faciat*, l. 16, ff. de servitut. præd. rust. Vid. etiam Inst. lib. 2, tit. 1, § 12; l. 3, ff. de acquir. rer. dom. In the law of Scotland it is not less clear. Lord Stair, speaking of the killing of game, adds, "From which the fiar may debar others indirectly, by hindering them to come upon his ground," b. 2, tit. 3, § 76. So also Craig, lib. 2, dieg. 8, § 13; Bankton, b. 2, tit. 1, § 2; Erskine, b. 2, tit. 6, § 6.

The first authority appealed to by the defender, entitled, "The manner of holding baron-courts," as it appears from the observations of Skene, subjoined to his treatise *de verborum significatione*, is of very doubtful authenticity, and deserving of little regard.

With respect to the statutes that have been quoted, the argument founded on them is sufficiently obviated by the principle, that a common law-right is never taken away by implication. But there is not here any thing of that tendency even implied. It is not unusual to protect common-law rights by additional sanctions or penalties; of which the acts of 1474, against the robbing of dovecotes and the like; of 1503, against slaying salmon in forbidden time; of 1587, against destroying plough-graith in time of tillage, and houghing oxen in time of harvest; of 1661, 1685, and 1686,

against the breaking down of inclosures; and of 1698, and 1st George I. against the destroying of growing timber, are examples. The superadding then of such sanctions as occur in the above-mentioned statute of Robert III. and in acts 1474 and 1555, not in any case evidence, that no right previously existed at common law. Of course it affords as little proof of the want of a common-law right in similar or analogous cases.

In the latest enactment indeed that was mentioned, that of 1707, a prohibition without a penalty occurs as to a particular method of killing game. But the object of this law seems to have been, to make a distinction between that and the ordinary or fair modes of fowling; so that though a *non repugnantia* merely on the part of the owner of the ground were to be held in regard to the latter as a sufficient indication of consent, a special or express "leave asked and given" should be required to justify a practice so destructive as the first-mentioned method.

The statutes of 1600 and of 1621 are to be regarded as sumptuary laws, intended to restrain the passion for an expensive amusement among the lower ranks of the people, without discouraging the exercise of it in those of superior condition. Nor is there any inconsistency between the prohibition as to one class of persons, or the permission as to another, and at the same time leaving it to the latter to avail themselves of the privilege, by obtaining from individual proprietors, freedom of access to their grounds.

[5002] The decisions quoted on the other side are evidently of little importance, if indeed they do not rather support the plea of the pursuer.

The Lord Ordinary "assolized the defender from the conclusions of the libel of declarator."

The question was then brought under the consideration of the Court by a reclaiming petition and answers.

Observed on the Bench; The right contended for by the defender is of a very anomalous description, as it may confessedly be annihilated at the pleasure of every proprietor who chooses to interrupt it by a wall or fence.

The Lords were unanimous, having no difficulty to discern in the action of declarator.

Lord Ordinary, MONBODDO.—Act. ROLLAND *et alii*.—Alt. WIGHT *et alii*.—Clerk, SINCLAIR.

S.

Fol. Dic. v. 3, p. 248. *Fac. Col.* No. 140, p. 276.

* * * This cause was appealed :

The House of Lords, 13th April 1791, "ordered, That the appeal be dismissed, and the interlocutors complained of affirmed."

No. 3. [5005] Tenants of DALMORTON *v.* Earl CASSILLIS, &c. December 8, 1666.

A barony was disposed with the mill thereof, and the multures used and wont. The multures of another barony belonging to the disponent were found not to be disposed, though the tenants had been in use of coming to that mill.

The lands of Dalmorton being a part of the barony of Cassillis, and formerly holden ward by the Laids of Blairquhan Kennedies, of the Earl of Cassillis; and now being in ward through the minority of the present heritor, who had succeeded in the right of the said lands, being acquired from the Laird of Blairquhan; the Tenants of the said lands pursued a multiplepoinding against the E. of Cassillis and Whiteford now of Blairquhan, and the heritor of Dalmorton; all pretending right to the multures of the said lands. The E. of Cassillis alleged, That during the ward they should bring their corns to his mill of the barony of Cassillis, there being no mills upon the lands of Dalmorton. The laird of Blairquhan alleged, That he was infest in the lands of Blairquhan and in the mill of Dalhovan, upon a right granted by Kennedy of Blairquhan *cum astrictis multuris et usitatibus*; at such a time as Blair-

quhan had right to Blairquhan and Dalhovan, and to the lands of Dalmorton ; and that before the said right granted by Kennedy of Blairquhan to John Whiteford of Ballach, author to this Laird of Blairquhan, the Tenants of Dalmorton were in use to come to the said mill, and to pay the like multure and service as the Tenants of Blairquhan did ; and since the right, have been in use to come constantly to the said mill. It was answered for Cassillis, That unless there were an express constitution of thirlage, the said lands of Dalmorton (being a distinct tenement from the lands of Blairquhan, which hold of the King) cannot be alleged to be astricted to the said mill of Blairquhan ; and if it had been intended that the lands of Dalmorton should have been astricted, it would have been expressed ; and when the same did belong to Kennedy of Blairquhan, it cannot be said that it was astricted to his own mill with the foresaid servitude, *quia res sua nemini servit* ; and he having disposed his mill, it cannot be presumed that he would have burdened his own lands with a servitude ; and, though it were clear Kennedy had astricted the said lands of Dalmorton, yet he could not constitute a servitude without the superior's consent in his prejudice, when the lands should ward in his hands. It was replied by Whiteford of Blairquhan, That the superior had consented to the thirlage, in so far as John Gilmor and one Bonar, having comprised the said lands of Dalmorton from Kennedy of Blairquhan, and having assigned their said comprising to John Whiteford, the said Whiteford, by contract, did assign the same to Kilkerran, with a reservation of the multures thereof to the mill of Dalhovan ; and the said E. had granted a charter to Kilkerran upon the foresaid right.

The Lords thought, That these words *cum multuris usitatis*, do relate only to the quantity of the multures as to such lands as can be shown to be astricted ; but, before answer to the debate upon the said charter and reservation, they ordained the charter and contract containing the reservation to be produced, that they might consider, whether it be in the charter, and how it is conceived ; and what it should operate if it were only in the contract.

The Lords inclined to think that a clear reservation, though there were not a preceding thirlage, should import a constitution, as to those who accept or consent to such a reservation. See THIRLAGE.

Fol. Dic. v. 1, p. 340. Dirleton, No. 58, p. 24.

No. 13. [5018] MOCHRIE v. LIN. January 6, 1736.

An assignation *mortis causa*, executed in *liege poustie*, containing an exact list of all the moveable bonds and bills, with a general clause adjected of "goods and gear, debts and sums of money, gold, silver, coined and uncoined, and others whatsoever," was not found to comprehend an heritable bond due to the defunct, but the same was found to belong to the heir. See APPENDIX. *Fol. Dic. v. 1, p. 340.*

No. 15. [5019] DAVID ROSS, Manager of the Theatre Royal, Edinburgh, Pursuer v. ELIZABETH ROSS, Spouse to HUGH ROSS, Merchant in London, Defender. March 2, 1770.

A general clause of "goods, gear, debts, &c., and all other effects of what nature or kind soever," in a disposition, held insufficient to convey heritable bonds and adjudications.

David and Elizabeth Ross were the only children of Alexander Ross, solicitor in London, who, in the year 1748, executed a holograph settlement of his estate ; by which, disinheriting his only son David, he, by a deed containing a procuratory of resignation, settled his landed estate upon his daughter Elizabeth. This deed contained the following clauses : "I hereby also assign and dispoine to and in favour of my said daughter, &c., all my goods, gear, debts, sums of money, corns, cattle, insight

plenishing, and all other effects which shall belong to me at the time of my decease, of what nature or kind soever they are, dispensing with the generality thereof, and admitting the same to be as effectual as every particular herein were enumerated and described; whereanent, and with all objections that may be moved in the contrary, I hereby dispense for ever, &c."

The settlement farther contained the following clauses: "And I hereby assign, transmit, and make over to myself and to the said Elizabeth Ross, my daughter, and her foresaids, &c., all and singular charters, dispositions, retours, precepts, and instruments of sasine, procuratories, and instruments of resignation, and all other writs, rights, titles, and securities whatsoever, made and granted to me, &c., of or concerning the lands and others foresaid, and of and concerning my goods, gear, and debts, and other moveables aforesaid, whole tenor, contents, and effect thereof, with all that has followed or may follow thereupon."

Alexander Ross died in 1753; and at the time of his death, besides a landed property, was possessed of two heritable bonds and of several adjudications, the legals of which were expired; and upon one of which possession had been obtained.

As the conveyance in favour of Elizabeth Ross was in general terms, she, in 1753, brought an action against her brother, that he should make up titles to the heritable debts which had belonged to the defunct, and convey the same to her. She accordingly obtained decretet to that effect; and thereafter obtained a decretet of adjudication in implement of the above disposition.

David Ross, upon his coming to this country, made inquiry into his father's settlements; and having expedite a general service as his heir, brought a reduction against Elizabeth his sister and her husband of the settlement 1748, and of the decretet of constitution and adjudication in implement thereof, upon the ground, that as the deed did not specify the heritable debts secured by adjudication or otherwise, so the general words therein, conveying goods and effects, could not extend to or comprehend those heritable debts, which must therefore belong to the heir.

[5020] The Lord Ordinary, on the 23d December 1769, pronounced the following interlocutor: "Having considered the disposition and procuratory of resignation executed by the deceased Alexander Ross, father to the pursuer and defender, of 2d May 1748, in favour of the defender, Finds that nothing is thereby conveyed to her except the lands of Little Daan and Mayblairie, and the moveable goods which belonged to the said Alexander Ross; and that there are no general clauses in said deed sufficient for conveying, in favour of said defender, any other heritable subjects which belonged to him; and therefore sustains the reasons of reduction of the decretet of constitution, and of the decretet of adjudication, obtained at the instance of the defender against the pursuer in implement of the said deed, so far as it adjudges the adjudications and heritable bonds which belonged to the said Alexander Ross; and reduces the same accordingly."

In a reclaiming petition, Elizabeth Ross pleaded,

Heritable subjects, as well as moveables, were capable of being conveyed by a general disposition; and the words made use of in this deed, and the arrangement in which they were placed, were sufficient to convey the heritable subjects in question, amongst with the rest of the estate. The only subject specified in the deed was heritable, viz. the lands of Little Daan and Mayblairie. This was the leading subject; and then came a general clause of "all goods, gear, debts, and sums of money." Had the deed even stopped here, it might, on good grounds, have been argued, that heritable debts were understood to be comprehended under the words "debts and sums of money"; for as a land estate had been conveyed, it could not be alleged that moveables only were in the testator's contemplation.

But the deed did not stop here, but added, "All other effects which shall belong to me at the time of my decease, of what nature or kind soever." These words applied to all that went before, to goods, debts, sums of money, and all other effects; and must therefore mean both those that were heritable and those that were moveable. The testator specified no particular, but used the most general and comprehensive words that could be devised; and as, in all questions concerning the legal import of such general words, the rule of decision must be the intention of the maker of the deed; so, in the present instance, it was clear that the testator meant the deed should comprehend debts; and of course, by the addition thereto, debts of every kind were included.

A farther argument was held upon the clause of the deed assigning the writs and evidents ; as, besides those relating to the landed estate, it comprehended all other writings, &c., of or concerning the lands and others foresaid.

The pursuer answered, That Alexander Ross's disposition in 1748 fell to be considered as comprehending two separate and distinct deeds ; by the first he conveyed his lands, and these only ; and by the second, his goods, gear, and all other effects ; which could only comprehend his moveable estate. The words of the deed could admit of no other construction. Nothing heritable be-[5021]-sides the lands was intended in the first clause ; and it was impossible in the other to discover a single expression that could, in fair construction, imply an heritable subject the most trifling, far less a variety of heritable bonds and adjudications, with expired legals. The leading words in the clause, goods, gear, &c., could import nothing more than moveables ; and although it contained the general phrase, "all other effects," yet as that phrase was subjoined to a variety of particulars, all respecting executry, it was impossible to construe that general expression as meant to comprehend subjects of a different and more important nature.

The clause assigning the writs and evidents confirmed this construction. It also consisted of two similar branches ; the first respecting the land ; the second in the following words : "And of and concerning my goods, gear, debts, and other moveables aforesaid" ; thereby explicitly referring to the disposition to the moveables, and pointing out the testator's understanding of the general phrase "effects" in the disposition.

It was an established principal of law, that, in the construction of such general words, whether in assignments or discharges, they never were extended to particulars of a distinct species from those occurring in the same clause ; and in support of this proposition, and of the argument applicable to the precise nature of the question, the following authorities were referred to ; Stair, b. 1, tit. 18, § 2, b. 4, t. 40, § 34. Erskine, b. 3, t. 4, § 9. Bankton, b. 1, t. 24, § 2. Durie, 1636, Lawson *contra* Ard-kinlas, No 2, p. 5023. 19th November 1680, Dalgarno, No. 10, p. 5030. Fountain-hall, 29th June 1705, Talbot *contra* Guidet, No. 6, p. 5027. 1736, Mochrie *contra* Lind, No. 13, p. 5018. 19th February 1745, Kerr *contra* Young, No. 29, p. 2274. Fac. Col. 26th January 1770, the Heirs *contra* the Trustees of Dr. Brown, *voce* HERIT-ABLE AND MOVEABLE.

In giving judgment, their Lordships admitted that it appeared to have been the intention of the testator to disinherit the heir ; but as exheredation was not a *nomen juris* in the law of Scotland, it could only be effected by a proper conveyance of the subject to another. This had not been done ; the words were insufficient to convey the heritable debts ; *quod potuit non fecit* ; so that the intention could not be regarded. It was also observed, that it was a general rule in law, that when a man in a discharge or disposition conveyed particulars, and subjoined a general clause, such clause imported only subjects of the same nature with those specially mentioned. In this case, the particulars specially conveyed were moveables ; and hence the subjoined words "all other effects," &c., could include subjects only of the same kind.

The cause was brought twice before the Court upon petition and answers ; but the Lord Ordinary's interlocutor was unanimously adhered to.

For David Ross, LOCKHART, SINCLAIR.—For Elizabeth Rees, RAE, J. SWINTON, JUN. Lord Ordinary, KENNET.—Clerk, Ross.

R. H.

Fol. Dic. v. 3, p. 250. Fac. Col. No. 28, p. 71.

No. 33. [5052] JOHN MONRO, Chirurgeon in Edinburgh v. Major GEORGE MONRO of Auchinbowie. December 16, 1712.

A father executed a bond of provision in favour of a younger son, which he kept in his own custody. This bond was found not to be comprehended in a discharge of all clags, claims, &c., granted by the son to the father.

The deceased Sir Alexander Monro of Bearcrofts having in anno 1699, assigned his share in the African Company to his second son John Monro, without prejudice

to his portion ; and in the year 1703, disposed his whole moveable sums, goods and gear to his daughter Jean, who, as executrix to her father, confirmed the African money in his testament, and assigned the same to Major Monro her eldest brother who uplifted it ; John Monro pursued repetition against the Major, by virtue of the assignation from Sir Alexander their father.

Alleged for the defender ; The assignation to the pursuer, cannot carry right to the African money, because, 1mo, The same was never delivered by the father to him. And though bonds of provision by parents in favours of children in *familia* require no delivery ; yet bonds in favours of children forisfamiliated, and otherwise sufficiently provided, as the pursuer was, are not effectual till they be delivered. 2do, *Est*o the assignation had been valid, yet it was taken away by a posterior discharge granted by John to Sir Alexander his father, of all actions, causes of action, suits, bills, bonds, judgments, challenges, and demands whatsoever, which John had or might have against Sir Alexander upon whatsoever account preceding the date thereof ; thus it was determined in a parallel case, 29th June 1680, Young contra Paip, *voce* PRESUMPTION. 3tio, The assignation was revoked at least by the general disposition in favours of Jean, conform to the decision Hall v. Gordon, 17th February 1708, *voce* PRESUMPTION ; especially considering, that Sir Alexander not only did not deliver the assignation of the African money to John, but delivered it to Jean with the universal disposition ; which clears, that the African money was understood to have been a part of the subject of the general conveyance, and not designed to be effectual to John. 4to, The assignation is taken away by a discharge granted by the pursuer to the defender, upon a decreet-arbitral determining differences between them, wherein the pursuer discharged all clags and claims he had against the Major for himself, and as representing his father ; which is a renunciation of any later claim against the inheritance to which the Major had right.

Replied for the pursuer ; 1mo, All writs granted by parents to children whether in *familia* or forisfamiliated, require no delivery, Stair, b. 1, t. 7, § 14. 2do, It is absurd to pretend, that the discharge granted to Sir Alexander could take away the assignation ; it being the nature of a discharge to extinguish, and not to convey a right. Besides, there was no action competent against Sir Alexander or his heirs, upon the assignation ; and the discharge doth only discharge all actions and law-suits competent to his son against him before the date of the discharge, which could not take away his father's good-will. The cited de-[5053]-cision where a settlement in a contract of marriage was presumed to be in satisfaction of a prior bond, *quod debitor non præsuntur donare*, doth not concern the present case, where there was no posterior payment made to John, which could be reckoned in place of the assignation. 3tio, The assignation could not be taken away by the general disposition ; *quia specialia derogant generalibus*, whether the special right be prior or posterior to the general, L. 4, § 3, L. 99, § ult. ff. de Leg. 3, l. 15, ff. de Peculio ; L. 1, Pr. ff. de Auro Argent. Leg. Inst. § 1, de Codicil. Vin. Comment. *ibid.* 29th January 1679, Aikman contra Boyd's Heirs, *voce* PRESUMPTION. The practique betwixt Mr. Hall and the Lady Gordon doth not meet ; for there Cesnock had expressly revoked the right in favours of the Lady Gordon ; but here the question is, Whether Sir Alexander Monro hath revoked this assignation. Had the general disposition carried the African money, Jean's right to it would have been as good without this paper, as with it ; consequently it was not delivered to her as an instruction of her right. Nor could the delivery of the assignation to Jean be an extinction of John's right ; on the contrary, it made it as effectual as if it had been delivered to John himself, since it went thereby out of the granter's hands. Nay, Jean, who was the father's trustee, and presumed to understand his intentions best, delivered the assignation to John as his proper evident after the father's death. 4to, The discharge upon the decreet-arbitral could go no further than the submission, which was only in relation to depending processes ; and the pursuer had then no clag nor claim against the Major in relation to the African money, the present claim having arisen from his subsequent deed of uplifting that money. Nor could either party have in their view at that time when the discharge was granted, that any difference would emerge concerning such a fund, which in all human appearance was then desperate.

The Lords found, the assignation in favours of John is a valid assignation without delivery, being betwixt father and son. And found the general disposition by Sir Alexander Monro to Jean his daughter of his heritable and moveable estate, with

the delivery to her of the assignation in favours of John of his interest in the African Company, is not a revocation of that assignation in favours of John. And found, that the discharge granted by John to the father, doth not extend to the money in the African Company. And also found, that the discharge following upon the decreet arbitral granted by John to the Major, doth not exclude this claim.

Fol. Dic. v. 1, p. 345. Forbes, p. 644.

No. 7. [5131] STEEL v. HIS PARISHIONERS. January 31, 1712.

Found that it is in the minister's option, either to take £20 for his grass, or require land to be allocated to him for that use ; but the presbytery must not pitch on land which was in use to be tilled ; and the heritors on the other hand must not *in emulationem* till that which was in use to be lee.

Mr. William Steel, minister at Lochmaben, wanting a manse, he applied to the presbytery, in terms of the acts of Parliament, to make a visitation, in order to provide him ; and the same being edictally intimated from the pulpit, a committee of the ministers of that presbytery met at the church, but the heritors did not compear ; however, they proceeded, and examined tradesmen what the building a manse in that part of the country might cost ; and on their report gave forth their decreet ; which being suspended, these points came to be determined, 1mo, That by the 21st act 1663, anent building manses, the ministers and tradesmen may proceed, though the heritors be absent or withdraw, being cited, the ministers having no other form or compulsor to bring them, but an intimation from the pulpit on the Lord's day preceding ; but the tradesmen being parishioners will not supply that clause of the act, requiring two or three of the most discreet men of the parish to be present also, to assist and judge on the tradesmen's opinion ; who must be over and above the workmen, who would be very unfit to restrict or limit their own work, 2do, The Lords found the ministers were by our law empowered to proceed to liquidate the value and price of the manse, not exceeding £1000 Scots, and likewise to chuse the most convenient place for its situation near the church, with a suitable glebe, and grass or forage for his horse and cows ; and also to cast and proportion the sum liquidated upon the heritors, and to name a factor and collector for uplifting and depursing it. 3tio, Found the rule of the cast must be, not the real rent (which would put ministers to a long probation, and occasion many great debates), but the valued rent extracted out of the cess-books. 4to, Found, though some of the heritors were dead, as the Duke of Queensberry, &c., others had the privilege as members of Parliament, yet this would not sist process as to others. 5to, As to bygones since his admission, and till his manse be built, he has a good claim for as much as he has paid of house-rent ; yet it cannot come in here in this designation, but he must raise a process against his heritors for the same. 6to, It is in the minister's option, either to take £20 for his grass, or to seek land to be allocated to him for that use. But the presbytery must not pitch upon arable land that has been in use to be tilled, see 7th act 1606 ; but so that heritors must not *in emulationem* till up what was in use to be lee ; else they might leave nothing to be designed for the ministers but moss, muir, hills, or rocky ground, to the minister's prejudice, and defrauding the good design of the law ; for such an interpretation were to lie at the catch *et verba legum captare*.

Fol. Dic. v. 1, p. 350. Fountainhall, v. 2, p. 713.

No. 33. [5151] Lord REAY v. The Reverend Mr. ALEXANDER FALCONER.
November 14, 1781.

A minister was found to have no right to the sea-ware on the shore of his glebe, for the purpose of making kelp; that right remaining annexed to the land out of which the glebe had been designed. In this case the proprietor of the barony did not contend for depriving the minister of the use of the sea-ware for manuring his glebe.

Lord Reay insisted to have it found and declared, That Mr. Falconer, as minister of Edrachilles, had no right to the sea-ware upon the shore of his glebe, except for the purpose of manuring his land and feeding his cattle; but that the sole and exclusive privilege of manufacturing said sea-ware into kelp belonging to his Lordship, in virtue of ancient infeftments.

Pleaded for the pursuer; The parish of Edrachilles is part of the Reay estate and, about fifty years ago, when it was disjoined from the parish of Durness, Lord Reay agreed that a very extensive tract of land should be designed and allocated as a glebe for the minister. But in this designation, although the boundaries are distinctly marked, there is no mention of shores, nor any clause upon which a right to sea-ware, as part and pertinent, can be founded. The original right therefore of the family of Reay still continues, and must be sufficient to exclude any right competent to the minister in virtue of the designation above-mentioned.

The view of the Legislature in making this provision for the clergy, evidently was that such of them as were situated in the country might have conveniencies about them, which perhaps no addition of stipend could otherwise supply. This is the idea which runs through most of the statutes relative to glebes, as appears both from the situation and extent thereby prescribed; *vide* acts 1563, [5152] c. 72; 1572, c. 48; and 1606, c. 7. But to suppose that, under that denomination, any right to sea-ware, for the purpose of manufacturing it into kelp, can be comprehended, is equally inconsistent with the design of the provision, and with the dignity of the clerical character.

The pursuer, however, though he doubts the minister's right to it, does not mean to deprive him of the privilege of using the sea-ware in the way of manure and pasture. In the exercise of that privilege Mr. Falconer has always been freely indulged. It is by no means incompatible with the right now contended for, and is not struck at by the present action.

Answered; Whenever lands are legally designed as a glebe for the parish minister the former heritor is completely divested of them. The property from that moment belongs to the church, and the superiority goes to the Crown, which accordingly has right to the liferent escheat of the incumbent lying year and day at the horn; act 1572, c. 49. The designation therefore of a glebe is equivalent to an infeftment, and is equally capable of carrying whatever is possessed, as part and pertinent of the lands.

Neither is this general right at all limited by the terms of the designation in question. It is conceived in the usual form, and conveys to the minister of Edrachilles as full and ample a right as any minister in Scotland has to the glebe which he possesses. He is therefore entitled to the sea-ware upon his own shore as part and pertinent; and is not restrained by the nature of his right from the free use of this, more than of any other part of his benefice.

Observed on the Bench; The designation of a glebe is like a bounding charter. Here the designation makes no mention of shores; and the minister is circumscribed by the terms of his own right.

The Court, therefore, adhered to the interlocutor of the Lord Ordinary, who had "decerned in terms of the declarator."

Lord Ordinary, HAILES.—Act. HONYMAN.—Alt. ROBERTSON.—Clerk. HOME.

No. 34. ANDERSON and Others, Petitioners. November 22, 1791.

A minister is entitled to have half an acre of ground for the stance of his house, stable, barn, byre, and garden, and what he wants of that quantity may be designed to him by the presbytery, out of any lands contiguous to his manse; whether churchlands or others; the proprietor of such lands having his relief against the whole heritors of the parish. See APPENDIX. *Fol. Dic. v. 3, p. 253.*

No. 6. [14] MINISTER of NEWTON and PRESBYTERY of DALKEITH v. The HERITORS of NEWTON. June 3, 1807.

Right of a minister to work the coal in a glebe.

Under the glebe belonging to the minister of the parish of Newton, lies a bed of coal, which the minister proposed to let, at the sight of the presbytery of Dalkeith, for the benefit of himself and his successors. Doubts having occurred as to the legality of this measure, the question was brought into Court by a bill of suspension at the instance of the heritors, and by a declarator on the part of the minister and presbytery.

The Lord Ordinary ordered informations.

The minister and presbytery

Pleaded: Previous to the Reformation, the property of glebes was vested in the ecclesiastics absolutely, and was in every respect at their disposal. After the Reformation, it continued on the same footing; and it became necessary, by various statutes, passed at different times, to prevent the incumbent from acting as unlimited proprietor, and rendering it useless to his successors. Thus they are prevented from feuing, or setting long tacks, 1563, c. 72; from selling or annalzieing them, 1572, c. 48; Stair, b. 2, t. 3, § 40; Ersk. b. 2, t. 10, § 61. Glebes are held of the King as the superior, Stair, b. 2, t. 3, § 40; Bankton, b. 2, t. 8, § 127; Forbes on Tithes, p. 217. The power of a minister over his glebe, is necessarily limited, so as to prevent him from doing any thing which may injure his successors; but he may lawfully do any thing which may benefit them, if it do not injure any third party. The heritors can qualify no injury whatever, but, on the contrary, the benefit will be such as to free them from future claims of augmentation; and it is derived from a substance at present useless, and which is to be obtained without deterioration of the glebe. Thus, it was found, that a minister might dig peats in his glebe for the use of his family; Mercer v. Minister of Lethendy, 22d [15] January 1789 (not reported), and marl for the improvement of his glebe, Minister of Madderty v. Heritors, 14th November 1794, No. 35, p. 5153,* which are the acts of a proprietor using, to a reasonable extent, not the fruits alone, but the substance of the subject possessed by him. In Hepburn v. Heritors of Humble, 6th February 1791 (not reported) and Logan v. Reid, 16th May 1799, No. 1, APPENDIX, Part I. *h. t.*, a minister's right to cut the trees on the glebe was recognised.

Answered: The object of the Legislature, in giving each minister a glebe, was not so much to increase the annual value of the benefice, as to enable them to provide their families with as much of the chief necessities of life as may be obtained by the cultivation of a small spot of ground adjacent to their dwelling-houses. The size of the glebe, is, in all circumstances, the same; it is in the immediate vicinity of the manse; it is never commuted in money; it cannot be let in feu or long tacks, nor sold, nor rendered unfit for agricultural purposes, for which it was originally designed, however much such acts might be a source of profit to himself and his successors. The right which a minister acquires to his glebe, by the designation of the presbytery, is merely a right to the natural productions of the soil: He is in the situation of a liferenter or administrator; Stair, b. 2, t. 3, § 37. A minister was therefore not

* See note under No. 1, in which for "Mercer v. Minister of Lethindy," read "Minister of Madderty v. the Heritors."

permitted to feu one of two glebes he had ; Minister of Little Dunkeld *v.* Heritors, 14th May 1791, No. 36, p. 5153 ; nor allowed to manufacture kelp, Lord Reay *v.* Falconer, 14th November 1781, No. 33, p. 5151 ; nor to dig marl for sale, Minister of Madderty *v.* Heritors, 14th November 1794, No. 35, p. 5153.* Neither can he be allowed to work coal or other minerals himself, nor to let it to others for that purpose.

“ The Lords (3rd June 1807), in the suspension, repel the reasons of suspension, and in the declarator, find, That the minister has right to work the coal in question below his glebe, at the sight, and under the direction of the heritors and the presbytery ; and that the value and proceeds of the coal are also to be under their control and management, for behoof of the minister and his successors ; and decern and declare in terms of the other declaratory conclusions of the pursuer’s libel, and remit to the Lord Ordinary to hear parties as to the mode of working the coal, to adjust and fix the same, and to do and determine in the cause further for carrying this judgment into effect, as to him shall seem just.”

Lord Ordinary, BANNATYNE.—For Minister, BOSWELL.—Agent, FRA. BRODIE, W.S.—
Alt. MONYPENNY.—Agent, JOHN SMITH, JUN., W.S.—Clerk, WALKER.

F.

Fac. Col. No. 281, p. 635.

No. 8. [5204] L. CARNOUSIE *v.* L. MELDRUM. July 22, 1630.

Found, that the heir should have his relief from the executor, of all moveable bonds, and the executor should be relieved by the heir of all such as are heritable.

In a pursuit made by the bairns of the L. Meldrum, executors confirmed to her, against the executors of her umquhile husband, and the intromitters with his goods and gear, for payment of that part of their mother’s goods confirmed, which belonged to her, and consequently to them, as her executors, and wherein her husband would have been debtor to them, they being her bairns of an anterior marriage,—the Lords found, that albeit there were executors confirmed to the umquhile husband, yet that thereby the pursuers were not excluded, but that they might also pursue the intromitters with the goods, to make their part thereof due to them in law furthcoming ; for this is not, as when the creditor pursues a vicious intromitter to pay the debt, seeing here the intromitter is only pursued to make payment of the very particulars, wherewith he should have been proven to have intromitted ; and which he had no reason nor right to retain ; yet usually where executors are confirmed, no process is granted against intromitters, as is done 14th July 1626, and November 23, 1630. Gray contra Smith, *voce* LITIGIOUS—PASSIVE TITLE ; and November 25, 1630, Miniman, *voce* PASSIVE TITLE. And even in a wife’s testament confirmed, albeit her husband be living, defalcation ought to be of such particulars, which ought not to come in testament, viz. which of their own kind and nature are heirship ; albeit the husband, to whom the goods confirmed belonged, cannot have an heir to claim the same, he being on life the time of the confirmation, and therefore that the wife’s executors had no right to any particular of that kind.

[5205] July 30.—The heir desiring defalcation against the executors of the wife of the defunct, of the defunct’s moveables, for sums owing by the defunct by heritable bonds, which the heir alleged ought to be paid for the heir’s relief, out of the readiest of the moveables ; and the executor alleging, that the heir ought to have no relief for debts owing by heritable bonds, upon the defunct’s moveables,—the Lords found, that the heir ought to have no relief against the executor, nor upon the defunct’s moveables, for any sum owing by heritable bonds ; and found, that obligations bearing the debtor to be obliged to pay annualrent for the money borrowed, albeit not bearing a clause of infettment, were heritable bonds, which the heir was liable to pay, and not the executor ; for the Lords found, that heritable bonds ought to be paid by the heir.

* See note under No. 1, in which for “ Mercer *v.* Minister of Lethindy,” read “ Minister of Madderty *v.* the Heritors.”

and moveable bonds by the executor ; so that albeit the creditor may seek payment either from the heir or executor as he pleased, yet betwixt the heir and executor, when any of them seeks their relief off others, they are obliged to relieve others of the debts as said is. Also the Lords found, that where the debtor by an heritable bond dies before the term of payment, after the which the annualrent begins to take effect, to be paid as use is, that *eo casu* albeit both the debtors, heirs, and executors be obliged in the sum to the creditor, yet in the relief betwixt the heir and executor, the heir ought to have relief thereof off the moveables ; and, in that case, the moveables are properly liable therefor, even as when the creditor dies before the term of payment in an heritable bond, the same will pertain to his executor, and not to his heir ; but if, where the debtor dies before the term of payment, and the money lies over after the term divers other terms, and that the creditor exact his principal sum and annual-rents from the heir, albeit by this decision the heir will get his relief off the executor for the principal sum, yet it is a doubt if he can get relief off the annualrents paid by him ; which appears ought not to burden the executor, who can be subject in no further but what was owing by the defunct the time of his decease ; and which, as appears, cannot make him liable for the course of annualrents running after his decease. See HERITABLE and MOVEABLE.

Act. NICOLSON & BAIRD.—Alt. MOWAT & BURNET.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 356. Durie, pp. 534, 536.

No. 10.

[5207] WHITE *v.* WHITE. June 10, 1673.

A man dying, left a daughter of one marriage, a son and a daughter of another. The son, after making up titles to part of the estate, also died. His full sister entered heir to him in that part, and she and her half-sister made up titles to the remainder, as heirs-portioners to their father. Found, that the relief of the father's debts, betwixt the two sisters, ought to be in proportion to the respective parts to which they succeeded, whether immediately to the father, or mediately by representing the brother.

John White having been infeft in the lands of Nether Whillonhill, and having had a several right to the teinds thereof, died, leaving a son and two daughters ; after his death the son obtained himself infeft in the lands, by a precept of *clare constat*, but did not establish the right of the teinds in his person, and died without issue ; after his decease Janet White, who was his sister by both bloods, is infeft as heir to her brother in the land, excluding Christian, who was but only sister by the father ; and both Christian and Janet entered heirs-portioners to John their father, and thereby had right to the teinds ; whereupon Christian pursues Janet, who possess both land and teind, to pay her the half of the teind-duty ; who alleged compensation, in so far as Janet the defender had paid 1000 merks of their father's debt, and thereby had recourse against Christian the pursuer, as one of the two heirs-portioners to her father, for the half of that debt. It was answered for Christian the pursuer, That her sister the defender could not seek recourse or relief against her as heir-portioner for the equal half, but only proportionably effeiring to the heritage of the father, both in land and teind ; for albeit a creditor of the father's might have recovered payment against the pursuer for the half, as one of the two heirs-portioners, so a creditor might also have obtained payment from the defender Janet, of the whole debt as heir to her brother, who was heir passive to his father ; so that as the pursuer is heir immediate to her father in a half, so the defender is not only heir immediate in the other half of the teinds, but is sole heir by progress to her father in the land ; and, in either case, when either party were pursuing for relief, they are in the condition as different heirs of the same defunct ; and law and custom hath cleared the order and relief of all heirs and successors amongst themselves, viz. that heirs of line must relieve heirs of tailzie and provision ; and as to heirs-portioners, when they come to divide their succession, or to get relief of the defunct's debt, they must have collation of what

portion or provision they got from the defunct, and according thereto the division and relief must proceed ; and albeit a case of this nature hath never occurred till decided till now, it must be decided according to equity, and to like cases already determined ; and there can be no doubt, but that, in equity, the benefit and burden of the father's estate and debt should proceed proportionally, and that all that represent him should pay his debt, according to the benefit they have received ; for, upon the same ground of equity, the collation of goods amongst heirs-portioners was introduced. It was answered for the defender, That equity cannot rule this case ; but is determined by the course of law, [5208] which makes heirs-portioners to succeed as in the benefit, so in the burden of the defunct's debts equally ; neither are they obliged to confer any more than what they had from the defunct, whose heirs-portioners they are, and that immediately, and so they are not obliged to confer the succession of the brother, nor to have regard thereto in relief of the father's debt ; neither is there by the law of Scotland any succession, active or passive, by inventory or proportion, but all either *in solidum*, or for a determined *quota*, according to the number of the heirs-portioners.

The Lords found, that the relief of the father's debt betwixt his two daughters, ought not to be equally, though they were heirs-portioners, but proportionally, according to the proportion of the father's whole estate, to whom both succeeded, either mediately or immediately in the whole ; and therefore ordained probation *hinc inde* of the worth of the land, and of the teind, that the pursuer might bear only burden for the half of the teind, and the defender for the other half of the whole land.

Fol. Dic. v. 1, p. 356. Stair, v. 2, p. 183.

No. 11. [5209] MARION and MARGARET WRIGHTS v. WILLIAM and GEORGE SMITH
July 12, 1716.

In a process at the instance of two heirs-portioners against the third, for payment of a debt due to them by the defunct *singulari titulo*, the Lords found, that the debt was extinguished by confusion as to two-third parts, to which they succeeded as heirs-portioners, but granted decree for the other third.

Thomas Wright, merchant in Dumfries, having been twice married, obliges himself, in the contract of marriage with the first wife, to secure her in £1000 in *lifrent*, and the children in fee ; and to the second 2000 merks in the same manner : The only child of the first marriage being married to Mr. Patrick Smith, the second wife of Thomas, after his decease, paid the said £1000 to the said child of the first marriage, and Smith her husband ; after which, the said child of the first marriage, with consent of her said husband, granted bond to Sir Patrick Maxwell, whereupon he led an adjudication against her, as lawfully charged to enter heir to her father, and adjudged from her some lands, &c., in Dumfries ; which adjudication was disposed by Sir Patrick to William Smith, son procreated betwixt the said Mr. Patrick Smith and the said deceased Agnes Wright ; and the Magistrates of Dumfries are charged to infest the said William upon the said adjudication.

Upon this there is a process upon the passive titles, raised at the instance of the children of the second marriage, after serving heirs-portioners to their father, against the said William Smith a minor, upon the ground of the act of Parliament 1695, cap. 24, concerning the obviating the fraud of apparent heirs.

Answered for the defenders ; That the pursuers being served heirs-portioners, their claim is extinct *confusione*.

Replied for the pursuers ; That, as they succeed to the two-thirds of their father's inheritance, so far indeed the debt is extinguished *confusione* ; and [5210] therefore they only insist against William Smith, who doth represent his mother as one of the three heirs-portioners, for the third of their provision, in which he must be liable, as having purchased the foresaid adjudication.

Duplied for the defender ; That a service in indefinite terms is an universal representation, and therefore a total extinction of the pursuer's claims, which must certainly

a place, unless they had cognosced themselves heirs of provision, or of the second marriage, in which case only the extinction would have been partial. Further alleged the defender, That he could not be liable in behaviour, being minor, and not capable to accept a disposition, which was necessary to infer behaviour; and, 2do, That did not possess the land adjudged.

Answered for the pursuer, to the 1st; That nevertheless the defender must be able in the terms of the act, unless he repudiate or renounce the benefit of the said indication; because, by purchasing it, he had acquired a right to a legal diligence affecting his predecessor's estate, which is all that the act requires to infer behaviour, as it holds in the case of a successor *titulo lucrativo*. To the 2d, answered, That the foresaid clause in the act of Parliament establishes a behaviour in two cases, viz. the apparent heir either possesses his predecessor's estate, or acquire and purchase a right thereto, or to any legal diligence affecting the same.

"The Lords found the defender liable in the passive titles according to the act of Parliament 1695, unless he renounce the right purchased for him to the tenements and acres belonging to his predecessor; and sustained the defence of extinction of the debt by confusion, in virtue of the general service for two-third parts to which the pursuers succeed as heirs-portioners; but repelled the same as to the other third part."

Act. FLEEMING.—Alt. ILA FERGUSON.—Clerk, M'KENZIE.

Fol. Dic. v. 1, p. 356. Bruce, v. 2, No. 17, p. 21.

No. 12. MAXWELL of Monreith v. HOUSTON of Calderhall. July 12, 1717.

An heir male evicting the estate from the heirs of line who had entered, and upon the faith that the estate was their own, had paid several debts; the question occurred, if relief was competent to them against the heir-male. It was pleaded for them, That he ought to be ultimately liable who enjoyed the defunct's estate, seeing it is most rational, that the defunct's debts should be paid out of his effects; upon this footing stands the relief betwixt the heir and executor.—The Lords found no relief competent.

This was reversed by the House of Lords. See APPENDIX.

Fol. Dic. v. 1, p. 356.

No. 13. [5211] KER v. THOMSON. February 3, 1736.

Where a defunct's succession splits, and he comes to be represented by two different heirs of line, which may happen in many cases, the heirs have no total relief one against another, but only in proportion to the subjects they succeed to: And, therefore, an heir having made up titles to a part of his father's estate, and his sister, after his decease, having made up titles to what remained in *hereditate jacente* of the father, neglecting her brother's succession as overcharged with debt; in a question betwixt her and her brother's creditors, with respect to a bond of provision granted to her by her father, upon which she was a preferable creditor, the Lords found, that she could not draw the whole out of her brother's estate, but proportionally out of both, as well that part she succeeded to, as the part that her brother succeeded to. See APPENDIX.

Fol. Dic. v. 1, p. 356.

No. 15. JANET and MARY RUSSELS, and their Husbands v. RACHEL RUSSEL, and her Husband. January 23, 1745.

A disposition of heritage, with burden of debts, does not preclude the heir from being relieved by the executor.

David Russel, surgeon in Kennoway, having no children, settled his small land estate upon Mr. William Dall, the husband of his eldest sister Rachel, in liferent and on Thomas Dall their son in fee, and the heirs-male of his body, whom failing &c., with and under the reservations, burdens, conditions and faculties after express viz. reserving his own liferent and power to alter, sell, or burden without consent of the heirs of tailzie; and then followed a clause in the following words: "And I hereby expressly burden this right and disposition, "not only with the payment of my funeral charges, but also with the payment of my three sisters german, their portions yet resting by me to them, and with payment of all the just and lawful debts that shall be resting by me the [5212] time of my death, to whatever person or persons, by bond, bill, contract, decree, or any other manner of way."

And after a clause, obliging the heirs to carry his name and arms, followed a provision, "That it should not be in the power of the said Thomas Dall, or of any other of the heirs substituted to him, to contract debt, sell, wadset, or dispose the said lands" (with an irritancy in case of contravention) "except in the case aftermentioned, viz. that it shall be in the power of the said Thomas Dall, or of the remanent heirs mentioned in the foresaid substitution, to contract as much debt on the foresaid lands, and to grant security therefor affecting the said lands, as will satisfy and pay the said debts that shall be resting the time of my death, with and under which reservations, provisions, &c., these presents, and the resignation to follow hereon are granted, and shall be accepted by the said hail heirs, &c., and no otherways."

Upon the death of David Russel, his sister Rachel, and Mr. William Dall her husband, having confirmed executors to him *qua* nearest of kin, and amongst other subjects having given up in inventory two bills due to the defunct, and another debt of £2000, whereof the term of payment was not yet come, a process was brought against them at the instance of the other two sisters, to account to each of them for a third of the executry, and particularly, to assign and transfer to each of them a third of the moveable debts still outstanding.

Alleged for the defenders; That there were more moveable debts than exhausted the executry.

Replied; That the defunct had, by the disposition foresaid, laid the burden of all his debts upon his land-estate, whereby his moveables were left free to his executors.

Duplied; That as, by the clauses in the disposition, the debts were not made real burdens, these clauses imported no more than an anxiety in the defunct to secure his creditors, but by no means an intention to lay his moveable debts ultimately on his heir, and to bar him from the relief competent to him in law from the moveable estate: And that the circumstances of the case strongly concurred to support this construction; for as the estate did not exceed 1800 merks a-year, and was affected by two liferents, one of the defunct's mother, the other of his wife, extending together to about 1200 merks, one of which still subsisted; as the moveable debts amounted to 15,000 merks, and the executry to near that sum; it was not to be conceived, that when he tailzied his estate, he at the same time meant to exhaust it by debts, and leave a free subject to go to his executors.

The Lords, "in respect it was not denied by the pursuers, that the moveable debts due by the defunct, did exceed the moveable estate belonging to him, repelled the claim made by the pursuers for the said moveable estate."

The circumstances of the estate in this case were a strong indication, that it could not be the intention of the granter to burden the tailzied estate with the debts. But laying aside these circumstances, it was the general opinion, that [5213] the rule is, that a clause in a disposition of a land-estate, burdening the disponee with the payment of the granter's debts, does not exclude the disponee from relief of the moveable debts from the executry.

b. 16. MARGARET, LILLIAS and HELEN CAMPBELLS v. CAMPBELL. January 14, February 17, & July —, 1747.

father, in a disposition of his personal estate, burdened the disponent with payment of all his debts heritable and moveable. He executed afterwards an entail of his land estate, in which he burdened the institute and substitutes with payment of all his debts heritable and moveable, empowering the heirs of entail to sell as much of the lands as would pay the debts. Found that the disponent to the personal estate had no relief against the heir of entail for payment of the entailer's debts.

On the 28th May 1733, Archibald Campbell of Shirvan, having then one son and three daughters, executed a settlement of his personal estate, by which he disposed to his son Dougal, and the heirs-male of his body, which failing, to any person he should appoint, and failing such appointment, to his own nearest lawful heirs-male and assignees; all and sundry debts heritable or moveable, which should happen to belong to him at the time of his death, with what other moveables he should be then possess of; proviso, That the [5214] said Dougal, and the heirs substitute to him, should be holden and obliged to pay the respective provisions made, or to be made to his other children, and to satisfy and pay all his just and lawful debts and legacies, &c." And of the same date, he granted a bond of provision to his three daughters, Margaret, Lillias, and Helen, for £1000 Sterling, equally among them, in full of all they could ask, &c.

On the 8th June thereafter, he executed a tailzie of his land-estate, containing prohibitory and irritant clauses against contracting of debt, or alienating any part of the lands "in favour of himself in liferent, and his son Dougal, and the heirs-male of his body in fee; which failing, to the other heirs-male of his own body; which failing, to Alexander Campbell his eldest natural son, and the heirs-male of his body; which failing, to John Campbell his second natural son by another mother, and the heirs-male of his body; which failing, to his three lawful daughters, Margaret, Lillias, and Helen in their order, and the heirs-male of their bodies, &c. And this tailzie also contained a proviso, "That the said Dougal, his son, and his foresaids, and the heirs substitute to him, should be holden and obliged to pay the provisions of his other children; and that the lands and others above express should not only be affected and burdened with the payment thereof, but also with the payment of all debts that should be due by him at his death, and the implement of all his obligations that should be then unfulfilled; all which the said Dougal and other heirs of tailzie should by their acceptation be obliged to pay and fulfill, albeit the said bonds and obligations be only personal, and no infertment has followed thereon." And, by an after proviso, it was declared, that it should be lawful to the said Dougal and the other heirs of tailzie, to sell as much of the lands as will pay the debts resting at his death, and children's provisions, the purchaser being always obliged to see the price so applied, and to no other purpose."

In 1737, Archibald Campbell of Shirvan died, and his estate heritable and moveable devolved upon Dougal his only lawful son; who thereafter dying an infant, the succession of the land estate fell to the eldest natural son Alexander Campbell now of Shirvan; and as there was no special appointment made of the person to succeed to Dougal in the personal estate, the same fell in terms of the above settlement to the collateral heir-male Dougal Campbell of Kilmartin; who, upon a transaction with the daughters, whereby they were to pay him 11,000 merks, and to relieve him of their father's debts, disposed to them his whole right to the personal estate, in virtue of the disposition above recited.

Upon this transaction, the daughters, in right of Campbell of Kilmartin, pursued Alexander, the heir of tailzie, for relief of the debts that were resting by their father at the time of his death; upon this ground, that from the several clauses and provisos in the tailzie, it appeared to be the intention of the granter, to lay his debts ultimately upon the heir of tailzie; particularly from that clause, whereby it is declared, "that the lands should be burdened and af-[5215]-fected with the payment of all the debts he should be resting at his death, &c." That clauses burdening a disponent with the payment of debts, such as that in the disposition to

the personal estate, are no other than usual clauses of stile, which *de jure insunt*, but clauses burdening the lands are legal evidence of the granter's intention, that the debts should ultimately affect the heir succeeding in the lands. That as our law was understood to stand at the date of this deed, the disposer's debts would by the clause have been made real, even in a question with a singular successor; and though since that time our law has undergone an alteration, yet the granter's intention by such a clause does not therefore vary; wherefore such clauses still retain this effect to show the intention of the disposer to exclude that relief which otherways the disponee would be entitled to from the moveable estate; that this intention is further confirmed in this case, by the power given to the heir of tailzie, to sell lands for the payment of the debts; for which there was no occasion, if the heir of tailzie was to have relief from the personal estate, as that was more than sufficient to pay all the debts. And lastly, The decision, Lady Margaret Cunningham *contra* Lady Cardross, July 23, 1680, No. 6, p. 2449, was appealed to, where, although there was no clause burdening the lands disposed, but only a clause declaring, that by the acceptance of the right, the disponee was to be bound to pay the debts, he was found to have no relief against the heir.

Answered for the defender, That where a person settles his estate, not by way of succession, but by disposition *inter vivos*, reserving a liferent and power over the estate to himself, the disponee takes not as heir, and especially if he be not *aliqum successorus*, the creditors cannot recover their payment, but by the circuit of a reduction upon the act of Parliament 1621; and therefore it is the universal practice, where one settles his estate upon a series of heirs, to burden the disponee, and the heirs succeeding to him, with the payment of the debts; and the intention of such burdening clause is understood only in favour of the creditors, to give them the like access against the disponee, as if he had taken the estate by service, but by no means to deprive him of the like relief that would have been competent from the moveable estate, had he taken the estate by service; and that so the law stands, even where the land estate only is disposed with such burdening clause, and the moveables left to go to the heir *ab intestato*, as was found in the case between Russel and Dall, No. 15, p. 5211.

Nor does the decision, Lady Margaret Cunningham *contra* Lady Cardross, contradict this doctrine, as being in a special case, where Sir William Stewart, having a weak man for his eldest son, had disposed the bulk of his estate to his second son, with this provision, that by his acceptance, he should be bound to pay all his debts, leaving a small matter to descend to his eldest son for his subsistence, and which it could not be supposed he meant was to be affectable by the second son for his relief; and this being once established, that the clause burdening the disponee with the payment of the debts, does not exclude [5216] his relief; such general clause, though also burdening the lands with the payment thereof, can have no different effect, as it does not make the debts real burdens upon the lands.

And as to the alleged speciality in the present case, that at the date of the deed, the law so stood, that this general burdening clause would have rendered the debts real, &c.; answered, 1mo, That it was doubted, if at any time, a general clause respecting even debts to be contracted, rendered such debts real burdens. 2do, Be that as it will, the law was known to be as it now stands, long prior to the date of the deed in question, even as far back as the judgment of the House of Peers anno 1720, in the case, Creditors of Innes *v.* Duff, *voce* PERSONAL and REAL; which has ever since been followed; so that, 3tio, The question is no other than what has been stated, whether in all cases a general clause in a disposition, burdening the disponee, and the lands disposed, with the payment of the disposer's debts, is to be held as laying the debts ultimately on the disponee, although, as the law now stands, it imports no more than a personal burden upon the disponee. And on this the foresaid decision between Russel and Dall was appealed to as in point; for in that case the clause was exprest with equal anxiety, and in the precise same words as in the present case, burdening not only the disponee, but also the lands disposed, with the payment of the debts; and nevertheless, it was found, that he had relief of the moveable debts out of the executry.

And as this is the legal construction of the burdening clause, it is also enforced from the circumstances of the case. All the question is, What was the defunct's will? His declared purpose was to rear up a family by an entail; first to his lawful son, next to his natural sons, and failing them, to his daughters; and that while he

fences this entail with prohibitory and irritant clauses against alienation, or contracting debts, he should intend even to lay his funeral charges on it, and leave the moveables entire, and that even when his son was the institute both in the land and moveable estate, is so inconsistent, that nobody can imagine it to have been his intention. Lastly, The two deeds, though a few days distant in dates, are one settlement, and there is no making that settlement consistent with itself, without supposing that he intended relief to the disponent in the land-estate, in the event of the several estates falling to distinct heirs. The disponent to the personal estate, and those substituted to him, are also burdened with payment of the debts; which is consistent according to the defender's doctrine, that both clauses were intended only for the benefit of the granter's creditors; but if it is supposed that the burdening clause subjects ultimately to the debts, the settlement is unintelligible, and one part of it inconsistent with the other; as in both the institute and substitute would be made ultimately liable.

And as to the clause in the tailzie, empowering the heirs to sell part of the lands for payment of the debts, nothing is more ordinary than such a clause in the [5217] strictest entails; and particularly in the so often mentioned case of Russel and Dall, there was the very same clause, which was found to have no influence; for as it is not in any man's power to exempt any part of his estate from the diligence of his creditors; unless they be *aliunde* paid, the creditors might, notwithstanding the entail, proceed to adjudge, and the adjudications carry off the estate, and put an end to the family, which was intended to be perpetual; to prevent which, is the sole intention of such clause, that the heir may sell a part to preserve the rest.

Upon this debate, the Lords were much divided; and at first, upon report, Jan. 14, 1747, "Found that relief of the debts of the tailzier was competent to the pursuers in the right of Campbell of Kilmartin, against the defender heir of tailzie." But upon advising petition and answers, upon the 17th February thereafter, "Found that relief of the debts of the tailzier was not competent to the pursuers in the right of Campbell of Kilmartin, against the defender, heir of tailzie in the land-estate"; and again, on advising petition for the pursuers and answers, upon the July 1747, "Adhered."

In no cases are men so apt to be of different opinions, as in those that are called *questiones voluntatis*, nor in the nature of things can they be brought within one rule. Mean time, as this particular *questio voluntatis*, Whether one heir or another is intended to be ultimately liable in the debts? has generally its rise only from the conception of the burdening clause, so much may be thought to be established by the decision in this case, and that of Russel and Dall, that no clause, however anxiously burdening the heir or disponent, is to be constructed to exclude from the relief competent to him by the operation of the law, unless either the clause be such as makes the debts real burdens, or that by apt words such relief is excluded.

Fol. Dic. v. 3, p. 256. *Kilkerran* (HEIR AND EXECUTOR), No. 4, p. 231.

N.B. This judgment was, upon an appeal, affirmed.

No. 18. [5221] DAVID MULLO *v.* JAMES and ROBERT MULLOS.
December 20, 1758.

An heir was found entitled to relief from the executor of the provisions in a contract of marriage, although the obligant in the contract had bound himself to lay out money or land for these provisions.

By marriage-contract, in the year 1743, betwixt Alexander Mullo and Christian Robertson, Alexander had "bound and obliged him, his heirs and executors, at and against the term of Whitsunday thereafter, to provide and have in readiness, of his own proper means and effects, the sum of 10,000 merks; and to ware, employ, and bestow the same, upon land, or other good security, for annualrents; and to take the rights and securities to be granted therefor, conceived in favour of himself, and the said Christian Robertson, his promised spouse, and longest liver of them two,

in liferent, and to the child or children to be procreated between them of said marriage, their heirs, executors, or assignees, in fee; and failing of children, the [5222] of said principal sum, to fall, accresce, and belong to the said Christian Robertson, her heirs, executors, or assignees, in case she shall happen to survive the said Alexander Mullo, her apparent husband."

An after clause in the same marriage-contract is in the following words: "As in order that the said Christian Robertson may be the better secured in the regular payment of the annualrent of the foresaid principal sum of 10,000 merks, in case she shall happen to survive him, he thereby binds and obliges him and his foresaid wife, thankfully to content, pay, and deliver, to the said Christian Robertson, during the days of her lifetime, after his decease, an yearly annuity or jointure of 500 merks or any other annualrent agreeable and corresponding, by the laws of this kingdom for the time, to the foresaid principal sum of 10,000 merks."

After this marriage, Alexander purchased a tenement of houses in Dundee, of £20 yearly value, the rights of which he took, not in terms of the contract of marriage, but in general, to himself, his heirs and assignees.

Alexander died in the year 1755; Christian Robertson survived him; there were no children of the marriage; his subjects were the above tenement, and £700 of personal estate.

When on deathbed, Alexander executed two settlements; by the one, he conveyed his moveable subjects to his nephews James and Robert Mullos, and burdened them with the payment of 200 merks of his wife's jointure provided to her by the above contract of marriage; by the other, he disposed the tenement in Dundee to another nephew, Alexander Mullo; with this proviso, "Providing and declaring, that the said Alexander Mullo shall, by acceptation hereof, be expressly bound, burdened, and obliged, to content and pay yearly to Christian Robertson his spouse, during all the days of her life, after his decease, the sum of 300 merks Scots, as a part of the yearly jointure provided to her by the marriage-contract entered into between them."

David Mullo, heir of conquest to Alexander, brought a reduction of Alexander's disposition of the tenement to his nephew Alexander on the head of deathbed, and prevailed in it. But James and Robert Mullos, the legatees of Alexander, and who were likewise, with others, executors to him, appeared for their interest in the process, and claimed relief of the sum of 300 merks yearly, payable to the relict, as provided by the deathbed disposition, to which extent they insisted to support the validity of the deathbed disposition.

Pleaded for David Mullo; Alexander Mullo, by taking the investitures of the tenement to his heirs in general, did not implement the obligation in his contract of marriage, to take to his wife and self in liferent, and children of the marriage in fee. This last provision therefore remained only *in nudis terminis* of a personal obligation, and as such was ultimately prestable by the executor, who was bound to relieve the heir thereof. Neither could that obligation be transferred from the executor upon the heir, upon the footing of the second clause above mentioned of the contract of marriage; for the first clause [5223] is the primary, principal, and capital obligation; the after clause is only an accessory obligation to the other. It is so immaterial, that nothing is therein expressed which would not have been implied, whether expressed or not; it being plain, that if the husband was bound to lay out 10,000 merks for the wife's liferent, he and his representatives would have been liable to her for the interest of the money whether laid out or not; and therefore any question of relief betwixt the heir and executor must be regulated by the governing clause; in which view that clause never having been implemented, the implement of it lies now upon the executor.

Answered; Imo, There is no law that establishes a privilege to a clause first inserted in a writing, to abolish the subsequent clauses of the same deed. All the clauses, whether first or last in point of order, are to be considered equally as declarations of the will of the parties, and to have their full effect in the several events for which they are calculated. Nor is it to be presumed, that any clause is added that is entirely insignificant or useless. It is to be presumed, that the parties had a view to a different event in the second clause; if it will admit of that construction, any construction will be taken rather than to suppose they meant to say nothing, or *nihil agere*. Now, it is obvious that there are two separate events, to which these

clauses fall respectively to be applied. The first is, Where the wife and children shall happen both to be creditors to the father at his decease. The second is, Where there are no children existing, but the wife is the sole creditor upon the contract. In the first event, the father is bound to lay out the sum in favour of himself and his wife, and longest liver, in life, and the children of the marriage in fee. But for the other event, when there happens to be no children, and the wife is the only person who has an interest in the provision, the other clause is adapted for securing her in the due payment of the annuity or annual rent yearly, during her life. Suppose the wife had been past child bearing at the time of the marriage, no writer could have inserted the first clause in the contract; the second would then have been thought the only proper obligation to lay upon the husband, viz. to pay or secure to his wife a yearly annuity, to be paid to her in case of survivance; and if that would have been the only clause, had the event that has now existed been foreseen at the time, it seems pretty plain, in constructing the effect of the obligation, that that is the clause to be chiefly considered; and not the other, which was calculated for a different event that has not happened.

Now, this being taken for granted, it is an indisputable point, that an obligation for payment of an annual sum, which is to take place after the debtor's death, will affect his heirs principally; and the executors, if sued on it, will be entitled to relief against the heir. This takes place, though the obligation has no respect to lands; and the reason is, that the executry is a limited succession, which comprehends only the moveables that belonged to a defunct at the time of his death. They are supposed to be all contained in an inventory [5224] then taken up, and the extent of them to be ascertained at that period; and therefore, if a defunct had obligations due to him that depended upon distant events, which might or might not exist after his decease, such obligations, though merely personal, will not fall under his executry; e.g. if he had acquired a life annuity due to a third party, or had entered into a contract of victual for a tract of years, all such obligations, *cujus dies cedit de anno in annum*, will fall to his heirs, and not to his executor; and, *e contra*, obligations of that nature will ultimately affect the heir, who is entitled to a permanent succession, and not the executry, which comprehends only what is *in bonis defuncti* at the time, and cannot from the nature of the thing admit of a *tractum temporis*.

2do, Alexander's taking the investiture to the heirs in general, which would have made it go to the heir of the marriage, was a virtual implement of the contract.

"The Lords found, That in this case the heir is entitled to relief against the executor."

For David Mullo, LOCKHART.—For James and Robert Mullos, FERGUSON.

J. D.

Fac. Col. No. 152, p. 270.

No. 20. [5225] The Honourable JOHN ARBUTHNOT, second Son of the Viscount of ARBUTHNOT, and the said Viscount, his Administrator-in-law v. Mrs. AGNES ARBUTHNOT. June 23, 1773.

It is the nature of the obligation granted for the price of lands purchased at a judicial sale, and not of the debts ranked thereon, that regulates the relief, *quoad* these debts, between the purchaser's heir and executor.

The estate of Finart, the property of John M'Farlane, having been incumbered with debts, partly secured by voluntary infeftments, and partly by adju-[5226]-dication, an action of ranking and sale of that estate was brought, at the instance of the creditors; and the same having been purchased at the sale by John Rowan, writer to the signet, who granted bond, in common form, for payment of the price, payable to the creditors as ranked, decree of sale went in his name accordingly.

John Rowan having acted, in the premises, only as trustee for James Arbuthnot, he, by deed dated 27th November 1747, declared the trust, and granted a conveyance of the lands thereafter in his favour; and James having died in 1747, without issue,

these lands devolved on Robert Arbuthnot, who procured himself served and returned heir in general to his brother, whereby he carried the disposition of the foresaid lands on which no infertment had followed in James's person.

Robert, who survived James but a short time, made a settlement in favour of John Arbuthnot, the second son of the Viscount, then under age, and whom the creditors of James having attached for their payment, and it being judged necessary that Robert's estate should be sold, warrant was obtained for that purpose ; and, when sold, the creditors, both of James and Robert, were paid, out of the price thereof, the respective sums due to them.

Thereafter, the present action was brought, at John's instance, against Mrs. Ann Arbuthnot, the executrix of James, concluding, that she should be decerned to make payment to the pursuer of the particular sums therein mentioned, which were paid by him, of the debts that were owing by the said James Arbuthnot, and also to relieve him of a debt of the said James Arbuthnot still outstanding. And in this action the Lord Eliock Ordinary "repelled the defences, so far as concerns the debts due to the creditors ranked on the price of the estate of Finart, and the debt due by bond to Matthew Henderson ; and found Mrs. Ann Arbuthnot, defender, as executrix of her brother, James Arbuthnot, liable in payment of the same."

Pleaded in a reclaiming petition ; As, in the course of legal succession, the heritable estate goes to the heir, and the executry, or personal estate, to the other nearest of kin, each of these *transit cum suo onere*. The heritable debts must be paid by the heir out of the heritable estate ; and the moveable debts are a burden on the executry, and must be paid therefrom. Though both estates are equally liable to the creditors, they are entitled to mutual relief against each other, in so far as either have paid debts which do not ultimately fall upon them. And, as the debts in question had a real lien upon the estate, secured by infertments or adjudications, and as these were not loosed by the judicial sale of the estate, but remained still a real burden upon it, they must fall ultimately on the heir, and not on the executor.

The pursuer's observation, that a debt may be heritable *quoad debitorem*, and personal *quoad creditorem*, et *vice versa*, is nowise applicable to the case in hand. The debts were heritable, both *quoad debitorem et creditorem*, being actually secured on lands, the property of James Arbuthnot, which undoubtedly made them heritable *quoad debitorem*.

[5227] Answered, As the right of succession is regulated by the *animus* of the creditor ; so the question of relief between the heir and executor is regulated by the *animus* of the debtor.

Where the debtor grants a real security to the creditor, for his payment, as he has, by his own act and deed, made the same a real burden on the estate, the law does not presume it was the intention of the debtor, that the same should remain ultimately a burden on his heir ; and, consequently, if he pays, he pays without relief ; and, if it is paid by the executor, the executor will be entitled to be relieved thereof by the heir. But that is not the case at present. The obligation which, in this case, was granted by James Arbuthnot, or, which is the same thing, by John Rowan, his trustee, is a mere personal obligation, in common form, for payment of the price to the creditors, as they should be ranked.

It is no doubt true, that the debts were really secured on the lands ; but then that real security was not created by the act and deed of M'Farlane, the original debtor : and there is no doubt that, in a question between his heir and executor, these debts would have been ultimately a burden on the heir ; but the additional security that was given to the creditors by the purchaser, from its nature, burdened the executor, and the personal estate, and of which, therefore, the heir fell to be relieved by the former.

Again, it is a trite distinction in our law, that obligations may be heritable *quoad creditorem*, but moveable *quoad debitorem*. Thus, bonds excluding executors, though they descend to the creditor's heirs, are payable by the debtor's executors, without relief from the heir ; as the debtor's succession cannot be affected by the destination of the creditor. And the present case is likewise a very proper instance of it. These debts being really secured on the lands, so the supervening personal security granted by the purchaser, will not render these debts moveable, but the real security, as the *jus nobilius*, must remain, and regulate the succession of the creditor. The real securities, however, created by the act and deed of M'Farlane.

not affect the succession of the purchaser ; and, as he came under no more than a personal obligation, for payment of the price to the creditors as ranked, that obligation cannot, in the least, be affected by the nature of the creditor's rights, but must be performable by the purchaser's executor, out of his personal estate.

The respondents do not dispute that the debts do remain a burden on the estate, after the purchase, as much as before it, and that these burdens must likewise affect the heir ; but the question is, Whether the heir is entitled to be relieved of these burdens by the executor ? And it is contended, that, as the purchaser granted a personal obligation to pay the price to the creditors as ranked, that so he might be entitled to take the estate, disburdened of the debts of his author, that this personal obligation must be made good, after the death of his executors. Indeed, the debts cannot, with propriety, be said to be a burden on the estate of the purchaser. The estate is not the estate of James Arbuthnot, until the price is actually paid to the creditors ; and, therefore, the price cannot be said to be a burden on his estate. The decree of sale does not give a right to the purchaser ; it gives no more than a conditional right, viz. on payment of the price to the creditors, as ranked ; and on James Arbuthnot's death, it was incumbent on his executors to purify that condition.

"The Lords adhered to the Lord Ordinary's interlocutors, and found Mrs. Ann Arbuthnot only liable to the extent of the inventory."

ACT. M^CQUEEN.—ALT. DEAN OF FACULTY.—CLERK, GIBSON.

Fol. Dic. v. 3, p. 257. *Fac. Col.* No. 74, p. 180.

No. 21. SAMUEL BROWN v. PATRICK BROWN. November 19, 1782.

Found, that the heir-general is liable to relieve the heir of conquest.

* * See, as explanatory of this case, a prior question between Samuel Brown and Peter Blackburn, *voce* PASSIVE TITLE.

The pursuer having failed in obtaining relief from Mr. Blackburn, as intromitter with the personal estate, insisted against Mr. Patrick Brown, as heir-general to the deceased, and consequently liable to relieve the heir of conquest from all obligations not immediately affecting the subjects falling under the succession of the latter.

Pleaded in defence ; The grandfather of the deceased left four sons. The defender represents the eldest ; the pursuer the second ; the defunct was the son of the third ; and there was likewise a fourth son, who had issue. As by the law of Scotland the heritage or general representation of the deceased brother or uncle descends to the next younger brother or uncle ; the representative of the fourth son, and not the defender, who is the descendant of the eldest brother, is heir of line to the deceased. In England again, the law of which regulates the succession in the island of Jamaica, as the real estate of every denomination goes to the eldest brother, the defender, in place of being obliged to relieve any other heir, would be entitled himself to the succession.

Hence, as matters stood at the predecessor's death, the period when rights of succession are finally ascertained, the present claim was altogether incompetent ; nor ought the extraneous circumstance, of the defender's having a residence in Scotland, to subject him to that right of relief, which the peculiarity of the law of this country indulges to heirs of conquest.

Answered ; In whomsoever the general representation of the deceased is vested, that person must be liable primarily to all his debts. Heirs of a particular denomination, such as conquest, provision, marriage, or heirs-male, who succeed to the subjects specially devised to them, either by provision of law, or the destination of the proprietor, are considered, with regard to him, as singular successors, and their several interests admit no defalcation, while he who is held to be *eadem persona cum defuncto* is possessed of effects sufficient for their relief.

[5229] Nor is it of importance in the present question, that by the law of England, the defender is entitled to the whole real estate ; nor that, by the law of Scotland,

the descendants of a younger brother would have excluded them from the succession. As of all those who enjoy any part of the predecessor's estate, he alone is entitled to the character of heir-general, every burden which is not of its nature applicable to the estate falling to the particular heirs, must affect him only.

The Lords repelled the defences.

Lord Reporter, HAILES.—Act. RAE.—Alt. DAVID ARMSTRONG.—Clerk, HOMER.

C.

Fol. Dic. v. 3, p. 256. *Fac. Col.* No. 67, p. 105.

No. 3. [2] FRASER v. FRASER and Others. November 13, 1804.

A debt due by an heritable bond, must be paid by the heir, without relief, though the executor is taken bound in general to pay all the debts of the deceased.

Lieutenant-Colonel Hugh Fraser of Knockie, executed a deed of settlement on the 28th of April 1801, in London, by which he disposed his lands of Knockie and Dalchapple to his cousin Simon Fraser of Farraline, binding him-[3]-self to make up proper titles, and convey these lands to him, his heirs and assignees; "and with regard to my personal estate, I give, grant, devise, and bequeath the same in manner following, viz. in the first place, I order and direct, that my funeral charges and expenses, together with all my just and lawful debts, be paid by my executors hereafter named, as soon after my decease as conveniently may be: All the rest, residue, and remainder of my estate and effects, of every nature and kind whatsoever, and wherever situated, I give, grant, and bequeath, assign, convey and dispose to my uncle, James Fraser of Gorthlick, Esq., his heirs and assignees; and I hereby nominate and appoint him the said James Fraser to be my residuary legatee."

Colonel Fraser had not been in Scotland for more than a year before he executed this settlement. His personal estate was much more considerable than his heritable property; and the only debt which he left was a bond of £2000 due to Helen and Grizel Fall, which was heritably secured upon his estate in Scotland.

Farraline, and the other trustees of Miss Falls, brought an action against the executors for payment of this bond, and the executors brought a counter action against Farraline for relief.

"The Lord Ordinary having heard parties' procurators, conjoins the process of relief at the instance of John Spalding and others, the executors of Colonel Hugh Fraser, against Simon Fraser of Farraline, Esq. with the before-mentioned process at Simon and John Fraser's instance against Colonel Fraser's executors: Finds the whole defenders, conjunctly and severally, liable for payment of the heritable bond libelled on; but in respect the settlement by which the lands of Knockie are disposed to Simon Fraser of Farraline, one of the defenders, could only import a right to those lands, subject to the heritable debt with which they were burdened; and that the clause taking the executors bound to pay the debts, cannot have the effect of altering the right of relief between him and the executors; finds the executors entitled to relief from said Simon Fraser of Farraline, Esq., of the heritable bond libelled on, conform to the conclusions of their actions of relief; and decerns accordingly."

The trustees presented a petition to the Court against this interlocutor, and

Pleaded: The present case ought to be decided by the law of England, where the testator had his domicile, by which law the executors are liable for this debt. The settlement was drawn in London, and must be interpreted according to the received rules of the country where it was executed. But even supposing the question to be decided according to the principles of the law of Scotland; when a person disposes an heritable subject to one, and, at the same time, the bulk of his fortune to another, in a character inferring general representation, taking him bound to pay the whole of his debt, he must relieve the disponee of the burden attached to the heritable property. Consi-[4]-dering this as a question of intention, there can be no doubt that

Colonel Fraser, who had no other debt than this heritable bond, meant, by imposing the obligation of discharging his debts upon his executors, that the disponee should possess the estate unencumbered, and that the executors were only to have a right to the personal estate after paying this debt.

But the petition was refused without answers, the Court being of opinion, that, without a special clause to that effect, the legal rules of accounting between heir and executor could not be altered.

Lord Ordinary, HERMAND.—For Petitioner, CRAIGIE.—Agent, COL. M'DONALD, W.S.—
Clerk, FERRIER.

J.

Fac. Col. No. 179, p. 403.

No. 16. [5247] BLAIR v. STEWART. February 28, 1733.

The privilege competent to apparent heirs by act 1695, to sell the predecessor's estate at a public roup, found competent notwithstanding the pursuer had behaved as heir, and become thereby liable to all the debts of his predecessors. See APPENDIX.

Fol. Dic. v. 1, p. 359.

No. 27. [5264] IRVINE v. MAXWELL of Springkell. January 29, 1748.

A decret of sale, at the instance of an apparent heir, within year and day of the first effectual adjudication, brings in the whole creditors, whether adjudgers or not, *pari passu*.

Richard Bembie-Johnston, apparent heir of Colonel John Johnston of Netherwood, pursued a process of sale of his predecessor's estate, which was accordingly sold 21st July 1744. But Mr. Francis Grant, merchant in Edinburgh, had obtained an adjudication 12th June of the same year, upon a decret of cognition, which interest came into the person of Sir William Maxwell of Springkell; and George Irvine, writer in Edinburgh, obtained an adjudication 23d February 1745, within year and day of the first.

A question arose, whether these adjudications ought to be ranked *pari passu*; or if the first had a preference, as the second was led posterior to the decret of sale, when there was no adjudgeable subject in the *hereditas jacens* of the common debtor, the estate being sold, and the price only affectable by arrestment.

On the other hand it was pleaded, That the adjudications within year and day of the first were to be ranked *pari passu* with it; and an apparent heir, by obtaining a decret of sale, could not take from his predecessor's creditors the benefit of leading them: That adjudications after the sale of a bankrupt estate, were not only competent, but necessary, if any of the creditors had not completed their diligence before; and there was no difference in the competence of them, betwixt the case of a sale pursued by a creditor, and by an apparent heir; in both which the price, as come in place of the land, fell to be affected by the diligence.

The Lords considered the decret of sale as an adjudication, for the benefit of the whole creditors, being obtained by the apparent heir, who was empowered by law to act as trustee for them and himself, and being within year and day of the first adjudication, that it ought to be beneficial to all, whether they had adjudged subsequent to it or not; they therefore found the whole creditors on the estate were to be ranked *pari passu*.

N.B. The apparent heir had raised a summons of sale, which he desisted from on account of an informality, and raised another; before the execution of which, Mr. Grant, who had been called in the first, commenced his diligence; but this did not seem to influence the decision.

Reporter, DRUMMORE.—For Irvine, A. MACDOUALL.—Clerk, HALL.

D. Falconer, v. 1, No. 233, p. 319.

No. 29. [5270] JOHN LOWDON, and other Creditors of EDWARD MURRAY of Drumstenchill v. GIDEON MURRAY, Tenant in Drumstenchill. June 13, 1752.

A tack granted by an apparent heir, though three years in possession, was found not effectual against an adjudger.

Alexander Murray, being in possession of the lands of Drumstenchill, as apparent heir to his father Edward, set in tack a part of these lands to Gideon Murray for the space of 19 years, at the same rent they had formerly paid.

The creditors of the said Edward Murray having adjudged the said lands from Alexander, as charged to enter heir to his father John Lowdon, one of the creditors brought a sale of the estate, and together therewith a reduction and improbation, as is usual, in order to force production of all rights affecting the estate.

The summons of reduction and improbation was executed against Gideon Murray the tenant, who appeared and produced his tack; against which the creditors objected, that it was null, being granted by an apparent heir. The Lord Ordinary, 2d July 1751, "sustained the reason of reduction of the tack, as flowing *a non habente potestatem*."

Long after the days of reclaiming were over, Gideon Murray applied to the Ordinary, and afterwards by petition to the whole Lords, setting forth, that the proceedings in this process against him were irregular; for he was properly no [5271] party in the reduction, nor was the tack called for in the summons, or any ground of reduction thereof libelled, the process being intended only to force creditors to produce their rights and diligences, that the ranking might go on: The summons was by mistake executed against him, and he ignorantly produced his tack; but as the certification would not have struck against the tack had he not produced it, so neither could it be reduced in this process when produced. And this being the case, he insisted that he was not foreclosed by the lapse of the reclaiming days, because the whole proceedings were void and null, and therefore the interlocutor ought to be recalled.

2dly, Although there were a proper process of reduction brought, yet John Lowdon and the other creditors could not insist therein, because they are not infeft; and creditors not infeft cannot challenge a tacksman whose right is real by possession.

3dly, The tack is not null, as flowing *a non habente*; for it was set by an apparent heir, who, as he was entitled to continue his predecessor's possession, of course was entitled to substitute another person in his own place, by granting him a tack of the lands; for this, amongst other reasons, that the lands might not lie waste. At least, seeing the apparent heir was more than three years in possession, this tack must be valid by act 24th, Parl. 1695.

Answered for John Lowdon and the other creditors; That, in a process of this nature, creditors are entitled to object to any interest founded on in competition with them, and to remove all the incumbrances that stand in the way of their payment, as the tack in question does; for though the lands may be set for the old rent, yet as the tack is for the space of 19 years, it must occasion the lands to sell at a lower price. And supposing that the certification would not have struck against the tack if not produced, yet seeing the tacksman compeared with his tack, and founded upon it, it surely was competent for the creditors to object to the validity of the tack; his own acting subjected himself to a trial of his title; and as he, no doubt, expected to avail himself of the judgment had it been in his favour, so of course it follows, that he cannot now complain of the incompetency of the process when judgment has gone against him.

With respect to the objection to the pursuers title to reduce, because they are not infeft,

Answered, That as the tacksman *provocavit ad judicium* by insisting on a preference in virtue of his tack, and thereby gave rise to their objecting, he must stand or fall by the judgment given.

And as to the power of an apparent heir to set tacks, it is *trivissimi juris*, that he has no such power, having no right in himself further than to continue his predecessor's possession; and though a tack, set by an apparent heir three years in possession, might be good against a subsequent heir upon the act 1695, yet it cannot avail the tacksman in a question with creditors, or with a singular successor.

[5272] But it is needless to insist further on these points ; for, as the days for aiming were run long before the defender applied against the Lord Ordinary's interlocutor, the Court cannot now consider the pursuer's title, nor enter into the merits of the reasons of reduction.

"The Lords were of opinion, that, had the tack not been produced, the certification of the reduction and improbation would not have struck against it ; but the Lords, regarding of the production of the tack, found the tack void and null ; and therefore decreed to the Lord Ordinary's interlocutor."

Act. Ro. PRINGLE.—Alt. Jo. DALRYMPLE.—Clerk, KIRKPATRICK.

l. Fol. Dic. v. 3, p. 258. Fac. Col. No. 14, p. 28.

. 31. [5273] JAMES BURNS v. ARCHIBALD PICKENS. July 4, 1758.

An onerous purchase from an apparent heir three years in possession, cannot be defeated by an adjudication upon a gratuitous bond of a second apparent heir, though deduced for behoof of the gratuitous creditor in the bond, and not of the second apparent heir.

James Knox, when apparent heir to his brother John, sold several subjects, in which John had been infeft, but in which he himself was not infeft. He lived more than three years after the sales so made by him. One of these subjects came into the hands of Archibald Pickens.

George Knox, the brother of James, granted a gratuitous bond to James Burns, to be the foundation of an adjudication of these subjects, for the behoof of Burns, and accordingly Burns obtained adjudication against George, as charged to enter heir to his father John in these subjects ; and upon that title brought a reduction of the above sales against the several possessors ; and among others against Pickens.

The ground of the reduction was, that the sales had been made by an apparent heir ; and therefore flowed a *non habente potestatem*. The defence for Pickens was, that as James Knox, the apparent heir, had been three years in possession, George Knox, the next apparent heir of James, was therefore bound by his ancestor's deeds ; and Burns, on a gratuitous bond from George, could not quarrel with those sales which George himself could not quarrel.

The abstract question came therefore to be, whether an onerous purchase from an apparent heir who had been three years in possession, can be defeated by an adjudication upon a gratuitous bond of a subsequent apparent heir, deduced, not for his own behoof, but purposely to connect a title to the estate of his predecessor, or behoof of the gratuitous creditor in the bond.

Pleaded for Burns ; At common law no man could sell that heritage in which he was not infeft. The statute of 1695 corrected the common law, and gave certain effects to deeds of apparent heirs in certain circumstances ; but in statutes correctory of the common law, courts of justice cannot extend their interpretation beyond the strict words of the statute ; nor apply decisions to cases falling within the purview and reason of the statute, if they fall not within the letter of it. Now, the alteration made on the common law by the statute of 1695, is that when a second apparent heir either serves himself heir, or by adjudication on his own bond succeeds to a remoter predecessor, he shall be liable to the debts and deeds of the interjected apparent heir who was three years in possession of the lands with which he connects ; but here George has not connected himself with the lands by a service, for he is not served at all ; neither has he succeeded by an adjudication on his own bond, for the bond granted by him is not for his own behoof, but for the behoof of Burns ; and it is Burns, and not he, who is to succeed upon it.

Answered for Pickens ; The statute of 1695 was intended to correct the frauds of apparent heirs ; but statutes correctory of fraud are to be extended to every case falling within the purview and reason of them. In order to bind the second apparent heir, or those in his right, all that the statute requires is, that the estate be taken out

of the *hereditas jacens* by his act and deed, whether in the form of a service or adjudication. It is not the less true, that an heir takes the succession out of the *hereditas jacens*, that he has thought fit to give it away to another, whether gratuitously or for an onerous cause; even if he should give it away before the titles are made up that would not relieve him from the sanction of the statute. If the title is made in consequence of his deed, he must be liable at least *in valorem* of the estate, which he has carried off from the *hereditas jacens* of his predecessor, whether he keeps it to himself, or disposes of it to another.

Of this many instances may be figured, which cannot be disputed to fall under the statute. Suppose an apparent heir should sell the estate in which his grandfather died infert, before he makes up titles, and after the purchaser is infert he makes up his titles by service; or suppose the disposition he had granted before the service had been gratuitous; in either of these cases it could not be doubted, that the heir would be liable to his father's debts, in terms of the statute; though it might be alleged, with the same colour as in the present case, that the heir had not *cum effectu* succeeded to his grandfather's estate, as his service truly gave him nothing; for that the moment it was expedite, and completed by infertment, the right accresced to the purchaser or gratuitous disponee to whom he had before conveyed it.

Again, if in place of serving heir, the purchaser should chuse the other method to make up the title, by charging him to enter to his grandfather, and [5275] adjudging upon the disposition or obligation to infert, there seems as little ground to doubt, that the heir would be liable in terms of the act, though he had chosen to part with the estate, in place of keeping it, and had made up the title in such manner, that the lands should immediately pass over to the purchaser, without remaining one moment with himself.

And if that would be the case, even where the title is made up by adjudication upon a disposition, it applies, *a fortiori*, to the present case, where the adjudication is upon a bond. For though the title was directly vested in Burns, to the extent of the sum in the bond, yet as to the reversion of the subjects adjudged over and above that sum, the right was acquired to the heir, and not to the adjudger; and as the heir could not contest payment of the last possessor's debts, to the extent of the value of the reversion which remained with him after adjudication, so a court will not sustain it as a defence against his being liable to the whole value of the lands, that he had given away a part, whether onerously or gratuitously, by the same deed by which he established a title to the subject.

"The Lords found, that the pursuer cannot, on his gratuitous bond, and adjudication following upon it, impugn the defender's right flowing from James Knox, upon account of James Knox's not making up his titles, as James is admitted to have been three years in possession."

Act. LOCKHART.—Alt. FERGUSON.

J. D.

Fol. Dic. v. 3, p. 258. Fac. Col. No. 115, p. 209.

No. 33. [5276] JAMES KNOX v. IRVINE and FORSYTH. November 21, 1759.

The son of an heiress possessing in a state of apparenry falls under the act 1695, notwithstanding his father's having right to the liferent by courtesy.

By the death of Sarah Irvine, proprietrix of the land of Kirkconnel, her surviving husband William Knox was entitled to the courtesy. Dr. Knox the heir-apparent was allowed by his father to possess the bulk of the land, by levying rents and giving tacks in quality of heritable proprietor, assuming that designation in every one of his deeds. Particularly, he set a tack of certain [5277] houses and yards in the town of Ecclefechan, to Robert Irvine and Thomas Forsyth, to endure for 1260 years. The Doctor having died in apparenry, his sister Janet Knox the next heir, was infert upon a precept of *clare constat* from the superior. She brought a reduction of the tack as granted *a non habente potestatem*, insisting, that she was not bound by her

brother's deeds, though he was more than three years in possession; because he was excluded by the courtesy, and therefore could not possess as heir-apparent, but only in the father's right. It was answered, That the courtesy cannot take place unless it be claimed; and that it was not claimed is evident from the following circumstance, that the son possessed as heritable proprietor; and that this possession must subject Janet the next heir to his onerous deeds, unless Janet will bring evidence that the son's title of possession was derived from his father claiming the courtesy. The Court repelled the defence upon the courtesy; found, "that Dr. Knox possessed as heir-apparent; and, therefore, assoilzied from the reduction."

Fol. Dic. v. 3, p. 258. Sel. Dec. No. 157, p. 217.

No. 34. [5279] CHARLES M'KINNON of M'Kinnon v. Sir JAMES M'DONALD.
February 14, 1765.

Where a fee becomes void by the death of the proprietor, the next heir in existence may serve, though there be a nearer in hope. And this heir, who may be termed heir expectant, may sell land for payment of the family debts.

The lands of M'Kinnon having, anno 1715, been forfeited to the Crown by the attainder of the deceased John M'Kinnon, were purchased from the Crown by Sir James Grant, who conveyed the same "to John M'Kinnon, junior, eldest son to the said John M'Kinnon the attainted person, and the heirs-male of his body; whom failing, to the heirs-male of the body of the said John M'Kinnon elder; whom failing, to John M'Kinnon tacksman of Missinish, and the heirs-male of his body; whom failing, &c." And, upon the procuratory of resignation contained in the disposition, the said John M'Kinnon, junior, expedite a charter under the Great Seal, and was infett. John M'Kinnon, junior, [5280] died in the year 1737, without issue-male, whereby the estate would, according to the said settlement, have devolved upon the male-issue of his father, had any such existed at that time; but none existing, the said John M'Kinnon, tacksman of Missinish was served heir in special to the said John M'Kinnon, junior, his grand-nephew, and was infett.

John M'Kinnon, elder, the attainted person, having, in the year 1743, married a second wife, had of that marriage two sons, Charles M'Kinnon born in the 1753, and a younger son born 1756. Charles, who was the nearest heir in terms of the destination, brought a process against Missinish, for declaring his own right, and for setting aside Missinish's service; and obtained a decree of the Court of Session; finding, "That, upon the pursuer's birth, the defender's right to the estate of M'Kinnon resolved and became void; that the pursuer has right to the said estate from the time of his birth; and that he may make up his titles to the estate as if the defender had never been entered."

As the estate was much burdened with debt, Missinish, in the year 1751, at which time John M'Kinnon elder had no children, nor much prospect of any, sold part of the estate to Sir James M'Donald, at the price of £7300 Sterling; which sum was wholly or nearly applied for payment of the family debts. This price was reckoned adequate at the time of the sale; but as land in the Isle of Sky came soon after to rise in its value, Charles M'Kinnon, in the year 1758, found it his interest to bring a reduction of this sale against Sir James, upon the following ground, That Missinish's right to the land was temporary only, and not such as to empower him to alien any part. Sir James, on the other hand, insisted, 1mo, That Missinish was proprietor, and consequently entitled to alien. 2do, Supposing him no more than a *curator bonorum*, the sale was necessary for payment of the family debts, and therefore ought to be found effectual.

"The Court sustained the sale to Sir James M'Donald, and assoilzied him from the reduction."

Instead of stating the pleadings *pro* and *con*, which were drawn out to an enormous length, it will probably give more satisfaction to set forth the chain of reasoning that arises from this case and leads to the judgment given.

By the common law of this land, no man can serve as heir to a predecessor, but he who can qualify himself to be the nearest heir, and who in that character excludes all others, which is the precise definition of an heir apparent. It is not sufficient that he can qualify himself the nearest heir for the time; for that circumstance can only entitle him to be termed heir expectant, but does not constitute him heir apparent. And it is for that reason that when a man dies without children, leaving a wife, his brother cannot serve for nine months, because of the possibility that a relict may produce a child.

The only exception to this rule, is the succession of the father, where the son dies without nearer relations. But the reason is obvious, that if the father [5281] were to delay his entry while there is a possibility of his having children, who would be nearer heirs, he never could enter at all.

This necessary exception from the general rule of succession, has drawn along with it another exception not altogether so necessary. The proprietor of a landed estate dies leaving a father and a sister. The sister may take up the succession, though, by the possibility of her father's male issue, she cannot qualify herself as heir apparent. For it would be absurd, that she can bar her father, and yet not be entitled herself to enter. So stands the common law, without indulging any other exception.

The case is still more clear against an heir expectant, when we take under consideration the present settlement. The destination is "to John M'Kinnon, junior, and the heirs-male of his body; whom failing, to the male-issue of John M'Kinnon, elder; whom failing, to Missinish," &c. Here there is no place for Missinish until he can qualify that the male issue of John M'Kinnon elder have failed, which in this case he never could do, because *de facto* they have not failed.

In cases of this nature, the practice of the Roman law was to name a *curetor bonorum*, who managed the estate till time made it certain who was the heir; and that this was formerly our practice, appears from a decision observed by Stair, 12th Feb. 1677, Bruce *contra* Melville, *voce* SUCCESSION. This was considered as law down to the 1708, when on the 2d Jan. 1708, Lord Monstuart *v.* Dame Eliz. M'Kenzie, *voce* SUCCESSION, the nearest heir for the time, was admitted to serve, though there was a possibility of a nearer heir. This was a new exertion of the *nobile officium*, in order to remedy many hardships, and even injustice that must arise in this case, from the aforesaid rule of succession established at common law. For if the succession be suspended, and the estate be put under the management of a curator, two consequences must follow among many that break in upon the principles of justice. The first respects the creditors of the deceased proprietor, who during this interval are deprived of every legal remedy for making their debts effectual. A charge to enter heir is the first step of diligence, which is indispensable; and yet there can be no charge, if there be no heir to be charged. The next respects the heir expectant, who is also heir apparent, if no nearer heir shall happen to exist; and if this man cannot enter heir, the superior, who must have a vassal, is entitled to sweep away the whole rents by a declarator of non-entry. Now supposing the heir expectant to be also heir apparent, though this cannot be known at the time, he is entitled to the rents as heir apparent, from the very moment of the predecessor's death, and yet these rents are levied by the superior upon a good title in law, who upon that account can never be bound to restore them. Here is another wrong or act of injustice: And as it is a rule in equity, that there cannot be a wrong without a remedy, it is the duty of the Court of Session to provide a remedy, which is done by authorising the heir for the time to enter.

[5282] It being now established that the expectant heir may enter, the important question is, What ought to be the effect of such entry? The following answer is founded clearly upon the principles of law and justice; that such entry ought to have the effect to remedy the unjust consequences above stated, and not to have any further effect, particularly not to have the effect of forfeiting the nearer heir afterwards born; which forfeiture would be an act of injustice, no less violent than those above mentioned, to remedy which the service is authorised. This would not only be a flagrant wrong in the Court, but plainly *ultra vires*. For though the Court has power to remedy the injustice of common law, they have not power arbitrarily to alter the common law; and still less to alter it in order to commit injustice. Hence it clearly follows, that the service of an heir expectant cannot have the effect of an ordinary service to transfer to him the property, so as totally to exclude the nearer

heir afterward existing ; for this would be forfeiting an innocent man of his property, an injustice which cannot be authorised by any court.

The effect of such a service being thus limited upon equitable principles, the only remaining question is, What ought to be held the nature of such a service, in order to make it correspond to the limited effect above mentioned. If held to be of the nature of an ordinary service, and that the heir apparent is sufficiently secure, if the heir expectant be obliged to denude in his favours ; I answer that this remedy is far from being effectual. For if the land be transferred to the heir expectant in property, it must be affected by his debts and deeds. He is upon the supposition similar to an heir of entail at common law, who even, after incurring an irritancy, can alien the estate before a declarator is raised against him. The heir expectant continues proprietor till he be decerned to denude ; in the mean time, as proprietor, he must have the power of disposal.

The counsel for the heir apparent, sensible, for the reason above given, that an action against the heir expectant to oblige him to denude, is no security to the heir apparent, unwarily yielded that the property is transferred by the service, but that the right of the heir expectant is resolved *ipso facto* upon the existence of the nearer heir ; which must bar the debts and deeds of the heir expectant, according to the rule *quod resolutio jure dantis resolvitur jus accipientis*. But this construction of the service lies open to many objections. In the first place, That a pure infeftment, once legally established, should resolve *ipso facto*, is a novelty in the law of Scotland, and contradictory to the maxim, That one infeftment of property cannot be taken away but by another. 2do, Supposing the nearer heir to exist a week only or a day, what becomes of the heir expectant ? His infeftment is voided. Is it necessary that he be infeft a second time ? And if his first infeftment continue in force, it is not voided *ipso facto* by the existence of a nearer heir. But 3tio, Supposing these objections to be capable of a satisfactory answer, the great difficulty remains that the maxim urged is not applicable to this case. It is evident, indeed, from prin-[5283]-ciples, that a man who has a limited right cannot convey one that is unlimited ; and it is equally evident, that when a man's right is reduced *a principio*, all the rights derived from him must fall of consequence. But I see not that the maxim can be carried further. A case resembling the present is a feu reduced *ob non solutum canonem*. Here the right of the author is resolved. But will this resolve an adjudication led against the feu before he incurred the irritancy ? By no means. In general, it is necessarily inherent in property, that the subject should be at the disposal of the proprietor ; and therefore, if I have the full property in me this day, my deeds and debts must affect it ; and if these be once legally established upon the land, no subsequent event can render them ineffectual either in law or equity. And whatever may have been the practice of the feudal law, I see no foundation in common law that recognition should forfeit those rights derived from the ward-vassal, which he could lawfully grant as being within the half of his feu. Tacks indeed are not effectual against the superior while the land is under ward ; but the reason is, that a tack, being a personal contract, is not in its nature effectual against any but the contractors ; and the act 18th, Parl. 1449, makes them only good against a purchaser, not against the superior.

Abandoning, therefore, this plan, I suggest another that seems liable to no legal objection, and at the same time does justice to all concerned, which is, to hold the service of the heir expectant with the infeftment following upon it, to be a conveyance of the property *sub conditione*, to be purified in case a nearer heir exist not, and to be void *a principio* if a nearer heir exist. Such conditional infeftments are no strangers to our law. An infeftment *a me* is good from its date, if it be confirmed by the superior at whatever distance of time ; and null from its date if it never be confirmed. An infeftment in warrandice is equally conditional, depending on the event of eviction or not eviction.

This construction of the service, will, on the other hand, prevent all the hardships that ensue if the entry of the heir expectant be barred ; and on the other, will prevent the injustice done to the heir apparent if the service be held pure and not conditional. The creditors of the deceased proprietor have an heir whom they can charge to enter in order to adjudge the estate ; and the diligence will be effectual, even against the nearer heir afterwards existing ; because the heir expectant was the only person who could be charged. The heir expectant, by being admitted to enter, bars the

superior and levies the rents ; and if a nearer heir be afterwards born, he is not liable either for the debts or deeds of the heir expectant.

At the same time the heir expectant, though a conditional proprietor only, may have powers of administration equal at least to those of a *curator bonis*. Therefore he can do every act of ordinary administration, such as entering vassals, paying family debts, &c., nay, he can do acts of extraordinary administration, such as granting real securities to the predecessor's creditors, and even selling land, if such acts be found necessary.

[5284] With respect to the rents arising after the predecessor's death, the question is, To whom these ought to belong ? The common law undoubtedly bestows the rents upon the heir apparent, however late his existence be. But to the heir expectant who is permitted to enter, there is a clear defence in equity against the heir apparent claiming these rents *retro* from the death of his predecessor ; which is, that as, on the one hand, he is not to suffer by the entry of the heir expectant, so, on the other, he is not to have any benefit from it. Now, supposing the heir expectant had abstained from entering, the rents would have been swept away by the superior upon a declarator of non-entry. And therefore, as this evil is prevented by the entry of the heir expectant, it is just and equitable that he alone should have the benefit.

The President, who opposed this plan, urged the only argument that had any weight against it. He yielded that the definition of an heir apparent in the Roman law is that mentioned above ; and hence the necessity of a *curator bonis* while there is a possibility of a nearer heir ; but observed, that the connection betwixt a superior and his vassal has occasioned a different idea of an heir to be adopted in the feudal law ; that the superior being entitled to have a vassal, and not being bound to accept for his vassal any person but the heir apparent, these two circumstances conjoined, determined the next heir for the time to be the heir apparent ; that for this reason a father serves to his son ; and a sister to her brother even during the life of the father ; that the only exception is where a proprietor dies leaving a wife and no children, in which case his brother cannot serve for nine months, upon the favourable presumption that a child may be conceived *et qui in utero est pro jam nato habetur*.

Against this argument two things were urged, 1mo, That it establishes the property in Missiniah, not as heir expectant, but as heir apparent in the most proper sense ; which of course vests the absolute property in him, descendible to his own heirs ; contrary to what is agreed to be law, and contrary to what is found to be law in this very case, viz. That Charles had right to the estate the moment of his existence ; and he accordingly, by authority of this Court, is served heir and infeft. 2do, Supposing the next heir in existence at the death of the predecessor to be the heir apparent by the feudal law, yet this cannot hold in the present case. For, by the settlement above mentioned, Missiniah is not called to the succession but upon the failure of the heirs-male of John M'Kinnon elder ; and as they have not failed, Missiniah can have no title to the succession by this settlement.

The plurality of the Judges came into the opinion that the infeftment of Missiniah was conditional only. But there was no occasion to give an explicit interlocutor upon that point ; for, by a great plurality, it was found, That the sale to Sir James M'Donald, though an extraordinary act of administration, was yet a necessary act to save the family estate from being torn to pieces by the creditors ; of which they were satisfied from evidence produced in Court.

[5285] The only difficulty upon this point was, That, to empower Missiniah to sell, he ought to have obtained a decree of the Court of Session, finding the sale necessary. But, with respect to this difficulty, I suggested, That even a sale by a tutor *sine decreto* will not be reduced if it be found advantageous ; because a reduction, upon that supposition, would be hurtful to the pupil instead of beneficial. This argument concludes *a fortiori* to the case of an heir expectant ; because it is not established in law, otherwise than by analogy, that an heir expectant ought to have a decree of this Court in order to sell. Had Missiniah applied to this Court for power to sell, the circumstances of the case were such as that he must have obtained it ; and equity will not suffer the neglect of this precaution to be laid hold of for voiding the sale, when the pursuer by that neglect is not *in damno evitando*, but *in lucro captanda*.

We have upon record Sir George Lockhart's opinion, that the heir expectant serving is not bound to denude upon existence of a nearer heir. And to give a specimen of a sort of reasoning that found countenance in the last century, Sir George

ends his opinion upon L. 85, *De regulis juris*, "non est novum ut quæ semel utiliter constituta sunt, durent, licet ille casus extiterit a quo initium capere non potuerunt."

About the same time Missinish's widow brought a process against Charles M'Kinnon for payment of 400 merks yearly of jointure provided to her in her contract of marriage. The obvious objection to this claim was, that it is not like the former, a necessary act of administration for preserving the family estate; and that it ought not to be sustained, because Missinish in effect never was proprietor. It carried, however, by a plurality to sustain this claim; in which, as it appeared to me, the Judges were swayed more by compassion than by law. See No. 35, *infra*. *Sel. Dec.* No. 229, p. 298.

No. 35. [5290] Mrs. ANN MACDONALD v. CHARLES MACKINNON.
February 15, 1765.

A jointure provided by the actual heir in possession, good against the estate.

John Mackinnon, tacksman of Mishinish, married Ann Macdonald, daughter of Donald Macdonald of Benbecula, and, by postnuptial contract, provided her, in the event of her survivance, in a life-rent-annuity of 200 merks.

During the marriage, Mishinish acquired the possession of the estate of Mackinnon, in the manner explained in the preceding decision. And, upon the narrative, that a small additional tocher had been paid him, he provided her in the locality of certain lands, part of the estate of Mackinnon.

After the death of Mishinish, an action was brought by his widow against Charles Mackinnon, now of Mackinnon, for the mails and duties of her locality lands.

Sundry objections were pleaded to the titles produced by the pursuer; but what the defender relied on, was the general argument of the defect of power in Mishinish to burden the estate.

"The Lords repelled the defences."

Act. MONTGOMERY, WIGHT.—Alt. BURNET.

G. F.

Fac. Col. No. 2, p. 198.

February 25, 1771.—This and the preceding case having been appealed, the House of Lords Ordered and Adjudged, That the appeal be dismissed, and that the interlocutors therein complained of be, and the same are, hereby affirmed.

No. 38. [5294] CHRISTIAN SUTHERLAND v. JEAN SUTHERLAND. August 14, 1786.

Inhibition used against an intermediate apparent heir, of no effect after the succession is taken up by a subsequent heir serving to the predecessor last infert.

An apparent heir executed a deed in favour of Christian Sutherland, on which she used an inhibition against him. He afterward granted an obligation to Jean Sutherland.

On the death of the apparent heir, after being three years in possession, the person succeeding made up titles to the remoter predecessor. In a competition which followed, between the inhibitor and the other grantee, the former claimed a preference in virtue of that diligence; to which, as being directed against an heir who died in the state of apparenacy, the latter objected, and

Pleaded; Though an apparent heir has a title to the annual produce of the estate during his life, yet dying before service, he cannot transmit any right in the estate itself, which still remains *in hæreditate jacente* of the ancestor. All diligence, therefore, intended after his death to affect such estate, as having been his property, must be inept and void.

The statute of 1695, it is true, has made the person serving heir to a predecessor last infest liable for the debts and deeds of interjected apparent heirs three years in possession. This, however, is no more than a personal obligation, through which alone, or as being thus creditors to the heir served, those of the intermediate apparent heirs have access to attach the estate ; so that in this respect the statute has made no alteration of the common law.

Now, though inhibition may affect subjects to be afterwards acquired as well as those antecedently belonging to the party inhibited, the diligence in question [5295] must be unavailing, as having been used against a person who was at no time proprietor. No diligence can have effect in this case, but that which is directed against the heir whose right is completed by service.

Answered ; The object of inhibition is, to preclude debtors from disappointing the claims of their creditors, by posterior deeds tending to alienate or burden any real estate, which may fall under the right of the debtors. It has been admitted to be immaterial, whether such estate had been previously, or not till afterwards, acquired. And it is plainly of as little importance, by what particular means it has come under the right of the debtor ; whether immediately by his making up titles to it himself, or by the operation of law, in consequence of titles established in the person of a supervening heir. In both cases alike, it is the right of the debtor that is ultimately exercised.

The inhibition in question was calculated to debar all effect of the second deed, in carrying off, to the prejudice of the first, property attachable in the right of the grantor ; the very thing which is here attempted by the competing party. The inhibitor's claim of preference is therefore to be sustained.

The Lord Ordinary found the inhibition to be ineffectual, and repelled the claim of preference made on that ground.

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, ELLIOT.—For the Inhibitor, ELPHINSTON.—Alt. R. CRAIGIE.—Clerk, HOME.

Fol. Dic. v. 3, p. 260. Fac. Col. No. 292, p. 449.

No. 41. [5296] JAMES and WILLIAM BEVERIDGE v. ELIZABETH CRAWFORD and THOMAS COUTTS. July 10, 1793.

An adjudication on the trust-bond of an heir apparent, granted for the purpose of making up a title, in order to reduce a disposition, is competent, although the donee be infest.

The late Colonel Crawford conveyed the estate of Crawford-land to Thomas Coutts, by a disposition, of which Mrs. Elizabeth Crawford, the heir-at-law, proposed to bring a reduction *ex capite lecti*. As a preparatory step, she granted a trust-bond to Messrs. James and William Beveridge, upon which, after raising letters of general and general special charge against her, and after Mr. Coutts had taken infestment on the disposition in his favour, they brought a process of adjudication, wherein Mr. Coutts appeared, and

Objected : As the lands are not *in hæreditate jacente* of her predecessor, Mrs. Crawford cannot be served heir-at-law to him in them, nor can her creditors lead an adjudication against them. She is indeed possessed of the faculty of bringing a reduction of the disposition and infestment excluding her, and that faculty alone her creditors can adjudge, Erskine, b. 3, tit. 8, § 100 ; 1769, Tyson v. Simpson. See APPENDIX.

[5297] Answered ; An adjudication of the faculty, and any settlements Mrs. Crawford might make in the meantime, would be nugatory, if she should die before completing her titles by service, or by the mode now proposed, which cannot hurt Mr. Coutts, as the estate will be adjudged *tantum et tale*, as it stands in her person. The case of Tyson is not collected, and seems to have passed of consent.

Observed on the Bench ; As Mrs. Crawford is entitled to serve heir to her prede-

cessor, the adjudication must be equally competent, and she ought to be at liberty to vest such a title in her person as may enable her to make a settlement.

The Lords, on advising minutes of debate, "adjudged."

Lord Reporter, SWINTON.—For Mr. Coutts, TAIT.—Alt. R. CRAIGIE.—Clerk, SINCLAIR.

D. D.

Fol. Dic. v. 3, p. 259. Fac. Col. No. 71, p. 155.

No. 45. [5299] WILLIAM YULE v. ROBERT RITCHIE. February 10, 1758.

In a reduction of a disposition by an apparent heir not three years in possession, the possession of the disponent for three years was found equivalent.

Margaret Miller, while she was apparent heir, and before she had been three years in possession, disposed a tenement of land to Ritchie.

Ritchie entered to possession, and continued in it more than three years.

Yule, the heir of Margaret Miller, brought a reduction of this disposition, as granted by an apparent heir not three years in possession.

Ritchie's defence was, That his possession must be deemed the possession of Margaret Miller, the disponent, so as to make her, in the eye of law, to have been three years in possession.

Answered for Yule; The construction contended for by the defender, is contrary to the reason of introducing the exception from the common law. The exception was introduced merely in respect of the *bona fides* of those who had been tempted to contract with a person whom they saw three years in possession; and whom they therefore had reason to think was duly vested in the subject; but this will never apply to a person contracting with one not three years in possession, even though the contractor himself should remain twenty years in possession after that. His after possession will not give him that *bona fides* which he had not at first; and the rule of law takes place, *Quod initio vitiosum, tractu temporis convalescere non potest*.

In the next place, As the exception in question was introduced in the face of the common law, which allows no person not infeft to dispoise, courts cannot, in a statute correctory of the common law, go beyond the letter of the statute. The statute requires a three years' possession by the apparent heir; and a court cannot, in place thereof, substitute a three years' possession by the disponent.

"The Lords assoilzied from the reduction."

Act. J. DALRYMPLE.—Alt. DAV. RAE.

J. D.

Fol. Dic. v. 3, p. 259. Fac. Col. No. 96, p. 172.

No. 50. [5306] Sir GEORGE MAXWELL v. MAXWELL of Kirkconnel. July 11, 1671.

The power of redemption from the apparent heir purchasing in expired apprisings, competent by act 1661, cap. 62, to the posterior apprisers, was extended also in favour of the personal creditors. See No. 56, p. 5313. Apparent heirs are bound to assign to creditors, apprisings purchased by them, whether within the legal or after it.

Sir George Maxwell of Nether Pollock, pursues Maxwell of Kirkconnel, for payment of a debt of his father's, as behaving himself as heir by intromission with the mails and duties of his father's lands of Kirkconnel. The defender alleged absolutor; because his father was denuded, and an appriser infeft, and so could have no heir in these lands. It was replied, That notwithstanding of the apprising, the same

remained redeemable, and the defunct remained in possession; and the defender, his apparent heir, did continue his possession, and so has behaved as heir; and, though he had had a right or warrant from the appriser, yet during the legal it is *intromission*, having no other cause nor title. It must be presumed to be granted to him as apparent heir, much more where he hath no warrant from the apprisers. 2dly, It is offered to be proven the apprisers were satisfied by intromission, and what is wanting, the pursuer offers to satisfy the same at the bar; for, by the act of Parliament 1661, betwixt debtor and creditor, apprisings acquired by apparent heirs may be satisfied by the defunct's creditors, for the sums they truly paid out by the space of ten years; so that the defender ought to condescend and depone what he gave out, and to count for his intromission, and what is wanting the pursuer will pay. The defender answered, That behaving as heir, being an odious, universal, and passive title, any colourable ground is sufficient to restrict it to the value intromitted with; and, as to the offer to satisfy the defender of the apprising to which he has right, it is not competent *hoc ordine*; for by the act it is only introduced in favours of other apprisers, and the pursuer is a mere personal creditor without any apprising. It was answered, That the narrative of that part of the act, bears it expressly to be in favours of creditors; and though the subsumption is only applied to apprisers, yet it is not exclusive; and, by the common custom, satisfaction of apprisings by intromission or present payment, is ever received by exception or reply.

The Lords found, that behaving as heir is sufficiently elided by any right or warrant from the apprisers, as to intromission thereafter; or that if the defunct died not in possession, but that the apprisers had then, or thereafter attained possession before the intromission; but found, that the apparent heir's continuing in the defunct's possession without a warrant, did infer behaviour; and, that the offer to purge the apprising at the bar, was competent *hoc ordine*, without burdening the creditors with the expenses of apprising, to make the apparent heir liable for what he intromitted with; and that the apparent heir should assign the apprising, whereupon the creditor might continue possession till he were satisfied of the sums now paid out.

July 21.—In this pursuit related the 11th of July instant, it was further alleged for the defender, That the pursuer cannot purge his apprising, as now [5307] being in the person of the apparent heir, by the act of Parliament 1661 betwixt debtor and creditor, by payment of what truly the apparent heir paid, because the express provision in that act is, that wherever the apparent heir of the debtor shall acquire right to expired apprisings hereafter, which cannot extend to this case, because the right to this apprising was acquired before that act, and because it was not an expired apprising, but the legal then running. It was answered, That albeit the disposition of the apprising granted to the apparent heir was prior to the act, yet the right was purchased posterior to the act, for the disposition could not give right, but only the infeftment following thereupon; for if, after that disposition, any other had been infeft upon apprising or disposition by the defender's author, that posterior infeftment would carry the right, so that the author cannot be said to be divested, or the apparent heir invested, or stated in the right, till his infeftment, which is after the act of Parliament. To the second, the pursuer answered, That the defender's apprising, albeit it was redeemable when he acquired right thereto, yet, it becoming now irredeemable in his person, it cannot be denied but he has acquired right to an irredeemable apprising; albeit it was not irredeemable when he acquired the right, yet he hath acquired right to that apprising that now is irredeemable; for, the extinction of the legal reversion, *cursu temporis*, is a right accrescing to him, and acquired by him, and no heritage to him; and, seeing the words of the act are capable of this interpretation, there can be no doubt of the legislator's mind, or that it should be thus interpreted; because otherwise, that excellent provision would be evacuated, for the apparent heir would always acquire right to an apprising before the legal were expired, though he should pay the appriser the full sum, and would make no use of it till the legal were expired, and thereby carry the right of the whole estate, though it were of twenty times more value; but, the only motive of that act of Parliament being, that albeit the law gives apprisers the right of all that they apprise at random, if they be not redeemed within the legal, yet the appriser is ashamed to take so great legal advantage, and therefore ordinarily compones with the apparent heir,

ho being favourable, makes no bones to bruik the whole estate of his predecessor, including all his other creditors ; and therefore this remedy is introduced, which ill be evacuated if the act of Parliament be not thus interpreted ; and that interpretation should be ever followed which is according to equity, and whereby the statute may stand and not be eluded. The defender answered, That this statute being correctory of the common law, is strictly to be interpreted and not to be extended ; and the acquisition of rights being ever interpreted from the disposition, and not from the infeftment thereon, *multo magis*, should it be so interpreted in this case ; and as to that part thereof anent the expiring of the apprising, the pursuer's interpretation is not only constrained but inconsistent with justice, for *ubi subest remedium ordinarium non est recurrendum ad remedium extraordinarium* ; for, if the apparent heir acquire right to an apprising unexpired, the reason and motive of the statute cease ; for both [5308] the debtor and co-creditors may redeem from the apparent heir, and can pretend no necessity of extraordinary remedy, especially if the apparent heir's right be not latent, but public by infeftment.

The Lords found that the apparent heir's right being only become real by infeftment after the act of Parliament, that it was then to be understood to be acquired when the author was denuded and the apparent heir invested, so that no posterior right from his author could exclude him ; and found also, that albeit the apparent heir's right were during the legal, yet if it stood in his person till the legal were expired, that the same fell within the act of Parliament, and found it redeemable by what the apparent heir truly paid within ten years, to be counted from the date of the acquiring of the right, conform to the words of the act, and not from the time the apprising became expired thereafter. See PASSIVE TITLE.

Fol. Dic. v. 1, p. 359. Stair, v. 1, p. 751 & 763.

No. 2. [3] MIDDLEMORE *v.* MACFARLANE. February 2, 1803.

What title necessary for taking up the reversion after a judicial sale at the instance of an apparent heir ?

William Richard Middlemore, brother and apparent heir of the late John Middlemore of Donavoured, brought a process of sale under the act 1695, c. 24, against the widow and creditors of his predecessor. Part of the estate was purchased by Andrew Macfarlane, and, after payment of the debts, a considerable reversion remained for the heir of the deceased.

The greater part of the lands purchased by Macfarlane, had been held by John Middlemore under base infeftments, upon the precepts contained in the disposition from his authors, the procuratories of resignation continuing unexecuted.

It was objected by Macfarlane, that the reversion of the price should not be paid until the pursuer had made up a public feudal title to his brother, by entering with the paramount superiors. The pursuer maintained that this was not necessary ; but at the same time offered to take out precepts of *clare constat* from the immediate superiors of the base infeftments, and infeft himself upon these. But Macfarlane was not satisfied with this, and

[4] Pleaded : The pursuer is bound, as heir to his brother, to make up public titles to the lands, and to convey them to him, so as to put it in his power, on the most advantageous terms, to infeft himself publicly, both in the property and in the superiority. The reversion of the price of the estate is *in hæreditate jacente* of the deceased ; and the apparent heir can only acquire a right to it, by making up titles in the same manner as he must have done to the estate itself. The act 1695, c. 24, makes no change upon the law as to the rights and privileges of an heir, otherwise it would be easy for every apparent heir to avoid the necessity of entering to his predecessor at all, by bringing the estate to a judicial sale under the statute, by which he would become entitled to the reversion of the price. A purchaser has a right to insist upon obtaining the most complete and most beneficial titles that can be given ; and it is the pursuer's duty to make up public titles to the lands, because a base infeftment does not afford the same security as a public right. and the estate is subjected to the feudal casualties due to the interjected superiors.

Answered : The object of the act 1695, is to permit an heir to bring his predecessor's estate to sale, without any danger to himself, when it is doubtful whether it will be sufficient for the payment of the debts. This would be utterly defeated, if it were necessary to make up feudal titles to his predecessor, by which he would become his universal representative; for it is only in cases approaching to bankruptcy that recourse is had to the provisions of this statute. The act accordingly gives a liberty to the heir to enter *cum beneficio*, but does not absolutely require it. The heir bringing the estate thus to sale, acts in the capacity of a trustee for the creditors ; and if there happen to be any reversion of the price, he is entitled to receive it from the purchaser, being answerable to that extent in absolute warrandice ; Erskine, b. 2, tit. 12, § 61; Bankton, b. 3, tit. 2 ; Irving v. Maxwell, June 10th, 1747, No. 27, p. 5264 ; Hamilton, Dec. 14, 1750, No. 43, p. 5297 ; *Dict. voce* HEIR APPARENT. But supposing it to be necessary to make up a feudal title, the pursuer cannot be obliged to do any thing farther than to place himself exactly in the situation of his predecessor, which he does by obtaining a precept of *clare constat*, and taking infeftment upon it in the manner proposed.

The Lord Ordinary found, " that in offering to obtain precepts of *clare constat* and take infeftment, the pursuer had done more than he was in strict law bound to do ; and therefore repelled the objection."

And the Court, upon advising a petition against this interlocutor with answers, adhered ; being of opinion, that the decree of sale was to be held as an adjudication for the general behoof, and a sufficient title for the heir to take up the reversion.

Lord Ordinary, HERMAND.—Act. WILLIAMSON.—Agent, GEO. ANDREW.—Alt. W. CLERK.—Agent, JA. GIBSON, W.S.—Clerk, MENZIES.

Fac. Col. No. 81, p. 182.

No. 2. [5329] BRUCE of Earlshall v. The Earl of SOUTHESK. February 1, 1704.

An heritor was succeeded by his eldest son, who survived him seven years, and died unentered. After the death of this apparent heir, a younger brother having succeeded to the estate, offered to serve heir to his father *cum beneficio inventarii*. Found, that second or posterior apparent heirs have a year of deliberation, though the first had suffered it to expire without serving ; and the service was therefore allowed to proceed.

Andrew Bruce of Earlshall died last vest and seised in these lands, about eight years ago, leaving Andrew Bruce his eldest son, and Mr. Robert his second. Andrew having died in April 1703, unentered, Mr. Robert raises brieves in January 1704. to serve himself heir to his father. Compareance is made for the Earl of Southesk and other creditors, to stop the service ; and on application to the Lords, they name two of their number to be assessors to the macers ; and [5330] on their report, a hearing in presence being allowed, it was alleged for Southesk, That Mr. Robert cannot now seek the benefit of the act of Parliament 1695, by entering *cum beneficio inventarii*, because that act being an innovation of our old law, and by experience found hurtful to creditors, ought not to be extended ; but so it is, that act allows them only to enter with that benefit within the year of deliberation for making up the inventory, and more than seven years are elapsed since Earlshall's death, who stood last infeft, and therefore he cannot enter to him by virtue of that act ; neither is this any hardship, for if he will not represent his father, by entering simply to him conform to the old law, then he may abstain. Answered for Earlshall, That the *annus deliberandi* was introduced in favour of apparent heirs, and not to their prejudice ; and though the year and day be long run out since his father's death, yet that was not his fault, seeing there was a *medium impedimentum* in the way, viz. his elder brother Andrew, who died but within these nine months ; and if he made not use of the act of Parliament, that negligence cannot be imputed to Mr. Robert, his younger brother, who, during his life, was not *valens agere*, and could not serve, and now within the *annus deliberandi* from his death he has taken out his brieves, and cannot be secluded ; both the

year of deliberation and the entering *cum beneficio inventarii* being borrowed by us from the Roman law, and there an apparent heir had thirty years *ad explorandas hæreditatis vires* before he was cut off by prescription, unless the creditors urged him by charging and doing diligence, l. 69, D. *de acquir. vel. omit.*; and in the succession to moveables, the nearest of kin may confirm themselves executors *quandocunque*, unless interpellated by creditors. And the reason of simple entering was from the feudal law, where the vassal could not burden the fee with debt without the superior's consent (as now it is in tailzied estates); but our customs having altered that, and subjected heritage to debt as well as moveables, it was most equitable the heir should have the benefit of an inventory, as well as an executor, and not be liable *ultra vires hæreditatis*; and lately, in the case of Sir John Erskine of Alva and his father's Creditors, No. 1, p. 5329, the Lords found the privilege of serving *cum beneficio inventarii* competent to him, although his father had died many years before the act of Parliament 1695, and consequently his *annus deliberandi* was long ago elapsed. Replied for Southesk and the creditors, That the *annus deliberandi* must run from the death of him who was last vest and seised, as appears by the 106th act 1540, seeing he is not serving heir to his brother, but to his father, who died many years ago; and if an apparent heir let a bond prescribe by not interrupting by the space of forty years, the second apparent heir cannot pretend he will yet interrupt, seeing he was *non valens agere* during his predecessor's life, and yet the negligence of the first will pre-judge and cut off the apparent heir who is *in secundo gradu*; and if each apparent heir had a separate year of deliberation, this might confound and embarrass the diligence of creditors; for, suppose nine or ten brethren mutually succeeding one to another, if all of them claimed a year, when should creditors have access? [5331] And Justinian seems to allow no more but one annual prescription to them all, in l. 19, C. *de jure deliber.*—The Lords, by plurality, found a second or posterior apparent heir had a year of deliberation, though the first had suffered it to expire without serving, and therefore allowed Earls' service to go on.

Fol. Dic. v. 1, p. 361. Fountainhall, v. 2, p. 217.

No. 8. [5336] Mrs. JANET SCOT v. Sir ALEXANDER BURNET of Leys. July 4, 1724.

Creditors of an heir entered *cum beneficio inventarii*, are preferred according to their diligence.

Sir Alexander Burnet having entered heir *cum beneficio inventarii*, sold part of the inventoried estate to Mr. Fergusson of Pitfour; in whose hands, as debtor for the price, an arrestment was laid by Mrs. Janet Scot, one of the defunct Sir Thomas Burnet's creditors, and who had obtained a decret of constitution against the present Sir Alexander. She having thereupon insisted in a process of forthcoming, the defence offered for Sir Alexander Burnet was, "That he being heir entered *cum beneficio inventarii*, was liable to the creditors in the value only of the inventory; and the inventory not being sufficient to answer all the defunct's debts, the arrester could only draw her share proportionally with the other creditors."

In support of which it was argued, That the value of the respective debts must be calculated at the time of the heir's entering by inventory; if there be not sufficient fund for all, the several claims are so far *ipso jure* diminished, at least in so far as they relate to the heir, who by the law is protected from being further liable than to a limited extent; whence it was urged, that no diligence however in its nature preferable, could support a claim beyond that proportion of the inventory, which would fall to the user of the diligence, upon a just division amongst all the creditors. In consequence of this it was thought, that if an adjudication were leading against an heir who has entered *cum beneficio inventarii*, it would be competent to stop the adjudication, if the heir should offer [5337] payment of the debt in proportion with the other creditors; at least there behoved to be a reservation *contra executionem* in the decret of adjudication: And so *in executione*, i.e. in the division of the estate, the adjudger would only draw his share of the inventory, in proportion with the other creditors. 2do, It was contended, That the arrestment in this case is not a habile diligence, more

than in executry : The law is express, " That the heir shall have access to enter to his predecessor *cum beneficio inventarii*, as use is in executry and moveables " ; and it is certain, that no diligence by arrestment, whether of the subject of the testament, or of the executor's proper effects, can any way afford a preference, or make that debt, which in prosecution against the executor, in concurrence with the other creditors, would have been but half or third, extend in the furthcoming to the whole debt. 3tio, If creditors in this case were to be preferred according to diligence, it would give occasion to much fraud ; for the heir would have it in his power to prefer the creditors as he thought fit, by discovering the effects to some, and concealing them from others ; and by giving timely notice in order to use the first diligence, and a thousand artifices of that kind.

To the first it was answered, That the act of Parliament introducing the benefit of inventory in heritage, does not tie up the hands of creditors from doing diligence, more than where the heir enters without inventory : The act is likewise very far from diminishing the claims of the creditors *ipso jure* ; these stand equally good against the heir, as against the predecessor ; in proof of which, if neglecting or overlooking this privilege, the heir pay to any creditor his whole debt, though it may be far enough above the inventory, he will have no *condictio indebiti* ; which yet is always competent where one pays more than he owes. This act therefore does not affect or limit the rights of the creditors, but gives only a privilege or benefit to the heir, which, like other privileges, may be used or not at pleasure ; and it is only competent, after he has once made the value of the inventory furthcoming to the creditors, to protect him from being further liable : wherefore it is, that the defence should not be competent, as long as the heir has any share of the inventory still remaining with him, which he has not accounted for : And taking the matter in this view, it is evident that an heir *cum beneficio inventarii*, has no relevant defence against an adjudger, unless he can say, that the whole subject inventoried, or which is the same, its value is already applied to the payment of lawful creditors, who being before-hand with the adjudger in their diligence, have got payment, or at least established a *nequus realis* upon the subject, whereby the inventory is entirely exhausted. To apply which to the case in hand, since here is a part of the inventory not yet accounted for, *scilicet* the price of the land in Pitfour's hand, in which Mrs. Janet Scot, one of the creditors, has established to herself a preference by arrestment ; this part of the inventory must be made furthcoming to her, even suppose the question were with the other creditors, since she would have the first arrestment ; much more when the question is with the heir, who [5338] has not the smallest title to make objections, as long as any share of the inventory remains unexhausted. To the second, answered, The defender will not profit himself by running a parallel betwixt an heir *cum beneficio*, and an executor ; for it is certain, that in actions against the executor, one creditor may get the better of another, by the forwardness of his diligence : It is true that the executry cannot be arrested, but the reason of that is, because an executor is a common trustee for the benefit of all having claims upon the subject of executry, obliged to administer and do diligence for that end, but not personally liable to the creditors for their debts ; whereas an heir *cum beneficio* is not a trustee, but a proper debtor, as much as where there is no inventory ; with this only difference, that after he has made just count and reckoning to his predecessor's creditors, of all that belonged to his predecessor, the law *in favorem* has given him, as it were, a personal protection to be no further liable ; but in the meantime, he is liable to all manner of execution, real and personal, horning, adjudication, arrestment, &c., which an executor is not, till he be personally decerned, as not being debtor but trustee : Indeed after he is personally decerned upon the only medium competent against an executor, *viz.* his intromissions with the executry, that decret may be put to execution in every shape against him and his goods ; so that this argument is entirely inconclusive. Answered to the third, As to this matter, the creditors are in no worse situation with respect to the heir of their debtor, than they are with respect to the debtor himself ; every man has it in his power more or less to favour particular creditors ; and a creditor has no legal objection that he is not the favourite ; Indeed, if he can allege fraud ; if he can say, that by the collusion or deceit of the debtor, his co-creditor obtained the first diligence, this will be relevant ; and this is all the safeguard any creditor can have from the nature of the thing, against the partial favour his debtor may bear to a co-creditor.

"The Lords found, that in this case the creditors are preferable, according to the diligence done on their respective debts."

Fol. Dic. v. 1, p. 362. Rem. Dec. v. 1, No. 49, p. 96.

No. 10. [5342] AIKENHEAD of Jaw v. RUSSEL of Elrig. December 1725.

An heir entered *cum beneficio inventarii*, is obliged to communicate eases.

The present Thomas Russel of Elrig having served himself heir *cum beneficio inventarii* to his father, and given up inventories in proper form, entered into agreement with one Cowburgh, who was possessed of several adjudications upon the estate, above the value thereof; whereby Cowburgh accepted a part of the lands contained in the inventory in satisfaction of his debt, and discharged the remainder. Aikenhead of Jaw having right by purchase to a debt of 1000 merks, due by the deceased Russel of Elrig, insists against this Elrig, as heir served and retoured.

It was alleged for the defender, That he was heir *cum beneficio inventarii*, and that the inventory was exhausted, Cowburgh and his authors having adjudged for sums far exceeding the value. It was answered for the pursuer, That the adjudications were satisfied by the heir *cum beneficio*, out of the subject of the inventory, by payment of sums, or disposition of lands; which sums paid, or lands disposed, did not extend to the value of the inventory, and consequently could not exhaust it. The defender replied, That this was *jus tertii* to the pursuer, an heir *cum beneficio inventarii* not being obliged to communicate eases; and that it was sufficient to say, that Cowburgh's adjudications were exclusive of the pursuer's claim.

[5343] The question arising, If an heir *cum beneficio inventarii* is obliged to communicate eases? It was pleaded for the pursuer, That before the act 1696, cap. 11, diligences upon a predecessor's estate, acquired by the apparent heir, were redeemable by the creditors for the sums truly paid: But whatever reason there is with respect to apparent heirs, will equally obtain, that neither should heirs *cum beneficio inventarii* be allowed to clothe themselves with singular titles affecting their estate, to the exclusion of other creditors; and therefore it must be presumed, that as to this point the law has left heirs entering *cum beneficio inventarii*, upon the same footing they were before their entry. And truly were this otherwise, the act of Parliament, instead of being a new security to creditors, would afford an easier method for the heir to disappoint them than ever he had before: For heirs served *cum beneficio inventarii*, being best able to discover the condition of the debts, and the objections against them, would have the fairest opportunities to maintain vexatious suits against the creditors, and by purchasing in some preferable rights, to exclude all the rest. 2do, Heirs *cum beneficio* are in effect but trustees. What transactions they make, must accrease to the creditors, and disencumber the estate. This is clear from the words of the statute, ordaining, "That the apparent heir shall have access to enter to his predecessor upon inventory, as use is in executries and moveables." And it cannot be disputed, but an executor is a trustee, both for the inventory, and for the behoof of the creditors: And as such the Lords have found, "That executors are bound to communicate eases to the other creditors, suppose such eases were given by the other creditors, out of respect and favour for the executor, 16th December 1710, Sir James Elphinston *contra* Anne Paton," No. 17, p. 3853. And no imaginable reason can be assigned, if this is law in the case of executors, why it should not obtain in the case of heirs *cum beneficio*.

It was answered to the first, That no good argument can be drawn *ab incommodo*, to weaken the privilege given to apparent heirs by the statute, which ought to be interpreted benignly for them, and not so as to make the intention of the lawgivers wholly frustraneous; which would be, if heirs so entering were not capable of taking by the bounty of their father's creditors. Neither is the argument from the act 1661 of any force: For since it needed a special statute to oblige apparent heirs, getting eases, to communicate them, or (which is all one) that they should be redeemable upon payment of the sum transacted; why should that law be extended to give rule to a statute made thirty-four years after, when the statute itself is silent?

To the second it was answered, The case of executors does not apply. The pursuer wrests the words of the act, as in every respect an heir *cum beneficio* and an executor were similar ; which is far from the truth. Where has the pursuer seen an heir serve *cum beneficio*, finding caution ? And is not the inventory in heritage to be given up in different records and different manner from that of moveables ? As then in other things they differ, there is no reason [5344] that, from the words above cited, they should be equiparate, in being obliged to communicate easements. The words are indeed only intended to bring a familiar example of the manner in which the service was to be perfected. As the pursuer's reasoning is not warranted from the words of the statute, neither is it from the analogy of the law. An heir and executor are perfectly distinct ; an heir is by succession, not by office ; an executor, by his very name, denotes an office, and the same as administrator. Should it then be granted, that an executor in every case were obliged to communicate easements, which is not proved by the decision, which was not in the case of an executor *qua* nearest of kin ; it would be perverting the analogy of law, to draw an argument from an office to a right of succession, to make one a trustee who neither by name nor the nature of the thing, can be considered as such.

Beside the general point, the pursuer urged this argument, That the defender had not taken a conveyance of the adjudications, but only a discharge. Now, as he had not these adjudications in his person, he could claim nothing under them ; and as heir *cum beneficio*, he could not dispute with any creditor, while any part of the inventory remained with him ; at least not till he should show the value thereof exhausted by lawful debts.

In answer to this, it was alleged to be the same, whether an heir take an assignation or discharge. An assignation in the person of a debtor is virtually but a discharge, because *confusione tollitur obligatio* ; so that the use of an assignation is not to make up a title, but the same with a discharge, viz. for a proof and evidence, the heir has discharged and satisfied so many of the debts for which there was credit upon him, to the value of the inventory ; and if he can instruct so many debts are satisfied by him as exhaust the full value, whether the instruction be by his taking assignation or discharge, it makes no difference.

"The Lords found, That an heir *cum beneficio inventarii*, is obliged to communicate easements." (See the next case.)

Fol. Dic. v. 1, p. 363. Rem. Dec. v. 1, No. 65, p. 135.

No. 11.

AIKENHEAD v. RUSSEL. July 6, 1727.

An heir *cum beneficio* who had improved the estate, was made to account at the improved value.

An heir entering *cum beneficio inventarii* to an estate over-burdened with debt, but having afterwards, by industry, considerably improved the same, disposed a part from payment of a preferable creditor, more than equivalent to the original value of the inventory. Being thereafter attacked by other creditors, the question arose, If he must be liable according to the present worth of the subject, or only for what it was at his entry ? It was pleaded for the heir, That he was not trustee, but proprietor ; that the creditors had no real interest in the subject of the inventory ; that the inventory was only designed as a method to fix a certain value beyond which the heir should not be liable ; and accordingly, that if at any time the heir made this value furthcoming to the creditors he was at liberty to make of the estate what he would. It was added, that were this otherwise, it would put an effectual stop to the industry and improvements of heirs who enter by inventory, since no man will readily plant where another is to reap. The Lords notwithstanding found the heir liable to account according to the present value. See APPENDIX.

Fol. Dic. v. 1, p. 363.

No. 15. [5346] ANNE MURRAY v. Creditors of PILMURE. February 17, 1736.

An heir *cum beneficio inventarii*, was found entitled to pay even real creditors the value of the estate, and resist a sale at their instance. But this was afterwards found erroneous, and it was fixt that he must submit to a sale of the estate, if the creditors chuse that method for their payment.

An heir entering *cum beneficio inventarii*, brought an action for ascertaining the value of the land, concluding that the creditors, upon receiving that value, ought to disincumber the estate of their debts and diligences. On the other hand, the real creditors, who were infeft during the predecessor's life, insisted in a process of sale of the estate upon the statute 1681, cap. 17. These processes being conjoined, the defences made by the heir, were, 1mo, That, by the statute introducing the benefit of inventory, a privilege is given to the heir, to hold the estate upon payment of the value. The value comes in place of the estate; and when that value is made good to the creditors, they must disburden the estate of their whole debts, because they cannot have both the estate and the value. And to fortify this defence, it was urged, that upon an entry *cum beneficio*, the debts due by the defunct are *ipso jure* extinguished so far as they exceed the value; to which extent, and no further, the heir is liable. 2do, There is no foundation for a sale of the estate upon any of the acts of Parliament, seeing the heir, who is now proprietor, neither is nor can be bankrupt.

To the first, answered, The statute introducing the benefit of inventory, has only in view to protect the heir from an universal passive title, declaring that he shall not be personally liable beyond the value of the estate. From this indeed it follows, that if the creditors chuse to sue the heir for payment, they must accept the value, because the heir is no further liable personally; and if they receive the value, the estate must be disburdened of course. But if they forbear personal execution, the statute does not say nor insinuate, that the creditors are bound to accept this value. This is left to be determined by the common rules of law; and when that is the case, what room is there for maintaining, that a service with an inventory, can give the heir a more ample and unlimited right to the estate, than a service without an inventory? The infeftments granted to the creditors, were burdens upon the predecessor's estate; and the heir serving, with or without inventory, takes the subject *tantum et tale* as it was in the predecessor, burdened with the real debts. The debts once established upon the estate, must subsist until payment of the last shilling; unless the estate be brought to a public sale; which is the single case known in law, where a real creditor is bound to accept a proportion of the price. In short, the heir is put upon no better footing by the statute, than a debtor is, who has obtained from his creditors a discharge of personal execution, or than one is, who has a decree of *cessio bonorum*, or has the *beneficium competentie*. It is very true, the debts are restricted *quoad* the heir, he having, from the statute, a privilege of exception, to be free from personal execution upon paying the value; but this is perfectly consistent with his being *ipso jure* liable, which he is by representation: A personal exception against payment supposes the debts due; but to be free *ipso jure*, is saying, that there never was a debt, or that it is now [5347] extinguished. The defender's doctrine would go hard with real creditors; if the debts, real as well as personal, be extinguished *ipso jure* so far as they exceed the value, the estate must always be sufficient to pay the remainder; which would be a monstrous injustice, by putting personal creditors upon an equal footing with those that are real. Besides, what becomes of the moveables upon this supposition? These must always be free to the next of kin, whatever become of the creditors. Nothing can be more absurd.

To the second, answered, 1mo, The heir who enters *cum beneficio* to an overburdened estate, is in the strictest sense of law bankrupt; for he is liable *ipso jure* to the whole debts, though he has a privilege to defend his person. 2do, *Esto* the heir were free *ipso jure*, that would not bar a sale. Let us suppose one purchases an estate, with a real incumbrance upon it, near the value; he is not personally liable to this incumbrance; and yet, if his proper debts exhaust the remainder, the real creditor may insist in a sale. Or suppose a man accepts a disposition with the burden of the granter's debts, which afterwards are found to exhaust the value; can it be doubted, that any of these creditors, after leading an adjudication, may proceed to a sale,

though the debtor cannot be said to be bankrupt, when possibly he is not owing a shilling in the world? it is sufficient that the estate is bankrupt. And 3tio. If there arise any doubt here upon the words of the bankrupt statutes, it would be a defect, which the Court of Session would supply from the spirit and meaning of those statutes. And indeed, why not a sale in this case, if it can be shown rather more necessary than in any other case that can be figured? Personal execution, which is a strong spur to the debtor, is wanting here; and there is the more necessity for other execution to supply that defect. And truly, it must appear exceedingly strange to suffer an estate to lie in *medio* for ever, leaving the creditors without hopes of payment, when the price might be sufficient to discharge the whole debts, and possibly some reversion to the proprietor.

The Lords gave this question first for the creditors. But afterwards, upon a reclaiming petition and answers, it was found, upon the President's casting vote, "That the creditors have no right to bring the estate to a sale; and that the heir is only liable to the creditors for the value of the estate as it shall be proved."

Upon the authority of this case, several processes were brought at the instance of heirs served *cum beneficio*, and the Court beginning to demur upon the relevancy, the case was ordained to be pleaded in presence. And, upon 12th July 1738, "They found the creditors have a right to bring the estate to a sale; and that they are not bound to accept the sum that the estate may be valued at upon proof." The heirs of Sir Patrick Strachan of Glenkindy *contra* his Creditors, No. 16, p. 5348.

Fol. Dic. v. 1, p. 363. *Rem. Dec.* v. 2, No. 7, p. 13

No. 16. [5348] The Heirs of STRACHAN *v.* his CREDITORS. July 12, 1738.

Creditors of a defunct can bring the estate to sale, and are not bound to accept of the value of it from the heir *cum beneficio*. See No. 15, p. 5346.

It had been once and again found (No. 15, p. 5346), that where an heir was served *cum beneficio*, the creditors were not entitled to bring his predecessor's estate to a sale, and that the heir was only liable for the value of the estate, as it should be proved.

But the like question again occurring between the above parties, it was found that the creditors have right to bring the estate to a sale, and are not bound to accept of the value from the heir *cum beneficio*; and that the same day the like judgment was given in another case, Crawford *contra* Young.

There is much to be said for either side of this question, but it is scarcely thought that the Court will now recede from this last judgment.

Fol. Dic. v. 1, p. 363; v. 3, p. 261. *Kilkerran* (HEIR CUM BENEFICIO), No. 1, p. 239.

No. 21. [5353] RUTHERFORD. July 30, 1748.

It was found, upon a verbal report, that a sale might be pursued upon the act 1695, although the pursuer was served heir in general *cum beneficio*, he not being served in the lands. See No. 23, *infra*.

Fol. Dic. v. 3, p. 262. *Kilkerran* (HEIR CUM BENEFICIO), No. 5, p. 240.

No. 23. BLAIR, Petitioner. February 27, 1751.

An heir *cum beneficio* may pursue a sale on the act 1695 as apparent heir.

Patrick Blair, heir served *cum beneficio* to his brother Andrew Blair of Corbo, having pursued a sale as apparent heir, an act was pronounced by the Ordinary, before

whom it came, in common form ; and he now having applied by petition to the Lords, representing that the proof brought was not full, and craving a new diligence, a doubt was stirred on the Bench, How far it was competent for an heir served *cum beneficio* to pursue a sale as apparent heir ; and precedents having been alleged for the pursuer, the case was deferred till this day, that the precedents might be condescended on.

Accordingly two precedents were found, one of the 14th July 1742, Robert M'Doual, second son to Ann Johnston of Kelton, and of John M'Doual of Logan, her husband *v.* the Creditors of Robert Johnston of Kelton (see APPENDIX), where, on the verbal report of the Lord Elchies, it was found, " That the said Robert M'Doual, disponee from his mother, who had been heir served *cum beneficio* to Robert Johnston of Kelton, her brother, was entitled to bring the subjects of the inventory to a sale on the act 1695 " ; which was a step further, as the pursuer was only assignee from his mother, the heir served. The other was likewise on the verbal report of the same Ordinary, no longer ago than on the 30th July 1748 (No. 21, *supra*), when Andrew Ru-[5354]-therford, merchant in London, as son and apparent heir of Robert Rutherford, brought a sale, as apparent heir to his father, of certain tenements in Edinburgh ; and it being objected by the creditors, that the pursuer was heir served *cum beneficio*, and not apparent heir to his father, and so could not carry on the sale on the act 1695, the Lords found, " That notwithstanding the pursuer was served heir in general *cum beneficio* to his father, yet it was competent to him to carry on the sale on the act of Parliament 1695."

The record of both which proceedings being produced in Court, the Lords " Granted the diligence."

The greatest justice the heir can do to the creditors is to bring the estate to a judicial sale ; and in Holland, where the entry of heirs *cum beneficio* is most frequent, the heir not only may, but must expose all the subjects of the inventory to public auction. Voet, *ad Tit. De jure delib.* § 21.

Fol. Dic. v. 3, p. 262. *Kilkerran* (HEIR CUM BENEFICIO), No. 7, p. 241.

No. 1. [5357] ELIZABETH FENTON *v.* THE HERITRIX of Dirleton. February 26, 1523.

Gif ony fre tenant or vassal haldand landis of diverse and sindrie sisteris, or uthervayis airis-female, as thair superiouris, he aucht and sould be enterit thairto be the eldest air-female allenarlie and the releif quhilk he payis the time of his entrie sould be equally dividit amang all and hail the superiouris, and on na wayis sould pertene to the eldest aire alane. *Fol. Dic.* v. 1, p. 363. *Balfour* (RELIEF), No. 5, p. 256.

No. 6. [5362] JANET COWIE, eldest Heir Portioner to the deceased JOHN COWIE of Bothkenner *v.* The Younger Heirs. February 26, 1707.

A man who had a very small land interest, leaving five daughters, the eldest claimed the mansion-house. The Lords found the mansion-house (though scarcely fit for an heritor to live in) belonged to the eldest daughter, there being other houses for the tenants. An orchard not having been let for rent, was found to belong to the eldest heir portioner, without any recompence to the rest.

John Cowie's heritage falling to his five daughters as heirs portioners, the younger heirs raised a brieve of division for dividing the lands, house, and yards, by the Sheriff of Stirling, which was advocated by the eldest sister, for whom it was alleged at the discussing of the advocacy, That the house and yards should belong to her as a *præcipuum*, and a distinct indivisible right.

Answered for the Younger Heirs ; The dwelling-house ought to be divided equally amongst them all ; because, albeit the principal manse being tower, fortalice, &c., falls

to the eldest heir portioner, Stair, Instit. lib. 3, tit. 5, § 11, yet this doth not hold as to ordinary country houses, which pass as pertinents of the land. And *ita est*, the house in question is such, being about two stories high, having a thatch roof, and a round about fireside for the conveniency of servants, and the boiling of beasts' meat, &c. It was built by the parties predecessors after their acquiring of the lands, and they were only designed goodman and goodwife; and the whole estate is but a matter of five chalders of victual; so the original design of preserving a chief representative of a family, cannot take place here.

Replied for the eldest Heir; Many great heritors in old time went under the name of goodman and wife; and the principal manse or Messuagium, comprehends all ordinary dwelling-houses for accommodation of heritors, larger than farmers' ordinary country houses. For houses of late are not built by way of tower and fortalice as in old time, but for conveniency; and yet must remain indivisible rights for the accommodation of the heir and representative of the family. Now, this house was never in use to be set for rent, and is much larger than an ordinary farmer's house, being three stories high, containing about twenty-two glass windows in nine rooms, with a closs, office-houses, and a stone pend above the entry; therefore it cannot be reputed as part and pertinent of the ground it stands on. Again the reason for preferring the chief representative of a family holds without respect to the greatness or smallness thereof; and though the house in question was built by the parties predecessors after their acquiring of the lands, there was a mansion-house upon the heritage before.

The Lords considering that the house in question was the only house for the heritor's dwelling, and that there were several houses besides for the tenants on the ground, they found that the said principal messuage belongs to the eldest heir portioner.

March 5, 1707.—In the cause aforesaid betwixt Janet Cowie and her younger sisters, mentioned February 26, it was alleged for these younger heirs portioners, that they should get some satisfaction or equivalent from the eldest in lieu of the principal dwelling-house adjudged to her; because, 1mo, The said mansion-house being originally *prædium rusticum, fructuum colligendarum causa paratum*, built and used by the heritors for labouring their own ground before any tenants were put upon it; the subsequent building of a tenant's house, cannot alter the right and nature thereof, so as to hinder it to belong equally to the heirs portioners; for in determining the right and nature of things of this kind, *initium est inspiciendum*; and if it be adjudged to the eldest, the rest must have their proportion of the value. 2do, By our law and custom, where the eldest heir portioner gets the principal dwelling-house, or any other indivisible right, she must pay the value for the *ipsum corpus*, *Reg. Maj. l. 2, c. 28, § 3, junct. cap. 27, § 4*; *Craig feud*, lib. 2, dieg. 14, § 7; Mackenzie's Institutions printed with notes, page 249: In the same way as the first effectual adjudger, in the division of a bankrupt's estate, would have his option of the dwelling-house or largest share, but upon payment of the superplus value. And if it were otherwise, the eldest might come to have vastly more in proportion than any one, yea, than all the rest; which neither law nor the defunct designed.

Answered for Janet Cowie the eldest heir portioner; That she, by the right of primogeniture, ought to have the house as her *præcipuum*; and if she should be obliged to give a price for it, the privilege would be ineffectual and overturned. For what heir would not rather chuse to sell a share of an old or perhaps ill-contrived house, than to purchase it from five or six, and so the family would become despicable or extinct! Besides, many things that fall under division are adjudged to one of the heirs portioners for the value, for the more convenient expediting of the brieve; so that if a price were given for the mansion-house, it could not be called an exception in favours of the eldest. Again, no instance can be given in our custom, where an eldest heir portioner gave any allowance to the rest for the house; on the contrary, the eldest heir portioner of Carnock buiks the house and yards without any controversy, or compensation to the rest. And if any such compensation should now be found due by the eldest, what pleas might it create among those who have hitherto acquiesced in the common practice of the nation? As to the objections that are made against the eldest heir's pretensions, they are easily answered; for, 1mo, Though the house in question be not a tower or fortalice in the strict acceptation, which imports a *turris pinnata*, or house of strength with walls and ditches, it is such in a legal acceptation,

which includes all dwelling-houses that have lofting and joisting ; and therefore cannot pass for a country house, designed only for the accommodation of labourers of the ground. 2do, As to the opinion of old lawyers, who assert that satisfaction is to be made for the principal mansion-house, that is overbalanced by the opinion of our latter lawyers, supported by the constant custom of the nation in such cases, and more agreeable to the feudal [5364] law. And among these my Lord Stair is positive, b. 3, t. 3, § 11, that the indivisible rights fall to the eldest alone, without any thing in lieu thereof to the rest.

The Lords found that the principal house did belong to the eldest sister, without any compensation to the rest.

June 24, 1708.—In the competition betwixt the Cowies, heirs portioners of John Cowie of Bothkenner, Janet Cowie the eldest claimed the yard, as well as the house as a *præcipuum*, *jure primogenitura*, without division or compensation ; and contended, That such a claim was founded in law and the practice of the nation. For, 1mo, The eldest daughter of Innes of Dunoon in Angus, possessed the house, yards, and parks of Dunoon ; the eldest daughter of Sir Thomas Nicolson possesseth the house, yards, and a considerable park of Carnock without division, or compensation ; besides many other such instances. 2do, The right of primogeniture stands established by the judicial law of Moses, Deutr. 21, 17, and *Gudelin de jure novissimo*, lib. 2, c. 14, observes, that in *feudis illud generale, ut jure primogenitura, unus unave, vel totum, vel semissem, vel aliam partem præ cæteris obtineat*. It is true that some of our old lawyers, though they cannot but yield some privilege to the eldest, think some recompence ought to be given to the rest upon that account ; but this opinion is without foundation in law or custom ; for where law declares any thing to be mine another can have no interest therein ; and it is unreasonable to oblige a person to give a recompence for what *de jure* is his own. 2do, John Cowie the heritor did evidence his will, that the yard should go with the house ; in so far as he hath inclosed the house, office-houses and closs within the same by a continued fenced hedge, and admitted no passage thereto, save one through the closs, and continually possessed the same, without setting it separately for rent, selling only so much of the fruit as he could spare. 3tio, A house disposed carries with it the pertinents necessary for the use thereof possessed by the disposer, July 18, 1676, and December 9, 1679, See PART and PERTINENT. And though sometimes a greater house may have adjoined to it a lesser orchard, *et e contra, majus et minus* ought not to vary the law in this case.

Answered for the younger heirs portioners ; Albeit the eldest gets the house as a thing indivisible, without an equivalent, yet the orchard, which is of its own nature divisible rendering yearly profit, though for expediency it may be adjudged to one, the rest must have their share of the price. Nor doth other heirs portioners acquiescing in that matter to the eldest, make law in prejudice of the younger heirs portioners competing here. Besides, there are contrary instances, in the case of Hamilton of Pumpherstoun,* where an equal division of yards and parks was made before the Sheriff of Linlithgow ; and in the case of White of Weedins,* where the whole subject without distinction was equally divided. And our greatest lawyers, Craig, Skeen, Stair, M'Kenzie, and White-[5365]-law, in his notes on him, hold that a recompence is due, where the subject is valuable, even for a superiority that has feu-duties ; though it be otherwise in a barony, or *castrum* (as foreign lawyers speak) where all around the principal mansion-house, at which sasine is to be taken, is understood to be annexed thereto, so far as the same may have relation to the house, rather than to a tenantry.

The Lords found, that the orchard not having been set for rent, did belong to the eldest heir portioner as well as the house, without any recompence to the younger heirs.

Thereafter, July 22, 1708, The Lords preferred also the eldest heir to the custody of the writs, upon her granting an obligation to make the same furthcoming to all concerned, or to give transumps upon their equal charges.

Fol. Dic. v. 1, p. 364. Forbes, pp. 136, 137, 253.

* Examine General List of Names.

No. 7. [5366] Executors of Lady GARNKIRK v. GRAY. January 16, 1725.

In a question among heirs portioners whether the heirship moveables go as *præcipuum* to the eldest, or divide among all, the Lords found the eldest sister only draw her share. See APPENDIX. *Fol. Dic. v. 1, p. 361*

No. 11. [5369] Lady HOUSTON v. Sir GEORGE DUNBAR and Sir WILLIAM NICOLSON. November 3, 1744.

In a division of an estate among three heirs portioners, it was found, that two superiorities devolved to the two elder sisters, the eldest sister having the right of choice; but that the youngest was entitled to a proportional recompence from the other two.

The succession of the estate of Carnock having opened to three heir-portioners, a process was brought for dividing the same among them. A small part of the lands had been feued, viz. Gartencaber and Carbrock, each possessed by a different vassal, and each paying the precise same sum of feu-duty; and the question was, In what manner these superiorities should be divided among the three heirs portioners. For Lady Houston the eldest, it was contended, That all indivisible subjects, such as titles of honour, jurisdictions, the principal messuage, ward and blench superiorities, belong to the eldest heir portioner by the privilege of primogeniture; that a feu superiority, being also an indivisible subject, comes under the same rule; and that, if such subjects belong to the eldest heir portioner *jure proprio*, there can be no foundation for obliging her to pay any recompence to her sisters; because a man is not bound to pay a price for his own property.

It was answered for the other heirs portioners, That, whatever be the rule as to subjects that are strictly indivisible, the same rule cannot obtain as to feu-duties which are divisible; that Craig, lib. 2, dieg. 14, § 7, is clear that the eldest heir portioner who succeeds in a feu superiority, is bound to pay a proportion of the value to the other heirs portioners; that Stair, b. 3, t. 5, § 11, delivers the same opinion, with this addition, that, if there be any more feu-superiorities than one, they ought to be distributed among the heirs portioners.

[5370] "Found, That the eldest heir portioner is entitled to one of the superiorities and the feu-duties arising therefrom, and that she is entitled to make her election. Found, That the second heir portioner is entitled to the other superiority and the feu-duties arising therefrom. And found, That the third heir portioner is entitled to a recompence from the other two heirs portioners, for her proportion of the feu-duties."

The case being of no great importance to the parties, was reported upon a short minute, where the point was but slightly handled. In examining whether this judgment be well founded, it will be proper to take under consideration the case of heirs portioners in a vassalage, which may possibly afford some argument from analogy. It is a rule laid down by Glanvil, lib. 7, cap. 3, as well as in the *Reg. Maj.* lib. 2, cap. 29, that even in ward-holding the land is to be equally divided among the heirs portioners of the vassal, notwithstanding that the superior is only entitled to the service of one military vassal for the land. But then the matter is thus adjusted; that the husband of the eldest heir portioner is he only who is bound to do homage for the land; which of them is bound to perform service to the superior in war, or whether they must club for a soldier, is not said.

I think the same rule must obtain with regard to heirs portioners who succeed to a superiority; for this good reason, that lands held by any man, though with regard to vassals, it be considered as a superiority, yet, with regard to the holder's superior, it is considered as a vassalage. And what clears this point is the form of making up titles to the land, which is the same in superiority and in vassalage. A right of superiority is never mentioned as such in any charter or retour; the land is mentioned, and the expression is the same whether it be a superiority or a property. From this very consideration it is evident, that heirs portioners have an equal right to the land *pro indiviso*, and must make up titles accordingly, whether the land be

longed to their ancestors in property or in superiority. The eldest, by the tenor of the retour, has no better right than the youngest.

Dignities, offices, and such like feudal holdings, which have no relation to land, stand upon a different footing. These are in their nature indivisible, and, as they can be held but by one person, the eldest comes first in view. Whether her sisters be entitled to any recompence is not a clear point; but what incline me to think that they are not entitled, are the following considerations: By the law of England, originally the same with ours, the eldest daughter has no claim to a peerage by succession; it being the privilege of the Crown to bestow the peerage upon any one of the daughters. And if in our practice this privilege of the Crown have given way to the privilege of primogeniture, a claim for recompence, which was not known originally, would not readily arise upon the innovation; especially as dignities, offices, and others of the like nature, are not capable of an estimation in money.

[5371] With regard to ward, relief, marriage, non-entry, and all casualties that not only belong to the superiority of land, but admit of a regular estimation in money, there can be no reason why the younger sisters, who have an equal interest in the land, should be deprived of their proportion. And as to the principal messuage, though, as an indivisible subject, it goes to the eldest, yet, as a subject which can bear an estimation in money, it is settled that the younger sisters are entitled to a recompence, Glanvil, lib. 7, cap. 3, *Reg. Maj.* lib. 2, cap. 27, § 4, cap. 28, § 3.

It is very true, that as on one hand the superior is not entitled to homage and military service from each of the heirs portioners in the property, but only from the eldest, so, on the other hand, the vassal is not bound to do homage or perform military service to each of the heirs portioners in the superiority, but only to the eldest; nor is the heir of the vassal bound to demand infeftment from each of those heirs portioners, but only from the eldest. But though the eldest is thus preferred to indivisible rights, without a recompence, where the subjects admit not a pecuniary estimation; it will not follow, that she must also be preferred without a recompence to pecuniary casualties, which not only admit an estimation, but which, in fact, can be divided among the heirs portioners. Taking the matter in this light, the interlocutor is undoubtedly well founded. While the heirs portioners in the superiority possess *pro indiviso*, there is the same reason for distributing the feu-duties among them, that there is for distributing the rents. And when they chuse to bring a process of division, there is the same reason for parcelling out among them the feu-superiorities, that there is for parcelling out the property of lands. And if there be not so many superiorities as there are heirs portioners, the privilege of age entitles the elder sisters to make a choice, upon giving a recompence to the others.

Fol. Dic. v. 3, p. 263. *Rem. Dec.* v. 2, No. 57, p. 85.

No. 12. JEAN WALLACE, and JOHN BUCHANAN, Writer in Glasgow, her Husband
v. JANET WALLACE, and THOMAS BUCHANAN of Kirkhouse, her Husband.
January 20, 1758.

A dwelling-house, &c., built within a burgh of barony discontiguous to the rest of the heritor's landed estate, falls not to his eldest heir portioner as a *præcipuum*.

Alexander Wallace, sheriff-clerk of Renfrew, died possessed of moveables to the extent of £3000 Sterling, and heritage to the value of about £1000 Sterling. He left two daughters, Jean and Janet Wallaces; and as he made no settlement, his estate fell to be divided between them.

Alexander Wallace's heritable estate consisted of 70 acres of ground yielding about 200 merks, situated at the distance of two or three miles from Paisley; of a house and offices, which he built for his own residence, on half an acre [5372] of ground purchased by him at the west end of the town of Paisley, and held feu of the burgh; and of six or seven acres of land, lying near half a mile distant from his house, which he purchased, and inclosed, after building the house, and sometime let to a tenant, but afterwards took into his own possession.

Jean, the eldest daughter, brought a process against her sister Janet, for having the house, offices, and garden, at Paisley, as the messuage or mansion-house of the

defunct, declared to belong to her as a *præcipuum*, in respect of her primogeniture, without being liable to give a recompence to her sister.

Pleaded for the pursuer, By the custom of this country, female heirs succeed equally in lands, and heritable subjects that admit of division; but such subjects and rights as are indivisible, devolve, according to the law of primogeniture, upon the eldest heir portioner. In judging what subjects are divisible or not, the nature of the subject, and not the value or estimation of it, is considered. The brief of division only concerns such subjects as of their own nature can admit of a partition, and does not apply to indivisible subjects, or direct them to be valued or sold, and the price divided. Nor does the law distinguish between mansion-houses used by heritors of lands for their own proper residence, but built in the form of an ordinary dwelling-house, and such houses built like a tower or fortalice. Of whatever form the house is, it falls to the eldest heir portioner, together with the offices and garden. So it was found, 26th February and 5th March 1707, and 24th June 1708, Cowie *contra* Cowie, No. 6, p. 5362; and in the competition among the heirs portioners of James Peattie, merchant in Glasgow, No. 10, p. 5367; and no recompence was allowed. The house in question was entirely possessed by the defunct, and built for the accommodation of his single family; and therefore ought to belong to the pursuer.

Answered for the defender, By our ancient law, the eldest daughter was entitled to the message, or principal mansion-house upon the estate of her father; but under this quality, *ita quod in aliis rebus satisfaciet aliis sororibus ad valentiam*; Reg. Maj. l. 2, c. 27, § 4, c. 28, § 3; Craig, lib. 2, dieg. 14, § 7. It is true, that a few later decisions have found the eldest daughter entitled to the message, without recompence; but the point cannot yet be held as so established; and, at any rate, these decisions will not be extended still further, contrary to the common law of succession among heirs portioners, which distributes equally every subject, capable by its nature either of division or of valuation. The brief of division is an executorial of the law, which confers the succession of the defunct's heritable estate upon his daughters *per capita*; and therefore must be understood to direct the Sheriff, and the assize called by him, not indeed to divide every field, farm, house, or mill, but to make the several allotments, according to the just value of the several subjects which compose the heritage. Titles of honour and jurisdictions are incorporeal rights, which, from their own nature, and that of the grant of them, cannot be vested in more [5373] than one person at the same time; and therefore fall to the eldest. A single superiority too goes the same way, in respect to the vassal's interest, which forbids a division; but, then, being properly a right of lands, a recompence is due; and if there are more superiorities, they are distributed among the sisters.

Thus it is plain, that every indivisible subject does not fall to the eldest without recompence.—But, at any rate, it is sufficient to exclude this pursuer's claim to the house in question, that it is not a mansion-house standing on the defunct's land estate, which lies at a considerable distance from it, but a house built within the town of Paisley, contiguous on one side to other houses in the town, and held feu of the burgh; so it is merely an urban tenement, which was intended for the defunct's residence when attending his business as clerk to the Sheriff-courts held there. It therefore falls under the division, according to the opinion of Craig, Stair, and other authors.

Replied for the pursuer, The house may be truly said to be situated in the country, as there are none of the houses of the burgh that lie without it, or separate it from the adjacent fields; and it cannot come under the description of borough-houses mentioned by Lord Stair, which are ordinarily set *per contignationes*, and built for the accommodation of several families. Most of the fields for two miles round hold of this burgh of barony; but that could never hinder an heritor from building a proper mansion-house upon his own grounds; and although this house and garden are not contiguous to the other lands of the defunct, yet that circumstance ought not to make any variation in the case, as a part of his lands were so near as to afford him the conveniency he wanted for keeping his horses and cattle.

The Court seemed to be of opinion, that this house was not properly a message or mansion-house, in respect of its situation.

“The Lords sustained the defence, assoilzied the defender, and decerned,”

Act. FERGUSON.—Alt. MILLER.—Clerk, KIRKPATRICK.

No. 13. ROBERT IRELAND v. ALEXANDER GOVAN. November 14, 1765.

Found in conformity with *Peadie v. Peadies*, No. 10, p. 5367, that the principal message belongs to the eldest heir portioner without recompence to the other heirs.

The lands of Mains of Eastwood, containing about 150 acres, and worth about £35 Sterling per annum, having fallen to four heirs portioners, Alexander Govan, as in the right of the eldest sister, brought an action, for dividing the lands, against Robert Ireland, as in the right of the other three sisters.

It was argued for the younger sisters, on the first point, 1mo, There are here no *termini habiles* for the principal message going to the eldest sister as a *præcipuum*; because the mansion-house is neither a tower nor fortalice, which alone, as carrying along with them an idea of honour, are considered as indivisible, and, therefore, fall to the eldest sister as a *præcipuum*. See Craig, lib. [5374] 2, dieg. 8, § 3; Stair, lib. 3, tit. 5, § 11; and M'Kenzie's Institute, lib. 3, tit. 8, § 25.

2do, Even though ordinary mansion-houses should fall to the eldest as a *præcipuum*, the estate ought to be such as to entitle it to a capital message, and able to afford the expense of keeping it in repair; otherwise what was intended as a mark of honour, will be a mark of dishonour to the family, which it is highly probable, would be the case in the present instance, where the estate is so very small, that the share of the eldest sister is at present set for £28 Scots per annum.

And, 3tio, The house ought to be actually subsisting, and not bare walls without a roof, as in the present case.

To the first, it was answered; That the distinction here between houses built in the form of towers and fortalices, and such as are not built in that form, is not supported by any of the authorities quoted, except M'Kenzie, who, from a misapprehension of Lord Stair, confines the right of the eldest sister to houses built in that form; whereas, it is evident, that Lord Stair, under the *et cætera* at the place referred to, comprehends all houses, in whatever form they are built; as do the other writers on our law. See Skene, de verb. signif. voce ENEYA; Craig, l. 2. dieg. 14, § 7; Balf. Practicks, p. 223; Lord Bankton, l. 3, tit. 5, § 84; and Erskine, l. 3, tit. 8, § 13.

To the second; None of our law-books or decisions make any distinction, whether the estate be large or small; it is sufficient if it has been the inheritance of the family; and, in the case of *Cowies*, No. 6, p. 5362, the Court found the eldest heir portioner entitled to the principal message as a *præcipuum*, though the estate was even smaller than here.

And, to the third; The ruinous condition of the house ought to be no reason for making it an exception from the general rule, as the decay is in a great measure owing to the antiquity of it, and as it was the ordinary residence of the family, while they lived on the estate.

Pleaded for the younger sisters, on the second point, If a recompence is due? A perfect equality, the most rational and equitable rule of succession, was formerly followed in this, as in most other countries, till, by the feudal customs, it was altered in the male succession, and the eldest son preferred to the younger: But, though this change took place as to males, yet the old rule of succession remained among females, who are all equally called to the succession, without any preference to the elder sister over the younger, except in such rights as do not admit of a division, or such as are by law considered as indivisible; those the law gives to the eldest heir portioner, without any recompence; for these she pays a recompence: Thus, titles of honour and dignity fall to the eldest sister without any recompence; because, *sua natura*, they do not admit of a division or of a valuation; a single right of superiority falls also to the eldest sister, as being indivisible, *ex lege*; but, if it yields a yearly profit as a feu-[5375]-duty, she must pay a recompence for it to the younger sisters; but there is no necessity for the mansion-house and gardens falling to the eldest sister without a recompence. They are neither *sua natura*, nor *ex lege*, indivisible, and may easily be valued; and, therefore, they ought to be divided among the heirs portioners; or, if they shall be considered as falling to the eldest sister, there is surely no reason why she should not pay a recompence for them to the other heirs portioners, in order to preserve that equality among them which is the principle by which the female succession is regulated. See *Reg. Mag.* l. 2, c. 27, § 3, and c. 28, § 1, 2, 3, and 4;

Balfour's Pract. p. 223 ; Skene, *voce* ENEYA ; Craig, l. 2, dieg. 14, § 7 ; and the *ca* Carruber *contra* Sibbald, No. 2, p. 5357 ; and Hathorn *contra* Gordon, No. 5, p. 5361.

Answered ; The mansion-house may, with great propriety, be reckoned among the subjects that do not admit of a division, as it would be impossible to divide a small house among a number of heirs portioners ? neither does it properly admit of a valuation, as it would be next to impossible to get any two valuator's to agree in a value to be put upon houses ; and, therefore, the law has justly considered the principal messuage as a subject indivisible, and incapable of being valued, and which therefore falls to the eldest sister. And, though some of our oldest writers, and more ancient decisions, lay it down that a recompence is due, yet our later writers are of a contrary opinion, supported by an uniform train of decisions from the beginning of this century, where, as often as the case occurred, the Court found the eldest heir-female entitled to the principal messuage, without any recompence. See Stair, lib. 3, t. 5, § 11 ; Erskine, lib. 3, t. 8, § 13 ; and Feb. 26th, 1707, Cowies, No. 6, p. 5362 ; Carnock, No. 9, p. 5366 ; Peadies, No. 10, p. 5367 ; and 1750, Gadgirth, see note on No. 10, p. 5369.

"The Lords found the eldest sister entitled to the principal messuage as a *præcipuum*, without any recompence."

Act. LOCKHART.—Alt. HENRY DUNDAS.

C. B.

Fol. Dic. v. 3, p. 262. Fac. Col. No. 17, p. 227.

No. 14. JAMES CATHCART of Carbiston, one of the Heirs portioners of Inverleith v. JAMES ROCHEID, the other Heir portioner of that Estate. February 16, 1773.

There is a distinction between heirs portioners *ab intestato*, and heirs portioners *provisional*, with respect to the *præcipuum* ; which, in the case of the latter, was found not claimable in right of the eldest of four daughters, who had been, failing a son, *nominatim* called to the succession, by a settlement equally among them.

In 1691, Sir James Rocheid of Inverleith executed a deed of settlement, disposing the estate of Inverleith, and others, to his son James, and the heirs whatsoever of his body, whom failing, to Magdalen, Janet, Mary, and Elizabeth, his four daughters, equally among them, and the heirs whatsoever of their bodies ; but qualified with this condition and proviso, that it shall not be in the [5376] power of James, the son, to contract debts, or otherwise burden the lands disposed, or to alienate the same, or do any other deed whereby they may be adjudged, or otherwise evicted in prejudice of his four daughters ; with liberty, however, to James, the son, to make suitable provisions for a wife and younger children, and to charge the estate with debt to a certain extent. And these provisions are guarded with irritant and resolute clauses. The entail was completed by infettment, and recorded.

On Sir James's death, James, the son, took the estate on the footing of this entail ; and, having died in 1737, without issue, the succession devolved on Mary and Elizabeth, two of Sir James's four daughters then living, and the eldest sons of Magdalen and Janet, deceased, who made up their titles by special service, as heirs of provision.

From the death of the last-mentioned Sir James Rocheid, in 1737, the estate of Inverleith had been held *pro indiviso*, till James Rocheid, the descendant of Mary, the third daughter, having succeeded to her fourth share, and having right to the fourths of the other two sisters, Janet and Elizabeth, lately insisted in a brief of division, before the Sheriff of Edinburgh, against James Cathcart, who, as being grandson to Magdalen, the eldest daughter of Sir James Rocheid, and standing in her right as to one fourth part of the lands of Inverleith, contended, that he was entitled to have the mansion-house, offices, and garden of Inverleith, allotted to him as a *præcipuum* ; and the Sheriff having overruled his claim, the cause was removed by bill of advocacy ; which was passed of consent.

Pleaded by the claimant; As it is a fixed principle in the law of Scotland, that the eldest heir portioner takes, as a *præcipuum*, all subjects which are in their nature indivisible, which is the case of the messuage and its appurtenances, the question resolves into this abstract point, Whether the same principle ought not to obtain, where the same persons are both heirs of line and heirs of provision?

That such would be the rule in succession, *ab intestato*, is established by the uniform opinion of the later writers upon the law of Scotland, and by a train of decisions conformable thereto; and, therefore, it lies upon the other party to show upon what principle the distinction between heirs-general and heirs of provision can be supported. The *ratio legis* is the same in both, viz. the indivisibility of the subject, which, in the nature of things, cannot admit of being split, and, therefore, *ex necessitate*, must be decreed to one or other of the heirs portioners; and, *cæteris paribus*, the law does so far acknowledge a secondary right of primogeniture among heirs portioners, and in respect thereof, throws the indivisible subjects into the portion of the eldest, without any recompence to the other heirs portioners; *et ubi eadem est ratio, idem debet esse jus*.

[5377] It is manifest, from the tenor of it, that Sir James's only view, in executing this settlement in the form of an entail, was to tie up the hands of his son, that he might not dissipate the estate; the prohibitive, irritant, and resolute clauses, went no farther than the son; and, upon his death, the estate became a fee-simple in favour of those very persons who would have taken, in the course of legal succession, his four daughters, failing issue of his son's body; so that the destination of succession in their favour had nothing farther in view, than to continue the line of natural succession. Under these circumstances, it is impossible to imagine that Sir James could intend to establish a different rule among his own daughters, than would have obtained, had the estate devolved to them in the course of legal succession.

Answered; In some later cases, the Court has, no doubt, found, that the eldest heir portioner is entitled to the principal messuage, without being liable in any equivalent. But, whether these decisions are well or ill founded in law, is immaterial; because it is clear that they apply singly to the case of succession devolving, *ab intestato*, upon heirs portioners.

In strict propriety, the expression, "heirs portioners," applies only where a *hereditas* is split into portions, not by a deed of the party disposing a subject to two or three females equally among them, but by the operation of law; Stair, b. 3, tit. 5, § 11. In the present case, therefore, the four daughters of Sir James Rocheid did not take, as heirs portioners, in the legal sense of the word, but as joint disponees, to whom the estate was conveyed, in the event their elder brother should die without leaving heirs of his body; and the *hereditas* comes to be divided among them, not in consequence of any act of the law, which would constitute them heirs portioners, but by the express terms of Sir James Rocheid's settlement; which declares, that, in the above event, they should succeed, and the lands and barony of Inverleith be divided equally among them.

As the right of primogeniture, giving the whole of a land-estate to the eldest son, in preference to his brothers, and giving a *præcipuum* to the eldest heir portioner, in case of a female succession, is, like all other rules of succession, *ab intestato*, derived from the presumed will of the deceased, it must unavoidably cease where a person has not left his will to be gathered from presumption, but has disposed of his estate in his own lifetime, in the clearest and most unambiguous terms. Where an express deed is founded upon, the favour of primogeniture, and the presumptions of law, are at an end; and the only question is, with regard to the meaning and import of that deed.

The mode of expression, "which failing, to Magdalen, Janet, Mary, and Elizabeth Rocheids, my daughters, equally among them," importing as clearly as words can, that the four daughters were to have each an equal interest in the subjects thereby conveyed, without any preference of the [5378] one to the other, either expressed or implied, is repeated in all the other clauses of the deed. When Mr. Cathcart, therefore, as representing Magdalen, one of the four daughters, insists, that the mansion-house, &c., of Inverleith shall be adjudged to him, without being liable for any equivalent to one who stands in right of the other three daughters, is it possible to deny that he is maintaining a plea directly in face of that very deed under which alone he can claim?

"The Lords find, that, in this case, the claimant, James Cathcart, as in the right of the eldest daughter, is not entitled to a *præcipuum*, as in the case of heir portioners; and remit the cause to the Sheriff to proceed accordingly; reserving to the parties to be heard before him, to whom, in the division, the mansion-house, offices, garden, and planting about the same, shall belong, he paying a recompense."

Reporter, COALSTON.—Act. DEAN OF FACULTY.—Alt. CROSBIE, BLAIR.—Clerk TAIT.

Fol. Dic. v. 3, p. 263. *Fac. Col.* No. 58, p. 143.

No. 15. GEORGE FORBES v. ELIZABETH FORBES. June 24, 1774.

The eldest heir portioner was found entitled to the mansion-house and garden, as *præcipuum*, without any recompense, though it was alleged the house was divisible and actually inhabited by two families, and was out of all proportion in value to the yearly rent of the lands.

The succession to the estate of Boindlie, in Aberdeenshire, devolved upon two sisters, as heirs portioners to their father Captain John Forbes.

George Forbes acquired right from the eldest to her share; and having taken out a brief of division directed to the Sheriffs, when the brief came before him, various objections were stated, on the part of Elizabeth Forbes, the other heir portioner, in particular respecting the *præcipuum*; and, 2dly, that the marches of the lands were not distinct, and that these ought first to be settled.

The Sheriff repelled the objections to the division of the lands; and, 2dly, found, "That George Forbes, as deriving right from Jean Forbes, eldest daughter, and one of the heirs portioners served to the deceased Captain John Forbes of Boindlie, is entitled to have the lands of Boindlie, &c., divided betwixt him and Elizabeth Forbes, the other heir portioner: That the petitioner George Forbes has right to the legal *præcipuum*, being the mansion-house and garden thereto belonging, without recompense to the respondent; but superseded determining the particular quantity of ground allotted to the garden, until a survey and mensuration of the whole lands under division be made out and reported." And, by the same deliverance, warrant was granted for summoning an inquest, and for citing witnesses; and the Sheriff afterwards named a surveyor for making the survey.

Elizabeth Forbes and her husband presented a bill of advocacy, complaining of these proceedings.

[5379] In point of fact, she set forth, that, above 200 years ago, a younger son of the family of Pitsligo acquired the farm of Boindlie, on the coast of Aberdeenshire. The rent of that piece of land, till lately, was only 200 merks, and has been lately raised to about £26 Sterling: That, as this was their first acquisition, the family took their title from that farm; but they afterwards acquired an estate in Cromar, at about fifty miles distance, of above seventeen times the value of the lands of Boindlie: That, about the year 1660, when they were in possession of this large estate, the then Forbes of Boindlie built a house for his residence; and, as he was then tutor and nearest agnate to the family of Pitsligo, his prospect of succession to that estate was not very remote. As Boindlie lay nearer the sea coast, and within two miles of Pitsligo, he chose, it seems, to place his house on this detached little farm rather than on his principal estate. A house was built in proportion to the fortune of the family: By various accidents, however, they were obliged to dispose of all the rest of their estate except Boindlie, which remained alone to them with this building, which the rents were hardly sufficient to keep in repair.

And, with regard to the first point, Whether any *præcipuum* at all be due in the present case? it was pleaded, It is true the Court have found, in some decisions of late, that the eldest sister is entitled to the mansion-house and garden, as a *præcipuum*, without any recompense; but, at the same time, that the Court has departed from what might be reckoned the old law, with regard to a recompense being due, as laid

down by the books of the Majesty, Craig, and the older decisions, which Lord Bankton also gives as his opinion : The Court have in no case given the mansion-house and gardens to the eldest sister, except where it could be properly considered as a *præcipuum* according to the old feudal laws.

There were only two reasons for giving these subjects to the eldest sister, viz. that they were considered as indivisible ; and that she, as being at the head of the family, had the rites of hospitality to maintain. None of these reasons, however, occur in the present case. The house not only is divisible, but in fact has been absolutely divided for many years. The one side was possessed by the old Lady Boindlie, and the other side by Elizabeth Forbes's husband, who had a lease of the lands. And if there be any person who is to keep up the rites of hospitality, that burden will certainly fall upon Elizabeth, to whom part of the estate belongs, and not upon her sister, who has abandoned it, nor the pursuer who is a stranger.

But, 2dly, In all cases where the Court have given the mansion-house as a *præcipuum*, there has always been a proportion between the house and the estate. The house has always been such as might have been built by a proprietor of the estate to which it belonged. The present case is perfectly different. The house and gardens in dispute must have cost, at the time they were built, above £400. The rent of the present lands of Boindlie was then only 200 merks, and the value of it, at fifteen years purchase, the ordinary price then, would [5380] have been only 3000 merks, or half the value of the house which was built for an estate above seventeen times that rent. Were no distinction to be made between the case, where a mansion-house is proportioned to the estate, and where the disproportion is so great as in the present question, it must render the succession of heirs portioners often exceedingly unequal, and lead to consequences which could not be intended by law. And in a case something similar to the present, Wallace *contra* Wallace, No. 12, p. 5371, the Court sustained the defence, that a house, that was discontinuous to the rest of the landed estate, did not fall to the eldest sister as a *præcipuum*.

In the second place, were it to be supposed the Court should find a *præcipuum* due to the pursuer without a recompense, he can have no pretence to any more than the garden corresponding to the old garden of the family.

Lastly, With regard to the great encroachments made by the pursuer, it is evident that the division cannot proceed until they be properly settled.

Answered ; By the interlocutor in question, the general point is indeed determined, that the eldest heir portioner is entitled to a *præcipuum* ; but, as to everything else, the interlocutor is quite innocent, having neither determined the extent of the *præcipuum*, so far at least as respects the garden, nor ascertained the precise boundaries of the lands, as neither of these could with propriety be done till after the survey was taken ; and then, and no sooner, was the Sheriff to determine upon them. Hence this obstinate litigation, which the other party have thought proper to carry on with respect to points not yet decided, and which they would not allow the Sheriff to determine when he was *in cursu* of doing it, is premature, and highly improper.

As to the general point, that the eldest heir portioner is entitled to the house and garden as a *præcipuum*, Lord Stair lays down this to be the law of Scotland, b. 3, t. 5, § 11. And it has been found, by repeated decisions, that under the mansion-house must also be included the garden and orchard, as pendicles thereof, Cowie, No. 6, p. 5362 ; Peadie, No. 10, p. 5367 ; Chalmers of Gadgirth, in 1750, see note in p. 5369 ; Ireland *contra* Govan, No. 13, p. 5373. The case of Wallace *contra* Wallace, in 1758, referred to on the other side, respected a dwelling-house within burgh.

Neither is the present case attended with any specialties which can have the effect to withdraw it from the common rule. The pursuer knows very little of the history of the family of Boindlie, nor does he think it of much consequence to the present question to trace that history for centuries back. The house of Boindlie, however, could not well have been built for the accommodation of an estate in Cromar, at the distance of forty miles ; and, to judge from appearances, it must have been built at a much earlier period than that mentioned by the other party, at least, that part of it which was not built by the late Captain Forbes of Boindlie, who, finding the old house insufficient for him, though he did not possess a fur of land other than Boindlie itself, made two additions to it, [5381] which brought the house to its present size ; and he also added to the garden. This shows, that the house has not, at least in the present century, been thought too large for the estate ; and, whether large

or small, being the messuage or manor house belonging to the estate, it must go to the eldest heir portioner, as an indivisible subject, and without any recompense.

In fact, notwithstanding the pompous description given of this house, by reckoning small closets in the number of the rooms it contains, it is at present in a situation almost perfectly ruinous; and the longer the cause is spun out, it will grow the worse.

The late Boindlie possessed the whole house and pertinents, and thought it fit enough for him, as he found himself obliged to make an addition to it for the accommodation of his family. His widow did the same; and though she found room also for her daughter and her husband, it will not follow that the house can accommodate two separate families.

As to the rent of the estate, which is likewise misrepresented, the fact is, that when set to the defender and her late husband by the liferentrix, at a very low rate it yielded about 700 merks; and, when afterwards subset by the defender, she got from the subtenant £40 Sterling of rent, besides reserving to herself what was worth £17 Sterling more; and, when the lands were surveyed in April 1772, they appeared to contain about 540 acres of ground, valued at £70 Sterling per annum.

And, with regard to the marches, were there any room for dispute about the marches, it is obvious, that, as the question arises incidentally in the division, the same falls properly to be tried and determined there; and nothing can be more easy than to do so, when the lands are at any rate to be measured, and witnesses and assizes, &c., to go upon the ground, in order to take the necessary steps for accomplishing the division.

The Court "refused to advocate the cause, and remitted to the Sheriff to allow the respondent the expenses that have been incurred by the litigation before this Court."

Act. ILAY CAMPBELL.—Alt. J. FERGUSON, C. HAY.—Clerk, ROSS.

Fol. Dic. v. 3, p. 264. *Fac. Col.* No. 116, p. 311.

No. 16. JOHN SMITH v. MARION WILSON, and Others. June 12, 1792.

A person died possessed of a farm worth £1600, a house in town in which he resided, and five or six acres in the country on which he had built a small villa. Found, that, in these circumstances, the eldest heir portioner had no right to the country-house as a *præcipuum*.

John Wilson, town-clerk of Glasgow, was proprietor of a farm in Dumbartonshire, worth about £1600. He had also a house in the town of Glasgow, where he almost constantly resided, valued at £1400.

Besides, Mr. Wilson had a small tenement, called Muirend, consisting of five or six acres, at the distance of several miles from Glasgow, where he had erect[~~ed~~]-ed a small kind of villa; the grounds, which were surrounded with a high wall, being converted into a garden and shrubbery, &c., and to this place he used to retire in the months of summer, for a day or two, as often as his professional engagements would allow.

Mr. Wilson was also possessed of some moveable effects. At his death, he having no son, John Smith, in the right of his eldest daughter, claimed as a *præcipuum* the property at Muirend. In support of this claim, Smith

Pleaded; The right of the eldest heir portioner to the chief mansion-house or country residence of the defunct, does not depend on the relative value of it, or of the garden-grounds connected with it. Neither is it of any importance that, as in this case, the messuage is at some distance from the other parts of the landed property which belonged to the ancestor; *Reg. Mag.* 2, 27, 28; Balfour, p. 223; Skene, *De verb. sig. voce* ENEYA; Hope's Maj. pract. tit. *De Jure nostro de Succes. in fin. red.*; Craig, 2, 14, 7; Stair, 3, 5, 11; Bankt. 3, 5, 84; Erskine, 3, 8, 13; 1707 and 1708, Cowies, No. 6, p. 5362; Carnock, No. 9, p. 5366; Peadies, No. 10, p. 5367; 1750, Chalmers, see note on No. 10, p. 5369; Ireland *contra* Govan, No. 13, p. 5373; Forbes *contra* Forbes, No. 15, p. 5378.

Answered ; *A præcipuum* can be claimed only where, after the principal message or mansion-house has been set apart for the eldest heir portioner, there is some landed property attached to it, which may be divided among the other co-heirs. Besides, though used as a retreat for a day or two in the summer season, the house in question could not be called the principal message or mansion-house of the deceased, whose residence was in the town of Glasgow, where he carried on his business. The consequences of a contrary doctrine would be, to give to the eldest daughter of every petty tradesman or man of business, who may have had a country house, such a preference over her younger sisters as would be exceedingly unjust, and at the same time quite inconsistent with feudal notions ; Du Cange, *voce Messuagium capitale* ; Ibid. *voce Præcipuum* ; Stair, 3, 5, 11 ; Mackenzie, 3, 8, 25 ; Bankt. 3, 5, § 5 ; Erskine, 3, 8, 13 ; Hawthorn, No. 5, p. 5361 ; Wallace, No. 12, p. 5371 ; June 24, 1786, Angus, See APPENDIX.

The Lord Ordinary found, that, in this case, the pursuer had no right to a *præcipuum*.

And, after advising a reclaiming petition, with answers,
The Lords unanimously adhered to the Lord Ordinary's interlocutor.

Ordinary, LORD JUSTICE-CLERK.—Act. MAT. ROSS.—Alt. CRAIG.—Clerk, HOME.

C.

Fol. Dic. v. 3, p. 264. *Fac. Col.* No. 217, p. 455.

No. 1. [1] DAVID WIGHT v. WILLIAM INGLIS. December 12, 1798.

The eldest of heirs portioners is entitled to the mansion-house, &c., as a *præcipuum*, although they should be called to the succession under the last substitution of a destination, as the "heirs whatsoever" of the immediately preceding substitute.

Andrew Simpson executed a settlement, by which he disposed his lands of Viewfield to the persons therein mentioned ; whom failing, to John Simpson, his nephew, and his heirs and assignees whatsoever.

In consequence of the failure of prior substitutes soon after Andrew's death, William got himself served heir in general to him, and was afterward infeft in that character upon a precept of *clare constat* from the superior. On his death, without children, the succession opened to the representatives of John Simpson. These were the sons of two sisters ; David Wight, the son of the eldest, and William Inglis, the son of the youngest ; and their mothers being also heirs portioners of line of Andrew and William Simpson, their sons got themselves served heirs to the latter in that character, and were infeft in virtue of precepts of *clare constat* from the superior.

David Wight afterward brought an action against William Inglis, for having it, *inter alia*, found, that as the son of the eldest sister, he had "the sole and exclusive right to the mansion-house, office-houses, barn-yard, and garden of Viewfield, as a *præcipuum*."

In defence, Mr. Inglis

Pleaded : The general rule of law is, that heirs portioners have an equal interest in the succession. From necessity, an exception has been introduced with regard to dignities and rights of superiority, which, exclusive of the emolument arising from them, as being indivisible, go to the eldest. And the exception has been also extended to the mansion-house. These deviations, however, take place only where the heirs portioners succeed *ab intestato* ; 16th February 1773, Cathcart v. Roughhead, No. 14, [2] p. 5375. But, as the parties in this case must take the succession under Andrew Simpson's settlement, they are not considered by the law as heirs portioners, but as heirs of provision ; Stair, b. 3, t. 5, § 11. Andrew Simpson having been an unlimited proprietor, the present parties, although heirs of line both to him and to his son William, cannot, by having made up their titles in that character, free themselves from the qualities which Andrew's settlement imposed on the succession. Nor does it signify, that they are not called to it *nominatim*, but by description, as the "heirs whatsoever of John Simpson. They are not the less heirs of provision on that

account ; of consequence, the pursuer does not come under the exception to the general rule above-mentioned.

Answered : The defender's plea is founded on an erroneous conception of the case, *Cathcart v. Roughhead*. There, the maker of the settlement disposed of his estate to his son and his issue ; whom failing, to his four daughters *nominatim* "equally among them," on whom, on the son's death, the succession accordingly devolved. It is plain, however, that they succeeded not as heirs portioners, but joint disponees ; and consequently there was no more room for the eldest claiming *præcipuum*, than if they had been four sons or four strangers. But here, the parties succeed as the "heirs whatsoever" of John Simpson. It is left solely to the law to find out who these are. They succeed, therefore, in the strictest sense, as heirs portioners at law ; and consequently, the pursuer is entitled to every advantage which the law confers on the eldest sister.

The Lord Ordinary reported the cause on informations.

The Lords, on the ground stated for Mr. Wight, unanimously found, that the pursuer, as representing the eldest heir portioner, has an exclusive "right to the mansion-house, office-houses, barn-yard, and garden at Viewfield, as a *præcipuum*."

Lord Ordinary, SWINTON.—Act. SOLICITOR-GENERAL BLAIR, JOHN CLERK, W. CLELLAND.—Alt. ROLLAND, DAVIDSON.—Clerk, MENZIES.

R. D.

Fac. Col. No. 98, p. 238.

No. 2. ELIZABETH CRUICKSHANKS and Husband v. JEAN CRUICKSHANKS and Others. May 27, 1801.

Heirship moveables are divided equally among heirs portioners.

The five daughters of Patrick Cruickshanks succeeded to his estate of Stracathra, as heirs portioners. His brother had been appointed by him his executor.

Elizabeth, the eldest daughter, with consent of her husband, brought an action against her sisters, and their tutors, for division of the succession, in [3] which she claimed the mansion-house, offices, lawn, gardens, and pigeon-houses, as *præcipuum*, and also heirship moveables.

The Lord Ordinary "sustained the pursuer's claim *jure præcipui*, to the "mansion-house, offices thereto belonging, the lawn around the mansion-house, the new and old gardens, and the two pigeon-houses."

This interlocutor was acquiesced in.

His Lordship ordered informations on the claim for heirship moveables.

The pursuer

Pleaded : Heirship moveables are given to the heir to enable him to support the dignity of the family, and the duties of hospitality in the mansion-house, which devolve on the eldest heir portioner, with more slender funds to support them than any other heir.

Heirship-moveables are indivisible, and fall naturally to be possessed by the head of the family, which the eldest heir portioner undoubtedly is, and they belong to her exclusively upon the same principle as the mansion-house, Ersk. b. 3, t. 8, § 13, 17.

Answered : The first traces of heirship moveables appear in the *Leges Burgorum*, c. 125 ; and from their beginning among burgesses, the reason of their introduction must have been rather to indemnify the heir for his being excluded from the moveables, which might be more valuable than the heritage, than the idea of supporting the dignity of family. They were extended to the heirs of barons, gentlemen, and freeholders, only by act 1474, c. 53 ; Mackenzie's Obs. on this act ; Ersk. b. 3, t. 8, § 17.

The act of Parliament mentions "heirs" in general terms, and therefore must apply to females as well as males.

Now, heirs portioners sometimes are, and sometimes are not executors of the deceased.

In the last situation, are grand-daughters by a son predeceased, where the grand-

father leaves other children. In such case, the heir portioners collectively bear the character of heirs ; as such, they are entitled to all the privileges, and the heirship moveables fall to be equally divided among them, as it would be quite anomalous to hold, that proper should be more divisible than constructive heritage.

There is still less reason for making any distinction among them, when (as in the present case), *ab intestato*, they are executors as well as heirs of the deceased.

Besides, as the original principle of succession suggests, that children should succeed equally to their parents, any deviation from it is to be considered as an exception from the general rule. Such is primogeniture, which arose from the feudal system, or the state of society which produced that system. Even in the more early periods of the feudal law, the fee opened equally to all the sons. This was altered by the *Leges Feudorum* only as to military fees, and as to others, an equal division remained.

[4] Such still continues to be the law in some parts of England ; Robinson's Law of Gavelkind, 12, 34, 78, 110, where the original rule universally prevails as to females ; Black's Law of Descents, § 3. Some articles do not indeed admit of division, in which case, the eldest heir has the choice, but only on giving an equivalent ; Blackstone's Commentary, vol. 2, p. 190.

By our older law, the eldest heir portioner gave an equivalent even for the mansion-house ; and an equal division or obligation to give an equivalent for articles indivisible, remains as to heirship moveables ; Craig, lib. 2, d. 17, § 7 ; Stair, b. 3, tit. 5, § 9 ; Reg. Mag. lib. 2, c. 27, § 4, c. 28 ; Craig, lib. 2, d. 14, § 7 ; Bankt. b. 3, tit. 5, § 84.

An opposite opinion is indeed delivered by Mr. Erskine, founded partly on the latter decisions as to the mansion-house, and partly on the decision, 16th January 1725, Executors of Lady Garnkirk, No. 7, p. 5366. But this opinion is erroneous. Exceptions from general rules are not to be extended to analogous cases, and the ultimate decision, in the case of Garnkirk, was against the exclusive right of the oldest.

The Lords, with one dissenting voice, “ found, That the moveables in this case divide equally among the heirs portioners, without any *præcipuum* to the eldest.”

Lord Ordinary, HERMAND.—Act. C. HAY.—Alt. D. WILLIAMSON.—Clerk, GORDON.

D. D.

Fac. Col. No. 231, p. 524.

No. 3. MACLAUCLANE v. MACLAUCLANE. May 27, 1807.

The elder of heirs portioners is entitled to the mansion-house, &c., as a *præcipuum*, though they be called to the succession as heirs whatsoever of the institute, but is not entitled to heirship moveables.

Major Maclauchlane of Kilbride, in 1775, executed a general disposition of his whole property in favour of Artt Maclauchlane, his brother-consanguinean, and the heirs-male of his body ; whom failing, to his own nearest heirs and assignees whatsoever. This disposition contained neither procuratory nor precept.

Artt Maclauchlane predeceased his brother the Major, who died in 1803, leaving two sisters-german, Elizabeth and Margaret, upon whom the estate of Ardchonnell, which belonged to the Major, devolved as heirs portioners.

Elizabeth, the elder sister, claimed as a *præcipuum* the mansion-house and garden, and likewise heirship moveables, including a valuable Gaelic manuscript, which had long been in the family. These claims being resisted by Margaret, the younger sister, an action was raised by Elizabeth, to have it found and declared, that as eldest heir portioner she was entitled to the mansion-house, and also to heirship moveables.

The Lord Ordinary (28th May 1805) “ sustains the defences, in as far as concerns the conclusions for heirship moveables, assoilzies the defender there-[5]-from ; also sustains the defences as to the conclusion, that the Gaelic manuscript shall be found to belong in property to the pursuer exclusively, and without recompense ; but finds

the pursuer entitled to the sole custody thereof, for behoof of herself and the defend and decerns accordingly: Repels the defences, in as far as concerns the conclusion for having the pursuer entitled to a *præcipuum*; and finds, that the mansion-house with the garden, yard, and office-houses thereto appertaining, must be set apart the pursuer as her exclusive property, without recompense; and decerns."

Mutual petitions were presented against this interlocutor. The younger sister

Pleaded: The mansion-house and offices can be claimed as a *præcipuum* by elder heir portioner, only when the heirs succeed *ab intestato* to their ancestor, and not when they are called to the succession in virtue of a special destination; See b. 3, tit. 8, § 74. Cathcart v. Rocheid, 2d February 1773, No. 14, p. 5375. By the settlement executed by Major Maclauchlane in 1775, his sisters were called to the succession as heirs of provision after his brother-consanguinean; and though they happen likewise to be his heirs of line, they must be considered as heirs of provision and might be compelled, by any one having an interest, to make up their titles to their brother in that character; Maccallum v. Campbell, 21st February 1793, No. 88, p. 16135; for the predecease of the first institute, without male issue, cannot have the effect of vacating the whole destination.

Answered: It is only as heirs-at-law that the sisters of Major Maclauchlane are entitled to claim the succession to this estate, which is not destined to them *nominatim* but only as the nearest heirs of the disposer. They can claim in no other character than as heirs portioners of their brother; and if they take it up in that character, they must be affected by every peculiarity which attaches to that description of heirs, one of which is, that the eldest sister shall enjoy the mansion-house, garden and offices, as a *præcipuum*, over and above her share of the estate; Wight v. Inglis, 12th December 1798, No. 1, *supra*.

The Court, upon advising the petition, with answers, adhered to the interlocutor of the Lord Ordinary.

The elder sister likewise reclaimed against that part of the Lord Ordinary's judgment, by which her claim to heirship moveables was set aside; but her petition upon this point was refused without answers.

Lord Ordinary, GLENLEE.—Act. BOYLE.—Agent, W. PATRICK, W.S.—Alt. L'AM.—Agents, BUCHAN & DRYSDALE, W.S.—Clerk, BUCHANAN.

J.

Fac. Col. No. 280, p. 633.

No. 1. [5385] KNOLLS v. HALKERSTON. February 27, 1489.

Ane air may not clame be ressoun of airschip ony gudis and geir that was ane ornament to the bodie of the wife of him quha is deceist, and that sche usit to wear in hir husband's time. Item, he may not crave as airschip ony gudis or geir that sumetime pertenis to him that is deceist, and befor his deceis were either tint, sauld, or annalzeit be him. Item, he may not crave in airschip ony gudis or geir laid in wad to him that is deceist, albeit the samen was in his possessioun the time of his deceis. Item, he may seik na airschip of sic gudis and geir as were in possessioun of him that is deceist the time of his deceis, and that, because thay pertenis to ane uther man, are restorit and deliverit agane to him befor or after the death of him be quhas deceis the airschip is acclaimit. Item, the hail appereling of the hall pertenis to the air as airschip.

Balfour (AIRSCHIP GUDIS), Nos. 1 and 2, p. 235.

No. 3. [5386] BROWN v. BROWN. March 27, 1527.

Na schip or boit pertening to ony man the time of his deceis, may be askit or cravit be his air as airschip, be ressoun the samin on na wayis pertenis to him in respect of airschip.

Balfour (AIRSCHIP GUDIS), No. 1, p. 235.

No. 4. Lord DRUMMOND v. The LADY. November 10, 1575.

Gif he that is deceist have divers and sindrie tapestries, the air may not acclame as airship, bot allendarlie the best piece of the samin : And siklike gif the deid have divers and sindrie pavilions pertening to him the time of his deceis, the best pavilion allendarlie pertenis to the air. *Balfour* (AIRSHIP GUIDIS), No. 1, p. 235.

No. 7. [5387] DAVID HEPBURN v. WILLIAM SKIRVING. June 19, 1793.

The heir has right only to a single horse, and having got an ox and a cow, he is not entitled to a bull.

William Skirving, as heir of James Skirving his brother, intromitted with part of his moveable effects. David Hepburn, in right of his wife, who was sister of James, and one of his nearest in kin, brought an action against William, to make him account for her share of the executry of her deceased brother.

In accounting the defender insisted, that he was entitled to retain, as heirship moveables, a plough of horses, and an ox, a cow, and a bull.

The pursuer denied his right to a bull, and quoted the following authorities, in order to show that he was only entitled to one horse : *Balfour's Practics*, p. 234 ; 1474, c. 53 ; 10th November 1575, Lord Drummond, No. 4, p. 5386 ; *Erskine*, b. 3, tit. 8, § 17.

The defender, on the other hand, argued, lmo, That the heir was entitled to a yoke of oxen ; *Stair*, b. 3, tit. 5, § 9 ; *Bankt.* b. 3, tit. 4, § 6 ; and that *Erskine*, b. 3, tit. 8, § 18, considers a yoke to be "as many as make a plough," and that therefore, from analogy, he was also entitled to a plough of horses ; *Stewart's Answers to Dirleton*, p. 214.

2do, That he was entitled to the "best of ilka thing," and consequently to a bull, as being essentially different from an ox.

[5388] The Lord Ordinary repelled the defender's claim to a bull, and found in respect of *Balfour's Practics*, p. 234,* that in virtue of his right to heirship moveables, he can claim only one horse.

A reclaiming petition against this interlocutor was refused, as to the defender's right to a bull, and ordered to be answered respecting the claim to a plough of horses. At advising the cause, it was

Observed on the Bench : Although the heir is entitled to two oxen, it does not follow, that he can also claim two horses. When heirship moveables were first introduced, oxen were used only for draught, and a single ox therefore would have been of little service. But a single horse must have been always useful for many purposes.

The Court, with only one dissenting voice, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, DREGHORN.—Act. HAY.—Alt. BELL.—Clerk, SIR JA. COLQUHOUN.

R. D.

Fol. Dic. v. 3, p. 264. *Fac. Col.* No. 64, p. 141.

No. 10. [5389] CRAWFORD and SEMPLE v. CRAWFORD. July 2, 1543.

Heirship due to the heir of a baron who died infert in lands, though they had been otherwise disposed of than to the heir.

Margaret Semple, and Robert Crawford her spouse, for his interest, askit airship goods of her goodsir the Laird of —, and Thomas Crawford, now the Laird thereof,

* At this place in *Balfour*, there is a long list of the particular articles which had been decided to be heirship moveables, which it would be superfluous to insert here.

and intromitter therewith.—It was excepted, because she was not air to him of lands, she ought to have none of his guidis, and also *ipse non obiit vestitus de terris ut de fædo*. Nevertheless the Lords decernit her to have action *quia erat de vita hæres, non de terris, et hoc eo magis pater dictæ Margaretæ obiit dominus tenementi in — et erat nobilis, et baro*, and therefore to have ane air, and the air have airschip guidis. *Fol. Dic. v. 1, p. 365. Sinclair, MS. p. 53.*

* * Balfour reports the same case :

Gif ony gentleman or baron beand frank-tenementar allenarie of ony land deceissis, his air aucht and sould have airschip gudis, albeit he be not servit air to him in special of ony landis, bot air general allenarie.

Balfour (AIRSCHIP GUDIS), No. 5, p. 236.

No. 14. [5391] WILLIAM RIGG v. ROSS or M'KENZIE. November 29, 1623.

Found, That a parson provided to a benefice may have an heir.

Fol. Dic. v. 1, p. 365. Kerse, MS. fol. 139.

No. 15. [5392] DUNBAR v. LESLIE. February 23, 1628.

An heir cannot be pursued upon the passive title of behaving himself as heir, by intromitting with heirship moveables, where the father ceased, to be *baro*. Found that a defunct's son could not be liable passive for intromitting with the heirship goods, because his father, though a burgess, was not alleged to be an actual resident, using trade, but only an honorary burgess.

In a reduction betwixt Dunbar and Leslie, of a decreet obtained by James Leslie against one Dunbar, as charged to enter heir to his umquhile father, who was cautioner for a sum of money owing to the said James Leslie by the Laird of Mochrum, principal party obliged ; which decreet was desired to be reduced, because it was given only against the son of the cautioner, as lawfully charged to enter heir, he being then minor, and as yet is ; likeas he, with consent of his curators, produced a renunciation to be heir, subscribed by them and him, and so desired to be reponed. This reduction was raised by the minor, and also by one who was cautioner for him in a suspension, raised by the minor of that same decreet, upon that same reason, and wherem protestation was admitted ; and therefore the reduction was also raised at the instance of the cautioner in that same suspension, against which the said protestation was admitted, and because the minor was dead since the intenting of the reduction, and the day of compareance in the second summons, the Lords found, That the said cautioner could not use the said renunciation, the minor, maker thereof, being dead, as he might have claimed the benefit thereby, if the minor had been living, and therefore assolizied from that reason at the cautioner's instance ; but thereafter the parties were ordained to be further heard, this being thought to be an hard decision.

This action being again called in presence of the Lords, upon 26th June 1628, this decision was altered, and found that the cautioner might produce the minor's renunciation, and use it for his own liberation, albeit the minor was dead, and the reason of his reduction was sustained.

July 8.—In the reduction Dunbar v. Leslie, mentioned 23d February 1628, the defender alleging that the minor could not renounce to be heir, because *res non fuit integra*, seeing he was successor to his father's lands *post contractum debitum*, and also had behaved himself as heir to his father, by intromission with his father's heirship goods, and uplifting of the mails and duties of the lands wherein his father was

infett, and that his father was a burgess of the King's burgh-royal, and that he thereby was a person who in law had an heir; the defender condescended upon sundry alternatives, whereby he alleged, that *res non erat integra* to the minor to renounce; which alternatives being consi-[5393]-dered by the Lords, they found, That a charter granted to the minor of the lands, whereof his father was heritor before the said charter, flowing from no deed done by the father to the son, but proceeding from the disposition of the superior, upon another party's resignation made in favour of the son, having no dependance nor relation to the father's right, made not the son to be successor to the father in these lands, albeit the sasine given to the son upon the foresaid charter, was after the contracting of the debt controverted; for he could not be successor in his father's right of these lands, the right whereof he had acquired *aliunde* as said is; for, seeing the father's right stood in his person, and the son claimed no right to these lands, whereby the creditor might claim the same right by adjudication or otherwise, and therefore the pursuer's answer, to elide that member of the condescendence, viz. whereby the defender had alleged, that the minor succeeded to his father's lands foresaid, was found relevant to elide that alternative; and also where the defender condescended that he had succeeded to his father in some other lands, whereon he was special, that alternative was found elided also in that part by this reply, viz. that the superior had obtained decret against his father, decerning all his evidents of these lands to make no faith; after which decret, he had for sums of money obtained to himself a new right of the same lands; which the Lords found relevant, seeing there was nothing qualified to detect, that that infettment after the said decret, was obtained by the procurement and travels of the father; and where the defender condescended, that the minor had meddled and intromitted with the evidents of the said lands wherein his father was infett, and so alleged that by that deed he had behaved himself as heir, that was repelled, and the intromission with the evidents (no other deed being done thereon), was not sustained *ad hunc effectum*; neither was it sustained that it was alleged, that the minor had, since the decease of his father, in some writ and evident subscribed as heir, and so professing himself; for the Lords found, that the subscribing of the writ, bearing that designation of the party, was not enough to make him heir, not being done in *re hæreditaria*, specially the pursuer subscriber being then and yet minor; and where the defender condescended, that the minor had intromitted with the mails and duties of the lands, wherein his father was infett, that was elided, because the father's relict had a tack thereof for her lifetime, by whose tolerance he had intromitted; which the Lords found relevant, and declared that the tack being proven by writ, the tolerance might be proven by witnesses against this party; also the Lords found, That the defunct being denuded of the heritable right of his lands by a decret, decerning the evidents thereof to make no faith, if he had no other lands wherein he stood infett the time of his decease, he was not such a person who might have an heir, so as if because he was once *baro*, he so continued, *quia semel baro, semper baro*, which rule holds but presumptive, viz. that where one is *baro* shown, it is presumed he so continues; and which presumption holds, except it be contrarywise shown, that he was really denuded, and then the presumption ceaseth, [5394] *quia præsumptio cedit veritati*; and where the defender condescended, that the father was a burgess of some royal burgh, the Lords found not that relevant, because it was not alleged that he was an actual resident burgess, indweller within burgh, and using the exercise of a burgess by trade; which not being alleged, but only that he was *civis honorarius*, the Lords found that made him not to be of such a quality, as that thereby he had an heir, who might be convened as heir, for intromitting with the best moveable goods pertaining to the defunct.—See PASSIVE TITLE.—PERSONAL and TRANSMISSIBLE.—PROOF.

Act. STUART & GIBSON.—Alt. NICOLSON & MOWAT.—Clerk, SCOT.

Fol. Dic. v. 1, p. 365. Durie, pp. 349, 383.

No. 17. [5395] STRATON v. CHIRNSIDE. January 27, 1636.

A son cannot be pursued upon the passive title of behaving as heir, by intromission with the heirship moveables, where the father ceased to be *baro*, by having his lands comprised, and the legal expired before his death. See No. 15, p. 53.

One Straton pursuing Alexander Chirnside, son to umquhile L. Eastnishes, payment of 500 merks addebted to his father, as behaving himself as heir to him, intromission with his heirship goods, or as successor to him *titulo lucrativo post tractum debitum*, in so far as he was infeft in his father's lands after the date of the bond libelled, granted to the pursuer; upon the which two alternatives, the parties being heard to dispute, the Lords found the first purged, and that he could not be subject to pay the debt libelled, as behaving himself as heir, by intromission with his father's heirship goods, seeing it was alleged, that his father's whole lands were comprised from himself by his creditors, and the legal reversion expired before his death, whereby he ceased to be *baro*, and consequently could not have heirship, by intromission wherewith any could be convened as heir: Likeas it was alleged, that he died at the horn, and his gift of escheat was gifted and declared, whereby the donor would have right to all the moveable heirship; which two exceptions were found irrelevant to purge that first alternative; and for purging of the other, where he was convened as successor by the foresaid infeftment granted to him, he alleged, that the infeftment was reduced in *foro contentioso*, by a creditor to his father, which creditor had comprised the lands. And it being replied, that that reduction cannot make the defender to cease to be successor to his father, in so far as, since the said sentence of reduction, he had received great sums of money to ratify and approve the said decreet; and seeing he had gotten so great sums, *quocunque nomine* the same were given, yet in effect and in truth the same being given to him, who was apparent heir of the debtor, and for no other cause, but under the name of an act composed and accorded to, for the purpose to defraud the debtor, albeit it was truly given to renounce all his right, and to ratify the compriser's heritable right, therefore he behoved to be reputed successor.—The Lords found this allegiance also relevant to purge the alternative, and in respect thereof, that he could not be convened as successor, notwithstanding of the reply, which was not respected, but was repelled; for in effect what money was alleged given to the defender, to ratify the decreet of reduction of his right, was in effect received and delivered, that he might not be reputed successor, likeas if he had renounced to be heir, and had received money to ratify that renunciation, he could not be found to be heir thereby; and the Lords found, That if the creditor pursuer could qualify any prejudice, which he could sustain by the defender's ratifying of the decreet reductive, and that there was any ground subsisting in his person, whereby his heritable right might be sustained, and the decreet reductive taken away, from the which he is debarred by the defender's ratification of the sentence reductive, *eo casu*, the Lords would consider thereof as a reason, which might make the defender liable to the creditor: but if that could not be shown (as it was not shown by the pursuer) then the right competent to the defender is yet standing to the fore, and [5396]-taken away, and may be sought for and claimed by the creditor, after what legal manner he thought most expedient, whereof the Lords thought that in reason he ought not to be prejudged. See PASSIVE TITLE.

Fol. Dic. v. 1, p. 365. *Durie.* p. 791.

No. 20. — v. SCOT and MUIRHEAD her Husband. February 1, 1668.

A man taking to himself lands in liferent, and to his daughter in fee, is not a *baron*, and has no heirship moveables.

Mr. Hary Scot's daughter, and her husband Mr. John Muirhead, for his interest, being pursued as representing the said Mr. Hary, for a debt due by him, the pursuer

insisted on the title of behaving as heir by intromission with his [5397] moveable heirship.—It was alleged, That he could not have an heirship, being neither prelate, baron, nor burgess.—It was answered, That he had acquired the land condescended upon to himself in liferent, and to his daughter in fee ; which was equivalent as if she had succeeded to him in the said lands.

The Lords assoilzied from that title, in respect he had no right in his person, in which she could have succeeded. Some were of opinion, That if the right had born the ordinary clauses, and a power to dispoise and wadset, notwithstanding the fee in the person of the daughter, that in law he ought to be considered and looked upon as a baron ; being in effect, and upon the matter a fiar.

Clerk, HAY.

Fol. Dic. v. 1, p. 365. Dirleton, No. 151, p. 60.

No. 22. [5398] DOCTOR JAMESON v. THOMAS WAUGH. November 21, 1678.

A marriage dissolving within year and day *sine prole*, the Lords found the gift given by the wife's friends fell to her executors, and by the husband's friends fell to the husband's executors, and the rest in *unoquoque genere* belonged to the heir, because he died infeft in an annualrent (though it was only a trust) which made him *baro*, he never being denuded.

Fol. Dic. v. 1, p. 365. Fountainhall, MS.

No. 23. COCHRAN v. The Duchess of HAMILTON. December 25, 1695.

A lady who was daughter to an Earl and wife to a churchman, possessed an heritable bond, on which she was not infeft. Found that all these circumstances did not entitle her to have an heir.

Arbruchell reported Cochran of Kilmaronock v. the Duchess of Hamilton, in a reduction, the title whereof was an adjudication of the barony of Evandale, out of which Lady Margaret Kennedy had an heritable bond from the Duke for 50,000 merks, but was never actually infeft thereupon. Alleged, [5399] The adjudication is null, because it does not adjudge the right of the sum contained in the said bond (as it ought to have done), but only the lands of Evandale, on a false supposition, as if she had stood infeft therein (as she did not), and so it can be no title for a reduction. Answered, The said bond was mentioned in the narrative of the decreet, and the conclusion, which was sufficient to sustain the diligence. Replied, The conclusion could not exceed the premises, and it being omitted in the subsumption, it was altogether defective and unformal ; which the Lords found, though generally the diligence of creditors are more favourable than to be overthrown on small quiddities and omissions in exact libelling. In this process there was also another member, wherein he insisted to have his right declared to the said Lady Margaret's moveable heirship. Alleged, by the act 53d Parl. 1474, she could have none, being neither baron, prelate or burgess. Answered, She was an Earl's daughter, and so a baroness ; she was wife to a minister, viz. to Doctor Gilbert Burnet, afterwards a bishop, and she had a bond bearing infeftment in lands, though not actually taken. The Lords found none of these sufficient to give her heirship moveables, unless infeftment had truly followed, though the brocard has been much extended from its original design ; for now any tradesman infeft in lands will be reputed a baron *quoad* the effect of moveable heirship, or of being a baron's peer, to pass upon his assize ; so much have we sunk and deviated from the meaning of that old maxim, when first introduced from the *pares curiæ* of the feudal law.

Fol. Dic. v. 1, p. 365. Fountainhall, v. 1, p. 692.

No. 24. CUMMING v. CUMMING. November 22, 1698.

There can be no heirship moveables where the defunct possessed an heritable bond without infetment. A defunct, heir to an actual burghess, who might have entered when he pleased, had borne stent in the town as a trafficking burghess. This was found sufficient to entitle his heir to heirship moveables.

One gives an assignation to an heritable debt, but he afterwards dying without coming to kirk and market, the heir reduces the assignation *ex capite lecti*; whereupon the assignee intents a process against the cedent's executor, to pay the sum assigned out of the moveables, on this ground, that *legatum rei alienae scienter legatæ* makes the executors liable to make it effectual *quoad valorem*, both by the Roman law, § 1 *Institut. de legat.* and ours, 2d Dec. 1674, Cranston *contra* Brown, *voce* QUOD POTUIT NON FECIT. Alleged for the Executor, That this cannot be called *res aliena*, for the heritable bond was his own. 2do, Neither can it be called *legatum*, for it is conveyed by assignation, which is a deed *inter vivos*, and so the brocard does not meet. The Lords found the executor not liable to make up this debt.

He had another process for the moveable heirship. Alleged, There can be no heirship save where the defunct was a prelate, baron, or burghess, none of which he was. Answered, He had an heritable bond, which was sufficient, though no infetment was taken thereon. 2do, The defunct was the son of an actual burghess, though he was not entered himself. Replied, Wadsets or other [5400] heritable rights never make one a baron in the sense of moveable heirship, without they be completed by infetment; and though it is the degree and quality that must be regarded in this case, yet even an infetment of annualrent has been sustained to infer heirship. Scrymzeour *contra* the Executors of Murray, No. 18, p. 5396. And as to his being a burghess's son, *non relevat*, for an honorary burghess's son gives no right to heirship, much less one unentered, Lesly *contra* Dunbar, No. 15, p. 5392. The Lords found the heritable bond whereon infetment had not followed did not give his heir right to claim moveable heirship; but found he had right thereto by the defunct's being heir to an actual burghess, who might have entered when he pleased, and bore stent in the town of Glasgow as a trafficking burghess. See QUOD POTUIT NON FECIT.

Fol. Dic. v. 1, p. 365. Fountainhall, v. 2, p. 16.

No. 33. [5405] STEVENSONS v. PAUL. November 12, 1680.

Heirship moveables are to be drawn off the whole head before the relict's share.

Stevensons, as creditors to umquhile — Cruickshank, having arrested the heirship moveables drawn by Sir John Paul his heir, pursue to make furthcoming. It was alleged for Cruickshank's relict, That, by her contract of marriage produced, "the half of all her husband's estate, heritable and moveable, was to belong to her, if there were no children," and therefore she had right to the half of the moveable heirship; and as to the other half, it was extant *ipsa corpora* entire, and she could be decerned in no more but to deliver the same, which the arrester could not crave till the price were liquidated.—The Lords sustained the defence for the one half, and decerned for the other, and ordained the Magistrates of Aberdeen to roup the same, and take an instrument upon the roup, and deliver the money to the pursuer. It was then further alleged, That seeing the relict had the one half of all, there behoved to be an alteration of what fell under heirship; for instance, if there were a dozen of silver spoons, the heir would get them all; but now coming to half a dozen, the heir would get but one, because the defunct had no more himself but the half, and the relict had right to the other half. It was answered, That the drawing of heirship was ever of the whole moveables, before any division; and albeit the relict by law has right to a half, or third, which must be as strong as any right by provision in a

contract, yet it was never pretended that she should draw her share of moveables first, and that the heirship should only be drawn out of the remainder, as solely belonging to the defunct.

The Lords found the heirship was to be drawn, and separated from the moveables, before any division by law or paction, and that the relict might claim the half both of the heritage and heirship moveables, as heir of provision to her husband; but if there were a dozen of silver spoons, for instance, the whole would fall in the heirship, and not one spoon only, as if there were but six, because of the wife's right to the half.

Stair, v. 2, p. 795.

No. 6. [5421] Dame SIDNEY SINCLAIR v. Sir WILLIAM DALRYMPLE. 1744.

The rule for determining the several interests of heir and executor, is very different in lands possessed by tenants, and in such as were in the natural possession of the heritor at his death. In those the executor has the one half of the year's rent, where the heritor survives Whitsunday; but in these, whether the heritor survive Whitsunday or not, the executor has right to nothing, but to the crop, so far as the same was sown before the heritor's death, and the heir has right to whatever may be sown after that period by the executor, upon repaying the expense of seed and labour; and as for the grass and growing hay, the [5422] right of the heir commences from the moment of his predecessor's death; and in these terms judgment was in this case given. *Vide* Craig, lib. 2, dieg. 9, § 13.

Fol. Dic. v. 3, p. 266. *Kilkerran* (HEIR AND EXECUTOR), No. 2, p. 229.

* * Lord Kames reports the same case :

December 7, 1744.—Sir John Dalrymple, after settling his moveable estate upon his spouse, died 24th of May 1743, having the land about his house of Cranston in his natural possession, most of it in grass, partly natural and partly sown. One field of seven acres was sown the year before his death, and the first crop was not cut when he died; of the other sown grass he had reaped several crops. Toward the end of the year 1742, he had sown a field with rape-seed; but that failing, his purpose probably was to plow the field in June 1743, and to sow it with turnip. But, the day after Sir John's death, it was tilled by his relict and sown with barley.

His heir, Sir William, took possession of the farm, as well as of the rest of the estate, and cut down the said barley crop. In a compt and reckoning betwixt him and Sir John's relict, she claimed the value of the barley-crop, and of the artificial grass crop, as being moveable and falling under her disposition. The heir endeavoured to support his right to the same as heritable subjects, by the following chain of reasoning: 1mo, It is one of the privileges of the heir to continue his predecessor's possession; and when the possession of an estate is apprehended either by an heir or a purchaser, it is a rule of common sense as well as of law, that every thing that is *pars soli* must go with the land. 2do, As this rule may appear to be hard and rigorous when applied to some special cases, it has been softened in the practice of England and of this country. A liferenter ought not to be discouraged from making profit to himself, by taking land into his natural possession, in order to cultivate the same; yet he runs this seen danger, that, if he die when his corns are ripe, and ready for the sickle, his right dies with him; the corns as *pars soli* go with the land to the proprietor. This hardship has probably at first been remedied by particular pactions, and afterwards it has grown into universal practice, that the representatives of the liferenter should have the benefit of the liferenter's industry, so far as to be allowed to reap the corns growing at the liferenter's death. It is probable that this practice has first obtained betwixt liferenters and fiars, whose interests are commonly distinct, and where the hardship must have appeared great. It has afterwards been extended by analogy for the benefit of younger children, who are but scantily provided by our law; and now it is established, that they shall have the corns growing upon the land in their father's natural possession, though really and truly not a moveable subject. 3tio, This right introduced in favour of the representatives of a liferenter, and of the

executors of a proprie-[5423]-tor, which, for the sake of utility, deviates from the principles of law, has never been extended further, either in our practice or in the practice of England, than to corns actually sown and growing at the time of the life-renter's or proprietor's death. Nor could it well be extended further, if the rule of law be at all regarded; for, as the proprietor's right is at an end with his life, as well as that of the life-renter, no mortal can be entitled to throw seed into the ground except in the right, or by allowance of the present proprietor; after his right commences, seed thrown into the ground makes the crop as much his, as where it is sown 20 years after the predecessor's death. 4to, The exception has never been extended further than to industrial fruits, which are sown and reaped annually. With regard to plants which remain longer in the ground than a year, neither the industry nor the expense are so great as to preponderate the rule of law and of common sense, that whatever is fixed to the land must go along with the land. And were the exception to be extended beyond annual plants, we should have no resting place; it behoves to be extended to every thing growing upon the ground that is the effect of industry, at whatever time sown or planted; and, at that rate, all planted trees would go to the executor, were they a hundred years old.

"Found, the defender Sir William Dalrymple, heir in the estate, hath right to the whole grass and hay the year libelled, it not being alleged that any grass seed was sown that year. And found, That the pursuer has not right to any part of the barley-crop sown by her after Sir John Dalrymple's decease; but that the defender is liable to the pursuer for the expense of the labour and of the seed."

Rem. Dec. v. 2, No. 60, p. 94.

No. 7.

[5429] DUFFS v. DUFF. June 5, 1745.

A bond granted to a person and his heirs and assignees, failing whom, to a series of heirs *nominatim*, was found moveable in the creditor's person, and transmissible by him on deathbed.

Alexander Duff of Drummuir gave a bond of provision of £500 Sterling to Katharine his daughter, payable the first term after his death, in these terms: "To Katharine Duff, or the heirs of her body, or her assignees respective; which failing, to fall in and accresce in manner after-mentioned"; which manner was, That if she happened to decease without heirs of her body, or without uplifting or disposing of the provision, "He willed, ordained, and appointed the same to fall in and return to the heirs-male of the body of Robert Duff younger of Drummuir, his eldest son, and to John and William Duffs his sons."

Katharine having no children, disposed the bond on deathbed to William Duff of Kilmuir, for uses expressed in the disposition; and a reduction on the head of deathbed being brought by Archibald the son of Robert Duff of Drummuir, and Alexander son of John Duff of Culbin, it was pleaded for the pursuers, That the bond was heritable *destinatione*, and not assignable on deathbed; that the proper way to make up titles to it was a service, and the pursuers were served heirs of provision; from which it appeared it could not be transmitted by testament, nor consequently on deathbed.

Answered, There was in this case no substitution, but a conditional institution, in case Katharine should not uplift nor dispose of the money; and if the case had happened, the pursuers needed no service; but the case had not happened, she having disposed of it to the defender, who became thereby her assignee, in whose favour the bond was granted.

In the next place, taking it for a proper substitution, that does not make the bond heritable, since such are only bonds secluding executors, or having a clause of infestment; but bonds containing substitutions are moveable, so far as to be transmissible by testament.

[5430] Replied, Assignees must be understood such made *debito tempore*; and

therefore, if the bond is heritable, the defender is not an assignee in the sense thereof; and the case of the substitution has existed.

2dly, Pleaded for the pursuers, Drummuir the granter disposed to his second son John a considerable land estate, under the burden of this bond; which so being really secured, became heritable.

Answered, If the disposition to John Duff were in process, it might appear he was thereby only laid under a personal obligation; but however, it was not in the power of the debtor in the bond to change the destination of the succession, since that depended solely on the will of the creditor.

3dly, Pleaded for the pursuers, Katharine had herself made this bond heritable, by leading an adjudication against John Duff's estate of Culbin.

Answered, When Culbin's affairs went wrong, he, before any diligence, disposed his estate to trustees; and the creditors having mostly homologated the disposition, the estate was sold; but some of them having afterwards adjudged, those who had accepted the trust-right, amongst whom was Katharine, adjudged also by advice of the trustees, and then the whole acceded. This adjudication gave her no real right in the estate, because it was sold before with her consent, it immediately accresced to the purchaser, and was of no effect with regard to her; and besides, she afterwards took a decret against Drummuir as representing the granter, and this behoved to make the bond moveable.

Replied, The adjudication had effect, because the trust-right was reducible by the creditors who had not acceded; and though the estate was sold, yet, as is the case in judicial sales, the debts and *nexus* of diligence remained till payment of the price. Thus the adjudication was standing at her death, and the decret alleged on was never extracted.

The Lords, 10th January 1745, "Found the bond was moveable; and therefore transmissible by testament"; and this day, on a bill and answers, adhered.

Act. W. GRANT, H. HOME & GRAHAM, JUN.—Alt. GRAHAM, SEN., LOCKHART & FERGUSON.—Clerk, JUSTICE.

Fol. Dic. v. 3, p. 267. D. Falconer, v. 1, p. 90.

No. 11. [5436] Sir JOHN STEWART of Grandtully *v.* Executors of Sir GEORGE STEWART. June 25, 1761.

If the possessor of an entailed estate sells the woods upon the estate, and dies before the whole is cut down, the price of that part of the wood which was cut before his death goes to his executor; but the price of that part which remained uncut goes to the next heir of entail.

By contract, dated October 1758, Sir George Stewart, proprietor of the entailed estate of Grandtully, sold to Robert Stewart, &c., the trees growing on his wood of Cransie, for the price of 4205 merks, payable to Sir George, his heirs, executors, or assignees, at Whitsunday 1760. The purchaser became bound to commence cutting the 1st of May 1759, and to finish the whole the 1st of September 1760.

Sir George having died in November 1759, after part of the wood was cut, the question occurred, Whether the price belonged to his executors, or to his heir of entail? It was agreed, that the entail could not enter into this question. A contract of sale of growing wood is none of the deeds prohibited by this entail, or by any entail; and is therefore effectual against an heir of entail as much as against any heir. This point being adjusted, it was urged for the executor, that the price here being a moveable subject, belongs to the executor, even where the subject sold is heritable; witness a minute of sale of land, the price goes to the vender's executor though the land goes to the purchaser's heir. 2do, The executor at least ought to be entitled to that proportion of the price which corresponds to the trees actually cut during Sir George's life. For these trees became moveable, and the executors ought either to be entitled to these trees, or to their price as a *surrogatum*.

It was pleaded for the heir, That, by the law of Scotland, no subjects can fall under confirmation, but moveables that belonged to the deceased in property, including debts payable to him during his life, which for that reason are understood to be money in his pocket. Hence it is that a conditional obligation not purified during the life of the obligee goes to his heir, and not to his executor; and hence it is that an obligation having a *tractum futuri temporis* goes the same way. In short an executor has not a permanent office: He is appointed to levy what debts were due to the predecessor when he died, and he has no commission to wait for debts that shall become due. That rents, though becoming due after the proprietor's death, accrue to his executor, is not properly an exception. For none accrue to him but what are understood by law to be due before the predecessor's death, though the term of payment be postponed by paction. Nor is it any objection that the price of land contained in a minute of sale has been adjudged to the vender's executor, though it is incumbent upon his heir to grant a disposition of the land. For this only was found where the term of performance is past before the vender's death. The Court would be of a different opinion where the term of payment is after the vender's death. And the same ought to hold in the present case, where the vender died in November 1759, and the price of the wood was not taken payable till the Whitsunday thereafter.

"Found, That a share of the price, corresponding to the trees cut before Sir George's death, belongs to his executors, and the remainder to Sir John Stewart his heir."

I cannot approve of the first branch of this interlocutor. For though the sum decreed to the executor was the price of a moveable subject; yet the price of a moveable subject payable after the vender's death ought not to go to his executor, more than the price of an heritable subject payable before his death ought to go to his heir.

Fol. Dic. v. 3, p. 265. Sel. Dec. No. 180, p. 246.

No. 15. [5443] MARGARET JOHNSTON, and Others v. WILLIAM DOBIE, and Others.
February 25, 1783.

Window-frames, doors, and the like, found within a house when a building, but not yet fixed to their proper places, belong to the heir.

James Johnston executed, in favour of Margaret Johnston, his wife, and of certain other persons, a disposition of the whole estate heritable and moveable, that should belong to him at the time of his death. But as he lived only a few days after the date of this deed, it was, at the instance of his heir-at-law, reduced *ex capite lecti* "so far as respected the heritable subjects thereby conveyed."

When Mr. Johnston died, a house was erecting for him, in which a set of doors and windows, and other articles, were then lying, in order to be fixed to their proper places in the building. A question thus arose in regard to them between the heir-at-law and the disponees; the former contending, that along with the house itself they had fallen under the heritable succession; and the latter claiming them as moveable subjects.

Pleaded for the disponees; A subject, it is admitted, in its nature moveable, may be rendered heritable by the destination of the proprietor, whether expressed in words, or *rebus et factis*. As, however, for this end, words clear and unequivocal must, on the one hand, be employed; so, on the other, the acts whence the design is to be inferred, must be such as to preclude ambiguity. Hence, though a man should have pitched on a certain piece of ground for the purpose of raising an edifice, should have provided the materials for the undertaking, and should have even collected and conveyed them to the destined spot; so that, it must be acknowledged, no purpose could be marked with stronger probability, than that of a building consequent on those preparations, or of the union of those moveables with the immoveable soil; yet still, until the building should have commenced, and the union been actually constituted, the moveable nature of the materials would remain unchanged. Such is the doctrine of our law; Erskine, b. 2, tit. 2, § 14, as it is also of that of England; Viner's Abridgment, voce HEIR.

In the present case, it was to be sure highly probable that Mr. Johnston had destined the doors, the window-frames, and the other moveables in question, to be united with, and to become part of his proposed tenement; and a like probability would have attended his purchasing in their rudest state the materials out of which they were formed; yet, as their fixture had not been accomplished, they were still no parts of the building, nor more joined to it by an actual union, than when in the state of unwrought timber or metal. Notwithstanding, therefore, any probability to the contrary, there was here no certainty of destination, and consequently no effectual change of the nature of the subjects from moveable to heritable.

Answered; As it has been admitted, on the one hand, that a proprietor *destinatione*, expressed either by word or deed, may convert a moveable into an heritable subject; so it is now, on the other hand, granted, that not merely a [5444] probability, but a reasonable measure of certainty of design, arising from the acts of the proprietor, is required to effectuate that change. The doctrine of Mr. Erskine is accordingly subscribed to. But though in the case supposed by that author, the mere collecting of rude materials for building would not infer an alteration of their moveable nature, yet no sooner should the building have been begun, than the change must have instantly taken place; the probability of intention thus rising to certainty; Stewart's Answers to Dirleton's Doubts, tit. Executry. In like manner, had the timber, iron, or brass, which compose the doors and windows in question, remained, though in the possession of Mr. Johnston, in their rude, unwrought, or unfinished state, whatever high degree of probability of design they might have evinced, their nature, it may be allowed, would not have been altered; but by their having been completely formed, fitted, and adjusted to their peculiar places in a particular tenement, the absolute destination of them for the use of that tenement becomes unquestionably ascertained. The *animus destinandi* is then as fully expressed as it possibly can be *rebus et factis*.

Some of the Judges seemed to be of opinion, that even the simple collecting of materials for building might often sufficiently denote the *animus destinandi* of the proprietor, so as to render them heritable. Others appeared to admit no other rule but the then actual state of the subjects. The opinion of the majority was, that in cases like the present, where the will of the proprietor, so strongly marked, is actually carrying into execution by overt acts, such *animus* should have full effect.

The Lord Ordinary had "found, that the articles of unfixed work were to be considered as parts and pertinents of the house, and that the same do fall and belong to the heirs-at-law."

The judgment of the Court was, "To find that the articles of unfixed work destined for the house fall to the heir, and not to the executor, and in so far adhere to the interlocutor of the Lord Ordinary."

In a reclaiming petition it was farther argued, That as Mr. Johnston could undoubtedly have effectually alienated *in lecto* the subjects in question, as being, at any rate, heritable *destinatione* only; so in fact, his disposition being reduced as to the proper heritage alone, ought, with respect to them, to be understood as still subsisting. But this petition was refused without answers.

Lord Ordinary, ALVA.—For Margaret Johnston, HENRY ERSKINE, MORTLAND.—Alt. R. DUNDAS.—Clerk, HOME.

S.

Fol. Dic. v. 3, p. 267. Fac. Col. No. 98, p. 156.

No. 16. The Duke of GORDON v. JOHN LESLIE, and Others. March 8, 1791.

The executors of a tenant not liable for the rents of those years of which the heir was entitled to reap the crop.

William Leslie was the tacksman of a farm belonging to the Duke of Gordon. He was also creditor to his Grace by a bill for £220.

[5445] At William Leslie's death, his moveable effects descended to John Leslie, and his other younger children, as his nearest in kin; while the lease, which was a

beneficial one, and did not expire for many years after, devolved to his eldest son and his heir.

An action of multiplepoinding, brought by the Duke of Gordon soon after William Leslie's death, for the purpose of enabling him to pay with safety the contents of the bill already mentioned, was not brought to a conclusion till 1790. At this time, it was only the rent for crop 1788, but that for the following year, was unpaid; and for the years as well as for the rents of the subsequent years, the eldest son of the original tacksman, having become bankrupt, his Grace claimed retention out of the sums due by him. In support of this claim, he

Pleaded; Those engagements which in this case the original tacksman came under to his landlord were a burden, while he lived, on his whole funds, whether heritable or moveable. Had these funds never been appropriated by his family after his death, his landlord would have been authorised to attach any part of them for his payment; and so too, although the funds have been regularly transmitted in succession to the legal heirs, every one of those heirs, in representing him, must be liable; Stair, b. 4, tit. 5, § 13; b. 4, tit. 22, § 22; Durie, 17th Feb. 1633, Kinnaird *contra* Yeaman, Sect. 1, h. t.; 19th July 1637, Lord Innerwick *contra* Lady Smeiton, IBIDEM.

Answered; The general principles which have been stated are unquestionably just; but they fail in their application to the present case.

A lease is in its nature an agreement founded on a *delectus personæ*, and therefore should be at an end when the lessee dies. From equitable considerations, however, the benefit of this contract is now held to transmit to the heir of the lessee. But as no part of this benefit can be claimed by the executors, no reason can be given why they should be exposed to any risk.

In the case of mercantile partnership, where the share of a deceased partner is, by special agreement, given to one of his sons *nominatim*, his other children, if the concern was a lucrative one at the time of his death, have never been considered as liable for any part of the subsequent loss. So too, in the case of a feu-right, although the executors of the vassal may be required to pay the feu-duties incurred before the succession opened, no instance can be shown, in which, upon the subsequent bankruptcy of the heir, the superior has attempted to render them liable.

The present claim is not founded in the meaning of the parties, the lessee and his heirs alone being debtors in the obligation. If listened to, it would be attended with very unjust consequences, the executors having no way of securing themselves against the loss arising from the heir's bankruptcy. Neither is it necessary for the landlord, if he is sufficiently attentive, by exercising in due time his right of hypothec.

[5446] The Lord Ordinary found "the Duke of Gordon entitled to retention out of the sum in his hands, as craved."

A reclaiming petition was given in, which was followed with answers.

The Court, considering the crop of 1788 as belonging to the executors, were of opinion, that they were liable for the rent of that year.

But as to the rents of the subsequent years, a great majority were of opinion, that the heir alone, after being acknowledged by the landlord as tenant, could be sued for these rents.

The Lords "found the Duke of Gordon entitled only to retention of his rent for crop 1788."

Ordinary, LORD DREGHORN.—Act. TAIT.—Alt. DICKSON.—Clerk, GORDON.

C.

Fac. Col. No. 176, p. 359.

No. 17. Mrs. ANNABELLA WIGHT, and Others v. WILLIAM INGLIS, and Others.
February 10, 1796.

Hay produced from seed sown along with barley and wheat in spring 1794, and cut down in summer 1795, was found, in a competition between the heir and executor of the proprietor, who died in December 1794, to belong to the heir.

In spring 1794, William Simpson sowed clover and rye-grass along with wheat and barley, on about 70 acres of land belonging to him. He died in December following, and Mrs. Wright and others, his executors, afterwards brought an action against

William Inglis, and his other heirs, concluding that the hay-crop in summer 1795, produced from the seeds sown in 1794, should be found to belong to them as an artificial fruit.

The arguments used by the parties were, in substance, the same with those to be found in the case of *Dame Sydney Sinclair v. Dalrymple*, No. 6, p. 5421.

The Lord Ordinary reported the cause.

Observed on the Bench ; The hay in question is to be considered as a second crop, and as such belongs to the heir. It is true, the first crop would, in this case, be of little, or perhaps no value ; but that arose entirely from wheat or barley having been sown along with the grass seeds ; and as the crops arising from the former were reaped by Mr. Simpson, the executors are by that means fully indemnified for the deficiency or loss of the first crop of grass.

The Lords unanimously assoilzied the defenders.

Lord Ordinary ESKGROVE.—Act. CULLEN.—Alt. DAVIDSON.—Clerk, PRINGLE.

Fac. Col. No. 201, p. 482.

No. 46. [5476] EUPHAN EWING *v.* RALPH DRUMMOND. November 29, 1752.

An assignation of a liferent right made by a daughter to her father, was found to fall, after the father's death, to his heir, and not to his executor.

In a contract of marriage, a tenement of houses was provided to the husband and wife, in conjunct fee and liferent, and to the heirs of the marriage. The wife, who survived her husband, disposed her liferent to her father-in-law ; and he having also died during the subsistence of the liferent, the question occurred betwixt his heir and executor, Whether the rents falling due after his death were heritable or moveable ?

The argument urged for the executor was, That a liferent cannot be conveyed, so as to establish a real right in the person of the assignee. A liferenter is not a proprietor, so as to be entitled to give either a procuratory or precept ; and therefore an assignation to a liferent stands upon no better footing than an assignation to mails and duties, granted by a proprietor. It entitles the assignee to claim the rents by a personal action against the tenants, when the rents fall due ; and this claim, which is moveable, must descend to the executor.

On the other hand, it was urged for the heir, as a point established in law, that no subject descends to an executor, which has *tractum futuri temporis* after the proprietor's death. The reason obviously is, that the purpose of naming an executor, is to gather the defunct's effects without delay, and to make a distribution among the parties interested ; which excludes subjects that have a course after the proprietor's death ; and this is entirely independent of being heritable or moveable *sua natura*. Rights may be moveable *sua natura*, that have *tractum* [5477] *futuri temporis* to fall under single escheat ; and yet, for the reason given, will not fall to the executor.

But whatever be the foundation of this doctrine, it is undoubted law, as vouched by all our authors. Lord Stair, lib. 2, tit. 1, § 4, near the end, lays it down as a general rule, " That all rights and obligations having a tract of future time, are heritable as to the executors, who are thereby excluded, though they no way relate to infeftments or lands, as pensions, tacks, &c." In the same section, he observes, " That rights having a tract of time, but not for life, are moveable so as to fall under single escheat." And he adds, " That assignations of liferent tacks fall under single escheat, as also the *jus mariti* of husbands, though they carry the profit of the wife's heritable rights, or rights of liferent."

A liferent escheat of a land estate, is equivalent, in all respects, to a widow's liferent in lands, in the person of an assignee ; and it was found that a liferent escheat, which has *tractum futuri temporis* in the person of the donatar, falls to the heir of the donatar, and not to his executor, except as to bygones. Coulter *contra* Forbes, No. 26, p. 5460. And, upon the same principle, an annual payment, as to terms after the debtor's death, was found a burden upon the heir, not the executor. Hill *contra* Maxwell, No. 43, p. 5473.

" The Lords preferred the heir." *Fol. Dic.* v. 3, p. 265. *Sel. Dec.* No. 23, p. 26.

No. 64. [5498] Mr. JOHN SANDILANDS v. AGNES SANDILANDS. June 17, 1680.

A bond secluding executors, assigned in favour of one, and his heirs, executors, and assignees, is thereby rendered moveable.

A competition betwixt the Heir and Executors of Mr. Robert Sandilands for 2000 merks. The heir claimed it, because it was provided to Robert himself, and failing him to his daughter Rachel, and her heirs and assignees, excluding executors, and that she had renounced it in her contract of marriage. Alleged, Her renunciation made it moveable, because she had renounced it in favour of her father, his heirs, executors, and assignees. Answered, This ought no more to alter the nature of the bond (which was originally heritable), than the assignation of an heritable bond altered the same in the person of the assignee. The Lords preferred the executor.

Fol. Dic. v. 1, p. 369. Fountainhall, MS.

No. 67. [5499] Mrs. ANN KENNEDY, and BLAIR her Husband v. Sir THOMAS KENNEDY. November 17, 1747.

Bonds secluding executors, assigned to an eldest son, without repeating the seclusion, fall to the heir of the son.

Sir John Kennedy of Culzean had issue at his death, three sons and two daughters. To each of his two younger sons, Thomas and David, he granted bond of provision for £1000 Sterling; and as thereby each was substitute to the other, so it was in Thomas's bond also provided, "That in case, by the death of John, his eldest son, Thomas should succeed to his lands and estate," and which event has happened, "Thomas's £1000 should fall and accrease to David, and which Thomas should be obliged to pay to him, although part thereof should, before said event, have been uplifted by himself."

Of the same date with these bonds of provision, 5th June 1742, Sir John executed a testament, whereby he nominated and appointed John, his eldest son, his executor and universal legatary, and left certain legacies; and, on the 15th of said month, "He for the love and favour he bore to the said John, his eldest son, granted assignation to him and his heirs (these were the terms of the assignation) of several bonds, whereof seven were conceived to him, his heirs and assignees, secluding executors; and this assignation bore to be granted with the burden of the bonds of provision made or to be made by him in favour of his younger children.

Upon Sir John's death, John, his eldest son served heir to him in his land-estate; and in about two year's after his father's death, died unmarried and intestate, after he had uplifted two of the bonds secluding executors in virtue of the assignation: And five of them remaining unuplifted, a question arose between Thomas, now Sir Thomas, and his brother and sisters, whether the same [5500] fell under Sir John the younger's executry, or if they belonged to Sir Thomas as his heir.

This question coming before the Court by a multiplepinding pursued in name of the debtors, the Lords, "found Sir Thomas the heir preferable."

Though the Lords were unanimous in this judgment, they were of very different opinions upon the point of law. Some were of opinion, that as, before the year 1661, all bonds bearing annualrent were heritable, so when, by the act 1661, bonds, though bearing annualrent, were made moveable, there are two exceptions, if either they bear an obligation to infeft, or a clause secluding executors, in either of which cases the sums are declared to be heritable, and to pertain to the heir: Therefore, where a bond excludes executors, the sum in that bond is to all effects heritable, as all bonds bearing annualrent were before the 1661, and remains so notwithstanding an assignation thereof made by the creditor to the assignee and his heirs, without adding his executors; and that it is no objection to this, that the cedent cannot settle the succession of the assignee, for it is the assignee, that by taking the assignation in these terms, settles his own succession.

Others thought this a wrong conception of that exception in the statute, of bonds excluding executors; for that, by the statute, all bonds bearing annualrent are declared to be of their nature moveable, unless they bear an obligation to infest. And that the other exception, in the case where the bonds seclude executors, does not leave such bonds to be heritable *ex sua natura*, but only gives force to that clause, which has obtained its operation how soon the bond is taken out of the person of the first creditor, and that whether by assignation made by him, be it to a stranger, or to his own heir, or by the general service of his heir; for that, even in that case, the clause has had its effect by the descent to the first heir.

Nevertheless, they thought the heir preferable in this case to the executors, in respect of the special circumstances of the case, where all the younger children were provided for, and the reason the same as at first, for continuing the money with the heir of the family, which therefore was presumed to have been the intention of Sir John the elder, by the assignation to his heir; especially as by the settlements made by him, the very event which has happened, of John the eldest son's dying, and Thomas the second succeeding, appears to have been in view and provided for, by his obliging Thomas, in that event, to pay the further sum of £1000 Sterling, which was his own portion, to David the third son, and which Sir John the father would not have obliged him to do, had he understood that the bonds secluding executors, which were so considerable a part of the fund out of which the heir was enabled to pay the provisions of the other children, were, upon his eldest son's death, to descend to the younger children, and among the rest to David, to whose portion so considerable an addition was made in that event.

[5501] A third opinion was given by others, who thought, that had there been no assignation granted, and that Sir John the second had made up his title to the bonds by general service, they must upon his death have descended to his heir; and observed, that so much was the Court of this opinion, in the case observed by Home in his Select Decisions, M'Kay, and Elspeth his wife, *contra* Robertson, No. 47, p. 3224. That a confirmation as executor-creditor to the heir, who had made up his titles by general service to a bond secluding executors, was found to be an inept title, *cum hæres hæredis mei sit hæres meus*: But they leaned to the opinion, that where an assignation is made to a stranger and his heirs, though not adding his executors, it would vacate the clause, secluding executors; but that where such assignation is made to the person who was heir, and who, in case no assignation had been made, must have taken the bond by service, it was a *præceptio hæreditatis*, and the bond was descendible from the assignee in the same way as it would have been, had he taken it by service.

Fol. Dic. v. 3, p. 267. Kulkerran (HERITABLE AND MOVEABLE), No. 3, p. 243.

No. 102. [5545] Mrs. ELIZABETH ROSS v. The Trustees of HUGH ROSS. January 31, 1793.

When an adjudication is led on a moveable debt by a factor *loco tutoris*, the debt remains moveable as to succession.

Hugh Ross died in London in the year 1775, leaving a widow and two sons, Hugh and Andrew-William. Hugh the eldest succeeded to the whole of his father's landed property. As a provision for Andrew-William, his father granted a bond for £10,000 to certain trustees, for his behoof, payable at his majority.

Mr. Ross left his affairs in considerable disorder, and his eldest son having contracted large debts, the trustees of Andrew-William in 1776 thought it necessary to raise an inhibition against him.

Andrew-William attained the age of majority in 1777; but having soon after become insane, the Court of Session named a factor *loco tutoris*, to take charge of his interest.

In 1786 the Creditors of Hugh Ross the son brought an action of ranking and sale of his whole landed property. And in 1789 the factor *loco tutoris* of Andrew-William obtained an adjudication over it, in security of the sums contained in the above-mentioned bond of provision.

Andrew-William died in 1791, leaving no issue.

Hugh Ross served heir in general to his brother, and on that title executed a conveyance of the bond of provision and adjudication in favour of certain trustees, in behoof of himself and his creditors.

These trustees applied for an interim warrant of £10,000 on the purchasers of part of Hugh's landed property, to account of this debt.

[5546] Elizabeth Ross, the mother of Andrew-William, opposed this warrant, on the ground, that notwithstanding the adjudication, the provision still continued moveable as to succession, and that as Andrew-William had his domicile in England, the division of his executry must be regulated by the law of that country, by which she was entitled to an equal share with his surviving brother, in terms of the statute 1st James II. c. 17. In support of her claim, it was

Pleaded, A creditor having the free administration of his own affairs, who leads an adjudication upon a personal debt, if he does not guard against it by proper deeds, must be presumed to have intended an alteration in the course of his succession. But when the adjudication is led by those acting for a person disabled by non-age or infirmity, from disposing of his property, there is no room for this presumption. Hence it is fixed, that no deed of a guardian can affect the succession of his ward; Bankt. v. 1, p. 169; 12th July 1688, *A. v. B. voce TUTOR and PUPIL*. It is true, indeed, that in this case from Fountainhall, the alteration in the state of the pupil's property arose from the tutor's voluntary act, whereas, in the present case, the adjudication was necessary, in order to secure the debt. But whether the deed be voluntary or necessary, seems unimportant, as the general principle applies equally to both.

2dly, Even if a proper tutor could, by leading an adjudication, alter the line of his pupil's succession, an adjudication led by a factor *loco tutoris* can have no such effect. It is clear, from the preamble of the act of sederunt 13th February 1730, under which such factors are appointed, that their whole duty consists in preserving the estate entrusted to their management. No step, therefore, taken with this view, should alter the course of its succession. Besides, when a tutor adjudges the estate of his pupil, the adjudication is led in the pupil's name; but here the adjudication went out in the name of the factor; so that the interest of Andrew-William Ross, at his death, had resolved into a personal claim against the factor, which must of course descend to his executors.

3tio, It is not in consequence of the adjudication, but of the inhibition in 1776, that any part of the debt is recovered. The interests produced for prior adjudgers exhaust the whole price of the estates in Scotland. But an inhibition neither alters the nature of the debt nor its course of succession.

Answered, 1st, It is not the presumed will of the proprietor, but the nature of the subject which regulates, whether as heritable it shall descend to the heir, or, as moveable, go to the nearest in kin; nay, it often devolves in direct opposition to his intention. In the case of *Ross v. Ross*, in 1770, No. 15, p. 5019, sums secured by adjudication went to the heir at law against the *enixa voluntas* of the deceased. See also *Waddell v. Colt*, 13th February 1789, No. 16, p. 5022. Upon this principle, testamentary deeds, bequeathing heritage, and dispositions on deathbed, are ineffectual against the heir. For the same reason it is not the citation in an action of adjudication, although it is then that the creditor shows his intention of altering the nature of the debt, but the de-[5547]-cree pronounced upon it, which renders a personal debt heritable; *Erskine*, b. 2, tit. 2, § 14. And, on the other hand, the mere intention of the proprietor to convert his heritable into moveable property, does not make it lose its heritable quality; *Reids v. Campbell*, No. 98, p. 5538; *President Falconer*, 17th January 1683, *Wishart v. the Earl of Northesk*, No. 109, p. 5552. The right to a debt may even descend partly to the heir, and partly to the executor, although it is impossible to suppose, that the predecessor intended such a destination; *Sir William Dunbar v. the Executors of Brodie*, Sect. 28, *h. t.*

Even the voluntary acts of a tutor affect the pupil's succession; *Stair*, b. 1, tit. 6, § 36; *Erskine*, b. 1, tit. 7, § 18; *Bankton*, b. 1, tit. 7, Par. 29 and 36; *Harcare*, p. 296, 19th July 1671, *Sharp v. Crichton, voce TUTOR and PUPIL*. And that his necessary acts, such as the present, have that effect, has never before been disputed.

2do, A factor *loco tutoris* has nearly the same powers with a tutor; *Kilkerran*, 13th Jan. 1747, *Robina Pollock, voce TUTOR and PUPIL*; 17th June 1758, *Brown v. Scouler*, *IBIDEM*. What is said of the adjudication vesting in the factor *loco tutoris*,

and not in the pupil, is impossible ; for then it would follow, that the debt could exist in the one, and the adjudication for the debt in the other. But even if the debt and the adjudication could be thus separated, it would not avail the objector ; for a personal right attached to an heritable subject, is equally heritable with the subject itself. The factor held the subject in trust, and the claim against him was to denude.

3tio, It was solely in virtue of the adjudication that a security was created over the estate, by which the debt can be recovered. The inhibition had merely the negative effect of annulling posterior rights ; Erskine, b. 2, tit. 11, § 13.

The Court were of opinion, that there was no difference between an adjudication led by a factor *loco tutoris* and a proper tutor. And a great majority thought, that although both might better the security of the pupil, by converting his moveable estate into heritable, yet no deed of either could alter the line of his succession. It was further observed, that the circumstance of a subject heritably secured going to the nearest in kin, was not at all adverse to the analogy of our law in other cases. It was upon the same principle, that requisition used by a creditor upon an infestment of annualrent made the sum in the right moveable, although the infestment remained.

One of the Judges wished to make a distinction between the voluntary and necessary acts of a tutor, and to consider the latter as having in all respects the same effect with those of the proprietor himself. But it was suggested, that this would leave the matter on too loose a footing, and involve parties in a proof of the necessity of altering the security in every particular question.

The Court found, " That the debt in question was moveable in regard to succession."

A reclaiming petition against this interlocutor was refused, without answers.

Lord Reporter, SWINTON.—For Mrs. ROSS, WIGHT, M. ROSS.—Alt. HONYMAN *et alii*.—Clerk, SINCLAIR.

R. D.

Fol. Dic. v. 3, p. 269. Fac. Col. No. 20, p. 40.

No. 112. [5554] Duke of HAMILTON v. The Earl of SELKIRK. January 8, 1740.

Found, that not only irredeemable dispositions, but also adjudications, heritable bonds descendible to the heirs and assignees of the defunct, although no infestment had followed thereon, descended to the heir of conquest ; but that [5555] the right of succession to bonds secluding executors, and containing no obligation to infest in lands, descended to the heir of line.

Found also, that a personal bond of corroboration taken by the defunct to heirs secluding executors, of the principal sum and annualrents contained in an heritable bond, and in which bond was also contained a further new sum borrowed of that date, did not alter the succession as to the principal sums contained in the original bond which devolved to the heir of conquest, but that all the further sums contained in the bond of corroboration descended to the heir of line. See HERITAGE and CONQUEST.

Kilkerran (HERITAGE and CONQUEST), No. 2, p. 251.

No. 118.

[5566] HART v. HART. March 18, 1630.

Found in conformity with Cant v. Edgar, No. 116, p. 5565.

Umquhile Mr. John Hart, as cautioner for Partick Hart his son, who was principal, being obliged in 1000 merks, for which he being distrest by the creditor, he borrows the sum from Eupham Wilson, and pays the debt, and gives redeemable infestment of his lands to her for her security. Thereafter the said Mr. John, who paid the debt as cautioner, in his testament makes his son Patrick, who was principal debtor foresaid, his executor, who is confirmed executor to him. Thereafter the heir of umquhile Mr.

John, whose lands were engaged for the debt, as said is, pursues Patrick, the principal, to relieve him and his lands of the foresaid distress ; in which process, the defender clothing himself with the said executry, the Lords found, that the heir of the cautioner had no action for relief against the principal ; for albeit his father, the cautioner, to whom he was heir, had paid the debt, and that the payment was made by that money for which he gave heritable infeftment out of his lands, yet thereby the heir had not the right of that relief competent to him, albeit his lands were burdened therewith ; but they found, that the right of that relief pertained to the executors of the cautioner, and who had the only interest to seek the same ; and consequently they found, that the said principal being nominated executor, and confirmed to the defunct, who, as cautioner, paid the debt, the said relief was confounded, he having right to seek the relief, as being executor, and being the same person who should make the relief, being the principal, and so obliged to relieve his cautioner, and so he was both creditor and debtor ; but as to this relief, albeit the heir was excluded from the right thereof, yet the creditors of the defunct will have right thereto against the said executor, or may be sought by the executor-dative *ad omnia*, if it be not confirmed in the principal testament.

Act. ——.—Alt. STUART.—Clerk, HAY.

Fol. Dic. v. 1, p. 373. Durie, p. 509.

No. 138. [5591] Sir WILLIAM DUNBAR v. The EXECUTORS of BRODIE. July 13, 1743.

A debtor disposed his estate to trustees. Some of the creditors assigned their debts to the same trustees, to lead an adjudication to be made over to a purchaser. The adjudication was found to make the debts heritable.

Lewis of Merchiston, and Scot of Blair, becoming both bankrupt, they, in 1720, granted conveyances of their estates, real and personal, in favour of certain trustees, for the use and behoof of their creditors, and bearing to be in order to facilitate their payment by a sale of the subjects, to which conveyances the most of the creditors acceded. But as a few stood out, and that it was not at that time a settled point. Whether or not a debtor, bankrupt in terms of the act 1696 could effectually grant a trust right for the behoof of his creditors, so as to exclude the diligence of such as should not chuse to accede thereto ; and as that scruple might scar purchasers ; it was agreed by the acceding creditors, that they should assign their debts to the trustees. Among the rest, Mr. William Brodie, in prosecution of this plan, assigned to the trustee three debts due to him, expressing the purpose thereof to be, that by an adjudication proceeding thereon, and on the debts assigned by the other creditors, a sufficient right might be made up to the purchaser ; and one adjudication was accordingly led for the whole debts due to the several acceding creditors.

The event justified this precaution ; for the non-acceding creditors having proceeded to separate diligence by adjudication, notwithstanding the opposition made by the trustees, who pleaded that the bankrupts were denuded by the trust conveyances made for the behoof of all their creditors equally and proportionally, the Lords,—January 1729, “ Allowed them to proceed in their separate diligence ” ; and in February 1736, at their instance, “ Reduced the trust-right,” No. 244, p. 1908.

The trustees had in the mean time proceeded to sell several parcels of the estate : and as the prices were adequate, the outstanding creditors acquiesced in the sales : and as the adjudications were all within year and day, so far as the prices were paid, the whole drew their shares in proportion to their debts.

While part of the price of the subjects sold was yet unpaid, and other subjects remained unsold, Mr. Brodie died ; and a competition ensuing between Sir William Dunbar his heir, and the Lady Dipple his executor, each claiming the whole of the debt remaining due to him, the trustees brought a multiplepinding, wherein the Lords “ preferred the executors to the defunct’s interest in the price of the subjects sold before Mr. Brodie’s death, and yet resting unpaid, and preferred the heir upon the subjects that were unsold at his death.”

As this decision was agreeable to a former precedent, *vide* Murray [5592] Kinnymound *contra* Cathcart and Rothead, No. 136, p. 5590, so it was in itself just. as to what was argued for the heir with regard to the subjects sold, that notwithstanding the sale of a subject adjudged, the debt stood secured by the adjudication, a nothing but payment can extinguish an adjudication, which is a settled point in judicial sales; the answer was, that judicial sales proceed without consent of the creditor, whose security therefore it would be unjust in the law to loose till the creditor should obtain payment, which does not apply to the case of a voluntary sale. And as to what was argued for the executor with regard to the subjects unsold, that the trust-right, even when acceded to by the creditors, was by the express tenor of it only intended to facilitate their payment by a sale of the subjects, which could not infer a purpose to alter the nature of their security; and that neither did the adjudication alter the case, as the conveyance of the debts whereon it proceeded expressly bore, that the same had only been intended to make up a sufficient right to the person who should be purchaser of the lands, and for the better enabling the trustees to uplift the debts and other subjects conveyed to them; if arguments of that kind were hearkened to, neither trust-rights nor adjudications would ever render debts heritable. However the intention of such rights may have been expressed by the creditors, it could not be thence inferred, that the creditors could not use them to other purposes.

Fol. Dic. v. 3, p. 268. *Kulkerran* (HERITABLE AND MOVEABLE), No. 4, p. 245.

No. 143. [5599] Lady CHRISTIAN GRAHAM, and Others *v.* the Earl of HOPETON.
March 6, 1798.

Heritable bonds, taken by a tutor, who was heir at law, for money belonging to his ward, and adjudications led for personal debts, found to be moveable as to succession. The price of tithes, sold by a tutor, by judicial authority, in the event of the ward's death, belong to his executors.

George, Marquis of Annandale, was cognosced insane in 1758; and the late John, Earl of Hopeton, his nephew, was appointed his tutor in law.

Earl John was succeeded in 1781, by his son, the present Earl, who was named curator-dative to the Marquis.

The Marquis died in April 1792, possessed of a valuable landed estate.

The Earl of Hopeton was his heir at law.

Lady Christian Graham and others had right to his executry; and soon after his death, they brought an action of count and reckoning against the Earl of Hopeton, both as the Marquis's curator, and as representing Earl John, the former tutor.

The defender produced his own and his father's accounts, to which a variety of objections were stated by the pursuers.

The Lord Ordinary having taken the cause to report on informations, the following points *inter alia* occurred for the determination of the Court.

I.—It did not appear that Earl John had made up tutorial inventories. The pursuers, therefore, contended, That in terms of the act 1672, cap. 2, the expenses disbursed by his Lordship in the management could not be sustained as an article of credit in his accounts; March 1685, Burnet *v.* Johnston, *voce* TUTOR AND PUPIL; Jan. 1686, Murray *v.* Gordon, *IBIDEM*; 11th June 1709, Riddoch *v.* Forsyth, *IBIDEM*; 10th July 1788, Henderson *v.* Duff, *IBIDEM*; 25th January 1793, Kilpatrick *v.* Macalpine, *IBIDEM*.

Answered; The objection resolves into a claim for a penalty; and therefore, although it might have been relevant in a question with the late Earl, it cannot be stated against the present defender, in accounting for his father's intromissions.

Replied; The present action is in no respect penal. The pursuers claim nothing but the moveable funds of the Marquis in the hands of the defender. They only object to a counter claim on his part, expressly disallowed by the act 1672. Supposing, however, the objection were penal, the special enactment of that statute would be sufficient to create an exception to the rule of common law, as to penal actions.

[5600] Duplied; The same defence is competent to heirs against penal claims,

whether they be brought forward by way of action or exception, *Stair*, 10th July 1666, *Cranston v. Wilkinson*, *voce* PERSONAL AND TRANSMISSIBLE; *Forbes*, 15th Dec. 1710, and 17th Jan. 1711, *Lord and Lady Ormiston v. Hamilton*, *IBIDEM*. Nor does it alter the case, that the claim arises from statute.

The Lords found, "That any claim which might have been competent to the pursuers against the deceased John, Earl of Hopeton, on account of his not having made up judicial inventories in terms of the act 1672, is of the nature of a penal action, and does not transmit against the defender James, now Earl of Hopeton, as heir to his father." See PERSONAL AND TRANSMISSIBLE.

II.—When the present Earl of Hopeton was appointed curator-dative to the Marquis, he made up curatorial inventories; and in the action for that purpose, he called Charles Hope Weir, William Hope Weir, and Captain Charles Napier, as the Marquis's nearest in kin by the father's side. Lady Charlotte Erskine, and Lady Christian Graham, however, stood more nearly related to him on that side, than the two last-mentioned gentlemen. Neither of these Ladies were called; and on that account the defenders objected to the formality of the inventories, contending, that the citation of two of the nearest of kin on both sides was indispensable.

The Lords "found no relevant objection stated to the form of the proceedings in making up inventories by the present Earl." See TUTOR AND PUPIL.

III.—The defender and his father lent a considerable part of the rents of the Annandale estate on heritable bonds. They also led adjudications for some small moveable debts due to the Marquis. The defender, in his accounts, did not charge himself with either, contending, that they fell to himself as the Marquis's heir at law.

The pursuers, on the other hand, maintained, that no step taken by a tutor for securing the fortune of his ward, can have the effect of altering the course of his succession, particularly in a case like the present, where both tutors had been successively the heirs at law of their ward.

The arguments of the parties on this point, were similar to those stated in the report, 31st January 1793, *Ross v. the Trustees of Ross*, No. 102, p. 5545.

The Lords "found, That the defender is not entitled to take credit for the money lent out upon heritable bonds, or secured by adjudications, unless he will convey the heritable bonds and adjudications to the pursuers, as nearest of kin to the deceased George, Marquis of Annandale, and as having right to his executry."

IV.—The late Lord Hopeton had purchased, with the Marquis's rents, some small pieces of ground lying in the heart of the Annandale estate.

[5601] The pursuers contended, That the defender fell to account to them for the price of these lands. Scarcely any argument was used by the parties on this point, probably from its being thought to rest on the same principles with the last.

The Lords "found, the defender is not entitled to take credit for the price of certain lands in the county of Dumfries, purchased by his father out of the executry funds, unless he will agree to convey these lands to the pursuers as nearest of kin to the late Marquis of Annandale, and as having right to his executry." See TUTOR AND PUPIL.

V.—During the guardianship of the Earls of Hopeton, different heritors, of whose teinds the Marquis was titular, had purchased them, in virtue of decrees of sale of the Court of Teinds.

The defender maintained, that on the principle of the pursuers themselves, he was entitled, as the Marquis's heir, to retain their price, as the subject was heritable at the commencement of the curatory, and no subsequent alteration on it could affect the succession.

Answered; The subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempted. A change effected in this manner on the nature of the property, is very different from one brought about by the voluntary act of the tutor, and must have the ordinary effect in regulating the right of succession.

The Lords "found the defender accountable to the pursuers for the price of teinds sold in consequence of decrees of the Court of Teinds."

VI.—The late Earl of Hopeton paid with the rents of the Annandale estate, upwards of £36,000 of heritable debts, and took discharges from the creditors, who had, before payment, taken legal measures for enforcing it.

The pursuers contended, that the defender was bound to account to them for rents so employed.

His Lordship, on the other hand,

Pleaded ; The presumption of law is, that a minor will attain majority, and that a fatuous person will recover the use of his reason. It is the duty of a tutor, therefore, in the exercise of his office, to consult his immediate interest, without attending to the contingent benefit, which in the case of his death before either of these events, may arise to his heir or executors, by following one course of management in preference to another. *Ex parte Bromfield*, 1st vol. Vessy, junior, 453 ; *Oxenden v. Lord Compton*, 2d vol. Vessy, junior, 69, and fol. 261. Now, the payment of the debts affecting the estate, was not only a proper, but a necessary act of administration on the part of the tutor, and the course which every wise man, in the full administration of his property, would have followed ; and these debts being absolutely extinguished, by the discharges [5602] of the creditors, they cannot be revived, so as to constitute a claim against the heir.

Answered ; That the application of the rents to the payment of the heritable debts, was a proper act of administration, is indisputable. But the tutor, in place of discharges, ought to have taken assignments from the creditors, for behoof of the Marquis, and those entitled to succeed to his executry ; and he will not be allowed to shelter himself under the form of a deed. In whatever manner he may have employed the moveable funds of his ward, he must account for their whole amount to his executors, otherwise he would be virtually regulating his ward's succession, and be at the same time *auctor in rem suam*, although the Court have already found that he can do neither, by determining the question as to the heritable bonds in favour of the pursuers.*

The Lords, considering this point to be attended with difficulty, “ before answer, ordered a hearing in presence on it.”

When the cause was again advised after the hearing, one Judge thought the claim of the pursuers should be sustained. His Lordship observed, that, as the necessity of appointing a tutor arose from the defect of judgment in the ward, his powers should reach no further than necessity required ; and it seemed to be neither necessary nor expedient, that any act of management should have the effect of regulating the ward's succession.

The rest of the Court were of an opposite opinion. Intestate succession (it was observed) is in general governed by the state of the property at the defunct's death. This rule indeed admits of exceptions, as in the above case of an heritable bond, or adjudication obtained by a tutor ; but, in the present case, the pursuers seek to revive and reintegrate debts which do not exist, in order that they may succeed to funds which have been most properly applied by the tutor to relieve the estate of the proprietor, without any sinister view to his succession. There was no equity between the executors and the heir which could have this effect. In so urgent an act of administration, the tutor was bound to consult the interest of the proprietor alone, without attending to eventual consequences.

The Court (6th March 1798) “ found, that the defender is entitled to take credit for the sums applied by his father in payment of certain heritable debts constituted by infettment on the estate of Annandale.” See TUTOR AND PUPIL.

VII.—After the Marquis had been 37 years in a state of fatuity, the defender employed between £20,000 and £30,000 of his moveable funds in rebuilding a mansion-house and deer-park, and in making ornamental plantations. The Marquis had no other mansion-house on his Scots estate, which, at his death, produced £8000 a-year. He had one, however, on his English property, in which he resided.

[5603] The pursuers contended, That this expenditure was irrational, *ultra vires* of the tutor, and could not be admitted as a charge in his accounts.

The defender, on the other hand, argued, That the nonage, or incapacity of a proprietor, ought not to put a stop to the improvement and embellishment of his

* All the other branches of the cause were decided 17th May 1797. See APPENDIX.

whether they be brought forward by way of action or exception, *Stair*, 10th July 1666, *Cranston v. Wilkinson*, *voce* PERSONAL AND TRANSMISSIBLE; *Forbes*, 15th Dec. 1710, and 17th Jan. 1711, *Lord and Lady Ormiston v. Hamilton*, *IBIDEM*. Nor does it alter the case, that the claim arises from statute.

The Lords found, "That any claim which might have been competent to the pursuers against the deceased John, Earl of Hopeton, on account of his not having made up judicial inventories in terms of the act 1672, is of the nature of a penal action, and does not transmit against the defender James, now Earl of Hopeton, as heir to his father." See PERSONAL AND TRANSMISSIBLE.

II.—When the present Earl of Hopeton was appointed curator-dative to the Marquis, he made up curatorial inventories; and in the action for that purpose, he called Charles Hope Weir, William Hope Weir, and Captain Charles Napier, as the Marquis's nearest in kin by the father's side. Lady Charlotte Erskine, and Lady Christian Graham, however, stood more nearly related to him on that side, than the two last-mentioned gentlemen. Neither of these Ladies were called; and on that account the defenders objected to the formality of the inventories, contending, that the citation of two of the nearest of kin on both sides was indispensable.

The Lords "found no relevant objection stated to the form of the proceedings in making up inventories by the present Earl." See TUTOR AND PUPIL.

III.—The defender and his father lent a considerable part of the rents of the Annandale estate on heritable bonds. They also led adjudications for some small moveable debts due to the Marquis. The defender, in his accounts, did not charge himself with either, contending, that they fell to himself as the Marquis's heir at law.

The pursuers, on the other hand, maintained, that no step taken by a tutor for securing the fortune of his ward, can have the effect of altering the course of his succession, particularly in a case like the present, where both tutors had been successively the heirs at law of their ward.

The arguments of the parties on this point, were similar to those stated in the report, 31st January 1793, *Ross v. the Trustees of Ross*, No. 102, p. 5545.

The Lords "found, That the defender is not entitled to take credit for the money lent out upon heritable bonds, or secured by adjudications, unless he will convey the heritable bonds and adjudications to the pursuers, as nearest of kin to the deceased George, Marquis of Annandale, and as having right to his executry."

IV.—The late Lord Hopeton had purchased, with the Marquis's rents, some small pieces of ground lying in the heart of the Annandale estate.

[5601] The pursuers contended, That the defender fell to account to them for the price of these lands. Scarcely any argument was used by the parties on this point, probably from its being thought to rest on the same principles with the last.

The Lords "found, the defender is not entitled to take credit for the price of certain lands in the county of Dumfries, purchased by his father out of the executry funds, unless he will agree to convey these lands to the pursuers as nearest of kin to the late Marquis of Annandale, and as having right to his executry." See TUTOR AND PUPIL.

V.—During the guardianship of the Earls of Hopeton, different heritors, of whose teinds the Marquis was titular, had purchased them, in virtue of decrees of sale of the Court of Teinds.

The defender maintained, that on the principle of the pursuers themselves, he was entitled, as the Marquis's heir, to retain their price, as the subject was heritable at the commencement of the curatory, and no subsequent alteration on it could affect the succession.

Answered; The subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempted. A change effected in this manner on the nature of the property, is very different from one brought about by the voluntary act of the tutor, and must have the ordinary effect in regulating the right of succession.

The Lords "found the defender accountable to the pursuers for the price of teinds sold in consequence of decrees of the Court of Teinds."

VI.—The late Earl of Hopeton paid with the rents of the Annandale estate, upwards of £36,000 of heritable debts, and took discharges from the creditors, who had, before payment, taken legal measures for enforcing it.

The pursuers contended, that the defender was bound to account to them for rents so employed.

His Lordship, on the other hand,

Pleaded ; The presumption of law is, that a minor will attain majority, and that a fatuous person will recover the use of his reason. It is the duty of a tutor, therefore, in the exercise of his office, to consult his immediate interest, without attending to the contingent benefit, which in the case of his death before either of these events, may arise to his heir or executors, by following one course of management in preference to another. *Ex parte Bromfield*, 1st vol. Vessy, junior, 453 ; *Oxenden v. Lord Compton*, 2d vol. Vessy, junior, 69, and fol. 261. Now, the payment of the debts affecting the estate, was not only a proper, but a necessary act of administration on the part of the tutor, and the course which every wise man, in the full administration of his property, would have followed ; and these debts being absolutely extinguished, by the discharges [5602] of the creditors, they cannot be revived, so as to constitute a claim against the heir.

Answered ; That the application of the rents to the payment of the heritable debts, was a proper act of administration, is indisputable. But the tutor, in place of discharges, ought to have taken assignments from the creditors, for behoof of the Marquis, and those entitled to succeed to his executry ; and he will not be allowed to shelter himself under the form of a deed. In whatever manner he may have employed the moveable funds of his ward, he must account for their whole amount to his executors, otherwise he would be virtually regulating his ward's succession, and be at the same time *auctor in rem suam*, although the Court have already found that he can do neither, by determining the question as to the heritable bonds in favour of the pursuers.*

The Lords, considering this point to be attended with difficulty, “ before answer, ordered a hearing in presence on it.”

When the cause was again advised after the hearing, one Judge thought the claim of the pursuers should be sustained. His Lordship observed, that, as the necessity of appointing a tutor arose from the defect of judgment in the ward, his powers should reach no further than necessity required ; and it seemed to be neither necessary nor expedient, that any act of management should have the effect of regulating the ward's succession.

The rest of the Court were of an opposite opinion. Intestate succession (it was observed) is in general governed by the state of the property at the defunct's death. This rule indeed admits of exceptions, as in the above case of an heritable bond, or adjudication obtained by a tutor ; but, in the present case, the pursuers seek to revive and reintegrate debts which do not exist, in order that they may succeed to funds which have been most properly applied by the tutor to relieve the estate of the proprietor, without any sinister view to his succession. There was no equity between the executors and the heir which could have this effect. In so urgent an act of administration, the tutor was bound to consult the interest of the proprietor alone, without attending to eventual consequences.

The Court (6th March 1798) “ found, that the defender is entitled to take credit for the sums applied by his father in payment of certain heritable debts constituted by infettment on the estate of Annandale.” See TUTOR AND PUPIL.

VII.—After the Marquis had been 37 years in a state of fatuity, the defender employed between £20,000 and £30,000 of his moveable funds in rebuilding a mansion-house and deer-park, and in making ornamental plantations. The Marquis had no other mansion-house on his Scots estate, which, at his death, produced £8000 a-year. He had one, however, on his English property, in which he resided.

[5603] The pursuers contended, That this expenditure was irrational, *ultra vires* of the tutor, and could not be admitted as a charge in his accounts.

The defender, on the other hand, argued, That the nonage, or incapacity of a proprietor, ought not to put a stop to the improvement and embellishment of his

* All the other branches of the cause were decided 17th May 1797. See APPENDIX.

estate; that the expenditure was suitable, and such as the Marquis must have approved of, had he reconvalesced.

The Court "found the defender is not entitled to take credit for the money expended in buildings at Raehills, or in making and inclosing the ornamental plantations immediately connected therewith." See TUTOR AND PUPIL.

VIII.—The Earl took credit for sums employed in supporting the Marquis's political interest in the county of Dumfries, and also for sums expended unsuccessfully in searching for lead on the Annandale estate.

The pursuers objected to both these articles; the notion of supporting the political interest of a lunatic was absurd; and it was contrary to the duty of a tutor to embark in hazardous speculations.

Answered; 1st, The preservation of the political consequence of a great family is a proper act of administration. 2dly, The appearances of lead were promising in the opinion of persons of skill, which rendered it the duty of the tutor to make the experiment.

"The Lords sustained the objections to the sums taken credit for by the defender, as the expense of political operations in the county of Dumfries, and of searching for mines."

A reclaiming petition for Lord Hopeton against the third and fourth branches of the judgment, was refused without answers. See PERSONAL AND TRANSMISSIBLE.—TUTOR AND PUPIL.

Lord Ordinary, SWINTON.—Act. SOLICITOR-GENERAL BLAIR, ROLLAND, TAIT, HOPK, ARCH. CAMPBELL, JUN.—Alt. LORD ADVOCATE DUNDAS, GEO. FERGUSON, H. ERSKINE, MAT. ROSS.—Clerk, HOME.

R. D.

Fac. Col. No. 66, p. 150.

No. 1. [5605] Heirs of the Earl of DUNBAR Competing. June 24, 1625.

A tack belongs to the heir of line, although conquest by the defunct. See No. 2, *infra*.

The Lords found a tack disposed to the Earl of Dunbar and his heirs-male succeeding to him, by proving of brieve, to pertain not to the heir-male of conquest, who was John Home of Shegden, the elder brother, but to the heir-male descending, viz. the younger brother, and this notwithstanding it was objected, that the E. of Dunbar had one general of his own body, viz. his daughter, and that there could not be two heirs general, viz. one lineal, and another collateral; and also, notwithstanding of the word "succeeding," which was contended should be respected heirs succeeding to lands.

Fol. Dic. v. 1, p. 375. Kerse, MS. fol. 130.

No. 2. FERGUSON v. FERGUSON. June 23, 1663.

Found as above.

Umquhil — Ferguson in Restalrig, having a tack set to him by the Lord Balmerino for certain years, his eldest brother's son, as heir of conquest, and his youngest brother's son, as heir of line, competed for the mails and duties of the lands.

The Lords found the tack to belong to the heir of line, albeit it was conquest by the defender.

Fol. Dic. v. 1, p. 375. Stair, v. 1, p. 193.

No. 3. ROBERTSON v. Lord HALKERTON. July 7, 1675.

A father granted bond to his daughter, obliging himself to infeft her in an annualrent out of certain lands. The bond contained a power to her to call for the principal sum upon requisition. Found, that the bond being principally conceived as an annualrent-right, though having a clause of requisition, fell to the heir of conquest.

The Laird of Halkerton having granted a bond to his daughter, "obligeth him and his heirs to infeft her in an annualrent of 100 merks out of certain lands expressed," and containing thereafter a clause of requisition and reversion; she having died without children, Sir Patrick Falconer, her immediate younger brother, having entered heir-general to her, assigns the bond to Ro-[5606]-bert Robertson for necessities furnished by him to Sir Patrick, and now pursues the Lord Halkerton, debtor in the sum, for payment of the 1000 merks, on which it was redeemable, and that by virtue of the clause of requisition. The defender alleged absolutor, because the right of this bond did belong to Sir Patrick, the pursuer's cedent, as heir-general or of line to his sister, because it being conquest, it did not descend to Sir Patrick, her younger brother, but did ascend to Sir John her elder brother, and his heirs.—To the first the pursuer answered, Imo, That this is *jus tertii* to the defender; 2do, The right of this bond must fall to the heir of line, not to the heir of conquest, because *de jure communi*, the younger brother is heir of line and heir-general, and to him doth belong *universum jus*, and he is liable for the whole debt; and albeit there be a special statute of King Robert's,* "declaring lands and tenements acquired by a mid-brother to ascend to his immediate elder brother, who thereby is denominated to have an heir of conquest"; yet that being against the common law, is not to be extended, and therefore can only take place in the case of lands and tenements where there is a complete real right; but if the right be incomplete, it gives no right to the land, and is but a personal right, and at best *jus ad rem*, not *in re*, and therefore the statute ought not to be extended thereunto; according to which Skeen, explaining conquest, and what befalls the general heir, doth only except "lands and tenements," but "declares reversions to belong to the heir-general"; and Craig expresseth himself in the same way.—It was replied for the defender, We are not now to debate what were fit to befall to the heir of conquest, there being great reasons that even lands and tenements should rather have descended to the heir of line, who hath the whole burden; but seeing that statute is made, it is to be considered what is the import thereof, and what by consequence and analogy is suitable thereto, and to the decisions of the Lord heretofore; by which it is evident that in the time of that statute, sasine was not requisite, but the disposition or charter, with possession, was sufficient; and therefore the superveniency of a statute requiring sasine cannot alter the case, seeing the disposition of this annualrent hath attained possession by frequent payment thereof. 2do, It were most incongruous and inconsistent that an absolute disposition of lands acquired by a middle brother or sister, having a clear destination for infeftment, should not befall to the heir of conquest; as if the infeftment had been obtained for the chief ground of the succession of heirs, being the will and destination of the fiar, it is always esteemed to have the same effect as if it were complete; and upon that ground obligations for borrowed money were ever esteemed heritable, if there were but an obligation to pay annualrent, till the year 1641, and are yet heritable, if they have but a general clause of infeftment for annualrent; and therefore the right of conquest lands by disposition, though it be incomplete, must ascend to the heir of conquest, which must also necessarily hold in annualrents acquired, and likewise in apprisings; whereunto Sir Thomas Hope gives his opinion; and though the case of reversions be much more doubtful, being but personal [5607] obligations *de retro vendendo*, yet seeing by statute they are made real rights to affect the ground against singular successors when registrated, the Lords have found reversions acquired by mid-brothers to ascend to the elder brother; as it is observed in the case of Pitcairns, where there being three brothers, Henry, Robert, and Mr. John, Mr. John the younger brother gave a right of reversion of certain lands to Robert the mid-brother, who dying without issue, in a

* Stat. Robert 3d, cap. 3.

competition betwixt Henry his eldest brother, and Mr. John his youngest brother. both claiming the reversion to be delivered to them as having best right, the Lords found that the reversion did belong to Henry, Robert's elder brother, and not to Mr. John his younger brother, albeit he was most favourable, as having granted the reversion himself, neither had Robert the mid-brother acquired the lands before the wadset. — It was duplied for the pursuer, That whatever might be pretended in dispositions of lands or annualrents, though not complete, yet it can have no consequence as to bonds of borrowed money, wherein parties for their further security adject clauses of infettment in an annualrent generally or particularly, yet do seldom make use thereof; and it cannot be thought that thereby they intended to make their sums ascend to an elder brother in prejudice of the younger brother, who is heir-general, and must bear the debt and the burdens of succession as tutors, &c.

The Lords found, That this bond in question having principally disposed an annualrent, albeit there was subjoined a clause of requisition and reversion, that it did belong to the heir of conquest, and that the pursuer, as having assignation from the heir of line, had no right thereto. *Fol. Dic. v. 1, p. 375. Stair, v. 2, p. 338.*

No. 7. [5609] BEGBIE v. BEGBIE. January 23, 1706.

Bonds secluding executors descend not to heirs of conquest, but to heirs of line.

Mr. Alexander Wedderburn having granted a bond of 1000 merks to the deceased John Begbie, and his heirs (secluding executors) there falls in a competition betwixt the creditors of the immediate elder brother, who claims the sum as heir of conquest, and the younger brother, who alleges the same falls [5610] to him as heir of line; and for whom it was alleged, That the heir of conquest has only right to lands and tenements; the privilege of the heir of conquest being derived from the feudal law, which is clearly expressed in the book of *Quoniam Attachiamenta*, or Baron Laws, cap. 88 and cap. 97; and therefore heirs of line have right to heirship moveables, and to tacks and pensions, though these be conquest.

It was answered; That whatever be indulged to heirs of line as to moveables, which are perishable goods, or to tacks and pensions, which are hardly to be reckoned heritage, that is not to be extended to heritable bonds; and there is no difference betwixt a bond secluding executors and a bond containing a clause for infetting the creditor: And the citations adduced do not clear the point; for nothing is there expressed concerning such heritable obligations, but only that lands ascend.

“The Lords preferred the heir of line.”

Fol. Dic. v. 1, p. 375. Dalrymple, No. 73, p. 94.

No. 8. [5612] MARGARET GREENOCK v. JOHN GREENOCK. December 16, 1736.

Teinds fall to the heir of line, and not to the heir of conquest.

The point controverted betwixt these parties, was, Whether teinds ascend to the heir of conquest, or go along with the land to the heir of line?

Pleaded for the latter; That he succeeds to every thing which is not specially appropriated to the heir of conquest, whose right depends allenarly upon the 88th chap. *Quoniam Attach.* by which it is provided, “That, if there be three brethren, and the mid-brother deceasing without heirs of his body, his eldest brother, first begotten, shall succeed to his land and tenement, and not the after born or younger brother.” And which is ratified by the statute, Robert III. c. 3. Now, as the old law mentions only lands and tenements, nothing but what were considered as rights of lands at that

* See SUCCESSION.

period can belong to the heir of conquest ; teinds, therefore, which are solely a burden upon the fruits, do not fall under these statutes ; more especially as they were not *in privato patrimonio* at the time, being then the peculiar patrimony of churchmen, not transmissible by succession or conveyance ; and that nothing befalls the heir of conquest, [5613] but what can be brought under the description of these ancient laws, is founded upon the practice of the Court ; seeing it is from this principle it has been found, That tacks, pensions, and bonds excluding executors, fall to the heir of line.

Besides the general point, it was urged ; That the particular circumstances of the case behoved to determine the question the same way, in so far as the proprietor of the land, the same day that he took a precept of *clare constat* from the superior, whereby he and his heirs are obliged to appear at the superior's courts, and are subjected to be judged there, for any bloodwits which may happen amongst their tenants, did likewise obtain a disposition to the teinds from the superior, who was also titular ; by which the proprietor, his heirs, tenants and cottars, are bound to answer to courts, and perform other services, as at length is specified in the precept of *clare constat*, or other rights and securities of the land ; whereby it is plain the heirs in the disposition were intended to be the same as the heirs in the precept ; because, if the parties had it in their eye, that the teinds were to devolve to another heir than he that was to succeed in the lands, it was very irregular, instead of mentioning the particular duties and services to be paid and performed for the teinds, to make a general reference to the rights that were to go into other hands, and which could not at all times be readily brought out to ascertain the services demanded from the vassals of the teinds. Besides, the proprietor and his heirs, with their tenants and cottars, being bound to answer to courts, shews plainly, that the heirs therein mentioned can be none other than the heir of line to whom the lands were to descend ; seeing he could only have tenants and cottars liable to prestations.

Pleaded for the Heir of Conquest ; The distinction betwixt heritage and conquest is of equal standing with the feudal law amongst us ; for, whether we had that law immediately from the Normans or from England, where it was introduced by them, it is highly presumable that this noted distinction came along with that law ; seeing at this day it obtains in both countries ; and, though it is mentioned in our old statutes, this does not prove that the same was not the common law *ab ante*. The law of deathbed, which is acknowledged to have arisen from custom, occurs likewise in the book of Majesty ; and therefore the determination of succession in conquest cannot be looked upon as an exception from a general rule of succession in heritage to the heir of line ; but both of them ought to be deemed different rules of succession coeval among us with the feudal law.

It is true, that our ancient statutes only mention lands and tenements, conquest and acquired ; but these words are sufficient to comprehend every heritable right : The law of deathbed says, *Nemo potest alienare terras suas* ; but yet, *de praxi*, every heritable right falls under the prohibition ; and therefore there can be no doubt, that, where lands and tenements are mentioned, teinds are comprehended, which, both by our law and stile, pass under the denomi-[5614]-nation of *separata tenementa*, the rights thereof being established and carried down in the same manner as lands by charter and sasine. Indeed, before the Reformation, they were not *in commercio*, and so could not be deemed to fall under the statute ; but thereafter, when they became commercial, of course they behoved to be comprehended under the old law.

As to the specialty arising from the particular circumstances of the case, it was answered ; The succession settled by law is not to be varied and overruled by so slight presumptions of the intention of the purchaser, where with certainty it cannot be affirmed what his intentions were, touching his succession, failing issue of his own body. By neglecting to make any substitution to these, it is presumable, he left the succession to be governed by the rules of law ; and it is of no import that the "heirs whatsoever," mentioned in the right of the teinds, were to answer to courts, &c., seeing these could be performed by the heir of conquest, if he succeeded to the teinds, as well as by the successor in the lands ; and, if both could perform the services according to the tenor of their several rights, no necessary consequence can be drawn from the reference in the disposition to the precept ; that tending to no other purpose than to ascertain the services by the heir and successors in the right to the teinds.

Replied for the Heir of Line ; It is not to the purpose that teinds are called *tenementa* or *feuda*, since these are none of the *tenementa* denoted in the statute.

Were it necessary, it could easily be shewn that teinds are in no legal sense *tenements*; as a disposition of lands, or of lands and tenements, was never supposed to comprehend teinds; and, if they do not fall under a general description of lands and tenements at this day, How is it possible to maintain it could be otherwise, when they were the peculiar property of churchmen?

As to the argument drawn from the extension of the law of deathbed, it does not apply, because that law is extremely useful to the nation; therefore, when the subjects of succession came to multiply, the Court justly extended the same; but there is no advantage by extending the succession of an heir of conquest. Besides, if the argument proves anything, it proves too much; for, according to that reasoning, tacks or bonds (secluding executors) which have been adjudged to the heir of line, ought to go to the heir of conquest; since the law of deathbed militates against conveyances of these *in lecto*.

The Lords found that the succession to the teinds devolved upon the heir of line, and not the heir of conquest. *C. Home, No. 44, p. 78.*

No. 10. [5615] Duke of HAMILTON v. Earl of SELKIRK and RUGLEN. January 8, 1740.

In the competition betwixt the Duke of Hamilton, heir of conquest of the deceased Earl of Selkirk, and the Earl of Ruglen heir of line; the Lords determined the following points, 1mo, That the heir of conquest succeeds to dispositions and adjudications of land purchased and acquired by the defunct, and which were descendible to his heirs and assignees, although he was never thereupon infeft. 2do, That the heir of conquest has right to all heritable bonds acquired by the defunct whereupon he stood infeft at the time of his decease, and were descendible to his heirs and assignees whatsoever. 3tio, That the heir of conquest has right to heritable bonds conveyed to the defunct, though he was never infeft upon the conveyances. 4to, That the right of succession to bonds secluding executors, and containing no obligation to infeft in lands, descends to the heir of line. 5to, With regard to subjects where the annualrents of heritable bonds were accumulated with the principal sums in personal bonds of corroboration, making the whole payable to the creditor's heirs secluding executors, found that the bonds of corroboration do not alter the right of succession as to the principal sums contained in the original bonds which devolved to the heir of conquest: but, that all the further sums accumulated in the bonds of corroboration descend to the heir of line. 6to, Several heritable subjects being purchased by the Earl's doers for his behoof, but taken in their own name, and the trust being acknowledged by them, found that the right to the lands and heritable bonds being in the person of Mr. Bogle and Mr. Hamilton, in trust for the use and behoof of the Earl of Selkirk, the succession devolves to the heir of conquest. *Fol. Dic. v. 1, p. 376.*

No. 4. [5620] The Laird of PHILORTH v. The HERITORS of the Parish of RATHAN, or Lord FRASER. June 28, 1666.

An action having been raised for having it declared that part of a churchyard was the property of the pursuer, it was found, that the pursuer had homologated the right of the heritors, by burying the dead of his own family in the ground disputed.

In a declarator of property pursued by the Laird of Philorth v. the Heritors of the Parish of Rathan, to hear and see it declared, that the kirkyard dyke and stile of Rathan erected therein, may be cast down upon the ground, because the foresaid kirkyard was enlarged 18 feet outward upon the ground of the lands of Rathan, whereof he had right, and was in possession by all deeds of party, and which dyke was built without his knowledge and consent in anno 1636; and thereanent, and of

re stile made therein, he entered action of declarator and demolition in the year 1637, which is of new again awakened.—To which it was answered, That the place was now *locus religiosus*, and became *sepulchrum*. 2do, That the same hath not been quarrelled by the space of 30 years; and that this being a kirkyard, must have the privilege of *decennalis et triennalis possessio*, whereby the right is prescribed in *morem ecclesiæ*. 3tio, That Philorth had homologated the destination of the ground, in so far as he had built a part of the dyke himself, and others at his direction; and that he caused inter his tenants there, and had been present thereat; and last of all, craved a cognition.—The Lords sustained the declarator, and refused, in the first place, to grant a cognition, the same being once competent, where both parties pretend to the property, which was not in this case; and found, that the right of the kirkyard could not prescribe by 10 or 13 years' possession; and found, That Philorth had homologated the designation, in so [5621] far as he caused or consented to the burying of his own dead, and had consented and given warrant for the burying of his tenants; and repelled the homologation founded upon the bigging of the dike, but in so far as he had built, and no more, or given warrant therefor; and without prejudice to him to quarrel the putting up of arms on the kirk style.

Fol. Dic. v. 1, p. 377. Newbyth, MS. p. 66.

No. 35. [5652] DAVIDSON v. DAVIDSON and WEIR. July 13, 1714.

An eldest son subscribed witness to his sister's contract of marriage, in which she assigned to her husband a bond of provision granted by her father, and execution was appointed to pass at the brother's instance for implement of clauses in the contract made in her favour. Found that he had thereby so far homologated the bond of provision as to prevent him from reducing it *ex capite lecti*.

The deceased George Davidson, brewer in Leith, having granted an heritable bond to his three younger children for 9000 merks, George Davidson, the eldest son and heir, raised reduction of this bond *ex capite lecti* against his sister Elizabeth and her husband, whose share thereof was 3000 merks.

Answered for the defenders; That the pursuers had homologated the bond, in so far as he is a subscribing witness to his sister's contract of marriage with John Weir, wherein the said bond is specially assigned *nomine dotis*, and the person at whose instance execution is provided to pass for implement of the clauses in that contract.

Replied for the pursuer; 1mo, Homologation ought not to be sustained where it is ascribable to another cause, particularly 1st February 1676, Veitch *contra* [5653] Pallat, No. 28, p. 5646, it was found that subscribing witness to a writ did not infer a consent to the contents thereof, and *multo minus* can it imply a consent to the validity of the right conveyed or assigned; especially where the writ assigned may be valid as to one effect and not as to another, as in the present case, the bond assigned, though ineffectual as to the heritage, is effectual as to the moveables. For, though the bond be heritably conceived, yet when it is reduced upon the head of deathbed, it is no more heritable; but still the creditor, by virtue of the personal obligation, can affect the moveables; so that the pursuer's subscribing the contract may import his consent to the standing thereof, and its being a probative evident, but that can never be drawn to imply a ratification of all the deeds conveyed, and a consent to their being effectual farther than by law and their own nature they would otherwise have been; especially considering, that he never saw the bond before his signing the contract nor for some time after, nor yet did he know how it was conceived; and he as little knew what was assigned by his sister in the contract, never having read or heard it read at any time before signing witness thereto. 2do, As to the other circumstance of the execution's being appointed in the contract to pass at the heir's instance, that was only done *moris causa*, without any particular consent or order, for his sister's security. And still there would have been such a clause of execution for implement of the provisions to the wife, suppose no tocher had been stipulated.

Duplied for the defenders ; 1mo, There is a very great difference betwixt an indifferent person's being called to supply the form of law, and a brother-german's subscribing-witness to his sister's contract of marriage, who had none other to patronise her, and at whose instance execution is expressly provided, which cannot be presumed to have been adjected without his knowledge ; so that really this case is in very different circumstances from that of Veitch and Kerr *contra* Pallat, or the inferring homologation from the subscription of a witness adhibited only *pro forma*. Had the bride stipulated in general to pay a certain sum to her husband in name of portion, the pursuer might have been witness to the contract, and yet no homologation of the portion ; but where there is a special bond assigned, wherein the pursuer is debtor as heir to the granter, and upon the view of the assignment, the husband tied to terms, and where the pursuer is to be the executor against the husband, is it imaginable that he has not approved of the cause, without which that contract and execution could not subsist ? For there might be a defence competent upon *causa data non secuta*.

The Lords found the pursuer's subscribing the contract as witness, and that execution is therein provided to pass at his instance, with his knowledge of the assignation made by his sister, sufficient to infer homologation.

Fol. Dic. v. 1, p. 379. Forbes, MS. p. 83.

No. 37. [5654] BENJAMIN ALLAN *v.* HAMILTON of Little Earnock. July 20, 1715.

The procurator for a minor granted a discharge to which the minor himself subscribed as witness. Found that the minor did not thereby consent to the discharge.

Benjamin Allan having right by progress to 500 merks, as a part of 1000 merks contained in a bond granted by the deceased Little Earnock to Alexander Orr, and his tutors and curators, in his name and for his behoof, pursues the present Little Earnock upon the passive titles ; who at calling produced a discharge granted by James Henderson, stepfather to Orr, granting the receipt of 500 merks, with £20 as a year's annualrent in part payment of a greater sum borrowed by Little Earnock from him, conform to the bond, and discharges him *pro tanto*, to which discharge Orr is a subscribing witness. And this [5655] discharge the defender alleged did cut off the said bond (the other half thereof having been paid to William Douglas, vintner, who had right thereto by progress). And that

Because, 1mo, The bond bearing the money to have been received from the relict (Orr's mother) and her second husband Henderson, in name of her son, and being payable to him, his heirs, &c., and his tutors and curators in his name ; the payment was lawfully made to Henderson as tutor or pro-tutor to him, because *bona fide* payment is still by law sustained to dissolve an obligation, and here was *fides uberrima*, for the money was borrowed from Orr's mother and her husband, for her son's behoof while he was minor, and while she and her husband acted for him as curators ; 2do, Because Orr by signing witness to the discharge did homologate the same ; for certainly, where a witness is principally concerned in the subject matter of a writ, his knowledge of its contents is presumed ; as was found in June 1663, Stewart *contra* Stewart, No. 51, p. 5674, where the Lords found, "That an apparent heir's witnessing to a writ on deathbed, was equivalent to a consent, in regard he was in law presumed to have known, or ought to have known the nature of the right, because of his obvious concern in the subject matter ; which the Lords found made a great difference betwixt him subscribing as witness, and a stranger not interested." As also in anno 1710, in the case betwixt Home of Whitefield and the Laird of Castlestewart,* the Lords found "That the Viscount of Kenmure's subscription as witness to Castlestewart's fitted accompt with his father, did so homologate the said accompt, that the Viscount could not afterwards impugn the same, but that it stood probative against him, because of his subscribing witness thereto, and obvious concern in the subject matter.

* Examine General List of Names.

Replied for the pursuer ; lmo, That by comparing the conception of the bond itself with the discharge, it clearly appears that they do not meet ; because James Henderson is neither the person to whom the bond is made payable, neither is he tutor or curator to Orr ; and though he were, yet the minor must discharge, and the curator only consents. 2do, Nor will the signing witness help the matter, since witnesses may sign papers without knowing the contents, nor are they guilty of any fault in so doing. And that consent is not inferred by one's signing witness to a writ, is evident by the decisions, Veitch *contra* Ker and Pallat, No. 28, p. 5646 ; Gordon *contra* Menzies, No. 26, p. 5646.

The Lords repelled the defences, unless the defender would allege, that the money was applied to the minor's behoof.

Act. JA. HAMILTON OLIVESTOP.—Alt. SIR JAMES NASMITH.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 378. *Bruce*, v. 1, No. 122, p. 158.

No. 39. [5657] CHRISTIAN JOHNSTON, Relict of WILLIAM BERRY, junior, Merchant in Glasgow v. WILLIAM BERRY, elder, Merchant there. July 7, 1725.

Found, that a father's subscription to his son's contract of marriage, implied his knowledge of the contents, and of consequence his consent to a provision in favour of the wife, of a certain subject belonging to himself, and which the son could not grant without his concurrence.

A father having disposed to his son the fee of a tenement of land, reserving his own liferent, the son afterwards, in his contract of marriage, did provide his wife to an yearly annuity out of the subject disposed ; and to this contract the father was a subscribing witness : Upon the son's death, his widow insisted in an action of mails and duties, for payment of the provision in the contract, in which she was opposed by the father, who alleged, that, during his lifetime, the provision could not take place, because of the reserved liferent in his disposition to his son.

It was answered for the pursuer, That the father having subscribed his son's contract of marriage as a witness, he thereby past from his own right of liferent, as having tacitly consented.

Replied for the father, That his signing witness to the contract was no more than witnessing the subscription of parties, but did not import his knowledge of the contents of the writ, far less his consent to them.

Duplied for the pursuer, That though this might obtain in the case of a stranger's subscribing witness, yet, in the present case, the defender could not be supposed ignorant of the contents of so solemn a contract entered into by so near a relation.

The Lords found the father's knowledge of the clauses of the contract presumed, therefore found his subscribing as witness to the said contract did import his consent.

N.B. There was a decision, Stewart *contra* Stewart, 25th June 1663, No. 51, p. 5674, cited for the pursuer ; and one for the defender, 1st February 1676, Veitch *contra* Ker, No. 28, p. 5646.

Reporter, LORD GRANGE.—Act. ARCH. MURRAY.—Alt. JO. CRAWFORD.—Clerk, JUSTICE.

Fol. Dic. v. 1, p. 379. *Edgar*, p. 185.

No. 40. TELFER v. HAMILTON of Grange. January 21, 1735.

A submission entered into by a wife, with regard to her heritage, null upon the act 1681, there being but one witness to her subscription, was found homologated by her husband's appearing and pleading in her behalf before the arbiters ; for the husband being administrator for his wife, his consent implies her consent. See APPENDIX.

Fol. Dic. v. 1, p. 383.

No. 47. [5669] WILLIAM STEEL v. THOMAS and DAVID STEELS. January 13, 1774.

Where there is one deed for one sum, in favour of more persons, *ex eadem causa*, payment made in part, though not to every one of them, infers homologation of the whole.

Thomas Steel of Netherhouse, the father of these parties, by a deed, executed the 29th June 1764, for the love and favour he bore to James, Thomas, and David Steels, his children, did, with the special advice and consent of William Steel, his eldest lawfull son; and the said William Steel for himself, and they both, bound them, their heirs, &c., jointly and severally, to make payment to the said James, Thomas, and David Steels, equally between them, of the sum of 6000 merks, Scots money, at the first term of Whitsunday or Martinmas after the decease of the said Thomas Steel, with penalty and annualrent, &c.; which sum of 6000 merks is thereby declared to be over and above the executry that will fall to them through the death of the said Thomas Steel; as also, they bound themselves to make payment of an annuity of £30 Scots money, to Anne Weir, spouse to the said Thomas Steel, while she should remain a widow, after his decease, besides the provisions in her favour by the contract of marriage.

William Steel, the eldest son, within the *quadriennium utile*, instituted a reduction against his two surviving brothers, Thomas and David, James being by this time dead, to have the said bond set aside, as having been elicited from his father while on deathbed, and *quoad* him, only signed by one notary, before two witnesses, and from the pursuer himself, while he was under age, to his enorm hurt and lesion; especially considering the smallness of the land estate he derived from his father, attended with so many burdens, and that his younger brothers were *aliunde* provided to the whole of the father's executry, which was considerable.

Objected for the defenders; That the bond under challenge had been homologated by the pursuer after his majority, by payment of the additional annuity to his mother, and of the annualrents of the sums provided to the younger children, and that, on that account, he was barred from setting aside the bond. And the Lord Ordinary, "upon considering the debate, and the receipts of payment produced, whereby it appears that William Steel, pursuer, made sundry payments to and for the defenders, after his majority, repelled the reasons of reduction, and assailed the defenders."

Pleaded in a reclaiming bill, upon the point of homologation; As the bond is intrinsically null and void, acts of homologation are not sufficient to support [5670] it. In so far as the pursuer made payments after his majority, the defenders may be entitled to avail themselves of these payments, so as not to be liable in repetition; but, because a man made payments voluntarily of part of a sum constituted by a null obligation, and to perform which he could not be compelled, there seems to be no good reason why the payment of a part should bind him in payment of the whole, if thereafter he should find it an expedient measure to stop short; and, agreeably thereto, it seems to have been determined, June 1726, Katharine Harvey v. Gordon, No. 93, p. 5712; *vide* also, 30th June 1758, Ferguson v. M'Pherson, *voce* WRIT.

The plea of homologation is, at the best, but an unfavourable plea, as the tendency of it is indirectly to subject a person to a debt or obligation, by a presumed consent, to which otherwise the person was not liable; For that reason it is, that homologation is never presumed, when the act or deed from which it is inferred, can be attributed to another cause. And, for the same reason, it is not to be extended farther than the implied consent arising from the act or deed of homologation must necessarily carry it. In the present case, by the conception of the bond in question, James, Thomas, and David Steels, upon the death of their father, were each of them creditor for one third of that sum; and the one had no more connection with the other, than if a separate obligation had been taken, payable to each of them, for the sum of 2000 merks.

In this view, it is very clear, that any act inferring an approbation or homologation of the obligation conceived in favour of any one of the brothers, could never be understood as an approbation of the separate obligation which he had granted to the other two brothers. Where an undoubted good objection did lie against all and each of the obligations he came under, it was *res meræ voluntatis* in him, either to lay hold of the objection, or to depart from it. His pleading the objection against any one of

his brothers, laid him under no obligation or necessity to plead it against the other two ; and, by the same rule, his voluntarily fulfilling his obligation in favour of any one of his brothers, does by no means necessarily import an approbation of it as to the other two brothers.

This would clearly be the case, if three separate obligations had been granted to his three brothers ; and it does not occur how it can make any difference, when, though in one deed, the right of each brother is separately and distinctly ascertained. A document taken by any one of the brothers for his share of the debt, would not save the interest of the other two from prescription ; nor would a payment made by the pursuer to one of the brothers, be held as a document of interruption, *quoad* the interest of the other two ; and, if so, the pursuer can discover no principle upon which it can be maintained, that the pursuer's waving the objection that lay against the bond, as to one of his brothers, and so far conferring a favour upon him, should import a waiver of his objections against the bond, as to the other two creditors.

[5671] In fine, the payments which the pursuer made voluntarily, and which he was not obliged to make, cannot lay him under an obligation to make any further payments to any of his brothers. But, at any rate, this is perfectly clear, that the payments which the pursuer made on account of two of his brothers, Thomas and David, whatever effect these payments may have as to the supporting their right and interest in the bond, can never tie him down to depart from the objection he had against it, *quoad* the share of his deceased brother James, whose right he did not acknowledge by payment, or by any act or deed after majority.

Answered ; The defender's homologation of his father's settlement, to which he was himself a party, after he became of age, by making payment to his brothers, or their mother upon their account (she having been appointed one of their tutors) must effectually bar him from bringing any challenge of it now, and must render it equally valid as if he had been of perfect age when it was executed.

The pursuer, indeed, contends, that the deed under challenge is intrinsically null and void ; and, therefore, cannot be supported by any acts of homologation, and appeals to two decisions : But neither of these decisions are in the least applicable to the present case. The deed to which Katharine Harvey was made a party was absolutely null and void, *quoad* her, in respect she was under pupillarity at the time, and was, of course, incapable of acting for herself in any shape : And, in the case of Ferguson, the indenture was likewise null and void ; or, at least, could only be sustained as an obligation to the extent of £100 Scots, in respect it was only subscribed by one notary ; but the bond of provision now in question, was by no means null, either *quoad* the pursuer or his father. If the pursuer had not concurred in granting it, he might, perhaps, have challenged it upon the head of deathbed ; but that ground of challenge was entirely cut off, by his signing it himself ; and, though it might have been competent to him to have set aside his concurrence upon the head of minority and lesion, if he had not ratified it after his majority ; yet still it was not on that account null and void ; because he, at that time, was equally capable to grant a deed of that sort, as if he had been of full age.

2do, The deed in question does not contain separate obligations in favour of each of the younger children, but one obligation, to the amount of 6000 merks, in favour of them all ; so that payment to one must be considered as an acknowledgment or homologation of the deed *quoad* the whole. And so it was expressly found, *Erskine v. Erskine*, No. 87, p. 5703, which is thus marked in the Dictionary : " One upon deathbed having executed a bond of provision, in favour of his younger children, payment made by the heir to some of the children, found a homologation as to the rest." That a document taken by any one of the brothers for his share of the debt, would not save the interest of the other two from prescription, is nothing to the purpose. One of three creditors, in an obligation, may neglect to demand what is due to him ; and as, [5672] in that case, he is supposed to have relinquished his claim, he can no longer insist in it, although the other two have taken care to preserve their claims ; but where, by one obligation, an individual becomes debtor to three or more creditors, his making payment to one of them, must infer an homologation of the deed *quoad* the whole ; because, by so doing, he acknowledges it to be a just deed, and departs from any objection that might lie against it in point of form.

3tio, Although the pursuer does now acknowledge his having made payments after his majority to the two defenders, and only disputes his having made payments

after that time, to his brother James ; and, therefore, insists that he cannot be liable in payment of what is still due to James, his mode of conducting the cause before the Lord Ordinary was very different. His plea was then directed against the shares of the two defenders ; and he accordingly admitted, that he had made payments, after his majority, to his brother James. That he cannot now be allowed to retract. But it is the less necessary to insist upon this point, since the payments made to their mother, on her own and the defender's account, must be considered as a homologation of the bond *in toto* ; and must, therefore, equally bar the pursuer from bringing it under challenge, so far as concerns the interest of his brother James.

"The Court adhered to the Lord Ordinary's interlocutor."

Act. R. MACQUEEN.—Alt. WIGHT.—Clerk, TAIT.

Fol. Dic. v. 3, p. 272. Fac. Col. No. 99, p. 253.

No. 48.

RIG v. DURWARD and THOM. December 17, 1776.

Lease of lands *ubi dolus dat causam*, homologated by payment of rent.

Rig, who was under contract to furnish stones for paving the streets of London, took a lease from Durward of a piece of ground which the latter assured him contained stones of the best quality, and of which the lease had been eagerly requested by many people on that account. Rig held the possession for three years and paid the rent, but after laying out above £50 in experiments, found the stones were good for nothing. Durward becoming bankrupt, and having disposed this lease with his other effects to his creditors, Rig brought a reduction of the same on the head of fraud. The defence was, homologation, by continued payment. The Lords repelled the reasons of reduction. See APPENDIX.

Fol. Dic. v. 3, p. 272.

No. 55. [5677] JAMES DALLAS of St. Martin's v. WILLIAM PAUL. January 13, 1704.

Found that the apparent heir signing as a witness, ought not to import a consent, whether he knew the contents of the writ or not. The Lords resolved to observe this as a rule in future ; and declared, that the former decisions were in circumstance cases and made no general rule.

Mr. James Dallas of St. Martin's being creditor to Alexander Paul, merchant in Elgin, and the said Alexander's father having disposed some acres and tenements in favour of William Paul, his second son, St. Martin's having adjudged the apparent heir's right of succession, pursues a reduction of that disposition *ex capite lecti*, and it being so taken out of the way, the right accresces to the eld-[5678]-est son, his debtor. Alleged for William Paul, receiver of the disposition, That *esto* it were on deathbed, you cannot quarrel, because you have no right but as come in place of the apparent heir ; but so it is, he will never be heard to impugn or reduce it, because he has consented thereto by signing witness, which homologates his father's deed, as was found, Stewart of Ascog *contra* Stewart of Arnholm, No. 51, p. 5674, Stair ; and Haliburton *contra* Haliburton, No. 52, p. 5675, where an apparent heir's subscribing as witness to his predecessor's deed on deathbed was found to import a consent. Answered for St. Martin's, He not only insisted on the head of deathbed, but likewise that this disposition being signed by two notaries, because of his sickness, it does not bear that he touched the pen, as our acts of parliament expressly require, viz. act 29, 1555, and act 5, 1681, and so his subscription is null. Replied, That the first act speaks only of reversions ; and though the second act relates to all writs, yet it does not require that the notary's attestation should expressly bear the same ; for it requires the witnesses not to subscribe, under the pain of forgery, unless they either hear or see the party give a mandate or command to the notaries to subscribe for him, and it

evidence thereof he touch the pen ; so that the expressing that they subscribe *ex mandato* comprehends all ; and law presumes all to be legally and solemnly done in that case, unless the quarreller offer to prove the pen was not offered nor touched : and though sundry attestations bear both *ex mandato, et calamum tangens*, yet that is only *exuberantia styli, et omnia præsumuntur solenniter acta*, and included in the general mandate ; and as many want it ; and to find it a nullity might be of dangerous consequence, and cast all those who want it, which preparative ought to be prevented. Duplied, The last act is most express, and ought not to be dispensed with ; and a general expression ought not to supply defects of solemnities ; even as the Lords have found, where a messenger's execution says he has lawfully denounced and inhibited, and it was urged this included the three oyesses and blast of the horn, yet they found this omission did not supply the nullity, and the word legally did not include them, yea, that the oyesses did not import three oyesses, seeing the plural *duorum numero contentus est*, though it wanted only the letter *r* to make it three ; so nice are the Lords on these formalities. And as to the hearing the mandate given, there might be much fraud and knavery, if that were found sufficient ; for one might speak out of the bed where the curtains are drawn, and personate the testator, as Julius Clarus tells us was actually done in Milan by a wife (when her husband was dead), putting another in the bed to speak like him, *ad tit. de testamentis, quæst. 59*. And some could be named for using the same tricks in Scotland. So nothing can ascertain the witnesses' knowledge so much as to see the party giving the mandate likewise touch the pen, and thereby move his hand as an evidence that he is yet alive. The Lords would not find the notary's not adjecting of these words, "that he touched the pen," a nullity of the disposition, but found it included in these words, *ex mandato*, unless the party-reducer would offer to prove by the witnesses present and in-[5679]-sert, that the pen was not offered him ; otherwise it was to be presumed. Then the Lords fell on the second point, How far the apparent heir's subscribing as a witness can be construed to be a consent, and it was thought to be impossible to make a general rule to meet all cases ; for as to the decisions cited, one of them seemed to go on this ground, that the right he signed witness to was read to him, and so he could not be ignorant of its contents ; and the other gives this reason, that the heir knowing his predecessor's condition to be probably *in lecto*, he should have considered if it was prejudicial to him, and if it was to keep up his hands ; and if he did it not, *sibi imputet*. On the other hand, an apparent heir, for fear of displeasing, may subscribe, thinking it will not cut him off, and to shun his father's resentment for his refusal, in case his father happen to recover of that sickness. The Lords thought the determination of the import of such a subscription of consequence to the lieges ; and therefore ordained it to be heard in their own presence. See Stair, lib. 1, tit. 10, § 11, who tells, that there may be sundry cases, wherein subscribing as witness will not import consent ; but this depends on the pregnancy of their knowing the contents and other circumstances, as if the party be a purchaser for onerous causes, and the heir signing as witness would quarrel it, I think he would be excluded *personali exceptione de dolo malo* ; but in general, his subscribing as witness cannot validate the disposer's power over the subject disposed, and legitimate that where the law has declared him incapable, as it does in the case of disposing heritage on deathbed, especially where the deed is gratuitous, and that the reducer is a creditor of the defunct's, and not only of the apparent heir. To this head belongs that rule both in the civil and canon law. *Qui tacet consentire videtur*, l. 142, *D. de reg. jur. ibique commentar.* And on the canon law, *Dynus Decius aliquæ, ad l. 43 et 44, de regulis juris*, in § 6. *Decretalium*, who lay down this ground, That taciturnity imports consent in him, *qui contradicendo poterat actum impedire*, and without whose consent it could not be validly done.

This point being fully heard on the 19th of January 1704, the Lords found the apparent heir's signing as witness ought not to import a consent, whether he knew the contents of the writ he subscribed as witness or not, and resolved to follow this as a fixed rule in time coming ; and found the former decisions were in special circumstance cases, and made no general rule. See WRIT.

No. 67. [5688] HELEN HUME v. LD. JUSTICE CLERK. June 28, 1671.

A person having granted a bond of provision to his daughters on deathbed, payment of annualrents by the heir, being presumed to be done *ex pietate*, was found not to homologate the bond.

Umquhile — Hume of Renton having made several provisions to his children, and amongst the rest to Helen Hume, and having recommended the same to his son, now Justice Clerk; he gave a bond to the said Helen of 2000 merks, payable upon requisition of 40 days. The said Helen pursued registration of the bond, wherein it being alleged that any requisition made was past from, by acceptance of annualrent for terms after,

The Lords assoilzied from that charge until requisition were made, and new requisition being made since, before the extracting the absolvitor, the Lords sustained the same. It was further alleged absolvitor, because the bond granted by the father was done on deathbed, and the bond granted by the defender his son was in his minority, and he had reduction depending upon the said two reasons. The pursuer replied, That the defender had homologated the bond in question by a posterior contract, whereby he had appointed a yearly payment to his mother, in satisfaction of this and the other portions. The defender duplied, That that contract was no homologation, being subscribed by him when he was minor, having curators, without their consent, and so is null by exception. The pursuer triplied, That the defender had homologated the said contract and bond in question by these deeds. First, That after majority he had paid annualrent. 2dly, That he had pursued exhibition and registration of the said contract, and thereupon had obtained the same registered, and the decret decerns letters to be directed at his instance thereupon. It was answered, That the payment of the annualrent, albeit voluntary, though it may exclude repetition of itself, it cannot infer homologation of the whole bond, especially the payment being made by a brother to an indigent sister. 3dly, Payment of annualrent cannot homologate a contract which is null by exception. 4thly, Any payment that was made was after the decret of registration, and so necessary; and as to the exhibition, the pursuing for a delivery of a writ doth not import the approbation of the contents of it, but only a calling for it, because the writ belongs to the subscriber thereof, though he may quarrel the obligation therein contained; and albeit the writ was ordained to be registered, yet there was neither charge nor execution used thereupon.

The Lords found the payment of the annualrent in manner foresaid not to import homologation, but they found that a writ subscribed by a minor without consent of his curators, as it might be ratified, so it might be homologated, and that it was *de facto* homologated by this decret of registration, containing neither reservation nor protestation for quarrelling the writ registered. It was further alleged, That the new requisition was null, bearing to proceed on a procuratory, and not bearing the procuratory produced. It was answered, The procuratory was not called for, and that the having of the writs, which the [5689] requisition mentioned, did import a power to require. 2dly, This is a dilator after a peremptor.

The Lords found the allegiance upon the nullity of the requisition receivable after the peremptor, and sustained the requisition, the pursuer producing the procuratory, which was the warrant thereof, before extract. See REDEMPTION.

Fol. Dic. v. 1, p. 381. Stair, v. 1, p. 741.

No. 68. MARJORY MURRAY v. ISOBEL MURRAY. July 12, 1671.

A person in his testament appointed his wife executrix, and left a legacy to his daughter. The widow confirmed the testament under protestation, that it should not pre-judge her own right. This was found to take off the allegiance of homologation, and so the legacy was found a burden upon the dead's part only.

Umquhile — Murray having infett Isobel Murray his wife in two tenements, did thereafter by his testament, leave a legacy—of £1000 to their daughter Marjory

Murray, and gave other provisions to the said Isobel his wife, and provided his daughter to the two tenements, which testament the wife subscribes, and after his death confirms the same; but under protestation, that her confirmation should not prejudice her own right. The daughter pursues for the legacy of £1000, and for the rents of the tenements, and alleges that the £1000 must be free to her, without being abated by implement of the mother's contract, and likewise the two tenements by her mother's consent and subscription. It was answered, That the mother's subscription was a donation betwixt man and wife, for being to the man's daughter, whom by the law of nature he is obliged to provide, it was all one as if it had been to himself. 2dly, Her subscription was obtained *in luctu*, her husband being near his death, and at his desire, *ex reverentia maritali*, and the confirmation can be no homologation, because of the protestation foreshaid. It was answered, That it was *protestatio contraria facto*; and the wife had no necessity to do it, for she might have confirmed herself executrix creditrix.

The Lords found that there was here no donation between man and wife; but in respect the parties had not debated the effect of *reverentia maritalis*, ordained them to be heard thereupon, and found the protestation sufficient to take off the ratification, or homologation by the confirmation, and found the legacy of £1000 to be left only according to the nature of a legacy, out of the defunct's free goods, and would not exclude the relict, or any creditor. See LEGACY.

Fol. Dic. v. 1, p. 383. Stair, v. 1, p. 755.

* * * Gosford reports the same case :

Marjory Murray having pursued her mother for entering her to the possession of a tenement of land whereof her mother was liferentrix, and for payment of £1000, conform to her father's testament testamentar, subscribed by the mother, it was alleged, That the said subscribed testament was not [5690] obligatory; likeas there was a reduction raised upon these reasons, 1mo, That it was subscribed in *marore et luctu*, she being induced by her husband who was then a-dying; 2do, It was *donatio inter virum et uxorem*, and so revocable; 3tio, the £1000 left in testament was but a legacy, which could not be paid, the debts being greater than the moveables. It was answered to the first, That no deeds granted *in luctu et ob reverentiam maritalem*, were reducible by our law, which being a general case, the Lords reserved to be debated *in præsenti*. To the second, It was answered, That the subscribing of the testament, bearing the disposition of a liferenter's right of a tenement of land was in favours of the daughter, and not of the husband, and so was not *donatio inter virum et uxorem*. To the third it was answered, That the £1000 being for the provision of a bairn, the mother having both subscribed to the same, and confirmed the testament, did make herself liable, and could not exhaust the inventory by an debts due to herself by contract of marriage. The Lords did find, that the mother subscribing as to her liferent right in favours of her own daughter, albeit in her husband's testament, it was not *donatio inter virum et uxorem*, and could not be revoked; but for the £1000 left by the father, they found that it was a legacy, and that the mother having consented to it, did not prejudice her as a lawful creditor by her contract of marriage, and that it could only be due *deductis debitis*. *Gosford, MS. No. 375, p. 184.*

No. 77. [5696] MARGARET M'GILL v. RUTHVEN of Gairn. November 22, 1664.

In a reduction of a contract of marriage, it was not sustained as homologation, that the pursuer uplifted the rents of her jointure lands, because she did not complain of what she got, but what she gave.

Margaret M'Gill pursues a reduction of her first contract of marriage with umquhile Patrick Ruthven, younger of Gairn, upon two reasons, 1st, because it was *post nuptias*, and so *donatio inter virum et uxorem stante matrimonio revocabilis*; 2dly, Because she was minor, and enormly lesed, in so far as she disposed to her husband,

and the heirs of the marriage, which failing, to his heirs, £8000 of money and above and the half of some tenements in Edinburgh worth £1100 yearly; in lieu whereof her liferent was only of eight or ten chalders of victual, and of her own tenements; but she did not retain to herself the liferent of the money, or any part of the stock whereby she is lesed, in that, if the heirs of the marriage fail, the money and the lands go to the heirs of the husband, and return not to hers; and that her provision being worth £20,000, she ought at least to have had the double of the annualrent thereof in jointure. The defender answered to the 1st reason, That it was no ways relevant, seeing this was expressly a contract of marriage, although after the marriage, there being no contract before, it is alike as if it had been before the marriage; and, to the 2d reason, it is not relevant, unless it were enorm lesion; for there being no portion or rule in tochers and jointures, but that some get a jointure equivalent to the annualrent of their tocher, some half as much more, some double, and it being ordinary that tochers are provided to the heirs of the marriage, which failing, to the man's heirs, here was no enorm lesion, or any thing extraordinary, although there were an equality; the pursuer being a burgess' daughter, and her husband a gentleman of an ancient family, quality [5697] should be compensated with means. 3dly, The pursuer, since she was major, had homologated the contract, by setting her jointure lands, and lifting the rent thereof.

The Lords having, before answer, heard probation of the provision, and of the jointure, and having at length considered the whole cause, they first repelled the defence of homologation, because the pursuer was not quarrelling what she got, but what she gave, and therefore requiring rectification to have more: They also sustained not the first reason of reduction, and found the contract not to be a donation between man and wife; and they found the second reason of reduction relevant, in so far as extended to an enorm lesion beyond the latitude of contracts of marriage amongst such persons, and therefore found it not relevant to reduce the fee of the wife's provision, but found it relevant to add to her a further conjunct-fee, and therefore rectified the contract in so far as she had assigned her sums of money, without reserving her own liferent thereof; and found, that seeing the fee returned not to her, she should have the liferent of her own portion, and her provision out of her husband's estate, which is eight or ten chalders of victual further. See HUSBAND and WIFE.—MINOR.

Fol. Dic. v. 1, p. 382. Stair, v. 1, p. 237.

No. 87. [5703] *ERSKINE v. ERSKINE* of Balgownie. January 1682.

A person on deathbed executed a bond of provision in favour of his younger children. Payment made by the heir to some of the children, found a homologation as to the rest.

Sir John Erskine of Balgownie having granted a bond of provision to his wife's children, whereby every one of them was provided to 2000 merks, and [5704] that such of the children as should die, their portions should accresce to the survivors; George Erskine, one of the children, pursues his brother Sir John for payment of his own portion, contained in the bond of provision, and for that part of his brother James's portion that was resting the time of his decease.—Alleged for the defender, That the bond being granted by his father upon deathbed, it could not oblige him who was his heir; and upon that ground he had raised a reduction of the bond, which he now repeated.—Answered, That the pursuer could not reduce the bond as being granted upon death-bed; because as to James's portion, he had homologated the same, in so far as he had paid a part of the sum, which the Lords have already sustained as a sufficient homologation to make the pursuer liable for the remainder; as also, that he had homologated the bond as to the whole provisions, in so far as he had paid several of the children their provisions, conform to the bond, and had taken their discharges; and by payment of any of the children's provisions, he did thereby acknowledge and homologate the whole bond, and it must be effectual not only in favour of the children to whom he paid a part of their provisions, but also to the

other children, all their provisions being contained in one bond ; and his approving and homologating of it as to a part, must be reputed a homologation as to the whole, *nam nemo potest approbare et reprobare* one and the same writ ; and if the bond be effectual as to a part, it must be effectual as to the whole. As also the defender, by a missive letter after his majority, writes to the pursuer that the account might be stated betwixt them what he was due ; for the pursuer being major, it was fit accounts should be cleared, that what was owing might be paid, by which he clearly acknowledges the debt.—Replied, That the pursuer's paying any of the children is no homologation of the bond as to the rest of the children ; for what he did to some of the children upon the account of personal affection, or upon some other consideration, cannot oblige him to pay the other children their portions ; for if the bond had been null, as wanting writer's name, and witnesses, and date, or other intrinsic nullities, if the pursuer had paid any one of the children their portions, contained in such a bond, which did not at all oblige him, he could not have repeated it ; or however, if he had paid a part of the portion, that might import an homologation as to the remainder of the sum, yet that will not oblige him to pay the other children their portions ; for albeit the portions be contained all in one bond, yet they are *jura penitus desperata*, whereof the homologation of one cannot be understood to be an homologation of the other, albeit in the same writ, as was found in the case of a decreet arbitral, Pringle v. Duie, No. 85, p. 5702 where the homologation of a decreet arbitral *quoad* one of many articles of different natures, was found not sufficient for the whole ; and a discharge is properly no homologation, because the design of a discharge is not *contrahere sed distrahere obligationem*, for every understanding man will take a discharge of an obligation, albeit it were never so small or invalid, of purpose to free himself of any trouble, and has been frequently so decided, and particularly Sir [5705] George M'Kenzie v. Mr. John Fairholm, No. 23, p. 5639 ; and Farquhar v. Gordon, No. 65, p. 5685, where a minor, pursued for relief of a sum after he was major, was found not to infer homologation by taking a discharge *quia distrahebat non contrahebat obligationem* ; and homologation being only but presumption of a party's intention to approve a deed, it cannot be understood approbation and acknowledgment of the deed so as to oblige the party, if it can be ascribed to any other cause ; and the reason why the defender paid some other of the children their portions, albeit he was not obliged, was, because not only they were provided to 2000 merks of portion by the bond of provision, but also the father had disposed to them a part of the price that should be gotten for the wood of Ballquhery for augmenting of their portions, and upon the consideration that the children to whom he paid the portions did quit any interest they could pretend to any part of the price of the wood of Ballquhery, conform to a particular agreement betwixt them, the pursuer and his curators have paid them their portions contained in the bond, and the pursuer is content to pay the defender his portion on the same terms ; and no respect ought to be had to the letter, because it does not relate to the bond of provision, but only desires that accounts may be cleared betwixt them ; and there were other things betwixt them than the matter of their portion ; for the pursuer had given out some thing to writers upon the defender's account, and buying some necessities to him ; so that the letter may be understood on these accounts ; and albeit it were to be understood to relate to the bond of provision, yet that can only be in the same terms that he paid the other children their provisions according to the agreement, which was to pay the portion contained in the bond of provision, he discharging the defender of any interest he could pretend to the price of the wood of Ballquhery ; and the defender offers to prove by the cautioners, and other persons present at these treatings and communings, that the defender would never condescend to pay the pursuer his portion on any other terms ; and when the defender wrote the foressaid letter, he sent him an order to receive some money in part of what was due to him from the merchant to whom he sold the victual, as appears by the letter ; and in respect the order did bear, that the merchant should take a discharge from the pursuer in the terms of the foressaid agreement, as he had paid the other children, which the pursuer would not accept of, but sent it back ; which evinces that the defender did not design to pay the portion and homologate the bond on any other terms.—The Lords sustained the deeds of homologation, in so far as the pursuer, by the death of his brother, had right to these portions the time of the homologation ; and ordained the pursuer to be further heard if the homologation was sufficient to make the bond subsist in him.

January, 1686.—In the action mentioned in January 1682, at the instance of George Erskine v. Erskine of Balgonie, his brother, it being further alleged, That the provisions being to several children, albeit in one [5706] bond must be looked upon to be in the same case as if there had been distinct bonds, so that the payment made to one of the children cannot be understood to be a deed of homologation in favour of the rest, and the missive letter written by the defender to the pursuer cannot import an homologation, seeing it has no relation to this bond, but in the general desires, that the pursuer would clear counts after his majority; and at several communings the defender did always declare, that he would pay no more to the pursuer but his own proportion of the bond of provision, which was 200 merks; and the taking of a discharge from any of the children of their provision contained in that bond, can import no homologation as to the rest, because by the taking of a discharge there was only *animus distrahendi et non contrahendi obligationem*; and it being free for the defender either to pay or not as he thought fit, the paying of one of the children their portions contained in the bond of provision, will not make him liable for the rest, as in the case of a decreet arbitral containing several heads, an act of homologation of a part of the decreet arbitral will not import an homologation of the rest, if they be distinct heads, as was decided, Primrose v. Duie, No. 85, p. 5702; and acts of homologation which are but simple presumptions of law, are not to be inferred but by such deeds as can admit of no other construction, as is clear by several decisions; and, particularly, Sir George M'Kenzie v. John Fairholm, No. 23, p. 5630, where in a reduction of a bond upon minority, granted by Sir George M'Kenzie, as cautioner for his father, it being alleged he could not reduce the bond, having homologated the same by accepting of a discharge of the annualrent after his majority, the Lords found that the discharge imported no homologation unless it were instructed that the defender paid the annualrents out of his own money. And, in the case of Farquhar of Tonely v. Gordon, No. 65, p. 5685, where, in a reduction of a bond upon minority and lesion, the Lords found the cautioners pursuing for and obtaining a decreet of relief, to be no homologation to exclude reduction, *quia distrahebat non contrahebat obligationem*; and albeit the defender did pay some of the children's provisions and did take a discharge thereof, it was not only in satisfaction of their proportions of the bond of provision granted to them by their father, but of all that they could ask or claim of the defender, their brother, any manner of way, and particularly of their share of the wood whereunto likewise they pretend right; and the defender was always willing to have paid the pursuer his proportion of his father's bond of provision, providing he would grant a discharge of what he could ask or crave, as succeeding to his other brothers and sisters, and his proportion of the wood, or any other manner of way: As also the father, by a warrant under his hand, did empower the tutors to restrict the bond of provision if they found cause; and accordingly, after the father's decease, the tutors and the mother having considered the debts, and that the arrears thereof would be much more than the rents of the lands during the mother's lifetime, who is yet alive; and therefore the tutors, by a contract and agree-[5707]-ment, did disburden and free the defender, the heir, of the wood, and accessing portions; and the mother was to educate and maintain the children for the annualrent of their portions; and it was provided, that in case the heir should reduce his father's bond of provision, or refuse to pay to every living child at their majority, their proportions of the bond of provision, in that case, he should be liable to his mother for his own aliment, and for the annualrents of all the children's portions, notwithstanding they discharged the same in his favours; and in case that any of the rest of the children did quarrel the tutor's agreement, that they should be liable to the heir for whatever the law did allow for their aliment, maintenance, and education, during their residence with their mother; and according to that agreement, the defender did pay two of the sisters their proportions of the bond of provision, but no part of the wood nor accessing portions. Answered. That there being a bond of provision granted to all the children, and it being acknowledged and homologated by the defender, by payment making to one or more of the children of their proportions, it does so far import his consent and acquiescence to the bond, that he cannot quarrel it as to the rest of the children, seeing *quod approbat non reprobat*; as in case a minor should pay a part of a sum contained in his bond after his majority, it is such an homologation that he cannot question the res; and albeit voluntary payment by an apparent heir will not import a behaviour, nor make the

apparent heir liable for the debt, yet the case differs when payment is made in relation to a preceding obligation ; in which case, the payment of a part imports a homologation ; and the case of Primrose and Dowie does not meet this case, because the decret arbitral was in relation to several particulars, that were *penitus desperata*, and therefore the homologation of one part thereof was not extended to the rest, and the defender's payment of a part of the sums contained in the bond of provision to the other children, can be attributed to no other cause, nor admit of any other construction but to be an homologation and acknowledgment of the whole bond, being the same and individual right, especially being conjoined with the defender's missive letter, by which he requires the pursuer to state accounts as to what was then resting to him ; and the other decision does not meet this case, for, as to the case of M'Kenzie v. Fairholm, the Lords found that the son, who was cautioner for his father, accepting of a discharge of annualrent after his majority, did not import an homologation, because the discharge did not bear that the son had paid the annualrent, but that it was paid by the principal debtor ; nor that other case of Farquhar v. Gordon, because the Lords found a minor might secure himself either by reduction, or by an action of relief, and that both actions were compatible ; and the father did give no warrant to restrict the bond of provision, but having only signed a blank paper, in order to the filling up the inventory of some moveable goods, the tutors did unjustly fill up a warrant to themselves to restrict the children's provisions ; whereas all that the defender designed by signing of the blank paper, was in order to the filling up [5708] an inventory of some moveables, as appears by a note written upon the head of the paper, bearing to be an inventory of the goods disposed to a blank person for £600 Scots ; and the father was so far from designing that the children's portions should be restricted, that by his testament he recommends to his son and to his tutors and curators, that they should timeously and faithfully make payment to the children of their provisions, as he would expect the blessing of God upon the rest of his estate. The Lords found, by the writs produced, that the defender hath homologated the bond of provision, not only in relation to the other children, but also in relation to the pursuer, without respect to any restriction, and therefore sustain the bonds of provision with the substitutions.

Fol. Dic. v. 1, p. 382. *Sir P. Home, MS.* v. 1, No. 106, and v. 2, No. 774.

No. 91. [5711] JAMES MITCHELL v. MARGARET CUNNINGHAM. December 10, 1672.

Payment of annualrent, after viduity, found to homologate a bond granted by a wife *stante matrimonio*.

Margaret being charged to make payment of 500 merks, contained in a bond subscribed by her and her deceased husband, to James Mitchell, did suspend upon this reason, That she had subscribed the bond *stante matrimonio* [5712] with her husband, and so was null.—It was answered, That she had ratified the bond judicially, and given her great oath never to come in the contrary, as likewise had made payment of the annualrent since her widowity.—The Lords did find the payment of the annualrent relevant to make her liable, but did not give their interlocutor upon her judicial ratification and solemn oath never to quarrel the same. Yet it seems that the bond being for borrowed money, as it is null, so the addition will not make it valid ; for women being secured *per senatusconsultum macedonianum*, are in the case of minors and pupils, who neither by their bond nor oath adjected thereto, can contract debt.

Fol. Dic. v. 1, p. 383. *Gosford, MS.* No. 535, p. 284.

No. 95. [5721] LIDDEL and the other Creditors of DICK, Competing. July 20, 1744.

In a competition among creditors, an heritable bond was objected to, as wanting some of the necessary solemnities. Answered, The debtor had homologated it by assigning to the creditor the rents of his lands, in which assignation he had recited the heritable bond. The Lords repelled the defence of homologation.

An heritable bond granted to David Liddel for 16,600 merks, docketed thus, "Written by William Wishart, notary at Fintry, and subscribed before these witnesses, the said William Wishart and Thomas Wishart," being objected to as null, in so far as it did not design both the witnesses; the creditor pleaded homologation by an assignation by the granter to him of the mails and duties of the lands contained in the heritable bond for payment of his annualrents, which fully recited the heritable bond, and fell to have been part of it, written of the same date with the heritable bond, by the same writer, and signed by the same witnesses, and wherein both their designations are expressed thus, "Written by William Wishart, notary in Fintry, and subscribed before these witnesses, the said William Wishart, and Thomas Wishart his son."

But it was nevertheless found competent to the creditors competing to object the nullity of the heritable bond.

It was a point upon which the Judges are not of one opinion, how far deeds, void for want of solemnity, are capable of homologation. Although there be some decisions sustaining it, yet it was never found in any case that homologation was good in a competition. *Fol. Dic. v. 3, p. 274. Kilkerran (HOMOLOGATION), No. 2, p. 255.*

* * This case is reported by C. Home :

The said David Liddel being creditor to Andrew Dick by an heritable bond, in order the more easily to obtain payment of his debt, purchased an assignation to a minute of sale of Dick's lands, from one Forrester, whereby Liddel became debtor to Dick in the price of the lands. Dick's creditors having used [5722] diligence against him by hornings, inhibitions, arrestments, Liddel called them all in a multiple-pounding; whereupon a competition having ensued, Dick's creditors objected to Liddel's heritable bond, that one of the subscribing witnesses to it was not designed in the body of the bond, consequently it was null by the act 1681; the clause, requiring the solemnities of the act, running in the following terms: In witness whereof, I have subscribed this and the two preceding pages, at Clachan of Fintry, written by William Wishart, notary at the Clachan of Fintry, before these witnesses, the said William Wishart and Thomas Wishart.

Answered; Such nullities have been found suppliable by acts of homologation; and here a strong one occurred, viz. an assignation to the mails and duties of the lands granted by Dick to Liddel, wherein the heritable bond is fully recited, and of even date with it, and which was written by the same writer, and had the same witnesses, and ought to have been a part of it; and here Thomas Wishart is designed "son to William Wishart, notary in Fintry." If indeed Dick had been brought under any disability by his creditors, betwixt the date of the heritable bond and the assignation to the mails and duties, there might have been ground to have made a distinction betwixt the debtor and his creditors, with respect to the effect of the nullity and act of homologation; but as they were both executed *unico contextu*, there is no room for such a distinction. See 17th Feb. 1715, *Sinclair v. Sinclair, voce Warr*; 29th Feb. 1732, *Suddy*, see APPENDIX; 21st January 1735, *Blackwood*, see APPENDIX.

The Lords found it competent to the creditors, competing with the pursuer for the price, to object the nullity. *C. Home, No. 272, p. 442.*

No. 96. NASMITH of Ravenscraig v. STORY of Braco. November 9, 1748.

A disposition of superiority burdening it with the vassal's right, found to make the purchaser liable to anomalous conditions in the vassal's charter.

Robert Hamilton, by his disposition to Claud Nasmith, mentioned in the case betwixt the same parties 5th July 1748, *voce* PERSONAL and REAL, had granted several privileges to his vassal ; as that he or his tenants being convicted of any wrong or riot in the superior's court, should not be fined in more than 50s. Scots, and that his heirs and assignees should be entered upon payment of double the feu-duty ; and he gifted to him the casualties of non-entry, liferent-escheat, or any other by which the lands might fall into his hands ; and having disposed the superiority to Ravenscraig, he excepted from the warrandice the feu-rights and charters granted by him and his predecessors, with the burden whereof he granted that disposition ; declaring that the exception of the feu-rights should not infer a ratification thereof, but that it should be lawful to Ravenscraig to impugn them on any ground of law, not inferring warrandice against him.

Pleaded for the pursuer of the no-entry against the defender offering to enter, upon a charter being granted him containing these clauses, That they being [5723] contrary to the nature of the holding, were only personal, and not binding on a singular successor.

Pleaded for the defender, The disposer is bound by the warrandice of his disposition to make the privileges effectual to his vassal ; and has taken the purchaser of the superiority bound not to quarrel any right in the vassal, on which he may have warrandice against his author.

Replied, The disposer is bound that he and his heirs shall allow these immunities, but not that he shall retain the superiority of the lands ; and therefore no warrandice is incurred.

Observed, That these clauses, being contrary to public law, could not be made real ; and therefore a personal obligation was taken for them, which went no further than to bind the granter while he continued in the right.

The Lords, 5th July 1748, " found that the clauses anent receiving the disponsee, his heirs and assignees, vassals for a certain sum, and discharging the casualties of superiority mentioned in the disposition, were not real, and did not affect the pursuer a singular successor ; and therefore ought not to be engrossed in the charter."

On bill and answers observed, besides the arguments used above, That the disposition to the superiority was burdened with the feu-right ; and Ravenscraig, by his acceptance of his right so qualified, was bound to implement it.

"The Lords found, that Nasmith of Ravenscraig, purchaser of the superiority, having accepted his disposition thereto burdened with the feu-right granted to the original vassal, was obliged to implement to the said vassal and his successors the obligations contained in the feu-charter granted to him." See No. 9, p. 4180.

Act. R. CRAIGIE.—Alt. A. MACDOUALL.—Clerk, MURRAY.

Fol. Dic. v. 3, p. 271. *D. Falconer*, v. 2, No. 6, p. 7.

No. 97. [5726] JAMES RYMER v. ALEXANDER M'INTYRE. July 19, 1781.

An informal indenture was found homologated by the service having taken place.

In May 1776, a son of M'Intyre's, under eleven years of age, entered into the service of Rymer, in his trade, that of an engraver ; and, soon after, an indenture was executed between them, by which the boy was to become bound as an apprentice to him, for the term of six years. This writing, however, though subscribed by Rymer, by M'Intyre, as cautioner for his son, and by the boy himself, was, in other respects, informal. The testing clause stood thus : "In witness whereof, both the said parties

have subscribed these presents, written upon stamped paper by (Signed) Gavin Rymer, shoemaker, and Adam Richardson, ditto." And below, these names were repeated thus: "Witness, Gavin Rymer, Adam Richardson."

The boy continued to serve Rymer till October 1779, when his father, on an allegation of bad usage, took him away from his master's service; upon which [5727] Rymer brought an action against M'Intyre, concluding for the penalty, and for damages.

Pleaded for the defender; The indenture, from its wanting such a proper designation of the writer and witnesses, as is required by the act 1681, cap. 5, is void and null. This statute has not, like 1593, cap. 179, left any room for a posterior condescendence; and, as its words expressly declare a writing, so defective, to be absolutely null, no person can reasonably think, that it affords nothing more than an exception which may be tacitly renounced by acts of homologation.

Answered; If defective deeds are not to become valid by homologation, a man's titles to his estate may not, even after the years of prescription, afford him any security. It is only *in nudis finibus contractus*, that the statutory nullities have force. Subsequent approbatory acts remove every objection. Such has been found, by many decisions, to be the effect of implement in tacks and in marriage contracts. Such, too, is the known effect of *rei interventus*. And, surely, the boy's continuing to serve under the indenture for upwards of three years, imports a sufficient homologation; November 23, 1699, Greeson *contra* Scott, *voce* WRIT; January 21, 1735, Telfer *contra* Hamilton, *IBIDEM*.

Observed on the Bench; As, in this case, there is full evidence of an agreement between the parties, there would have been good ground, altogether independent of the indenture, for compelling either of them to enter regularly into a written contract.

The Lords, "in respect of the apprentice's entering into his master's service, and continuing there for three years, by which the indenture was homologated by both parties, repelled the objection of the want of the legal solemnities, made to the indenture." See WRIT.

Lord Ordinary, HAILES.—Act. H. ERSKINE.—Alt. RAE.—Clerk, ROBERTSON.

S.

Fol. Dic. v. 3, p. 274. *Fac. Col.* No. 74, p. 128.

No. 1. [5759] Lady RANKEILLOR v. The Lady AYTON. July 8 and 23, 1709.

In a process against a relict, to whom the half of the household plenishing was disposed, it was found, that uncut webs of cloth were not household plenishing, nor such large silver vessels as were kept rather for ornament than for daily use; nor medals, unless the defender could prove that they had been gifted to her as paraphernalia. This according to Fountainhall's report. According to Forbes, the silver vessels were considered to be household plenishing.

In the process at the instance of the Lady Rankeillor, assignee constituted by the deceased Lord Rankeillor her husband, confirmed executor creditor to Sir John Ayton of that ilk, against Sir John's Lady, as intromitter with goods and gear belonging to the defunct, the defender contended, That, by her contract of marriage, she had right to the just and equal half of the whole plenishing and furniture of his house, as well heirship as other moveables, free of all debts.

Alleged for the pursuer; 1mo, The defender can have no share of uncut webs of cloth lying by the defunct; because, these not being formed to any particular use, but applicable to many uses, or to sale, are not reckoned household furniture or plenishing, which, by the Romans, is called *suppellex*, and defined *domesticum patris-familias instrumentum rerum ad quotidianum usum paratarum*. 2do, Vessels of silver of a larger size, as the great bason, laver, and caudel pot, fall not under division as household furniture; because these were not for daily use, but for ornament or ostentation, and had been long in the family, l. 3, § ult. ff. *De Suppellectile Legata*. So the Court of Frizeland, Sande, lib. 2, tit. 5, def. 5, in the case of a division of household furniture

betwixt married persons, *Suppellectili id tantum adscripsit, quod conjugibus fuit in quotidiano usu, non illud quod non in quotidiano usu, sed in argentario repositum habuerunt.* 3tio, The defender ought to restore without division two gold medals, viz. an Elizabeth, valued about two pounds Sterling, and a medal on the siege of Breda valued about ten pounds Sterling, except she can instruct they were gifted to her by her husband at or before her marriage; with the proving whereof she ought [5760] to be burdened, since giving is not to be presumed from her possession, because of the easy access she had thereto after her husband's death.

Answered for the defender; 1mo, The uncut webs must fall under division, and be reckoned household furniture, though not actually formed and shaped to that use; because they were made and provided for the use of the family, as to be hangings to rooms, bed-clothes, table-linens, &c., and not for sale: And it were hard to exclude the Lady from a share of her own virtue, to which she has so clear a right. The word *suppellex* in the civil law was not so extensive as household furniture in ours; there being in the Pandects a title, *De Auro, Mundo, Ornamentis, Veste vel Vestimentis Legatis* (whereof several species come under the denomination of house furniture), distinct from the title *De Suppellectile Legata*. 2do, Albeit when the Romans affected to live *ritu et more veterum Sabinorum*, silver work did not with them fall under *suppellex*; yet, when under their Emperors, they became masters of the world, they ridiculed that ancient austerity, and had scarcely any household vessels that were not of silver and gold, l. 3, § 5, l. 8, l. 9, § 1, *De Suppellectile Legata*. And here there can be no doubt but the larger vessels fall under division, considering that the Lady is provided to a half of the heirship, as well as of the other common moveables. The distinction betwixt what is designed for daily use, and that for ornament or extraordinary occasions, is frivolous; for, whatever is kept in the house and family to be made use of, whether daily or upon solemn occasions, must be reckoned household furniture; otherwise it were as reasonable to distinguish betwixt table and bed-linens, or the like, daily used, and those kept for extraordinary occasions. So that, if the pursuer's argument prove any thing, it proves too much. Again, had Ayton designed no share of the great silver vessels to his Lady, he would either have expressly excepted them, or tailzied them with the estate to his son; as some noblemen have tailzied their jewels with their estate; and one tailzied a silver salt of immense weight and bigness, that had been made to prevent giving offence to some by the superstitious omen of overturning the salt. 3tio, The medals are presumed to be the defender's, since they are in her possession; for it is not possible that she can prove that these *jocalia* were her marriage gifts, as indeed they were, it not being ordinary for the like to be given in the presence of witnesses.

Replied for the pursuer; The parallel betwixt finer linen and the greater silver vessels doth not hold, because the former, though not daily used, is not of the kind of what is of necessary use; whereas these last were never intended for necessary use, but only for ornament, as *res pretiosæ*. And as an argument that the defunct had no thoughts of giving his lady any share thereof, she is provided to the half of the household furniture, or 500 merks in her option; whereas the silver vessels in controversy are of far greater value, abstracting from the other household furniture.

[5761] Duplied for the defender; The alternative of 500 merks can have no influence upon the point of right; seeing that was adjected only in case the half of the plenishing had proved to be of less value, which indeed might have happened, seeing no man can tell what household furniture, or other effects, he will leave at his death.

The Lords found, that the clause in the defender's contract of marriage carried her to a share of all heirship moveables that were household plenishing, but no other heirship moveables; nor to the medals, unless they were gifted by her husband at or before the marriage: And found, that the uncut cloth was not to be reckoned household plenishing; but that the silver plate, though not destined for daily use, falls under the denomination of such plenishing. Here it was observed by one of the Lords, That the decision of the Court of Frizeland, observed by Sande, was only in the case where a wife claimed her legal share of plenishing, under which heirship plenishing doth not fall, and therefore doth not meet the present case. See HUSBAND AND WIFE.

No. 8. [5771] Lady WIGTON v. Lady CLEMENTINA FLEMING. June 7, 1748.

The Lords found, That a lady's dressing plate were not paraphernalia, so as to exclude the *communio bonorum*. See APPENDIX. *Fol. Dic. v. 3, p. 278.*

No. 9. MUNGEL v. CALDER. January 11, 1750.

A bill to a wife, bearing exclusion of the *jus mariti*, effectual, where it is for money that does not fall under it.

Patrick Calder of Reidford, accepted a bill, payable to Janet Mungel, spouse to James Hastie of Boggo, in the following terms : "Against Martinmas next, pay to me Janet Mungel, spouse to James Hastie of Boggo, or my order, secluding my husband's *jus mariti*, in the house of William Rannie, merchant in Falkirk, the sum of twenty guineas, value in your hand received of, (signed) Janet Mungel."

The charge on this bill was suspended on the following reasons, 1st, That it was null, not being in the ordinary form and stile of a bill, as containing an exclusion of the husband's *jus mariti*. 2do, The value by presumption of law, must have belonged to the husband, and it was not in the wife's power to exclude the husband's *jus mariti*; therefore the acceptor is not bound to pay to her but to her husband, against whom the suspender had a compensation to plead.

To all which the answer was, That the bill was granted as the value of a gown, which was agreed to be given to the charger, upon the sale of certain lands by Boggo to Reidford, and which did not fall under the *jus mariti*, and the husband nor his creditors had no interest in it.

Which the Ordinary "sustained, and found the letters orderly proceeded;" and the Lords "adhered."

Fol. Dic. v. 3, p. 278. Kilkerran (HUSBAND AND WIFE), No. 17, p. 269.

No. 15. [5777] BARCLAYS v. PEARSON. January 26, 1682.

The creditor in a bond dying after the term of payment of the principal, and before the term of payment of annualrent; the bond was found moveable as to the relict, the payment of annualrent being that which makes it heritable *quoad relictam*; but a clause to infeft would have made the bond heritable *ab initio*; and it is debateable, if a clause secluding executors would exclude the wife from her part of a bond, otherwise moveable, albeit it would cut off the fisk and executors.

Fol. Dic. v. 1, p. 385. Harcarse (BONDS), No. 171, p. 38.

No. 22. [5784] MARGARET M'KENZIE v. ROBERTSONS. December 23, 1668.

The relict's third of moveables is not burdened with bonds due by her husband bearing annualrent.

Margaret M'Kenzie pursues the executors of her husband to pay her share of the moveables, who alleged absolvitor, because there was as much debt as would exhaust the whole moveables. It was answered, *Non relevat*, unless it were alleged that the executors had paid the debt; for the debts being yet due, it is *jus tertii* for them to allege thereupon; neither can this pursuer propone allegiances of payment, compensation, or any other, or the defenders reply upon the debts belonging to third parties,

unless they were pursuing themselves; but the pursuer is content to find caution to repeat her share in case they were distressed.

The Lords repelled the defence, but prejudice to the executor to suspend on double pawning, calling the creditors.

It was further alleged for the defenders, That they must have allowance of sums bearing annualrent since 1641. It was answered, That no such sums can burden the relict's part, because, by the act of Parliament, the relict has no share of such sums if they were due to the defunct; and therefore, *a pari*, she cannot be burdened with such sums, being due by the defunct. The defenders answered, That the act of Parliament excludes relicts from such sums as bear annualrent, being due to their husbands, but doth not bear, that they shall be free of such sums due by their husbands; and statutes being *stricti juris*, the Lords cannot extend them beyond their sense to like cases. The pursuer answered, That the Lords always did, and might explain, and extend acts of Parliament to cases implied, and consequent, albeit not verbatim ex-[5785]-prest; and as to this act of Parliament, it bears expressly, that all such bonds shall remain in their condition as they were before the act of Parliament 1641, *quoad finem et relictam*, before which the bonds bearing annualrent could not have burdened the relict; for the word, "such bonds," may not only be extended to bonds due to defuncts, but to bonds due by defuncts.

The Lords repelled also this defence, and found the relict's part not to be burdened with any bonds due by her husband bearing annualrent, unless they had become moveable by a charge, or that the term of payment of the annualrent was not come at the defunct's death. *Fol. Dic. v. 1, p. 386. Stair, v. 1, p. 576.*

No. 23.

OSBORN v. YOUNG and MENZIES. January 10, 1696.

The Lords found a husband not liable for the principal sums of heritable debts due by his wife, whether heritable by a clause of infertment, or by bearing annualrent; but found him liable for the bygone annualrents of the same, and in time coming during the standing of the marriage.

The Lords advised the point debated between Harry Osborn, late of Peppermill, and Catharine Young, and Menzies, her husband, whether a wife's heritable bond granted before her marriage, and whereof the term of payment of the annualrent was then past, did make the husband personally liable in payment of the same? It was alleged, That the marriage was a voluntary novation, whereby *subibat personam mulieris*, and undertook all her debts, and which were compensated by the marital affection to her person, with her fidelity, and other qualifications, having taken her for better and for worse; otherwise women contracting a great deal of debt, might by marriage procure themselves a protection from personal execution, and knowing their husbands would not be liable, they might easily cheat their creditors thereby, and take away their rights, whereas *jus meum mihi invito auferri non potest*. Answered, The marriage introduced a communion of goods and debts, but not promiscuously of all, but only of moveable debts and goods; so that as the *jus mariti* reaches no heritable bonds (which in this case are understood to be any bonds bearing annualrent, [5786] where the term of payment is past before marriage), due to the wife, *ergo a paritate rationis*, and by the same analogy of law, he should be liable for no heritable debts so due by his wife before the solemnization of the marriage; for *quem sequitur commodum, eundem et sequi debet incommodum*, and they are *correlata*; so that if law gives me no right to debts of that nature, it ought not to burden me with the like debts, but justly relieves me of the same. It is true, a husband has the administration of a wife's heritable rights, so as the fruits and annualrents arising from the same fall under his *jus mariti*, and may be disposed of by him without his wife's consent, at his pleasure; and therefore it may be justly argued, that he in like manner should undergo the payment of the annualrents of his wife's heritable debts, because these annualrents being moveable (though accessory to an heritable security, and so might be alleged to retain the same nature), they fall *sub communione bonorum*. Only it is here debateable, whether they will simply affect the husband and his heritage, or

only *in valorem* of his moveables, and *in quantum* both his wife's part of the moveables, and his own extend ; or if he will be only liable *in quantum* he is *lucratus* by her. Replied, He ought to be personally liable, because if he pay an heritable debt for his wife, law presumes she may have another heritable debt owing to her which he may reach, and affect by arrestment, and so be no loser. The Lords tried if there had been any decisions on either hand ; but found no pathed road, people having either paid voluntarily, or forborne to urge this point by a tacit acquiescence. Only *Stair* states the case in his *Institutions*, Book 1, Tit. 4, § 17, and thinks it unreasonable to oblige the husband for the wife's heritable debts ; and I find *Molineus ad consuetudines Parisienses*, with the late collection of the *Coustumes de Paris, tit. de communauté de biens*, makes only the husband liable for his wife's moveable debts and *personalia*, but not for the debts they call *reelles* and *hypothecaires*, which answer to our heritable bonds. The Lords by plurality found a husband not liable for the principal sum of heritable debts due by his wife, whereof the term of payment was come and by-gone the time of the marriage ; but decerned against him for the bygone annualrents of the same and in time coming during the standing of the marriage allenary. The same decision was renewed in the case of Hay of Naughton v. Robert Cleland and Jean Henderson, 12th February 1696 ; but several of the Lords struggled much against it. If the husband be *lucratus* by getting a considerable tocher *ad sustinenda onera matrimonii*, it may be pleaded he ought to be liable even in heritable debts, *in quantum lucratus est*, if the tocher be considerable.

Fol. Dic. v. 1, p. 386. Fountainhall, v. 1, p. 699.

No. 32. [5795] COCKBURN v. BURN. February 21, 1679.

The Lords found, where wives uplift sums heritable *quoad maritum*, and re-employ them again upon another heritable security, the husband had no interest therein, though he got no tocher ; as also they found (which was never decided before), that in the wife's deeds of administration of her own proper goods, not falling under communion, she needed not her husband's consent, without prejudice of his right to the annualrents *jure mariti*. This last was not debated. *Fountainhall, MS.*

No. 38. [5799] Dame JANET MURRAY LADY PITFIRAN v. Mr. ALEXANDER WOOD, Chamberlain to the Earl of Kinnoul. July 26, 1709.

A bond granted to a Lady in lieu of the ordinary compliment of a gown, for consenting to the alienation of her husband's lands, found not to fall under the *jus mariti*.

In the suspension of a charge at the instance of the Lady Pitfirran v. Mr. Alexander Wood, for payment of £1400 contained in a bond granted by him to the charger, for the behoof of the Lady Cultmalundie her daughter, in lieu of the compliment of a gown for renouncing her liferent right in the lands [5800] of Cultmalundie, purchased by the Earl of Kinnoul from David Drummond her husband ;—the Lords found the bond not compensable by a bond granted of the same date for the like sum by the husband to Alexander Wood the suspender, in respect the customary gratification to a wife for her consent to the alienation of her husband's lands, commonly called, "the Lady's gown," falls under the paraphernalia, and excludes the *jus mariti* ; and it hardly consisted with *bona fides* in the suspender, to take another bond at the same time from the husband, to defeat the security granted to the Lady.

Fol. Dic. v. 1, p. 387. Forbes, p. 350.

lo. 43. [5803] Earl of LEVEN v. MONTGOMERY. February 27, 1683.

A woman gifting away her paraphernalia upon deathbed, and the same being unravelled by her heir, as in his prejudice, by laying the burden of the moveable debts upon him, the Lords sustained the donation, seeing paraphernalia are not subject to the heir's relief of moveable debts as other moveables are.

Fol. Dic. v. 1, p. 388. P. Falconer.

No. 45. [5821] DICKS v. Mr. ANDREW MASSIE. January 16, 1695.

What articles are accounted paraphernalia. See Synopsis.

Mersington reported Dicks and Dr. Crawford *contra* Mr. Andrew Massie, for return of the 8000 merks of tocher, conform to a clause in the contract.—Alleged, He must have deduction of her funeral charges; for, though it be *officium humanitatis*, and a debt on a husband to bury his wife, on his own expenses, where she hath no separate estate wherewith to do it; yet where her tocher returns to her nearest of kin, they ought to bear it.—Answered, He liferents it; and also had a jointure of £1000 per annum by her, which came by her first husband, and so he is *lucratus*.—Replied, All that was spent *ad sustinenda onera matrimonii*; and what if one should marry an heiress, should not her own estate bury her?—The Lords considered this was not a debt due *stante matrimonio*, but existed after the dissolution; and the executors were in *lucro captando*; therefore the funerals ought to be deducted out of the first end of the 8000 merks which return.—Yet every part of the husband's estate falling to a wife's nearest of kin, as the half or third of his moveables, would not be subject to her funeral expenses. See 3rd Feb. 1681, Gordon v. Inglis, Div. 3, Sec. 6, *h. t.* Then they insisted on repetition of the paraphernalia; and the question arose, what fell under that name? The Lords thought her apparel and ornaments, [5822] and the *mundus muliebris* was comprehended under it, as in Lady Boghall's process against the Duchess of Lauderdale. See APPENDIX.

February 14.—In the action of repetition of 8000 merks pursued by Dicks v. Mr. Andrew Massie, Regent, the Lords, on the 16th of Jan. 1695, having found, that he ought to have allowance of his wife's funeral expense out of the fore-end of that sum; and he, under that name, craving the medicaments and fees to doctors, with the mournings, the Lords found, that a husband *regulariter* being obliged *jure humanitatis* to bury his wife, the funeral expenses here could extend neither to drugs nor mournings, but allenarly to the charge expended on the likewake and burial, as bread, wine, dead-linens, coffin, grave-making, the bell-man, the poor, &c. Yet in the title, *D. De religiosis*, it is taken more largely in several of the texts there.

December 4.—Mersington reported Dicks *contra* Mr. Andrew Massie, mentioned 16th January 1695, for restoring to them, as his wife's executors, her *bona paraphernalia*. The Lords found he could have no allowance for the £20 Sterling he paid out for her wedding-cloaths, because, being a moveable debt, it fell *sub communione bonorum*, and so was extinct and ceased to be a debt; but it would have been otherwise if it had been heritable *quoad maritum*, as bearing annualrent. Then the next question was, What were to be reputed paraphernalia? A list and condescendence was given in, containing articles which cannot fall under the *mundus muliebris*, which are only for ornament of the wife's body, such as bracelets, necklaces, breast-jewels, ear-rings, which use only to be worn by women; but watches, rings, &c., which are *epicani generis*, and of promiscuous use, as well worn by men as women, are not so clearly paraphernalia, unless it be proved they were given to her by her husband, and in her custody and possession the time of his life, and so worn and used by her. As for webs of cloth, &c., the Lords rejected them; and for cabinets, found them not

paraphernalia, unless they were made expressly *et destinatione matris-familias* to that particular use of holding her rings and jewels ; neither were medals any part of them ; but would not restrict her to one of each sort (as done in heirship moveables), but a wife may have more of one kind, though it defraud creditors to multiply these too much, and encourage wives to cause their husbands furnish them with such toys. The Spanish and Italian doctors are very narrow to wives on this head, and allow them only the use (*ut ornatiores appareant*), but not the property of them : And when they are extravagant, they are like donations *inter virum et uxorem*, and so revocable.— In the case of the Duchess of Lauderdale, and Lady Boghall, the Lords inclined to restrict their paraphernalia as much as could be ; and, in this present case, they resolved to hear the lawyers in their own presence, to establish a rule what should be reputed paraphernalia in time coming. But the quality of persons will make a distinction ; besides, a merchant or jeweller's wife having many watches or rings, &c., in her possession, ought not to make them her's or her executors, because they are in such cases designed for sale.

[5823] January 15, 1697.—The Lords advised the debate between the executors of Elisabeth Dick and Mr. Andrew Massie, her late husband, mentioned 4th Dec. 1696, and resolving to fix a rule for determining what wives, or their executors might claim as paraphernalia or *jocalia*, they did lay down several positions and heads, under which they might bring all the species and kinds of such gifts, with an equal regard to the dignity of the wives, and also for curbing and restraining exorbitancies therein, for the interest of the husbands, and their children or creditors ; and accordingly the Lords found, that under the paraphernalia peculiarly belonging to the wife, and no ways entering into the communion of goods betwixt the husband and her, are comprehended, the *mundus* or *vestitus muliebris*, viz. all the body-cloaths belonging to the wife, acquired by her at any time, whether in this or any prior marriage, or in virginity or viduity ; and whatever other ornaments or other things were peculiar to her person, and not proper for men's use or wearing, as necklaces, ear-rings, breast-jewels, gold-chains, bracelets, &c. And that under child-bed linens, as paraphernal and proper to the wife, are to be understood only the linen on the wife's person in child-bed, but not the linens on the child itself, nor on the bed or room, which are to be reckoned as moveables ; and therefore found the child's spoon, porringer and whistle, contained in the condescendence are not paraphernal, but fall under the communion of goods ; but that ribbons, cut or uncut, are paraphernal and belong to the wife, unless the husband were a merchant ; and found, that all the other articles are of their own nature of promiscuous and common use, either to men or women, are not paraphernal, but fall under the communion of goods, unless they become peculiar and paraphernal by the gift and appropriation of the husband to her, such as a marriage-watch, rings, jewels, and medals, &c. But found, that a purse of gold, or other moveables, that by the gift of a former husband became properly the wife's goods and paraphernal, exclusive of the husband, are only to be reckoned as common moveables *quoad* a second husband, unless they be of new gifted and appropriated by him to the wife again : And found, that such gifts and presents as one gives to his bride before or on the day of the marriage are paraphernal and irrevocable by the husband during that marriage, and belong only to the wife and her executors ; but found, any gifts given by the husband to the wife after the marriage-day are revocable, either by the husband's making use of them himself, or taking them back during the marriage ; but if the wife be in possession of them during the marriage, or at her death, the same are not revocable by the husband thereafter : And found cabinets, coffers, and other alleged accessories, for holding the paraphernalia, are not paraphernal, but fall under the communion of goods. Some of the Lords were for making anything given the next morning after the marriage paraphernal, called the morning-gift in our law ; but the Lords esteemed them man and wife then, and so revocable.

No. 57. [5843] TRUSTEES of MURRAY v. DALRYMPLE. February 5, 1745.

The husband can renounce his right of administration.

It was the opinion of our old lawyers, that the husband's renunciation of his *jus mariti*, even before marriage, could not be effectual, unless the wife had before marriage conveyed the subjects falling under it in favour of a third party. Their notion was, that the right acquired to the wife by the renunciation fell back, and accresced to the husband by the marriage, like water thrown upon high ground, as Stair expresseth it; though now for some time it has been considered as a settled point, that the wife's reservation is effectual, though not exercised by her in favour of any third party. But it is still a different question, how far the husband can renounce his right of administration? that is, what seems to have been thought to be *contra bonos mores*. Vide 9th February 1667, Lord Collington *contra* the Lady, No. 50, p. 5828. Yet though even that was the expressed intention in this case, as it was executed by a trust-right, it was found effectual.

The case was, Isabella Sommervill, relict of Mr. Hugh Murray-Kynnymound, having agreed to marry Charles Murray, brother to Sir Alexander Murray of Stanhope, after he had been declared bankrupt, and obtained a *cessio bonorum*; in order to secure her estate from his creditors, and to enable her to apply the same for the subsistence of her, and her future husband's family, she, by her contract of marriage, conveyed her estate to George Lockhart of Carnwath, and others as trustees, for the ends and purposes therein mentioned, viz. "For her sole use and benefit, exclusive of the *jus mariti* of her said future husband, and of all right of administration or other right whatsoever that might be competent to him by and through the intended marriage, and exclusive of his debts contracted or to be contracted, wherewith the subjects thereby disposed are declared to be noways affectable, but the same to be applied for her sole use, and for the aliment and subsistence of her and her family, notwithstanding the coverture; with a power to the said trustees to appoint such factors as she should name, who should be obliged to account to her, and to pay over to her what they should receive, upon receipts to be granted by her alone, without the consent of her husband."

[5844] And Sir James Dalrymple, who was debtor in a certain annuity to the said Mrs. Isabella, having for his own safety presented a bill of suspension of a charge at the instance of the factor appointed by the trustees to the end foresaid, chiefly upon these reasons, That a husband could not effectually renounce his *jus mariti*, at least his right of administration; the Lords, upon answers, "remitted to the Ordinary to refuse the bill."

Fol. Dic. v. 3, p. 281. *Kilkerran* (HUSBAND AND WIFE), No. 8, p. 260.

No. 58. MESSRS. ANNAND and COLHOUN v. HELEN CHESSELS. March 4, 1774.

In a settlement by a father of his estate on his daughter, in trust for herself and children, her husband's power of administration, in the event of his future insolvency, may be excluded.

Helen Chessels was the daughter of Archibald Chessels, and the wife of James Scott.

About a year before his death, Mr. Chessels executed a settlement of his whole estate, real and personal, in favours of his daughter, in trust, for behoof of herself, in liferent, and of her children in fee, with this proviso, "That, in case of the event of James Scott her husband's insolvency, he secluded and debarred the said James Scott's *jus mariti*, and him from the administration and management of the said estate, heritable and moveable, and of the rents, annualrents, and other produce and profits of the same; and declared the same should neither be liable nor subjected

to the payment of his debts, implement of his deeds, nor affectable by the diligence of his creditors."

Scott became bankrupt, and, notwithstanding the proviso in Mr. Chessels's deed of settlement, Annand and Colhoun, as creditors of Scott, having proceeded to attach certain subjects, which would otherwise have fallen under his *jus mariti*, a process of multiplepoinding ensued.

Pleaded for Helen Chessels and her Children ; An unlimited fiar or proprietor is entitled to the full exercise of his property, and, consequently, may alienate it, either absolutely, or under any lawful condition, such as that of excluding the *jus mariti* of the disponee's husband ; Lord Bankton, b. 1, tit. 5, § 84 ; Erskine's Lesser Instit. b. 1, tit. 6, § 7 ; Larger Instit. b. 1, tit. 6, § 14. Hence Mr. Chessels might, either by the nature of his settlement, or by a special clause to that effect, exclude the *jus mariti* of Mr. Scott ; and, in fact, he did both ; conveying his whole estate to Mrs. Scott in trust, which imported a virtual exclusion, and farther qualifying the conveyance by the above express condition, by which Mr. Scott's right of administration, the only thing given to him, was barred, in the event of his insolvency. The distinction between the complete *jus mariti*, and the simple power of administration, was early known in the law of Scotland. A difference, indeed, formerly arose from this, [5845] that, though a husband could renounce his *jus mariti*, so far as it respected his interest in the wife's moveables, yet could not divest himself of his curatorial power, or right of administration. The contrary, however, is now established ; and with respect to a third party giving an estate to a wife, it never was at any time doubted whether he might exclude the husband's power of administration ; and such is the predicament in which Mr. Chessels stood.

Answered for the Creditors of Scott ; The *jus mariti* is, in the eye of law, as much an estate in a husband as any other property whatever. In this case, Mr. Scott appeared vested with that right from the moment his wife succeeded to her father, and, on that footing *bona fide*, his creditors transacted with him. With respect to them, therefore, the exclusion contained in the latent deed in question ought to be held *pro non scripto*. But, even though there had been no deception in the matter, the *jus mariti* having once taken effect, and a *jus quæsitum* thereby been created to the husband's creditors, they cannot justly be now deprived of it, on account of a circumstance altogether unknown to them. That would be to give to that eventual exclusion a retrospect to their prejudice, which ought not to be allowed. Every man's estate is liable for his debts. Hence entails, when first introduced, were considered as *pacta contra leges* ; and it is only upon the ground of the subsequent invention of irritant and resolute clauses, that they are now supported. But still the interests of third parties are guarded by the forms of publication which the Legislature has ordained. Nor is there any solidity in the observation respecting a distinction between the *jus mariti* and the power of administration. The *jus mariti* includes both the rights of administration and disposal ; the latter of which, indeed, is inseparable from the former ; Lord Stair, b. 1, tit. 4, § 9.

Replied ; The argument from entails, brought into this question, is totally misapplied. There each heir is fiar or proprietor of the estate ; whereas, in regard to a wife succeeding to a stranger, the estate belongs not to the husband, whose right, as such, is merely personal, but to the wife alone.

"The Lords found that Archibald Chessels's heritable subjects, and also his moveables, and executry funds, were vested in Helen Chessels, his daughter, in trust, for the purposes mentioned in his deed of settlement, and were not affectable by James Scott, or his creditors ; and that, when James Scott became bankrupt, his right of administration of the said subjects ceased, and that the rents, and annualrents, that fell due thereafter, belonged to Helen Chessels and her children, in terms of Archibald Chessels's settlement, and were not affectable by James Scott's creditors."

Act. LORD ADVOCATE, SOL.-GENERAL, & ILAY CAMPBELL.—Alt. RAE, A. MURRAY,
—Clerk, GIBSON.

No. 59. [5846] PATRICK BLAIR and Others, Trustees for Barbara Blair v. JOHN MALLOCH. January 25, 1776.

A wife preferred in a multiplepointing, for the interest of the sum in a bond belonging to herself, until she should be alimanted by her husband; and even then, for repayment to her of a sum, not falling under the *jus mariti*, which the husband had uplifted.

Barbara Blair was creditor to Captain Robertson of Newton in a bond for £180 Sterling, payable at Whitsunday 1770, and bearing interest from Whitsunday 1769.

By the conception of the bond, the annualrent is made payable quarterly; and Barbara Blair received payment of her annualrents from the date of the bond down to Lammas 1773.

About that period she conceived an intention of intermarrying with one John Malloch, who kept a public-house in Perth, a man of an indifferent character, and in very suspicious circumstances.

Her friends finding they could not prevent the match, endeavoured to make the best of a bad bargain, and, at all events, to secure something to her and her children. In that view, they entered into treaty with John Malloch, the intended husband, who engaged to furnish £50 Sterling on his part, to which £80 Sterling of the bride's fortune was to be added, to make a joint stock of £130, to be laid out upon land, or other good security, and to be employed *ad sustinenda onera matrimonii*; and it was agreed, that the remaining £100 Sterling belonging to Barbara Blair, should not be subject to John Malloch's *jus mariti*, nor affectable by his debts or deeds. These terms being settled, the scroll of a contract of marriage, agreeable thereto, was made out; but Malloch, who, though he had engaged for £50, was not master of a penny, resiled from the agreement, and would not sign the contract. The above is the account of the matter that was given by one of the parties to the present question; although it was partly contradicted by the other, viz. John Malloch, particularly as to the alleged terms of a contract of marriage having been settled, and his afterward resiling therefrom, whereas he averred that he rejected the proposal from the first, so that the scroll produced in process was a fabrication with which he had no concern.

Barbara Blair, however, did, before her marriage, execute a trust-deed in favour of Patrick Blair her brother, James Hay her cousin-german, and James Ross her doer; the three persons in whose names it was by the contract of marriage provided that execution should pass.

This deed proceeds upon the narrative, that she was resolved to marry John Malloch, though unacquainted with his stock or circumstances; and that, if [5847] they turned out to be bad, her patrimony might be consumed, and herself and children, if she should have any, might be left in poverty and distress; for these cogent reasons, she assigned to the above-named persons, as trustees for the behoof of her and her children, £100 Sterling, part of the £180 due to her by Captain Robertson; declaring that the said £100 should not be subject to the said John Malloch's *jus mariti*, nor affectable by his debts or deeds. The assignation was intimated, and recorded in the Sheriff-court books of Perth.

It soon appeared that all the precaution used was but too necessary; for not only was Malloch a beggar in point of circumstances, but his character and conduct going on from bad to worse, became at length so flagrant, that, by a judgment of the Magistrates, he was banished for ever from the town of Perth. In these circumstances, he soon consumed as much of his wife's money as he could lay his hands on, and she remained (for there were no children of the marriage) without any resource but the £100 in question; and he, or rather his creditors in his name, making demands upon Captain Robertson for the remaining £100, which had been secured by the trust-assignation, Captain Robertson found it necessary to bring a multiplepointing; in which the trustees appeared, produced that assignation as their interest, and were thereupon preferred by repeated judgments of the Lord Ordinary; against which the other party reclaimed, insisting that the husband had the preferable right; that a married woman can execute no deed without the consent of her husband; that, in law, the proclamation of bans is in this respect held equivalent to marriage; and that the assignation to the competitors, though executed before the celebration of the marriage, being after the proclamation of bans, is invalid.

Answered; Although no objection lay to the regularity of the proclamation, it could not at any rate support the defender's argument. This was a debt which, although the marriage had been completed, would not by law have fallen under the *jus mariti*. In these circumstances, is it possible to maintain that her husband, or his creditors in his name, will be allowed to uplift, for the professed purpose of wasting it, or paying his debts, a sum of money belonging to her, which does not fall under his *jus mariti*, and to which, of consequence, even independent of her trust-deed, he has by law no right?

The trustees have, therefore, no need to argue upon the validity of the trust conveyance; but, were it otherwise, were the proclamation of bans unexceptionably regular, and were the money in question a sum which would, by law, have fallen under the *jus mariti*, it is contended, that the trust-deed, executed by Barbara Blair before her marriage, would be an effectual bar to the claim now made by her husband and his creditors.

That the publication of bans of marriage, when regularly made, is by our law in many respects held equivalent to the celebration of the marriage, is not disputed. It is not so, however, in all respects; for example, it has been repeatedly found, that a donation made by either of the parties to the other, after proclamation and before marriage, is not revocable; 26th January 1680, [5848] Home, Div. 10, Sec. 1, & t.; and February 1688, Gordon, Ibidem, whereas a donation made after marriage by either party, may unquestionably be revoked. And there is another difference established in our law, that although, after marriage, a woman can grant no deed whatever (unless *mortis causa*) without consent of her husband, yet, before marriage, although after proclamation of bans, she is only barred from granting such deeds as are purely gratuitous.

The Court, by their first interlocutor, found the husband preferable for the annualrents of the sum in question; and, with that variation, adhered to the Lord Ordinary's interlocutor; but, on a reclaiming bill for the wife and her trustees, and answers for the husband, the case was considered to be a very special one, and to be determined upon its own circumstances, viz. The husband had uplifted and spent the £80 which he had agreed to accept of as tocher; and that was a sum that fell not under the *jus mariti*, as bearing interest. On the other hand, the wife had an indubitable claim to be alimented by her husband; but he showed no fund other than that in question: Therefore, even supposing the trust-deed to be invalid, the question came to this, Was she not well founded in a plea of retention, both on account of the aliment, and likewise for indemnification *quoad* the £80 *indebite* uplifted by him?

The following judgment was pronounced, after appointing a curator *ad hanc viam* to Barbara Blair, on a motion of her counsel:

"Find the said Barbara Blair entitled to uplift and retain the annualrents of the sum in question, until she is taken home, and properly alimented in family by her husband; and, even in that case, find her entitled to the said annualrents, for repayment to her of such part of the £80 Sterling as has been already paid to her husband, or until sufficient caution is found by him to replace the same."

Act. NAIRNE.—Alt. J. BOSWELL.—Clerk, KIRKPATRICK.

Fol. Dic. v. 3, p. 279. *Fac. Col.* No. 217, p. 167.

No. 60. JANET MACDONALD, and JOHN DUFF, her husband r. DAVID DOIG.
January 29, 1793.

Every thing in the wife's possession, except her paraphernalia, is presumed to belong to the husband, till the contrary be proved; even although a few years before he had obtained a decree of *cessio bonorum*.

John Duff, in 1787, obtained a decree of *cessio bonorum*. In this action David Doig was called, among his other creditors.

Near two years after, Duff married Janet Macdonald. In an antenuptial

marriage-contract, proceeding on the narrative of her being possessed of personal effects at least to the extent of £200, he renounced his *jus mariti*; and she conveyed to trustees the whole property which she then possessed, or should [5849] afterwards acquire, without inventory or specification; but the trustees never took any possession.

Duff and his wife have ever since their marriage kept an alehouse.

In March 1791, David Doig sent a messenger to point his household furniture. The messenger, on going to the house, was told that the furniture belonged to Janet Macdonald; and, on his insisting to proceed in executing the diligence, she paid him, under protest, £5, 7s. 6d., being the amount of the debt and expenses. But she afterwards brought an action for repetition of that sum, and for damages. The defender

Pleaded; It is no doubt true that a marriage contract may be so framed as to exclude the husband's *jus mariti* over the personal property of the wife; 23rd June 1730, Walker, No. 55, p. 5841; 5th February 1745, Dalrymple v. Murray, No. 57, p. 5842. But it would be dangerous to give that effect to a contract like the present, where no inventory of the property conveyed was made up, and where, consequently, it might be made a cover for secreting the effects of the husband to any amount, and for any length of time, even where the wife had never had any property of her own.

At any rate, every thing in the wife's possession, and the money paid by her in the present case, must be presumed to belong to the husband till the contrary is proved. A presumption which is not removed by Duff having formerly been bankrupt.

Answered; If to exclude the diligence of her husband's creditors, it were necessary that the marriage contract should specify every article of the wife's property, no person in Janet Macdonald's situation in life could ever enjoy that benefit. Her property consisting of her stock in trade, as keeper of an alehouse, and a few articles of household furniture, being constantly liable to alteration.

The general terms of the contract create no suspicion of an intention to defraud in this case; where, on the one hand, the contract affords evidence that the wife had property; and, on the other, the husband having so recently obtained a *cessio bonorum*, renders it improbable that he can have any; unless he has fraudulently secreted it from his creditors, which is not to be presumed. And if the pointing attempted was illegal, the extorting money, in order to prevent it, must be equally so; 20th February 1782, Henderson v. Buddo, *voce* SEQUESTRATION.

The Lord Ordinary had sustained the claim to the extent of repetition of the money, and expenses of process.

This interlocutor having been brought under review, by a reclaiming petition and answers, the Court, on the 4th December 1792, adhered, "in respect no proof was offered by either party."

But upon advising a second reclaiming petition and answers, it was

Observed on the Bench; That the former interlocutor would have been attended with very dangerous consequences. Some Judges seemed to think, that [5850] a specification of the subjects in an inventory was absolutely necessary to make a contract of this nature effectual; for that although an actual and visible estate belonging to the wife might by an antenuptial contract be secured against the husband's *jus mariti*, a general stipulation that so much money should belong to her, would be liable to much abuse. But all agreed, that every thing in the possession of the wife must be presumed to be the husband's till the contrary was established, and that this presumption was not removed by his having formerly obtained a decree of *cessio bonorum*.

The Lords assoilzied the defender, and found the pursuer liable in expenses.

Lord Ordinary, DREGHORN.—Act. WILLIAM ROBERTSON, CHA. HOPE.—Alt. JOHN DICKSON.—Clerk, MENZIES.

No. 64. [5852] SIMPSON v. M'LELLAN. December 1682.

The husband is liable indefinitely for moveable debts due by his wife before marriage, without regard whether any thing came by the wife or not. See No. 68, p. 5855.

William M'Leilan being charged at the instance of Isobel Simpson, for payment of a sum contained in a bond granted by his wife before the marriage, he suspended upon this reason, that he being convened only *pro interesse* as husband, he could not be liable for his wife's debts, but only *in quantum* he was *lucratus* by the marriage; but so it is, he had not gotten so much benefit by the marriage as [5853] the sum would amount to, and was content to renounce in favour of the pursuer, all the right he had to his wife's goods *jure mariti*, or otherwise; but also to make forthcoming whatever means he got with her, for the charger's use; as also the ground in law upon which the husband is liable for the wife's debt, is only because by the marriage there is a communion; and therefore law infers that there should be a communion of debts. And seeing bonds granted by the wife before the marriage bearing annualrent, being heritable, do not fall under the *jus mariti*, nor the communion of goods; so neither should bonds granted by the wife before the marriage, bearing annualrent, fall under the communion of debts; so that, seeing the bond bears annualrent, the husband cannot be liable for the same, but at most for the bygone annualrent.—Answered, That albeit he was only convened *pro interesse* as husband, yet the husband is always liable for the wife's debts, especially seeing the marriage is still subsisting; for the husband and wife being *eadem persona* in law, he is as well liable for the wife's debts as she is herself; and execution for the wife's debt must take effect against the husband and his goods during the subsistence of the marriage, he being the head of the wife, and *dominus bonorum*. And however a creditor of the wife's should recover a debt against the husband for his interest, yet if no execution follow thereupon before the wife's decease, he will not be farther liable, nor can the creditors use any farther execution against him, seeing his interest ceases by decease of the wife; but if the marriage be still subsisting, and the wife alive, he is liable for her debt whether he be *lucratus* by the marriage or not.—The Lords repelled the defence, and found the husband liable for the debt. *Fol. Dic. v. 1, p. 390. Sir P. Home, MS. v. 1, No. 302.*

No. 65. LESLIE v. WALLACE. January 23, 1708.

The husband found liable for his wife's heritable debt, contracted before the marriage, *in quantum lucratus*; but in regard he had not present access to the *lucrum*, the tocher being liferented by another, the Lords ordained him and his wife to assign to the creditor as much thereof, to take effect when their right should commence by the liferenter's death.

Mary Wallace having been bred at Mr. Aitken's school, and being debtor for her education and board-wages in £166 Scots, and her parents being unable, Mr. Alexander Leslie pays it, and takes her bond, whereto her father is consenter for that sum. She being now married to Richard Howison, and charged on her bond, she suspends on these reasons, 1mo, That she is *vestita viro*, and so cannot be personally liable *ante matrimonio*.—Answered, He craved a decret to have effect against her on the dissolution of the marriage; which the Lords granted. 2do, This being a bond bearing annualrent, the husband can [5854] never be liable for the principal sum, because his *jus mariti* gives him right only to his wife's moveable sums, and so *a pari*, he can only be liable for her moveable debts, for *quem sequitur commodum, eundem debet sequi incommodum*, and no farther; as has been oft decided, betwixt Menzies and Osburn, No. 23, p. 5785; Captain Gordon and Cesnock, No. 24, p. 5787, and many others.—Answered, Whatever be in that principle, it only takes place where the husband is not *lucratus* by the marriage; but here the husband gets 5000 merks of tocher.—Answered, This comes not by the father, but is a *peculium adventitium*, gifted to her by her grandfather, and affords no present benefit, being liferented by

he mother.—The Lords found the husband liable *in quantum lucratus*; but in regard he had not present access thereto, they ordained him and his wife to assign him to as much of that sum, to take effect when their right commences by the mother's death. The third reason of suspension was, that she was minor the time of subscribing the bond, and lesed; for though it bore an onerous cause of her education at schools, yet this is not probative; for there is nothing more easy than to insert a specious narrative of onerous causes in minor's bonds; and here, being *in familia* with her father, he must be liable, and by his consenting could not be *auctor in rem suam*.—Answered, The testificate of her baptism is no authentic proof, and the presbyterian parents did then keep their children long unbaptized, till they got a minister of their own persuasion to do it. Next, if she be so ungrateful as to deny his paying the money, and relieving her, and the onerous cause, he will prove her staying at that school, providing it be *cum onere expensarum*.—The Lords repelled the minority, the cause of the bond being first instructed and adminiculated to have been *in rem suum*, and for her board wages.

Fol. Dic. v. 1, p. 390. Fountainhall, v. 2, p. 422.

No. 69. [5857] DICK v. CASSIE. January 24, 1738.

A husband who got made over to him, in the contract of marriage, all that belonged to his wife, *per aversionem*, found liable to pay an heritable debt contracted by her before the marriage; for a husband cannot lawfully take a right to all his wife's effects, without being liable to all her debts. See APPENDIX.

Fol. Dic. v. 1, p. 390.

No. 70. WEIR v. PARKHILL. November 3, 1738.

A disposition *omnium bonorum* by a wife to a husband in a contract of marriage, renders the husband liable to implement all conditions of the grant, *tanquam quilibet*.

By the contract of marriage between John Parkhill and Mary Weir, relict of Malcolm M'Gibbon, musician in Edinburgh, she, in consideration of the provisions made in her favour, "disponed to her future husband, in name of dote and tocher, all lands, heritages, debts, and sums of money, heritable or moveable, goods and gear, and others whatsoever pertaining or due to her any manner of way, &c." But with the reservation of a power and faculty to her "to dispose of the sum of 10,000 merks to such person or persons as she should think fit."

And Mary Weir having assigned this 10,000 merks to John Weir her brother; in an action at the instance of a creditor of Mary Weir's, brought after her death, both against John Weir and John Parkhill, the only question being, Which of the two should be found ultimately liable to the creditor? the Lords found, "That John Parkhill not having alleged that there were not sufficient effects intromitted with by him to pay the debts and answer the faculty, he was liable to the debts, and also to implement the faculty, to the extent of the subjects received by him."

[5858] Wherever an *universitas bonorum* is conveyed, it implies the burden of debts to the extent of the subject received, *quia bona tantum sunt quæ supersunt debitis deductis*: Nor does it alter the case that it is in a contract of marriage: For although where the husband is only, *qua* such, bound for his wife's moveable debts, the obligation upon him ceases by the dissolution of the marriage, except in so far as he is *lucratus*, yet where he takes from the wife a disposition *omnium bonorum*, he becomes liable *tanquam quilibet*.

Kilkerran (PASSIVE TITLE), No. 1, p. 366.

No. 71.

DRUMMOND v. STEWART. February 19, 1740.

A person who advanced money to a wife for defraying her first husband's funeral expenses, and carrying on a reduction of her former contract of marriage, brought an action for payment against the representatives of her second husband. Found, that the debt not being constituted against her husband *stante matrimonio*, his representatives were not liable unless proof was brought that he was *lucratus*.

The pursuer having advanced certain sums of money to his niece Jean Chalmers, for defraying her first husband's funerals, and carrying on a process of reduction of her contract of marriage with him, brought a process for payment thereof against the Representatives of her second husband.

The defences were, 1mo, Prescription, the last article of the account being dated anno 1710, which, it was pleaded, was founded on the statute introducing triennial prescriptions in all actions of debts, or merchant accounts, and other debts not founded on written obligations; and that this case fell precisely under the words of the act, "such like debts not founded on written obligations." 2do, That this claim being only a debt of the wife's, not constituted against the second husband *stante matrimonio*, could not be brought against him after the dissolution thereof, far less against his representatives.

Answered to the first, That the pursuer was no writer or agent, and run accounts with no body, neither was he a merchant; so that he could not be included either under the words or meaning of the act 83d, Parliament 6, James VI. It has indeed been justly found, that writers' accounts are comprehended in the general clause, because the laying out of money and managing processes, being their proper business by which they live, their accounts are not presumed to lie over; and indeed they bear a great resemblance to merchants' accounts; but the pursuer lives in the country on his estate, and concerned himself in the affairs of his niece, as her *negotiorum gestor*; and his case is much the same as that of a factor, who, in the course of his constituent's affairs, laid out money for merchant goods, or any other articles comprehended in that statute. In like manner, if a curator had laid out money in affairs of a like nature with this, and should neglect to have his accounts settled for five or six years after the expiration of his curatory, could it be pretended that he would lose what he could show he had laid out for his minor's behoof, to lawyers, writers, &c., by the prescription taking place against him. On the contrary, it would appear, that a curator could demand repetition of what he had laid out as above, at any time within the 40 years, before the statute 1696, otherwise there had been no use for that act, if a prescription of three years had formerly taken [5859] place; but the reason of the law is to obviate the inconveniency, both to minors and to curators, of having their accounts lying over their heads for 40 years; and there appears no reason of a difference betwixt a curator, a factor, and a *negotiorum gestor*, in this particular.

To the 2nd, it was answered, That the whole expense laid out by the pursuer, was evidently for the profit of Mr. Walter Stewart the second husband, who was benefited thereby; and, as he was *lucratus* by the marriage, his representatives ought in so far to be liable, notwithstanding the debt was constituted against him *stante matrimonio*.

Replied, It can make no difference that the pursuer is no writer or merchant, for the act doth not consider the creditor, but the nature of the debt. If it be an account, or money laid out, without a written obligation, the law does not allow action for payment of the debt after three years, unless by writ or oath of party. Neither will the parallel betwixt factors and curators, their accounts not prescribing in three years, apply to the present case; for factors have express commissions for what they do; and their factories must regulate their accounting; and curators have their office by the law, which is equivalent to the most express written factory. Nor is there any difference betwixt an agent and a *negotiorum gestor*. Every agent's account consists not only of money for his own pains, but chiefly in money paid to lawyers, clerks, &c. And yet it never was imagined that agents' accounts did not prescribe on that account. And, indeed, as most of the articles of this account are debursments in processes, which the pursuer pretends he undertook the management of for his niece, these fall directly under the denomination of agent's accounts. And with respect to the other articles, being the expense of the first husband's funeral charges, as the prescription

was evidently taken place against the original creditors, the defenders can see no reason why it should not be good against the assignee; which is putting the thing in the most favourable light for the pursuer, viz. that he had taken assignments to the several accounts paid by him. In which case, every defence competent against the creditor is competent against the assignee.

And, with regard to the 2nd defence, it was observed, That the husband was not *lucratus* by the money laid out by the pursuer; however, as that might involve the defenders in a proof, which behoved to be attended with trouble and expense, they were willing to rest their cause chiefly on the first defence.

The Lords found, That the triennial prescription does not take place in this case. But found, That the pursuer cannot have action for the accounts pursued on, the debt not being constituted against the husband *stante matrimonio*, unless he prove the husband was *lucratus* by the marriage.

Fol. Dic. v. 3, p. 281. C. Home, No. 147, p. 252.

No. 73. [5860] ALEXANDER NAIRN v. Colonel WILLIAM MERCER. November 17, 1785.

A debt contracted for the benefit of the separate estate of a married woman, though of such a nature that the husband was bound to discharge it, is still effectual against her heirs in that estate.

Colonel Mercer's predecessor in his estate, a married woman, granted a bond, along with her husband, for a sum of money borrowed in order to pay off the annual-rents which had arisen during the marriage, of a debt that was a burden on the lands; and in this bond Mr. Nairn concurred as cautioner. The whole parties afterwards joined in a second bond for an equal sum, which was to be applied for the discharge of the first; and again in a third bond, for the purpose of extinguishing the second. No assignment, it may be remarked, from the original creditor on the estate, had been obtained. The debt was ultimately paid by the cautioner; who having sued Colonel Mercer, the heir, for his relief, the latter

Pleaded, No valid personal obligation can be laid on a woman *vestita viro*; and as to the effect of a debt respecting the separate estate of a wife, it belongs not to the present case. The original debt, which was a burden on the succession, ceased when the first of the bonds was granted, no assignment having been made, by which only it could have been continued. In these bonds the husband was the proper debtor. He drew the rents of the estate; and if he employed them for extinguishing his own peculiar debts, or in any other way than in paying the interest due during the marriage on those of his wife, he must still remain indebted to that amount.

Answered, This claim is not made in virtue of the wife's personal obligation, except so far as by her bond she certifies the use to which the money was applied, that of clearing away a burden on her separate property. On this account there could be no necessity for an assignment to the original creditor's right, since that was nothing different from the rights of any of the creditors in the bonds, which were all equally burdens on an estate for the benefit of which the money borrowed had been employed. It is true, the husband was bound to relieve the wife, and so, as to her, was the proper debtor; but this does not save her at the hands of creditors.

[5861] The cause was reported by the Lord Ordinary; when the Lords repelled the defence.

A reclaiming petition against this judgment was refused without answers.

Reporter, LORD GRANGE.—Act. SOLICITOR-GENERAL BLAIR.—Alt. C. HAY.—Clerk, COLQUHOUN.

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Fol. Dic. v. 3, p. 281. Fac. Col. No. 232, p. 360.

No. 74. KILLOCH v. The EXECUTORS of the SHERIFF of MURRAY. June 23, 1612.

Ane decreet obtained against an heir portioner and her husband for his interest, will not have execution against the husband or his executors, if he was divorced from his wife in his lifetime, because the divorcement makes separation, and makes the wife's debts to follow herself, specially if the divorcement was deduced in default of the wife.

Fol. Dic. v. 1, p. 390. Haddington, MS. No. 2463.

No. 75. DOUGLAS v. STIRLING. February 27, 1623.

A husband, after his wife's death, cannot be imprisoned for debt contracted before the marriage; and if he be imprisoned before her death, he will be set at liberty.

James Douglas of Glaspen being married to Isobell Moffat, relict of James Stirling, advocate, and the said Isobell being charged for her debt contracted before Glaspen's marriage, and he charged for his interest, and they both denounced, and the husband warded; his wife deceasing, he summons the denouncers to see him put to liberty, since his interest was extinct by his wife's death; which desire the Lords thought reasonable. Thereafter it was alleged, That he was arrested by the said umquhile James Stirling's bairns, upon a decreet for debt, wherein he was principal, and for an act of cautionry.—I alleged, That as a man could not be warded, not being at the horn, so he could not be arrested and retained in ward, unless he were rebel.

Fol. Dic. v. 1, p. 391. Haddington, MS. v. 2, No. 2788.

No. 76. [5862] KNOWS v. KNEELAND. March 20, 1627.

A woman and her husband, for his interest, were charged upon a decree obtained against her before her marriage. After they were denounced, the wife having died, the husband, in a suspension, was liberated from all further diligence.

In a suspension betwixt Knows and Kneeland, Knows having obtained decreet before the Commissaries of Edinburgh against M. Hill, as intromissatrix with the goods of her umquhile husband, for payment of a debt owing by her husband; and after the decreet she being married upon Hary Kneeland, her second husband; who being charged for his interest with her upon that sentence, for payment of that debt decreed against her; and being both denounced for not payment, the wife being principal debtor, as representing her first husband, and for whose debt sentence had past against her in her widowhood, she deceases; after whose death Kneeland, her second husband, suspends, because he being only charged for his interest for his wife's debt, and she being dead, he ought to be freed of all execution. This reason was found relevant; for the wife, who was principal debtor, being dead, they found that her husband could not be astricted as husband *pro interesse*, to pay the debt, albeit he was put to horn therefor in the wife's time; whereby the charger alleged, That he thereby became properly debtor himself, being once lawfully denounced for not payment, which should be respected as if he had made payment in her time, *quo casu* he could not remit it back again; which was repelled. But because the charger alleged that the suspender had intromitted with all his wife's goods and gear after her decease, therefore the Lords found that relevant to sustain the same charges against him *per ordine* in the suspension; and found no necessity to put the charger to a new pursuit against the suspender, thereupon to convene him as intromitter.

Act. MOWAT.—Alt. —

Fol. Dic. v. 1, p. 390. Durie, p. 272.

No. 78. [5863] Dame RACHEL BURNET v. LEPELERS. December 23, 1665.

A decree of registration obtained against a wife, and her husband for his interest, cannot be put to execution against the husband after his wife's death.

By contract of marriage betwixt Mr. John Leper, and his father, and Dame Rachel Burnet on the other part, both father and son were obliged to employ £20,000, upon security, for the liferent use of the said Dame Rachel, who, with concurrence of Preston, her present husband, pursues the sisters of the said Mr. John Leper, as heirs, and otherways representing him, and their husbands, for their interests; and likewise Dr. Balfour's wife, only daughter of one of the sisters, as heir to her father and mother, against whom there was decreet of registration obtained, during their lifetimes together, and on this ground, that the defunct's husband did, by contract of marriage, disposition, or otherways, obtain right to the portion of his wife, one of the sisters, and heirs, and therefore is liable in payment *in quantum lucratus est*. It was alleged for Dr. Balfour and his wife, That she was willing to renounce to be heir to her mother; but as for the other passive title, as representing her father, who was *locupletior factus*, it is no ways relevant, for marriage is a cause onerous, and tochers are granted *ad sustinenda onera matrimonii*, and therefore are never counted fraudulent deeds, or without an onerous cause; nor do they fall within the act of Parliament 1621, against fraudulent alienations; neither was the defender's father liable, though there was a decreet of registration against him, because before any execution the marriage was dissolved. It was answered for the pursuers, That that member of the libel stands relevant; because the defender's mother being heir to her brother, the contracter could not transmit her estate to her husband without the burden of her brother's debt; and it is a most unquestionable ground in law and equity, *quod nemo debet cum alieno damno locupletari*, and therefore creditors are still preferred to portions of children, though given for their tocher.

The Lords found that member not relevant, that decreet was obtained against the husband and wife *stante matrimonio*, seeing it received not execution; and as to the other member, they thought, that if there were but a moderate and ordinary tocher, proportionable to the burden of the marriage, it would not infer repetition, or if the tocher was great, or an universal disposition of all the heir's right, they thought the husband would be liable, in so far as it was above a proportionable tocher, and therefore, before answer, ordained the contract of marriage to be produced, and the pursuer to condescend if there was any other benefit accresced to the husband by his wife than by virtue of the contract.

It was further alleged for the Lady Pitmedden, one of the sisters on life, That she could only be liable for her own sixth part, as one of the six heirs-portioners. It was answered, by our law, That all heirs were liable *in solidum*. There was several decisions alleged on either hand, on 7th Feb. 1632, Home *contra* Home, *voce* SOLIDUM ET PRO RATA, where the Lords found the heirs-portioners liable [5864] but for their own share; another, February 15, and March 21, 1634, Watson *contra* Orr, *voce* PASSIVE TITLE, whereby one of the daughters having a disposition of the whole estate, was found liable for the whole debt; and another, January 24, 1642, Scot v. Hart, *voce* SOLIDUM ET PRO RATA, where one of the heirs-portioners having disposed her share to the other, and thereby being insolvent, that other was found liable *in solidum*.

The Lords having considered the case, found the heir-portioner liable, *primo loco*, only for her own share, until the rest of the heirs-portioners were discust, but determined not whether these who were *solvendo* should be liable *in solidum*, albeit the debt exceeded their portion, or only entirely for their own share, and for as much more as the value of their succession could amount to. See SOLIDUM ET PRO RATA.

Fol. Dic. v. 1, p. 390. Stair, v. 1, p. 329.

No. 81. [5869] JOHN BRYSON v. MARJORY MENZIES. November 16, 1698.

Debated but not determined whether an adjudication led against the husband's lands for the wife's debt, ought to fall, upon the dissolution of the marriage.

In a competition betwixt John Bryson, merchant in Glasgow, and Marjory Menzies, relict of Turner, and Dr. Alexander, her factor, this question occurred; where a decreet is obtained against a wife for her debt, and her husband *pro interesse*, and an adjudication led of the husband's lands, and then the marri-[5870]-age dissolves by the wife's death, if the husband or his lands be personally liable for that debt, and if it will still affect his estate; or if the same be disburdened and liberated by the dissolution of the marriage, whereby his interest ceases. The *ratio dubitandi* is, that the communion of goods betwixt man and wife being only of moveables, by analogy of law, the same can only be of moveable debts, so as the husband's heritable estate cannot be affected, unless the decreet had been completed by execution or payment *stante matrimonio*; and in a like case the husband was found not liable. 23rd December 1665, Rachel Burnet *contra* Lepers, marked both in Dirleton and Stair's Decisions (No. 78, p. 5863); and Stair, in his Instit. lib. 1, tit. 4, § 17, says expressly, there is neither law nor decisions to make the husband's lands liable for the wife's debt, these not being in *communione bonorum*. On the other hand it was argued, That the diligence against the husband being brought the length of an adjudication against the husband's estate (which is *processus executivus*) during the standing of the marriage, it must be effectual as if he had disposed and granted bond; in which case the debt would have become the husband's own. Though the Lords, in the case of Osburn, No. 23, p. 5785, and several others, lately found the husband not liable for the wife's heritable debts, yet in this circumstantiated case there was some difficulty; therefore they superseded to determine that point, till the nullities objected against the adjudication were discussed; for, if it fell by these, there would be no need of the other. *Fol. Dic. v. 1, p. 391. Fountainhall, v. 2, p. 15.*

No. 82. Sir JAMES CUNNINGHAM v. THOMAS DALMAHOY. February 1, 1662.

A husband found liable in his wife's debt, though not established against him during the marriage.

Sir James Cunninghame pursues Thomas Dalmahoy, and the tenants of Pollomount, to make payment to him of the mails and duties of the lands of Pollomount, resting at the death of the late Duchess of Hamilton, because she had granted bond of £500 Sterling to the pursuer, to be paid after her death; and for security thereof, had assigned the mails and duties of her liferent lands of Pollomount, which should happen to be due at the time of her death. It was alleged for Thomas Dalmahoy, her second husband, absolutor, because these [5871] mails and duties belonged to him *jure mariti*, neither can he be liable for this debt *jure mariti*, because it was not established against him during the lady's life; neither could be, because the term of payment was after her death. The pursuer answered, That he did not insist against Thomas Dalmahoy as husband, but as intromitter with the rents of Pollomount, due at the Duchess' death, wherewith he hath meddled since, which could not belong to him, *jure mariti*, being assigned before the marriage; and if they could belong to him *jure mariti*, yet it must be with the burden of this debt.

The Lords repelled the defence, in respect of the reply, for they thought a husband, albeit he was not liable simply for his wife's debt, *post solutionem matrimonii*, yet that he should have no more of the wife's means, *jure mariti*, but what was free of debt, and so behaved to pay her debt, so far as he enjoyed of her means.

Fol. Dic. v. 1, p. 391. Stair, v. 1, p. 90.

- No. 91. [5877] BARBARA LOGAN v. ROGER WOOD, and AGNES CRICHTON v. Mr. ALEXANDER ABERCROMBIE. March 26 and February 26, 1561.

Gif ane man puttis away his wife out of his house and companie, for ony crime or ult alledgit committit be hir, he aucht and sould sustene hir conforme to her estate, at the day in the quhilk he put hir away, unto the day of the reconciliatioun, or then at the final sentence of divorce. *Fol. Dic. v. 1, p. 392. Balfour, p. 95.*

- No. 94. [5878] NEILSON v. GUTHRIE and GAIRN. July 10, 1672.

A husband found liable for clothes bought by his wife after proclamation of banns.

Alexander Neilson pursues Barbara Guthrie and Mr. William Gairn, her husband, and Captain Guthrie, her father, for an account of £500 for her wedding-clothes, taken off in his shop. It was alleged for the said Barbara, That she was minor, and the furniture was taken off, not only without her father's consent, but contrary hereto, for he did prohibit it, and so being done without consent of her father as tutor, or lawful administrator, her obligation was null. It was alleged for the father *absolutor*, because he had expressly prohibited the merchant to give off this ware, and there was nothing to oblige him to furnish wedding-clothes to his daughter, but that he might appoint her to be married in the clothes she had, if he thought fit. It was alleged for the husband, That he could not be liable, neither having promised, nor yet been liable for the debt of his wife, which was contracted after proclamation. The pursuer answered, That he offered to prove that the said Barbara was major, and that he did not found upon the father's promise, but that the father having consented to the marriage, and subscribed the contract, was thereby obliged to solemnise the marriage, and to furnish his daughter clothes according to her quality, being a part of his natural obligation: Likeas, the husband was obliged *de in rem verso*, because his wife be-[5879]-hoved to have had other clothes, if she had not been furnished with these.—The Lords found the wife liable, if she was major; but found the father not liable, seeing he prohibited it; but found the husband liable however *de in rem verso*. See RECOMPENCE. *Fol. Dic. v. 1, p. 393. Stair, v. 2, p. 98.*

- No. 95. Widow AUCHINLECK v. Earl of MONTEITH. June 23, 1675.

The husband is liable for goods taken off by his wife, even after inhibition, unless he can prove, that she was otherwise provided for.

In a pursuit at the widow's instance against the Earl for payment of a hundred and seventy-seven pounds, as the price of a parcel of stuff and furniture, sold to his Lady for her abulziements, it was alleged for the Earl, that before that furniture was gotten off, he had served inhibition against the Lady, which was registered and made public, after which she was not capable to contract debt. It was replied, that the sum craved being for merchandise and necessary abulziements, the Lady being in want, the inhibition could not affect the same, nor put the pursuer in *mala fide*, especially being for so small a sum. The Lords did ordain the pursuer to give her oath, if the inhibition was particularly intimated to her, which she denied; and thereafter, having advised this as a common cause, did find, that the Earl was not liable, he proving, that he furnished the Lady sufficiently with clothes and other abulziements.

Fol. Dic. v. 1, p. 393. Gosford, MS. No. 760, p. 471.

No. 97. CAMPBELL v. The Laird of EBDEN. July 25, 1676.

Found in conformity with No. 95, *supra*.

Lillias Campbell pursues the Laird of Ebden for payment of an account of ware taken off by his Lady, acknowledged by her ticket under her hand, sub-[5890]-scribed with her hand, subjoined to the count. The defender alleged, That the subscription wants witnesses, and therefore at least the receiving of the goods must be proved by witnesses. 2do, That his Lady was inhibited before this account, and thereby the lieges to contract with her. It was answered, That merchants are not obliged to look registers for inhibitions. 2do, That the furniture was competent for a person of the Lady's quality, and therefore must be understood to be necessary, unless the husband prove that his Lady was otherwise competently provided, as was found in the case of the Earl of Monteith, No. 95, p. 5879, though his Lady doth not cohabit with him.

Which the Lords sustained.

Fol. Dic. v. 1, p. 392. *Stair*, v. 2, p. 458.

No. 98. [5881] JOHN HENDERSON v. JAMES LAFREIS. June 24, 1696.

A minor found liable for his wife's wedding cloaths, bought by himself.

Lauderdale reported John Henderson, merchant v. James Lafreis, writer, for payment of a sum contained in his bond. The reasons of suspension and reduction being coincident, were, that he was minor, and lesed, it being for merchant ware, not taken off for himself (except a very few articles), but for his wife's marriage cloaths, which Mr. James Caithness, her father, ought to have paid. Answered, It was *in rem versum* to the minor, who was past twenty, and the count being no way exorbitant, and the furnishing being to his wife, and the bond granted since his marriage, he can no ways pretend to be lesed; for though her father should have paid her wedding cloaths, yet the charger would not have trusted him for a sixpence, he being then in prison for debt; and such furnishing to minors has been sustained, as appears by Dury, 5th Feb. 1631, Inglis *contra* Sharp, *voce* MINOR. The Lords repelled the reason, and found him liable, even for what was furnished to his wife, because being a movable debt, *jure mariti* it became his, especially the bond being after the marriage. See the 10th of July 1672, Neilson *contra* Guthrie, No. 94, p. 5878.

Nov. 11, 1697.—John Henderson having charged James Lafreis, writer (as mentioned June 24, 1696), for payment of the sum of contained in his bond: his reason of suspension and reduction was, minority and lesion. Answered, *In rem versum*, being for your marriage cloaths. Replied, The account is likewise made up of sundry articles furnished to his wife before the marriage, and to Mr. James Caithness, her father. The Lords found *quoad* what was given off to her father, he was lesed, and ought to be reponed against the same; but what was given to his wife, though prior to the marriage, yet would fall *sub communione bonorum mobilium*, and make him liable *jure mariti*, unless they had followed her father's faith in the furnishing. See July 10, 1672, Neilson *contra* Guthrie, No. 94, p. 5878. Then the charger alleged, That Lafreis being a writer and attendant about the Session the time he gave [5882] this bond, though then a minor, he cannot crave the benefit of reposition; and it has been so decided in the Parliament of Paris, and elsewhere. Answered, That if an advocate (which is more than a writer) should *ex errore facti* give bond, or enter into any other transaction to his prejudice, when minor, he will be restored; and this benefit is only denied him when he errs *in jure*; and so Pirezzius determines it *ad tit. cod. Qui et adversus quos in integr.* and in the decision 7th December 1666, between Fairholme and Sir George M'Kenzie, *voce* MINOR, he, though then a student of law, was reponed against a bond wherein he had signed cautioner, in his minority, for his father; but the ground there was, that his father could not legally authorize him *in rem suam*. The Lords found Lafreis's being in a writer's chamber did not exclude his reason on minority and lesion; but the Lords ordained the charger to depone that the articles of the account were at the common usual rates, and not exorbitant.

Fol. Dic. v. 1, p. 393. *Fountainhall*, v. 1, pp. 723, 792.

No. 99. The Lady KINFAUNS and LYON of Auchterhouse v. The Laird of KINFAUNS, her husband. July 19, 1711.

A lady being advised by her physicians to go to the baths in England for her health, her husband procured declarations from other physicians that medicine used at home might as probably recover her. He was required by instrument to furnish her with money for her journey, but having refused to do so, she borrowed the money and granted bond for it. Found that the bond was null, as being granted *stante matrimonio* without the husband's consent; and that she could not desert her husband's family; but that if her sickness required it, and his fortune could bear it, he was obliged to promote the cure, though it should be by going to the baths; and therefore sustained the process at her instance against her husband, in so far as the money was necessarily advanced for her journey to England. Where the husband is willing to aliment his wife in his own family, she is not entitled to a separate aliment unless she prove *sævitiū* or maltreatment.

Mistakes falling in betwixt Charteris *alias* Carnegy of Kinfauns, and his Lady, daughter to Carnegy of Phineven; and she falling tender, took the advice of some physicians, who declared her distemper had a tendency to a palsy, and that it was fit she go to the warm baths in England, or to the waters of Aix-la-Chapelle in Germany. This being signified to her husband, he consulted other physicians, who attested the use of medicines at home might as probably recover her, and so refused to comply with her going abroad. Upon which diversity of opinions, he is required by way of instrument to furnish money for her journey; and on his declining it, Phineven her brother, and Auchterhouse, who married her sister, advance her 2000 merks to carry her on her journey, and take her bond for it; and thereupon intent a process against the husband for paying that money, so profitably advanced, and likewise for an aliment in time coming: And *primo loco* insisted for the 2000 merks. Alleged for Kinfauns, the husband, the bond is null, granted by a wife *vestita viro*. Next, though a man is *jure naturæ* bound to aliment his wife; yet, if she causelessly desert and withdraw, his obligation ceases; which she has done these twelve months bygone, taking up her residence with her brother and brother-in-law, and then going not to the baths, but to London, contrary to the advice of Dr. Pitcairn and others the best physicians; and all this done only by bad influence and counsel, without the least provocation or *sævitiā*, libelled against the husband toward her. And this may be *pessimi exempli* to allow wives to borrow [5883] money at every caprice, especially when inhibited: For though merchants may furnish them necessities conform to their quality, yet the reason of the *senatus-consultum Velleianum* hinders their borrowing of money, either to oblige themselves or their husbands; and Auchterhouse was in *pessima fide* to lend her, for this would undermine and disturb the quiet of the conjugal society, which is the foundation of all the other great societies in the world, which are but composed of this; for this but encourages the wife to withdraw; and the creditor's concurrence fortifies her in her separation and aversion: And if a wife withdraw (which the English lawyers call eloping) no law will oblige the husband to maintain her, when he is willing to take her home and provide all necessities for her recovery, which he has many times offered to do. Answered, They did not so much found on the bond (which alone cannot bind the husband without his consent) as on the onerous cause for which it was granted; for a man by all laws, divine and human, is bound to maintain his wife conform to his estate; and under aliment is comprehended not only ordinary entertainment, cohabitation and apparel, but likewise extraordinary expenses of physicians' salaries, and for drugs and medicaments when she is sick; and if the cure cannot be perfected at home, one of his rank is bound to send her to the baths, God in his providence having afforded so good a remedy within this isle as the baths, where many in her circumstances have been cured; and both his character and estate should bear the charges of so necessary a duty, and refund the furnishers of the money towards her journey, as being *utiles negotiorum gestores*; it being notour that where wives contract for necessities, the furnishers have action against the husband; and her subscription in a merchant's count-book constitutes the debt. 3tio, Though borrowing money by a wife differs from the furnishing her with necessities, yet if her health require her undertaking a long journey, the one must be paid as well as the

other ; seeing without the money one cannot travel to the baths ; and in case of the husband's absence, or unjustifiable refusal to advance the money when required, she may lawfully borrow it from such as, seeing her circumstances, and the husband's cold indifferent and unnatural carriage, will from the principles of compassion lend. And as to her deserting, that was a stretching of the word ; for she only left her own house to wait on her sister, the Lady Auchterhouse, being in childbed, and there she fell sick, which cannot be construed a deserting or forsaking her husband or his family : For the l. 48, *D. De reg. jur.* says well, *brevi reversa uxor, nec divertisse videtur*. The Lords found the bond null, as given *stante matrimonio* without her husband's consent, and that where a man is willing to aliment his wife, she cannot crave a separate aliment, unless she prove *scævium* or maltreatment ; and that she cannot desert his family ; yet if her sickness require it, and his fortune can bear it, he is obliged to promote the cure, though it be by going to the baths, or other medicinal water : And therefore sustained the process at her instance against her husband, in so far as the money was necessarily advanced to her journey to England. But the se-[6884]-cond inspection that fell in, was the quantity borrowed, which was alleged to be exorbitant, and noways suitable to his condition, he having liferents and other debts affecting his estate. The Lords remitted to the Ordinary to try the circumstances, and to restrict and modify the same if he saw cause.

December 13.—The Lords, on a new report, resumed the consideration of the case mentioned 19th July 1711, betwixt Kinfauns and his Lady. There though the bond was found null, yet what was advanced for her necessary use was sustained. Now, it came to be debated, if her going to the baths was necessary towards the recovery of her health. Here (as happens in many cases where the doctors differ), there were contrary testificates under several physicians hands produced ; some thinking it necessary, and others that the cure might be as well performed at home. Dr. Cheyne's letter, who attended her at the bath, was very particular as to the good success they had. But this is to justify wives unwarrantable desertion and wandering by the event, nor does it prove the necessity of such a dangerous journey, for who knows but she might, by the application of suitable means, have done as well at home ? Neither is the recovery very apparent. And though it be turned somewhat common to go to the baths, yet many things now are turned pretty frequent in wives demands, that are neither necessary nor fit, upon the emendicate assertions of physicians yielding to the caprice of some, not without contempt and contradiction of the husband's inclinations. Answered for the Lady, That the husband's obligation to care for his wife in sickness is founded in nature and humanity (not to speak of Christianity), and though *regulariter* this is only to provide for her at his own residence, yet if these medicaments will not do, he is not to grudge her going to mineral waters. Yea, the Lords have found where wives are inhibited, yet the husband is liable for necessaries furnished to them, though abroad, as far as it would have cost them if they had staid at home with them in their own house, as was decided No. 97, p. 5879. Campbell *contra* Ebdon, where it is observed, the like had been done before betwixt the Earl of Monteith and his Lady, No. 95, p. 5879 ; as also, 6th July 1677, Allan *contra* Countess of Southesk, Div. 6, § 1, *h. t.*, where she had carried her son the heir of the family with her. See also the 11th December 1629, Gordon *contra* the Earl of Galloway, *voce* MINOR. The Lords thought it dangerous to subject a husband to all the proposals of a wife, who seldom wants costly advisers and flatterers ; yet having balanced all circumstances here, they found her journey necessary towards her recovery, and when her husband refused money, she might borrow. For put the case she had gone by sea, and was carried in by pirates to Dunkirk, behoved he not to have ransomed her ? But the difficulty was as to the sum, for the journey would require all that and more, yet his fortune could not allow it, it appearing from the sequestration of his estate by his creditors, that he had only 2300 merks at present. Some urged that the terms of payment might be divided ; but the plurality thought the most they could in [6885] these circumstances modify to her was only the half of his own aliment, viz. 1160 merks, for which sum they decerned.

[o. 102. [5886] SAMUEL MITCHELSON, senior, Writer to the Signet v. SOPHIA, Lady CRANSTON, and MICHAEL LADE, Esq., her husband. December 12, 1780.

Money advanced for aliment of a family, for which a voucher is taken from the husband, becomes the husband's debt, and the creditor has no claim against the wife, altho' she succeed to a separate estate.

Lord Cranston had a considerable estate, both in England and Scotland, and his lady, after her marriage, succeeded to an estate in the West Indies, which had belonged to her father, and to the liferent of which she was entitled; but, after this accession opened to Lady Cranston, Lord Cranston's affairs became so much involved, that his Creditors brought a judicial sale of his Scots estates.

During the dependence of the sale, Lord Cranston was much pinched for money; his family resided then in Edinburgh; and Mr. Mitchelson, from time to time, advanced sundry sums for the use and aliment of the family; for which, on settling accounts with Lord Cranston, in May 1771, he took his Lordship's bill.

The price at which Lord Cranston's Scots estates sold fell short of paying the debts preferably secured upon them. The English estate was so settled, as [5887] that it could not be attached for Mr. Mitchelson's debt; and Lord Cranston having died, Mr. Mitchelson brought an action against Lady Cranston, and Mr. Lade, to whom her Ladyship was married after Lord Cranston's death, concluding for payment of the sum in Lord Cranston's bill, as being advanced on the credit of the Lady, and applied for the maintenance of her family.

Pleaded for Lady Cranston and her husband; Mr. Mitchelson's taking Lord Cranston's bill shows he considered this as Lord Cranston's debt; which it clearly was, as every husband is bound to aliment his family. Such debts cannot affect the wife, as wives are not liable for their husbands' debts. Lady Cranston had no separate estate at the time these sums were advanced; therefore the pursuer must be presumed to have made the advances on the credit of Lord Cranston, and he can only affect his estate for the same.

Answered for the pursuer; He was not Lord Cranston's man of business, but was employed by Lady Cranston to look after her interest, while Lord Cranston's affairs were in confusion. It was on Lady Cranston's credit he made these advances, by which the debt in question was contracted; for, although Lady Cranston had not got possession of the West India estate at the time these advances were made, yet it was then certain she must succeed to it; as, in fact, soon after, she did; and it was on the faith of Lady Cranston's re-paying the money that it was advanced. Sundry letters of Lady Cranston's were produced, to show that this was the case; and that, even after the bill had been granted by Lord Cranston, Lady Cranston had promised to pay the debt.

Replied for the defenders; The letters founded on by the pursuer were impetrated from Lady Cranston by her husband Lord Cranston. They infer no obligation on Lady Cranston; nor could do so, even if a promise had thereby been made to pay the debt, as a woman clothed with a husband can come under no valid obligation to pay the husband's debts.

Both parties quoted sundry authorities, in support of their different pleas.

The Lord Ordinary found, "That the debt pursued on was the proper debt of the late Lord Cranston, and that the defender, his widow, is not legally bound to pay the same; therefore sustained the defences, and assoilzied."

The pursuer reclaimed to the Court; and, on advising his petition, with the answers, "the Lords adhered."

Act. JOHN SWINTON, DAVID ROSS.—Alt. ALEX. ELPHINSTON.—Clerk, TAIT.

Fol. Dic. v. 3, p. 286. Fac. Col. No. 9, p. 17.

No. 110. [5900] AGNES ROBB *v.* The TRUSTEE for her husband's Creditors.
March 8, 1794.

The wife of a bankrupt is not entitled to an aliment out of her own estate falling under her husband's *jus mariti*.

In 1787, Agnes Robb was married to William Robb. There being no contract of marriage, her moveables to the value of above £1000 Sterling, and the yearly revenue arising from her heritable property, and her bonds, bearing interest, which together exceeded £100, fell under the *jus mariti*.

In 1792, her husband became insolvent, and fled the country, and his estate was soon after sequestrated.

In 1793, Mrs. Robb made a summary application to the Court, praying to have a suitable aliment modified to her out of the annual produce of her heritable property; and, in support of this claim, she

Pleaded, 1st, If the wife, before her marriage, has no property of her own, she must depend entirely on her husband's fortune or industry for support; but, when effects formerly belonging to her are transferred to him by the act of the law, in consequence of the marriage, as that transference is founded entirely on the presumed will of the parties, it must be an implied condition in it that he shall suitably aliment her; or rather, that she shall reserve as much to herself as is necessary to secure her in all events against absolute indigence. Accordingly, in the case *Fac. Col. 22nd November 1785, Lisk v. her Husband and his Creditors, No. 103, p. 5887*, the Court, proceeding on these principles, modified out of her own estate a liberal aliment to a wife whose husband had become bankrupt. See also *Falc. 21st February 1745, Bontein v. Bontein, No. 100, p. 2895, Stair, b. 1, tit. 4, § 9*.

2ndly, When a wife is obliged to leave her husband on account of maltreatment, and still more, when, as in the present case, she is deserted by him, she becomes a just creditor for an aliment, in the same manner as she would for her legal provisions upon the dissolution of the marriage by his death. On this ground, she may not only claim on his bankrupt estate, but may also retain her own property for her security. December 1721, *Selkrig [5901] v. Selkrig, voce MUTUAL CONTRACT*. Neither can it be maintained, that there is now no room for retention, the legal assignation at the marriage having already transferred it completely to the husband; for a legal assignation can have no stronger effect than a voluntary one; and it is a clear point, that in the case of a direct assignation by the wife to the husband in a marriage contract, while the subject remains *in medio*, it may be retained in the event of the husband's bankruptcy, till the counter obligations in her favour are made good. 22nd June 1743, *Crawford v. Mitchell, voce MUTUAL CONTRACT*.

3rdly, The wife may be considered as fiar of her own heritable estate, and her husband, or the trustee for his creditors in his right, as the liferenter; and, according to the obligation universally understood to lie on the liferenter, where the fiar has no separate means of livelihood, the petitioner is entitled to an aliment, 1491, c. 25; *Stair, b. 2, tit. 4, § 36*; 22nd February 1722, *Master of Lovat v. Fraser, No. 23, p. 396, Ersk. b. 2, tit. 9, § 62*.

Answered, Whether a husband get a fortune by his wife or not, he is obliged to maintain her. But, if there are no goods in communion, this obligation must necessarily cease. Now, the funds from which the petitioner here asks an aliment belong not to him, but to his creditors, against whom she has no legal claim. Fountainhall, 25th November 1709, *Turnbull v. her Husband's Creditors, No. 108, p. 5895*. Even where a wife is secured in a liferent annuity by express paction, it was never pretended that she had right to it *pendente matrimonio*, on the insolvency of her husband.

The petitioner's argument, if good for any thing, would establish, that creditors are in every case bound to aliment, not only the wife, but the children of their insolvent debtor, as he is under a natural obligation equally strong to maintain them. This doctrine, however, is adverse to those established principles in our law, that a man's whole funds are liable in payment of his onerous debts, and that in every case the wife must follow the fortune of her husband, unless she has a separate estate constituted by law or paction.

Besides, it is wrong in the petitioner, who in fact has such separate estate, to lead that she is destitute. Upon her giving her creditors a part of the fee of her heritable property equivalent to the value of her husband's *jus mariti*, they will instantly renounce their right over the remainder.

Observed on the Bench, The fund from which Mrs. Robb claims an aliment, elongs, without any reservation, either express or implied, to the husband, *jure mariti*, and consequently to his creditors. Were the Court, therefore, to give her an aliment out of it, this would just be disposing of so much of their property, which the husband has no right to do. Even therefore if the petitioner's whole fortune had been moveable, she would have had no legal claim against them; and, as the larger part of it is heritable, her claim on their [5902] compassion is considerably weakened. By accepting of their offer of purchasing her husband's liferent on her disposing of part of the fee, she can obtain an immediate livelihood. The case of Lisk v. her Husband's Creditors, was thought to have been erroneously decided; and an appeal was entered against it, but a compromise afterwards took place in consequence of what passed in the House of Peers, after the cause had been begun to be pleaded.

The Court, with only one dissenting voice, refused the desire of the petition.

A reclaiming petition was refused (27th May 1794), without answers.

For the Petitioner, M. ROSS, FLETCHER.—Alt. TAIT.—Clerk, HOME.

R. D.

Fol. Dic. pp. 3, 289. Fac. Col. No. 114, p. 253.

No. 113. [5905] COOK v. JOHNSTON. February 23, 1700.

In an action of adherence, the defence that since the marriage the pursuer had cohabited with other men was sustained.

Jean Cook, daughter to Mr. Patrick Cook, minister at Prestonpans, having obtained a decret of adherence against Johnston of Corehead, on these qualifications of marriage; that he had suited and courted her as his wife, and given her tokens; that he had cohabited and conversed together for some time as man and wife; and, 3tio, That she had born him children which he had owned. Of this decret he raises suspension and reduction, on these reasons, 1mo, The Commissaries committed iniquity in sustaining these qualifications relevant. 2do, In finding them proved; for the material witnesses she had adduced were only women, who are inhabile in law, and only deponed on hear says. 2do, He offered to prove, that during the time she pretended to be married to him, she was guilty with another man, and as that would in law dissolve the marriage, though it had been formal, public, and solemn, so much more must it defend him from adhering to or taking home a whore, where the marriage was only inferred by stretches, presumptions, and occult converse. The Lords thought the 2nd reason relevant, and would not put him to raise an action of divorce; but seeing this might be obtruded against all adherences, therefore they repelled it, unless he paid in a sum to her for her aliment *medio tempore*, and [5906] to carry on the process, and condescended on the person he meant, with certification, if he succumbed, they would consider the infamy, what it should import, if it be found a calumnious defamation.

Fol. Dic. v. 1, p. 394. Fountainhall, v. 2, p. 92.

No. 118. [5909] LORD JUSTICE-CLERK and his LADY v. JOHN HAMILTON of Bangour. January 21, 1708.

A Lady, who in lieu of her jointure, had a bond for a great sum from her husband, payable the term after his decease, craved aliment for maintaining the family five months, from her husband's death till the term after that event. The Lords found aliment due, notwithstanding the bond.

Lord Grange reported the mutual processes betwixt John Hamilton of Bangour, and the Lady Whitelaw, and my Lord Ormiston, Justice-Clerk, now her husband. Sir

William Hamilton, Lord Whitelaw, granted a bond for £7000 Sterling to his Lady, failing heirs of his own body. She pursues a constitution of this debt against Bangour, who repeats a reduction of it on these reasons, 1mo, It is null, because though it bear witnesses inserted and subscribing, yet it is offered to be proved by these witnesses oaths, that the paper was presented to them, folded up to the very docket and signing, and they saw nothing above the said Lord Whitelaw's subscription; so that it might have been a half sheet of blank paper for them; and there was a marginal note to which they are made to be witnesses, and yet saw it not; and if this practice were once allowed, [5910] then the design of that excellent law, act 25th, 1696, declaring all blank writs, either in whole, or in any substantial parts, null after that act, would be frustrated; and therefore, my Lady Ormiston ought to prove that her name was standing filled up at the time of the witnesses subscribing; and they ought to be examined, if they saw any writing on the paper above my Lord Whitelaw's subscription; a subscription necessarily requiring something *supra scriptum*; and if this strange method of concealing the whole writ be once allowed, then the law of deathbed is overturned, as also all reductions of bankrupts deeds on the act of Parliament 1621, or *ex capite inhibitionis*; for the creditor's or receiver's name may be left blank at subscribing, and filled up either on deathbed, or after he is broke or inhibited, though it bear a date anterior to all these three cases; neither does its being holograph solve the matter, for that proves not its date against the heir; and though the Romans used caution enough in cancelling their substitutions wrote *in ultima cen*, yet the law expressly required the filling up of the heir's name in the testament in presence of the witnesses adhibited.—Answered, They opposed the bond, all written *unico contextu*, wherein, by ocular inspection, there is not the least vestige or appearance that ever there has been a blank; and for the marginal note, being of no moment, they pass from it, and so *utile per inutile non vitiatur*; and it were a new paradoxical doctrine to require that witnesses should see or know the contents of the paper they are called to. It is true, a witness is so far concerned to think he is not called to attest a treasonable writ, and for that he relies on the probity and fidelity of his employer. 2do, In all instruments of notaries, such as sasines, intimations, &c., the contents and heads of the writ must be read or explained to the witnesses; and, 3tio, By the law of England, a writ is not probative till the witnesses, if in life, make affidavit on the verity of the deed; but with us, a writ formally subscribed before witnesses, becomes *ipso momento* from delivery, or its dispensing therewith, a valid obligatory writ, and all is presumed *solemniter actum* in favour of the deed, unless improved or reprobated by some known nullity in law; and therefore, unless Bangour will offer positively to prove, by the witnesses inserted, that it was blank, either in whole or in part, when they subscribed it, the writ subsists as a good and complete deed; and it were a dangerous and unheard of presumption, to suppose it null and blank because of the folding up, unless the creditor, receiver of it, prove it was then actually filled up; for to transfer the *onus probandi* on the receiver were to shake and unhinge all the securities and settlements of Scotland, which stand upon this firm basis, They are good probative writs, except you convel and redargue them by some known nullity in law; and the *onus probandi* lies on the proposer, *alleganti, incumbit probatio*; and writs must not depend upon such uncertainties, as it may be, it was blank in whole or in part, unless there were an act of Parliament made, that witnesses shall not subscribe a deed until they first read or know the contents thereof.—Replied, That heirs may be easily defrauded, if a folded paper, concealing all the writ above, shall be sustained in favour of a [5911] wife; for where she has got the ascendant over her husband, it is easy for him to leave it blank when he adhibits the witnesses, and fill it up long after. And all laws grow gradually, as the cunning inventions of men increase to elude what was law before; for then new antidotes must be invented for new frauds, and deceits set on foot to disappoint former laws, especially in *re domestica*, where the *blanditia* and suggestions of a wife may prevail very far.—The Lords repelled the nullity, and sustained my Lord Whitelaw's bond to his Lady, notwithstanding the writ was covered and folded down when the witnesses subscribed it; and found it not relevant *est* it were true, and refused to examine them thereupon, unless it were positively offered to be proved that it was then blank, either in whole or in part.—The second reason of reduction was, That he binds his heirs and successors, and not himself; whereas, by an express title in the common law, all obligations must begin *a defuncto*, otherwise *nec prosunt nec obstant hereditibus*. 3tio, This being a moveable bond, and granted

stante matrimonio, it *jure mariti* recurred to the husband, and could not subsist in her person, as Newton observes was decided in January 1682, Telfer *contra* Campbell, No. 53, p. 5836; and was so found before, 9th February 1677, Lord Collington *contra* Tenants of Invertyle, No. 50, p. 5828; and 13th July 1678, Nicolson *contra* Inglis, No. 52, p. 5834.—Answered, That subtilty of the Roman law, making an obligation necessarily to commence at the defunct, was repudiated by the later constitutions, as a groundless ceremony; and a renunciation of the *jus mariti* to accresce and devolve again upon the husband, though advanced for a while *tam magno conatu et boatu* by our advocates, *primi ordinis*, as my Lord Dirleton speaks, *voce* ALIMENT, is now laid aside; and it is generally acknowledged, that paction will over-rule it, that it shall not, like water cast up a hill, recur back again; but if Bangour subsume, this bond was revoked by my Lord Whitelaw, the allegiance will be good.—The Lords repelled the second reason.—The third was, That this bond was extinct by confusion, in so far as my Lady was a vitious intromitter with her husband's goods, and so universally liable, at least to extinguish her own debt.—Answered, 1mo, By her contract of marriage she had right to a share of her moveables. 2do, Any intromission she had was necessary *custodiæ causa*. 3tio, This was only competent to a creditor. 4to, The Lady Houshill was confirmed executrix to her brother, from whom she has right; and this purges vitious intromission.—Replied, Confirmation can never defend here, because there is a fraudulent superintromission concealed, and not given up in the inventory, as both Hope in his larger and lesser practices, and Spottiswood, *voce* EXECUTORS, observes; and the heir is a creditor *quoad* his relief of moveable debts.—The Lords found the confirmation purged the passive title of vitious intromission, being before citation in the pursuer's process; and that the concealing and superintromitting made only place for a dative *ad omissa*.

November 16, 1708.—Lord Grange reported John Hamilton of Bangour *contra* Lord Whitelaw's Relict, now Lady Ormiston, of which cause see more [5912] at the 21st January 1708. The Lady now insisted on another conclusion of her summons against Bangour, for implementing that clause in her contract of marriage, whereby Whitelaw was bound to provide her to the liferent of £200 Sterling, as the annualrent of 60,000 merks. Alleged absolutor; because posterior to the said contract of marriage my Lord Whitelaw had granted her a bond for £7000 Sterling, which being *major* included *sub se minorem summam*, and must be understood to be in lieu and full satisfaction of all prior obligations; for law never presumes a donation, where there is a debt; but on the contrary, *nemo præsumitur donare nec rei suæ jacturam facere*, especially where the deed is in favours of a wife, and to the prejudice of an heir, whom law presumes the defunct *gravare* as little as he can, and this agrees to the constant uniform practice of our decisions, as is to be seen, 4th February 1623, Guild *contra* Guild, *voce* IMPLIED DISCHARGE AND RENUNCIATION; 11th Nov. 1624, Wallace, *voce* WRIT; and 24th February 1632, Kinnaird, No. 40, p. 5469; and in President Newton, 27th Nov. 1685, Robertson, *voce* PRESUMPTION; 16th Nov. 1682, The Children of Walter Law, Div. 11, Sec. 1, *h. t.*; and 2d February 1686, Selkirk, *voce* PRESUMPTION; in all which cases and many others, the brocard *debitor non præsumitur donare*, was sustained, and any posterior deeds were abscribed in payment and satisfaction of the first debt. Answered, If my Lord Whitelaw, a very eminent lawyer, and nice in the framing of clauses, had designed the £7000 bond to be in implement of his prior obligation for the liferent jointure, he would have certainly expressed it so; and it must be a donative *per se* without regard to her contract of marriage, because in the last he binds his heirs whatsoever, and in the £7000 bond only his extraneous heirs, not of his own body; and since that bond he purchased houses and stables, and took the rights and securities of them to her in liferent, which implies he designed that she should bruck and enjoy her liferent over and above that donative. The Lords thought if that brocard of *debitor non præsumitur donare* took not place here, it could never take place, seeing it was between an heir who was favourable in law, and a relict who beyond her legal provision of a *rationabilis tertia* is not very much to be favoured, law having restrained donations *inter virum et uxorem*; and therefore found, by plurality of votes, that the £7000 Sterling bond was presumed to be in satisfaction of the liferent provisions in the contract of marriage, and fully implemented the same, as being more.

January 15, 1709.—In the mutual actions oft mentioned *supra*, betwixt Hamilton

of Bangour and the Lady Whitelaw, the Lady insisted for alimentering the family from the time of her husband's decease in December 1704, to the Whitsunday thereafter, being five months and some more, for which she craved £200 Sterling to be modified. Alleged for Bangour, That the foundation of this practice to alimenter the family out of the defunct's means till the next term, was founded on this principle of natural equity, that they had not where-[5913]-with to defray the charge till their jointure existed, and became due, which was not till the next term; but where they had a fund and stock flowing from the husband whereon to subsist themselves, that reason ceased, and so they could claim no aliment, which was the present case; for my Lord Whitelaw had given her a bond for £7000 Sterling; and though it was not due till the term after his decease, yet it was a sufficient fund to afford her credit to maintain herself, and her own peculiar servants to the term; however my Lord Whitelaw's executry might be liable to aliment his own servants till the next; but his Lady being full handed, could crave nothing; and seeing the Lords had found this bond was in place of her jointure, and she could not claim both, by the same rule it behoved to stand for her claim of aliment till the next term, as well as for her jointure, seeing *debitor non presumitur donare*. Answered, This defence was new doctrine; for if this held, then a relict, who had been married to a former husband, and had a jointure by him, might be denied an aliment, because you can maintain yourself on your first husband's jointure. 2do, This can be obtruded against an heiress of lands, when she becomes a widow; you can crave no aliment to the term, for you have lands in property, by which you can competently maintain yourself. 3tio, Where the contract of marriage provides the half of the tocher to return to the wife in case of no bairns procreated of the marriage, or gives her the half of the conquest, in that event, will any body say that this will debar her from seeking the aliment of the family till the next term, though she have more than sufficient fund from her husband to live upon till that time. Replied, A widow having a liferent by a former husband cannot be denied an aliment, because her jointure is uncertain, depending on her life, and if she die before the term, she and it end together; but where she has a stock in money, there is no reason that either her husband's heir or executor be burdened with her aliment. Will any Judge give an apparent heir aliment, if it be instructed that he has *aliunde* to maintain himself; and even so here, in relicts. The Lords, by plurality, repelled the defence, and found an aliment due, notwithstanding of her £7000 Sterling bond. The next question was, what it should be? and the Lords made her liferent provision the rule; and finding her jointure was £200 Sterling per annum, they modified the alimentering of the family for five months and a half to £100 Sterling. The Lady had proved by her chaplain, and other servants in the house, that she had actually expended the aliment on the family till the next term. The common defence used to be proponed against this aliment, was omitted by Bangour, viz. You can have no claim for alimentering, because there was sufficient provisions laid in to serve the house till the next term, at least, to diminish the modification and make it less, such as provisions of meal, malt, coals, &c., which might furnish the family *pro tanto*, till the next term; or, 2do, You intromitted with as much money lying beside the defunct as might defray the expense, though that money might have been expended on the fu-[5914]-neral charges and mournings, which require present money; and if so, it would not be deducted off the aliment.

Fol. Dic. v. 1, p. 395. Fountainhall, v. 2, pp. 421, 462, & 480.

No. 119. [5915] ISOBEL MONCRIEFF and her HUSBAND v. CATHARINE MONYPENNY, Lady Sauchope. June 20, 1712.

A relict provided to an annuity to be uplifted betwixt Yule and Candlemas after her husband's death, was allowed a sum for her aliment from her husband's death till the commencement of the annuity.

George Moncrieff of Sauchope, in his contract of marriage with Catharine Monypenny, obliged himself to infest her in a liferent yearly annuity of eight chalders of

victual, to be uplifted betwixt Yule and Candlemas furth of his lands, beginning the first year's payment, betwixt the first feast of Yule and Candlemas after his decease. George Moncrieff having died November 19th, 1707, Catharine Monypenny, his relict, craved an aliment to be modified to her, from the 19th November, till Candlemas thereafter.

Alleged for Isobel Moncrieff, the husband's executrix, No aliment can be allowed, because, aliment to a relict till the next term after her husband's decease, is indulged only when she hath neither immediate access to her jointure, nor a fund of credit, that she may not be left to live upon the air; as when her liferent is provided by way of annualrent, in which case, if she happen to die betwixt terms, or before the first term of payment of her jointure, she gets nothing at all; and seeing that may fall out, no person will credit her in prospect of her jointure; which reason for an interim aliment ceaseth in this case, where the relict's security in a liferent annuity out of certain lands, afforded her a fund of credit immediately after her husband's decease; seeing, whether she survive Whitsunday or Martinmas or not, she has still right to less or more of her jointure. This distinction seems to be established by a solemn decision *in terminis*, Couper *contra* L. Tofts, No. 117, p. 5908.

Answered for the Relict, There is no solid difference betwixt a liferent provision of annualrent, and a liferent provision out of lands, where the provision doth not commence till the first term after the husband's death. For here lies a necessity of an alimentary provision *medio tempore*. Whether the liferent be due the next term after the husband's decease or not, by the re-[5916]-lict's living till then, or dying before; or whether she have a fund of credit or not, aliment is due to her by a general rule, and not in particular cases only. So that she is entitled to an interim aliment by a general rule, whereby a relict, having a jointure by a former husband, or being proprietor of lands as an heiress, hath right to such an aliment; which proceeds rather upon the motive of natural obligation, than that of mere necessity. As to the objected practick, it makes for the relict, since their aliment was decerned not to be allowed in the next term's rent.

The Lords modified a sum to the relict for her aliment from her husband's death, till the commencement of her jointure. *Forbes*, p. 601.

No. 126. [5924] GORDON v. INGLIS. February 23, 1681.

A husband whose wife died within year and day of the marriage, decerned to repay the tocher without any deduction except for the expenses of her funeral.

Thomas Inglis being married to Agnes Gordon, and having received 800 merks of tocher, Agnes dying within year and day of the marriage without children, Janet Gordon her sister, and executor, pursues Thomas Inglis to repete, and restore the tocher, who craved deduction of the expenses wared upon his wife's bridal-clothes, and her entertainment during her life, and her funeral charges. It was answered, That no deduction was ever allowed, or any expenses during the marriage, though this case has frequently occurred.

The Lords refused all expenses during the marriage, expended by the husband, but deducted the funeral expenses, as being debursed after the dissolution of the marriage, and likeways any debt of the wife's, contracted by the wife before her marriage, for marriage-clothes, and others, and paid by the husband.

Fol. Dic. v. 1, p. 396. *Stair*, v. 2, p. 867.

No. 130. [5927] MUIRHEAD'S RELICT v. Her FATHER-IN-LAW. February 19, 1706.

Found in conformity with *Hasty v. Hasty*, No. 124, p. 5922; that a relict is entitled, against her husband's representatives, to the expense incurred by the birth of a posthumous child.

Rose Fincham, relict of James Muirhead of Braidisholm younger v. her father-in-law, Braidisholm elder, for modifying an aliment to herself and her children, during

the dependence of a declarator she has for a terce, in respect her husband was once infett, though the sasine be now abstracted. The Lords refused to modify any aliment for the children, in regard the goodsire offered to take them home to his own house, and to aliment them as he does his other children ; for though infants are not to be taken from their mother during her viduity and their infancy, if she offers to keep them *gratis* ; yet if she seek aliment for them, the grandfather may stop it by accepting them into his own family. But the Lords found she ought to have an allowance for her expense of in-lying, and bringing forth the posthumous child, and for the nursing it ; and referred the modification to the Ordinary.

On the 28th current the Lady Braidisholm entered an appeal against this interlocutor. See APPENDIX. *Fol. Dic. v. 1, p. 396. Fountainhall, v. 2, p. 328.*

No. 149. [5951] MARGARET GRIEVE, and her Husband, for his interest v. GEORGE PRINGLE, and his Tutor *ad litem*. June 15, 1797.

An unsigned draught of a lease, written by the husband of the proprietrix, and delivered to the tenant, followed *rei interventu*, sustained as a valid lease, in a removing brought by the proprietrix, and her husband for his interest.

Margaret Grieve, and James Usher, her husband, for his interest, brought a removing against George Pringle, whose father, in 1795, died in possession of a farm belonging to Margaret Grieve.

The pursuers contended, That the father had possessed, by a verbal agreement, since Whitsunday 1793, when a written lease in his favours expired.

A tutor *ad litem* was named for the defender, who produced an unsigned draught of a lease, written by Usher, giving the defender's father a lease of the farm for 15 years, from Whitsunday 1793, at an increased rent. He likewise produced several receipts for the rent granted by Usher. One of them bore to be "for the first half year's rent of the second tack, beginning at Whitsunday 1793" ; and the next "for the second half year's rent of the new tack." He further averred, that his father, on the faith of his having a lease for a number of years, had expended a large sum on the farm, inclosing, liming, and improving moor ; and he contended, that, upon the whole, the pursuers were debarred from pleading the defects in the draught *rei interventu* ; No. 52, p. 4392 ; 1788, Dr. Drummond v. Scott. See APPENDIX.

The pursuers, on the other hand, maintained, that the draught contained merely the terms on which Usher was willing to grant a lease ; that these not being agreeable to the tenant, he preferred possessing by a verbal agreement from year to year, till he should procure another farm, and that the receipts related to this state of possession. They also offered to prove, by a variety of circumstances, the understanding of parties, that there was no lease for a longer period ; and denied that any improvements had been made by the tenant upon the faith of there being one.

They likewise stated, in point of law, that this case was very different from those where informal writings had been supported ; because, from the scroll not being signed, neither party could suppose it binding ; Erskine, b. 3, tit. 2, § 4 ; and besides, the husband had no power to grant a lease, without consent of his wife.

The Sheriff decerned in the removing.

A bill of advocacy having been passed, the Lord Ordinary reported the cause on informations.

Observed on the Bench ; The scroll, when taken along with the possession, receipts of the rent, and other circumstances, affords evidence of the understanding of parties, that there was a finished transaction, and therefore is a good defence against the removing. A husband may, without his wife's consent, grant a lease of her property to last during his administration of it.

[5952] The Lords assailed the defender.

A reclaiming petition was (4th July) refused, without answers.

Lord Ordinary, SWINTON.—Act. GEO. FERGUSSON, JO. DICKSON.—Alt. G. J. BELL—Clerk, MENZIES.

D. D.

Fac. Col. No. 36, p. 82.

No. 151. MR. DAVID AITON v. L. HALKERTON. December 21, 1629.

A wife was found not liable for money furnished to her for her aliment in her great necessity, though it was advanced upon her own credit.

The Laird of Halkerton consigning a sum modified to his wife for her entertainment, which was claimed by the said Mr. David, as arrested for satisfaction of a debt of 300 merks owing to him by the Lady, conform to her bond, and which sum he alleged he had furnished to her for her aliment in her great necessity, and which he referred to her oath; and she contending, That that sum was in law due to be paid by her husband, who in law was bound to entertain [5953] her, and that a bond made by her, having an husband, was null wanting his consent, and could not be obligatory against her; and the other answering, That he had no action upon that bond against the husband, not being made by him, neither could he prove that the money was furnished for his wife's use, because that probation which in law is good against herself, viz. her oath, is not relevant, and will not be admitted to prove against him, and he has no other probation, and so he cannot prevail against the husband, whereas she may prevail against him in pursuing him for her entertainment; for she wanting the same, and not being furnished by her husband, the Judge in law will modify and decern the husband to pay; and albeit he might quarrel the bond for want of his consent and subscription, yet it is not proper to allege and oppone her own deed for a sum, so profitably converted to her use; notwithstanding whereof the Lords ordained the wife to be answered of the money consigned, and found that the creditor upon that bond could not pursue the Lady, until he had pursued the husband, and after the discussing of the husband, they would find what was due to be done to the creditor by either of them, and in the mean time found no process against the wife upon the foresaid bond.

Act. AITON.—Alt. LERMONTH & GILMOUR.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 397. Durie, p. 477.

No. 152. SCOUGALL v. DOUGLASS. March 12, 1630.

Alexander Scougall having recovered decret against Alexander Douglass and Margaret Inglis his spouse, for the sum of £28, for the price of wares confessed to be received by her upon her oath, being referred thereto, and also her husband holden as confest thereon; and she being charged to pay after her husband's decease, and suspending, the Lords found, that that decret, albeit given against herself, and for gear confest to be received by herself, and albeit the sum was so small, yet being recovered against her and her husband, and she having a husband at the receipt of the goods, ought to be executed against her husband's heirs and executors, and not against herself, and therefore suspended the charges against her.

Clerk, GIBSON.

Fol. Dic. v. 1, p. 397. Durie, p. 506.

* * * Spottiswood reports the same case :

John Scougall having pursued Alexander Douglass, macer, and his wife, Margaret Inglis, for £60 owing by them to Patrick Craig, to which he had right as donatar to Patrick's escheat, referred the truth of the debt to their oaths; Alexander was holden as confest, and his wife by her oath granted them [5954] to be owing £26 to Patrick. After her husband's decease, John Scougall's executors pursued her for payment of that £26 which she had granted. The Lords "would not sustain action against her for that debt, granted by her in her husband's time," seeing she could neither prejudice her husband nor herself by it.

Spottiswood (HUSBAND AND WIFE), p. 158.

No. 153. HOWISON v. Lady LAURIESTON. March 18, 1631.

John Howison having pursued the Lady Laurieston for £63 for meal and malt furnished to her in her husband's time, when he was absent at Court; the Lords would not burden her with the payment of it, although it was for provisions to her house; and albeit it was alleged that she had a factory from her husband in the time, giving her power to uplift his rents, pay his debts, and transact therefor, and generally to do all his business.

Fol. Dic. v. 1, p. 397. *Spottiswood* (HUSBAND AND WIFE), p. 158.

No. 155. ADAM GAIRNS v. ELIZABETH ARTHUR. December 19, 1667.

A married woman found liable for drugs furnished to her and her children by her order, she having an estate from which her husband was excluded.

Adam Gairns as assignee constituted by Patrick Hepburn, pursues Elizabeth Arthur for the drugs furnished to her, and her children at her desire; it was alleged absolutor, because she was, and is clad with a husband, and the furni-[5955]-ture could only oblige him, but not her. It was replied, That she had a peculiar estate left by her father, wherefrom her husband was secluded, and which was appointed for her entertainment, that her husband was at that time, and yet, out of the country, and hath no means.

The Lords found the reply relevant.

Fol. Dic. v. 1, p. 398. *Stair*, v. 1, p. 498.

No. 156. HENRY ROBINS v. The Countess of SOUTHESK. July 6, 1688.

Found that though any furnishing made by merchants, &c., to the Lady Southesk, after she had a separate aliment settled upon her, would oblige her personally, and affect her aliment, yet neither she nor her aliment could be liable for furnishing before constitution of the aliment; and that her promise since the settling of the aliment, to pay what was furnished to her before the aliment, was revocable as done *ante matrimonio*; and that her husband's representatives were liable for that furnishing.

Fol. Dic. v. 1, p. 398. *Harcarse* (STANTE MATRIMONIO), No. 890, p. 253.

No. 181. [5982] PRIMROSE v. WATSON. January 13, 1610.

A woman, as executrix or intromissatrix with her umquhile husband's goods, being bound or decerned to make payment to her bairns of their portion, and being thereafter married; her husband and she giving a bond, obliging them, and the longest liver of them, to pay a sum to the bairns; that second husband deceasing, the bairns will get action against the said wife, upon the said bond, albeit made *ante matrimonio*, because it is for that debt which was her's before her marriage.

Fol. Dic. v. 1, p. 399. *Haddington, MS.* No. 1731.

No. 201.

[5997] GEMMIL v. YULE. July 11, 1735.

A wife may exercise acts of ordinary administration with regard to her own property, without her husband's consent; but without his express concurrence, she cannot dilapidate or alienate, whether onerously or gratuitously; and therefore a married woman at her own hand, impledging her paraphernalia for security of money borrowed by her, was found null, and *rei vindicatio* sustained to her representatives against the creditor, without being obliged to pay the debt. See APPENDIX.—The contrary found, No. 172, p. 5970. *Fol. Dic. v. 1, p. 401.*

No. 205. [5999] DICK and DUNBAR v. Lady PINKHILL. January 27, 1709.

An alimentary provision settled on a woman, does not fall under the *jus mariti* after her marriage, and is not affectable by her husband's creditors; but it being controverted, whether it fell under the husband or wife's administration, the Court, in respect of the husband's prodigality, found that the party who offered the best caution to apply it to the maintenance of the family ought to be preferred in the administration.

Bessie Dick, Lady Pinkill, being provided in a jointure out of Boyd of Pinkill her husband's lands, she, to obtain his creditors' consent, enters into a transaction with them in 1698, and restricts herself to 800 merks, but takes the security by way of an yearly alimentary annuity, excluding Lieutenant Crighton, then her husband, his *jus mariti*; and that it should not be affectable by his creditors, and that her discharge should be sufficient without her husband. Crighton being dead, she marries one James Dunbar; and Pinkill shunning to pay, she pursues a poinding of the ground on her infetment, and craving decreet, Dunbar compears, and alleges the decreet must go out in his name, as having right *jure mariti*; and though the former husband was excluded, yet he had never consented nor renounced, and the administration belongs to him as head of the family. Answered, She acknowledges she had made an unfortunate choice, who in sixteen months time has dissipated a great part of her means and livelihood, to her utter ruin and starving, what by his creditors' poinding and arresting all, and what by his own drunkenness and prodigality; and if he get the disposal of this small reserved aliment of 800 merks, he will reduce her to a cake of bread; and this being a constituted aliment long before he had any interest by his marriage, it must stand good against him, as well as it did against the former husband. Replied, Both by the laws of God and the land, the husband was *princeps et caput familiae*, and to divest him of that power, and invest it in the wife was against the laws of nature, and *contra bonos mores*. Yea, the Lords, 9th February 1677, between Lord and Lady Collington, No. 50, [6000] p. 5828, found the husband could not renounce his *jus mariti*; and therefore the Lady Pinkill having by chusing him for her husband, subjected herself to his government, both as to her estate and person, she cannot deprive him of his legal right; and Dirleton, *voce ALIMENT*, thinks it so personal that it is neither subject to the husband's *jus mariti* nor his creditors' arrestments, though some great lawyers *magno conatu et boatu* assert the contrary; but the Lords, since his time, have found the *jus mariti* renounceable, as in the case of Dr. Cunningham's Lady, and Mrs. Anderson and Patrick Telfer, her husband, No. 53, p. 5836, and in this case, they declared the Lady Pinkill's aliment not affectable by her husband's creditors, but only applicable to the use for which it was destined, to wit, the maintenance and entertainment of the family, of which Dunbar the husband was a part, and could not be secluded; but, in regard of his bad management, they appointed Lord Prestonhall, the Reporter, to see which of them offered the best caution to apply it to its true use, that these might be preferred in the power of administration and uplifting thereof, to prevent misapplying and squandering. *Fol. Dic. v. 1, p. 401. Fountainhall, v. 2, p. 485.*

No. 211.

[6003] — v. HAMILTON. June 21, 1634.

The Lords refused to allow accounts of tradesmen, who had furnished necessaries to a gentleman's family while he was out of the country, they wanting his special warrant, although they offered to prove, not only that they had such warrant, but that before his departure they furnished goods to himself and family. The reason of this decision was, that before the husband's departure, he had settled an aliment on his Lady.

Certain furnishers pursuing Sir James Hamilton for the price of certain furnishing, really and necessarily made by them to his Lady, bairns, and family, in his absence, by the space of two years, or thereby, viz. a baxter for bread, and a flesher for flesh, and a cordiner for shoes and patons; likeas they all offered to prove, that before these years pursued for, they were all in use to furnish in that same manner, to his Lady, bairns, and family, diverse preceding years, for which they were well satisfied; as also a part of this same furnishing, now acclaimed, was made by them since Sir James's coming to Scotland, and the said Sir James was partner, and ate of the said bread and flesh in his house with his Lady, for the space of three or four months of the space acclaimed, ay and while he diverted from his Lady and pursued divorcement (since which time they pursued not for furnishing sinceyne made). And the said Sir James excepting, That he was not in law obliged to pay the said furnishing to them, albeit it had been ever so necessary; because, before his going out of the country, he appointed a yearly provision to be given to his Lady, for furnishing herself, her bairns, servants, and whole family, answerable to his estate and her's, in all necessary and useful things, and which was accordingly paid to her by his servants, who had direction to pay the same, and whereupon acquittances were yearly received from her; so that the pursuers, having no direction or warrant from him, or any by his power, to make the furnishing, he ought not to be liable therefor. —The Lords found the exception relevant; for the Lords found, That the defender having given to his Lady as sufficient a quantity of money yearly, during each year libelled, as might conveniently suffice for maintenance [6004] of his Lady, bairns, and family, he was not liable to pay these furnishers, except he had given direction to them, or command to do it, or that he had known that they had furnished her, and also had known that they were not paid therefor by her; for they having no warrant from the husband, what they did without the same, they did it *as periculo*. Neither was it needful to have been intimated to them, that the husband had appointed maintenance yearly to his wife, whereby they might have looked and provided for their own security (as it was replied by them), nor were they ever discharged to furnish; which the Lords did not respect, seeing they had no warrant to furnish, from him; and it was not necessary to them to furnish; for nothing could have compelled them thereto, albeit the husband might have been compelled to aliment his family, which being done by him, he was no further bound in law; and so the action, for the danger of the preparative, was not sustained; for otherwise, wives or servants might bring on many bygone years furnishings upon their husbands and masters, to their overthrow, if they should thereby intervert the monies allowed by the husband, for sustentation of his house, applying the same to any other unlawful use, and bring the necessary furnishing of his house back again upon him; so that furnishers ought only to rely upon the security of payment to be made by those by whose warrant they do the same, and with whom they make their bargains, or else to take payment in hand.

Act. CUNNINGHAM.—Alt. NICOLSON *et* STUART.—Clerk, HAY.

Fol. Dic. v. 1, p. 402. *Durie*, p. 719.

No. 212. [6005] DALLING v. M'KENZIE. December 7, 1675.

A woman is understood to be *præposita negotiis domesticis*; so that for the provision of her house, she may take from fleshers and baxters and others such furnishing as is necessary; and her declaration and oath may be taken, and ought to be trusted as to the same; and the husband is presumed not to know the particular quantities; and those who do furnish are not obliged to enquire whether her husband has given her money sufficient to provide his house, if she be a person that is not inhibited; seeing the husband has a remedy, if he has any suspicion that she may abuse and wrong him, and may inhibit her.

Reporter, GLENDICK.

Fol. Dic. v. 1, p. 402. *Dirleton*, No. 310, p. 153.

No. 215. [6007] JAMES ALSTON v. PHILIP and Sir JAMES STAMFIELDS. November 1682.

Found that a husband after dissolution of the marriage, was liable for accounts taken off by the wife during the marriage, though without his order, and though she was competently furnished *aliunde*; but found the husband's father not liable for them, though the son and wife remained in his family, in respect he, the father, had been at considerable charges upon them *aliunde*, suitable to their quality. See RECOMPENCE.

Fol. Dic. v. 1, p. 403. *Harcarse* (STANTE MATRIMONIO), No. 871, p. 247.

* * Sir. P. Home reports the same case :

James Alston, merchant in Edinburgh, having pursued Philip Stanfield and Sir James Stanfield of Newmilns, his father, for payment of Philip Stanfield's wife's bridal cloaths, who was daughter to Major Biggar of Wolmet, and others furnished to her during the marriage; alleged for Philip, That he could not be liable, the marriage being now dissolved by decease of the said Biggar his wife; but her father's representatives are only liable for the same, especially seeing he received no tocher with her. And it was alleged for Sir James the father, That he could not be liable, because he was out of the country the time of the marriage, which was made without his knowledge or consent; so that albeit he was obliged to aliment his son, yet he was not obliged to furnish his wife with bridal cloaths, or others during the marriage, especially seeing he had paid above 5000 merks to his own merchants upon their account; and seeing the pursuer was not his ordinary merchant, he ought not to have furnished his son or his wife with any cloaths without his warrant. Answered, that Philip ought to be liable as husband, who was obliged to aliment and furnish his wife cloaths, albeit he had got no portion with her, and both before and since her decease he has letters in which he had promised payment of the accompt; as also Sir James his father did treat with the pursuer anent the payment of the accompt, and desired him to delay it for some time. Replied, That the letters cannot oblige Philip, because the same were written by him when he was minor, to his lesion, seeing he was not obliged to furnish the cloaths nor to pay the accompt, the marriage being dissolved; as also, he wrote the same only *pro interesse* as husband, and that the marriage being dissolved, he is not farther liable; just as if a factor should promise to pay his constituent's debt, yet if he be immediately discharged of his employment, he will not be liable for the debt *nisi intus habet*, it being always presumed that he made the promise *rebus sic stantibus*; and as to Sir James the father, albeit he treated anent the payment of the accompt, yet he never promised him payment.—The Lords found it relevant to assoilzie Sir James the father, that he had sufficiently furnished his son and his daughter-in-law suitable to their rank and quality by his own merchants, in so far as he had paid 5000 merks of merchant accompts for them, which they had taken on the time of the marriage.

Sir P. Home, MS. v. 1, No. 260, p. 364.

No. 217. [6013] Lady Boyd v. LD. AIRTH, &c. June 1582.

A wife is presumed to be *præposita negotiis domesticis viri*; but this presumption was not extended to a lady tercer granting discharges of her terce duties, which it was found she could not do, without consent of her present husband.

The Lairds of Airth, Kilsyth, &c., were pursued by the Lady Boyd, and James Fleming her husband for his interest, as cautioners for the Laird of Boyd her son, to pay to her certain yearly duties, in victuals, capons, and silver, because the Laird her son was obliged, by virtue of an obligation registered in the books of Council. The foresaid cautioners being charged obtained suspension, alleging, That they had made payment of the said duties to the Lady, and produced her acquittances and discharges thereupon. It was objected against the discharges and acquittances, That they were not sufficient, because the said Lady being clad with a husband, it was necessary to have his consent to the said discharges. To the which it was answered, That albeit the said Lady was clad with a husband, yet she intromitted with, and took up the duties of her own conjunct fee by herself, *et fuit præposita omnibus hisce negotiis*, and gave acquittances and discharges by herself, without her husband. To this was answered, That albeit *mulier et uxor possunt profici aliquibus negotiis, et exercere ea quæ spectant ad rem domesticam gubernandam*; tamen in rebus magni [6014] momenti, et ubi requiritur scriptura, it is necessary to have the consent of the husband, and unto the giving of discharges and acquittances.—The Lords, after long reasoning, repelled the reasons of the summons, and found, by interlocutor, that a wife might not give acquittances and discharges, without the advice and consent of her husband, *quia vir est caput uxoris, et de jure nostro, durante matrimonio, maritus est dominus omnium bonorum*.

Fol. Dic. v. 1, p. 403. Colville, MS. p. 330.

No. 218. Laird of PITTAROW v. his TENANT. June 1587.

The Laird of Pittarow warned a tenant to flit and remove from certain lands. It was excepted that since the warning the Lady being *præposita negotiis familie* had received from the defender three hogs as duty of the ground. Answered, that the allegiance was not relevant, except he would say that the Lady had received the same at the command of the Laird her husband; and so found by the Lords.

Fol. Dic. v. 1, p. 403. Colvil, MS. p. 417.

No. 220. [6015] MARGARET SCOT v. JAMES WEILL and KATHARINE BANKS.
February 2, 1628.

Margaret Scott relict of umquhile Mr. Robert Stevin, pursued James Weill and Katharine Banks his spouse, for the violent spuilzieing of her goods insight, and plenishing out of her house. Aledged for James Weill, that he could not be convened for the said spulzie, because he was out of the country in the mean time, and so neither privy nor accessory to it. Replied, that he ought to be answerable for his wife's deed, otherwise the inconveniency would be great. The Lords found the exception relevant. *Spotiswood, p. 156.*

* * Durie reports the same case :

In a spuilzie by one Scot relict of Mr. Robert Stevin v. Katharine Banks and James Weill her husband, which was restricted to wrongous intromission, and no spuilzie sought, the Lords found, that the deed of wrongous intromission done by the wife without command of the husband, was not effectual to produce action against

the husband, he not being accessory thereto, albeit the wife had medled with the goods violently, and had disposed thereupon at her pleasure, and albeit the husband thereafter getting knowledge of the fact done by her, and of her disposing thereof, and after the citation used also by the pursuer against him, did never express any act, by the which he made it manifest, that he disliked that fact, and disallowed thereof; and so albeit the pursuer replied, that the fact of the wife's intromission being done in the express name of her husband, and by her husband's right, viz. by a pointing, deduced at his instance, for debt owing to him, which was found unlawful, yet he thereafter making no expression, neither to the party, nor to the Magistrate of the town where he dwelt, nor to the officer deducer of the pointing, nor to any other person, to show that he was not accessory to that fact, which he ought to have done, if he had intended to have been freed thereof and which the pursuer alleged to be an express ratihabition, and so that he was subject to the hazard of the fact, albeit it were true, that he was not within the country at the very time of the act done by his wife, as he alleged; for it were of dangerous consequence, to give liberty to women clad with husbands to commit such wrongs, and that [6016] the husband (specially in civil matters, and pursued civilly before the civil Judge) should not be answerable therefor; whereas in contraventions the master is answerable for the fact done by the servant, after his knowledge of the fact, if he received the servant, albeit he was never accessory to the fact, nor ever knew of the same, but after the committing thereof, which hath not such grounds of equity, as pursuits for restitution of goods, unjustly taken away by the wife, which must be reputed to be allowed by the husband, and by his ratihabition, in respect of the facts above written; all which were not respected, but the exception sustained, and no action found against the husband for any fact done by the wife, albeit civilly pursued, no more than he could be convened for a debt, contracted by her, or for bonds or obligations made by her without his consent.

Act. — Alt. MILLER.—Clerk, SCOT.

In the cause of spuilzie betwixt Scot and Katharine Banks, whereof mention is made, February 2, 1628, the messenger who pointed, being convened as one of the spuilziers; the Lords found the allegiance proponed for him relevant to liberate him both from spuilzie and wrongous intromission, bearing, that he pointed by virtue of the Lords letters, directed for pointing of the pursuers goods, for the debt therein contained: albeit the pursuer replied, that these letters could not be warrant to the messenger, seeing the decret whereupon these letters of pointing were raised, was not given against the pursuer, and so he had not a warrant to point, and therefore he was not excusable; yet, the Lords found the messenger in *bona fide et in probabili ignorantia* to have pointed, seeing the Lords letters bore warrant to the officer, to point from this same pursuer, and it was not his part to search the decret and warrant thereof; for albeit the letters were evil directed, yet that was not his fault: But the Lords found, that he ought to allege, that he had delivered the gear pointed to the party at whose instance he had pointed; which being done, it was a liberation to him, otherways his retention of the same would enforce restitution against him, notwithstanding of the pointing. See REPARATION.—SPUILZIE.

Act. BELSHES.—Alt. NICOLSON.—Clerk, GIBSON.

[Fol. Dic. v. 1, p. 403. Durie, pp. 339, 353.]

No. 221. ROBERT NAIRN v. WILLIAM BUCHANNAN. June 3, 1680.

Robert Nairn charges William Buchanan on a bond for payment of 220 merks. The reason of suspension is, This bond was blank in the creditor's name, in the custody and hands of the charger's uncle, to whose wife I paid the money; and she was *præposita negotiis*, in so far as she was wont and in use to uplift other sums of her husband's; which was offered to be proved by [6017] her oath, or by famous wit-

nesses, and so he was *in tuto* to pay her. This being reported, the Lords “found her husband’s approving of her intromission by once or twice uplifting is not a sufficient ground, neither is use and wont enough, whereupon his payment to her may assoilzie him, unless she had been a shopkeeper or a taverner. And, 2do, Find that a wife’s preposition in a matter of this concern must not be proved by her oath, but must be only proven *scripto*; and that she behaved to have had a written factory.”

Fol. Dic. v. 1, p. 403. Fountainhall, v. 1, p. 99.

No. 222. ARNOT v. STEVENSON. November 19, 1698.

An apprentice, who was bound, not by his father, but by his mother, deserted after two years service. In a pursuit against the father, for the remainder of the apprentice-fee (the mother having paid part of it), it was found that the *præpositura* could not be extended to such deeds, and that the father’s knowledge and silence could not infer consent.

In a pursuit at the instance of Archibald Arnot, apothecary in Kirkcaldy, against one Stevenson, for payment of 100 merks yet resting of his son’s apprentice-fee, and for damages through his running away and deserting his service; there being no written indentures, he offered to prove by the defender’s oath, that though he did not bind his son apprentice to the pursuer, yet his wife, who did, was *præposita negotiis mariti*, which was sufficient to bind him to fulfil. He depones, That his wife did indeed buy and sell and take in the money, but he never gave her the power of binding or loosing; and particularly, he was dissatisfied with her putting his son apprentice to this pursuer. When this oath came to be advised, it was alleged, That the boy had staid two years with his master in his father’s view, who never reclaimed; which taciturnity must imply an acquiescence and homologation of his wife’s bargain; and there was 100 merks of the apprentice-fee paid.—The Lords considered it was not the husband but the wife who had paid that 100 merks; and that a man may be silent at the management and actings of an imperious wife, and yet must not be construed to approve of the same, else she may bring him into inconveniences enough; and therefore they found her *præpositio* *quoad* the power of binding her son apprentice not proved, and assoilzied the husband; seeing it was easy for the master to have entered into a written contract with his apprentice’s father; and since he did not, *sibi imputet* that he has followed only the mother’s faith, who should not dispose of their children’s callings and educations without the father’s consent.

December 1.—A bill having been given in against the interlocutor mentioned 19th November 1698, between Arnot and Stevenson, alleging, That he had alimeted the apprentice for two years, for which he had only received 100 merks, and this being *in rem versum* to the father, who was bound *jure naturæ* to entertain his son, he must be liable for the remanent apprentice-fee.—It was answered, He had the boy’s service, which might compensate the aliment.—[6018] Replied, An apprentice’s service is little beneficial the two first years; for then the master is at the greatest trouble in teaching him the mystery of his trade.—The Lords would not give it as apprentice-fee, but allowed the 100 merks by way of aliment, the father being thereby *lucratus*.

Fol. Dic. v. 1, p. 403. Fountainhall, v. 2, pp. 16, 21.

No. 224. COCHRAN v. LYLE. July 22, 1740.

Found, That in those affairs in which the wife is *præposita*, her oath is probative of furnishings; not as the oath of a witness, but as of a party.

Fol. Dic. v. 3, p. 283. Kilkerran (HUSBAND AND WIFE), No. 4, p. 261.

No. 233. [6023] ARCHIBALD KER, Brewer in Edinburgh v. NICOL GIBSON, Ferrier and Smith there. July 5, 1709.

A wife was allowed to receive ale from brewers, with her husband's knowledge, after an inhibition executed against her by him. This found relevant to make him liable to the brewers for the price of the ale.

In the action at the instance of Archibald Ker v. Nicol Gibson, for payment of ale furnished to the defender's wife, and sold by her in his dwelling-house,

Alleged for the defender; He could not be liable for any ale taken by his wife, in respect she stood inhibited at his instance.

Replied for the pursuer; He was *in bona fide* to furnish ale to the defender's wife after the inhibition, as he had done before, not being specially interpellated or discharged by the defender, whose allowing his wife *exercere tabernam*, to keep an ale-house after the inhibition, was a tacit passing from the same.

Duplied for the defender; Inhibitions at the instance of a husband, against his wife, need only to be executed at the market cross, and are not to be intimated to every particular person. Nor can such solemn registered writs be taken away, but by as solemn a discharge, or renunciation thereof in writ.

The Lords found it relevant to make the defender liable, that his wife was allowed to tap and receive in ale after the inhibition; and that it consisted with the husband's knowledge that she received ale from the pursuer, and found the allegiance probable by the husband's oath.

Fol. Dic. v. 1, p. 404. Forbes, p. 339.

No. 239. [6029] FLETCHER v. —. July 5, 1611.

Found in conformity with the above.

Robert Fleschour in Dundee, having contracted marriage with widow in Dundee, and conform to that contract, given infeftment of conjunct fee to his future spouse; after all that, and after their banns were once proclaimed, she made dispositions and renunciations of sundry of her conjunct fee lands to her daughters of the first marriage; for annulling [6030] whereof the said Robert moved action, as done in his defraud, and unlawfully, after that he was in effect her husband, without his consent; which summons the Lords found relevant, and declared the said dispositions and renunciations null.

Fol. Dic. v. 1, p. 404. Haddington MS. v. 2, No. 2261.

No. 242. [6032] GILCHRIST and GRANT v. PRINGLE. March 1682.

A gratuitous discharge of the bygone annualrents of a bond, after proclamation of banns, was not sustained in prejudice of the husband.

Robert Pringle and Bessie Crichton, being debtors by bond to Bessie Gilchrist, in the sum of 400 merks, bearing annualrent, whereupon the said Robert Pringle being charged at the instance of the said Bessie Gilchrist and John Grant her husband for his interest, he suspended upon this reason, that the said Elizabeth Gilchrist, the wife, had discharged all the annualrents preceding Martinmas 1681, before the marriage. Answered, that no respect ought to be had to the discharge, because it was granted after proclamation of the marriage, as appears by a certificate under the hands of the minister and elders; and by the constant practice such discharges are not sustained in prejudice of the husband, and was particularly decided, *Scott v. Brown*, No. 240, p. 6030, *M'Dougal v. Aitkin*, Haddington, MS. No. 236, p. 6027, albeit the proclamation was made at the husband's parish church; and the like was decided

in the case of a disposition in favour of the wife's children, after a proclamation, Fletcher, No. 239, p. 6029. The Lords repelled the reason of suspension founded upon the discharge of the annualrents, because the same was after proclamation, albeit before contract or marriage.

November 1682. In the action at the instance of John Grant and Elizabeth Gilchrist, his spouse, against Robert Pringle, mentioned the day of March last, the said Robert Pringle, suspender, having craved allowance of certain clothes and household furniture that he delivered to her when she was married, and for alimentering her the space of seven or eight years before she was married; answered, that the price of the clothes and household furniture is not competent *hoc loco*, being neither liquid nor verified; and albeit the same were instructed, yet it ought not to be allowed, because the suspender's wife, with his knowledge, did gift these clothes and household furniture to the charger's wife when she was married, in so far as it is offered to be proved that the suspender sent his own horse, cart, and servants, to carry the furniture to the [6033] charger's house, and so must be presumed to be *donatio propter nuptias*; neither can he have any allowance upon the account of alimentering the charger's wife, because it is presumed that the mother alimentered her *ex pietate materna* for these years before her mother was married to the suspender; and the charger's wife being about twelve years of age that time, the suspender ought not to have allowance for years subsequent, because she served them in the house in the condition of an ordinary servant; as also, the suspender having intromitted with the wife's first husband's hail moveables, and having given bond for the sum charged for to the charger's wife, for her part, he cannot crave allowance or retain any part of the same upon the account of aliment. The Lords found that any furnishing by his mother to the charger's daughter after the bond, is not competent *hoc loco*, but reserve action therefor, as accords of the law; and found the qualification that the father in law furnished horse, cart, and servants, to carry the goods and plenishing to the charger's house, relevant to infer that the same were gifted; and remit to the Ordinary to enquire if the first aliment acclaimed by the suspender before the charger's wife's age of twelve years was before or after the bond charged upon.

Fol. Dic. v. 1, p. 404. Sir P. Home MS. v. 1, Nos. 203, 277.

No. 247.

[6039] HACKET v. GORDON. July 8, 1673.

An action was not sustained at the instance of a wife, though the summons was raised in her name and her husband for his interest, she not being authorised by her husband's consent, but the Lords declared they would authorise her to insist by herself, if her husband referred to concur.

Christian Hacket as one of the heirs portioners of her father, pursues reduction of a disposition of lands made by her father to Gordon of Chapletoun as being on deathbed. The defender alleged no process, because the pursuer being a wife, was not authorised by her husband's concurrence, without whom she can pursue no action, unless she were particularly authorised by the Lords, as in actions against the husband. It was answered, That the summons was raised at the instance of the husband for his interest, and if the defender produce any warrant to disclaim, which they must instantly verify, and which he pretends to be a ratification by the husband, in that case the Lords ought in justice to authorise the wife to insist, this being an heritable right, wherein the husband could have no more interest but by his *jus mariti*, and the courtesy, and the wife declares, that the reduction shall proceed with reservation of any right flowing from the husband.

The Lords found that the husband behaved to be *in processu*, but if he refused concurrence, the Lords would authorise the wife to insist to reduce the right, in so far as the husband had no interest further than his *jus mariti*, and the courtesy.

Fol. Dic. v. 1, p. 405. Stair, v. 2, p. 206.

No. 259. [6051] FINLAY v. HAMILTON. February 5, 1748.

The Lords authorise the wife, when she is to pursue, and the husband will not concur.

Anna Finlay having pursued John Hamilton, her husband's brother, before the Sheriff of Lanark for beating her, the Sheriff "Sustained the objection to the instance, that her husband did not concur."

But upon a bill of advocation, the Lords "Directed the Ordinary to remit the cause with an instruction, that the Sheriff should authorise her to carry on the action."

Fol. Dic. v. 3, p. 284. *Kilkerran* (HUSBAND AND WIFE), No. 14, p. 267.

No. 265. [6056] JEAN CHALMERS, Relict of DAVID LYON of Banchrie v. His CREDITORS. July 25, 1710.

A relict raised a reduction of her contract of marriage, upon minority and lesion.

Objected, she had not revoked and raised reduction *intra annos utiles*. The Lords repelled the objection, she having timeously after the dissolution of the marriage raised the reduction.

Jean Chalmers, heiress of the south part of the lands of Wester Banchrie, and the mill thereof, yielding seven chalders of yearly rent, some months after her marrying David Lyon, without any contract, when she was about fifteen years of age, entered with him into contract, whereby she disposed her heritage in favour of him and her in conjunct-fee and liferent, and the heirs and bairns to be procreated betwixt them in fee: and he obliged himself to provide 6000 merks of his own money, with the conquest during the marriage, to him and her, and the longest liver in conjunct fee and liferent, and the heirs and bairns of the marriage in fee; providing, that if David Lyon happened to die before Jean Chalmers, without children, she should not only liferent the 6000 merks [6057] and her own heritage, but have power to dispose of four of the said 6000 merks; but in case of her surviving him, with bairns of the marriage, she restricted herself to the liferent of the 6000 merks, and the conquest; and if David Lyon happened to outlive her without children of the marriage, she had power to dispose of her heritage, without prejudice to his courtesy. David Lyon having died *oboratus* before his wife, leaving children of the marriage, she, to hinder his creditors from carrying away her fortune, raised reduction of the contract of marriage upon, 1mo, The ground of minority and lesion, seeing the husband could not authorise his wife *in rem suam*; 2do, As being *donatio inter virum et uxorem*.

Answered for David Lyon's Creditors, 1mo, As minors can marry without consent of curators; so they can enter into contracts in contemplation of marriage; and the pursuer cannot be allowed to reduce upon minority and lesion, because she did not revoke *intra annos utiles*. 2do, The disposition by the wife is not a revocable donation, because, there being no prior contract of marriage, it was for an onerous cause, 24th November 1664, M'Gill *contra* Ruthven of Gairn, Div. 10, Sect. 3, *h. t.* There was no lesion, the terms of the contract being equal and rational as matters stood at the time; and no supervening alteration in the husband's circumstances, which disappointed the wife's expectation by the settlement, can be a ground of restitution.

Replied for the pursuer, 1mo, She was certainly lesed, in not only quitting the fee of her estate, but also in excluding herself from the very liferent thereof, for an uncertain provision secured only by the husband's personal obligation, which is come to nothing. Besides, the condition that she should liferent her own and her husband's means, and have some power of disposal, is of no weight; seeing it depended upon an uncertain event, neither to be presumed nor desired, viz. the non-existence of children, which are the chief end of marriage. And there are not wanting decisions, where the Lords have reduced such contracts of marriage; witness that betwixt Castlehill and his Lady, who was afterwards married to Mauldsley, *voce Minor*; and that betwixt Alexander Reid and Anna Byers, No. 249, p. 6045. As

to the practick M'Gill *contra* Ruthven, the lesion there did not appear so considerable, the wife being provided to a competent effectual liferent ; besides, it makes against the defenders, for the Lords restored to her the liferent of certain sums assigned by her, without reserving her own liferent. 2do, The pursuer's not revoking, and raising reduction *intra annos utiles*, can be no reason to exclude her pretensions ; because she timeously after dissolution of the marriage revoked and raised reduction of the deed ; and she was not *valens agere* during the marriage, being then as a minor *sub cura et reverentia maritali*.

The Lords sustained the reason of reduction founded on enorm lesion, to repose the pursuer to the liferent of her own heritage disposed by the contract ; but repelled the allegiance of *donatio inter virum et uxorem*. See MINOR.

Fol. Dic. v. 1, p. 407. Forbes, p. 432.

No. 266. [6059] The Lord GRAY and other Creditors of the deceased DAVID LYON of Banchry v. Mr. WALTER STEWART. December 14, 1714.

A wife may revoke her contract of marriage made in minority, although the revocation has not been made *intra annos utiles*.

My Lord Gray, and other creditors of David Lyon, having led an adjudication against his heirs, pursue a mails and duties, with a conclusion of declarator, that the lands of Banchry, disposed to the said David Lyon by Jean Chalmers his wife, in their contract of marriage, did belong to the said creditors adjudgers, as in his place.

Compearance was made for Mr. Walter Stewart, second husband to the said Jean Chalmers, who produced a disposition to the same lands granted by his wife to him her second husband ; and alleged, that the first contract was entered into by her in her minority to her enorm lesion, in so far as she disposed the fee of her estate, without reserving her own liferent, in favours of her first husband, who had no estate whereby to make her any suitable remuneratory provision.

It was answered ; That a minor may lawfully enter into a contract of marriage, wherein if they be enormously lesed, they have the common benefit of restitution, but with the ordinary condition of revocation and reduction *intra annos utiles*, which she did not use, but continued satisfied with her contract till she was long past 25 years of age, and could not now impugn the contract, in prejudice of her husband's just and lawful creditors.

[6060] It was replied ; A minor may doubtless enter into a contract of marriage upon just and equal terms ; but, in case of enorm lesion, has always the power of revocation, because, whatever deeds are done in favour of a husband, he, nor any in his right, can never object the want of revocation *intra annos utiles*, a married wife being *sub cura mariti* ; but how soon the marriage dissolved, the wife being very sensible of her lesion, revoked and raised reduction within two months, before the diligence of any creditor ; and, on this consideration, the Lords have already restored her to the liferent of her own lands by a decret *in foro* extracted, she having thought fit *primo loco* to crave restitution as to her liferent ; but the same ground of law, that she obtained revocation as to her liferent *post annos utiles*, entitles her to be restored as to the fee, unless the creditors could allege, as they cannot, that her husband had any means whereby he could effectually provide her to a suitable remuneration.

It was duplied ; 1mo, If wives contracting in minority could revoke *post annos utiles*, then they could be restored after 50 or 60 years ; because, so long as the marriage subsists, the wife continues still *sub cura*, and then there might be 40 years craved for obtaining restitution after dissolution of the marriage ; which would bar all commerce with a husband, without any necessity ; because, if the wife were lesed, there is a remedy competent during the marriage, by revocation, which may be done without the consent of the husband ; and the Lords would, of course, give her a curator *ad litem* to pursue the reduction. 2do, No parity betwixt the life and fee, because it was a fraud in the husband to have denuded his wife of the liferent ;

but the fee of portions go usually to the husband, and lands come in place of the portion.

It was triplied; The extraordinary remedy of craving a curator *ad litem*, which is not usually practised where husband and wife live well together, is never considered as any ground to elide the dependence that a wife has upon the husband, the want of proper knowledge in her affairs, or the opportunity of advice; and restitution is as competent with relation to the fee, as the liferent, and upon the same ground in law; for, if it was fraudulent to deprive the wife of the liferent, it was no less so to denude her of the fee, when the husband had nothing to give in place of it.

“The Lords found the wife might revoke and reduce after elapsing of the *anni utiles*, upon enorm lesion, as well in relation to the fee as the liferent.”

Fol. Dic. v. 1, p. 407. Dalrymple, No. 128, p. 179.

No. 295. [6080] SPENCE *v.* THOMSON and Others. February 9, 1739.

The process for the pecuniary penalty upon the statute discharging playhouses, against the wife of Henry Thomson, comedian, was cast on this ground, that her husband had not been called.

Fol. Dic. v. 3, p. 285. Kilkerran (HUSBAND AND WIFE), No. 2, p. 256.

No. 298. [6082] JANET CHURNSIDE *v.* JAMES CURRIE. July 11, 1789.

A husband having left Scotland, his wife was found liable to personal diligence, as an unmarried woman, for debts contracted after his departure.

The husband of Janet Churnside having left Scotland in bankrupt circumstances, she entered into trade in order to maintain herself and her children.

Being charged with horning for payment of a bill of exchange granted by her to James Currie, she offered a bill of suspension, founded on the general rule of law, that a woman *vestita viro* could not, by any contract, subject herself to personal diligence.

This plea however was entirely disregarded, as inapplicable to a case like the present, where the debt had been contracted by a wife in her own name, while her husband was out of the kingdom. To refuse the ordinary legal compulsa-[6083]-tories, in such circumstances as these, would, it was observed, in the end prove hurtful to the women themselves, by preventing them from gaining a livelihood in trade, at a time when their husbands could not afford them any support.

The bill of suspension was refused by the Lord Ordinary. And

A reclaiming petition being preferred, it was refused without answers.

Lord Ordinary, GARDENSTONE.—For the petitioner, JOHN ERSKINE.

Fol. Dic. v. 3, p. 285. Fac. Col. No. 78, p. 141.

No. 299. Mrs. ELISABETH CHALMERS *v.* Mrs. HELEN DOUGLAS and her Husband. February 19, 1790.

No execution against a wife's person for a debt *ex delicto*, incurred during the marriage; nor is the husband liable, or the goods in communion, on that ground; but for the expenses awarded to the pursuer, the husband is liable as *dominus litis*. Upon appeal it was found, that the husband was responsible for the conduct of the cause, and liable in expenses only in so far as the same was malicious, vexatious and calumnious.

In an action of defamation and damages, the Commissaries having found sufficient evidence that the defender, Mrs. Douglas, “was guilty of the scandal libelled,”

decreed her to pay to the procurator-fiscal of court a considerable fine, and to the injured party farther sums in name of damages and of expenses, as also, to make a *palinode*; the fine, however, being to be restricted to a third of its former amount, "in case she should appear in court, and judicially repeat and subscribe the *palinode*."

Both parties brought the judgment under review by advocacy; the defender, beside objecting to the judgment in general, complaining, that the Commissaries had not qualified their sentence by declaring that no execution during her marriage could issue against her person, or her effects falling under the husband's *jus mariti*; and the pursuer complaining, that they had omitted to decern against the husband for the expenses of process.

The Lord Ordinary on the bills reported the cause, and afterwards a hearing in presence took place on the following points:

1. Whether execution ought to pass against the defender's person, to compel payment of damages and fine.

2. Whether the husband, or the goods in communion, were liable for payment of the money awarded in name of damages, or of fine.

3. Whether the expenses of process found due to the pursuer, could be demanded from the husband, as having in that character concurred in the defence.

On the first point, it was

Pleaded for the defender; A married woman, it is unquestionable, can come under no civil obligation, though with the consent of her husband, which shall be the ground of diligence, either against her person or her separate estate. Neither ought a different rule to be followed, if a fine has been imposed, or money decreed against a wife for reparation of damage. As not only her moveables, but the rents also of her heritage, belong to the husband *jure mariti*, it [6084] is evident, that without infringing his right, nothing could be recovered by diligence against her. Even were her paraphernalia to be attached, it would be incumbent on him to replace articles so indispensably necessary. Unless, therefore, where there is an estate exclusive of the *jus mariti*, no such diligence can proceed. Bankt. b. 1, tit. 5, § 69; Ersk. b. 1, tit. 6, § 24; Stewart *contra* Bannerman, 16th February 1633, No. 281, p. 6071; Home, Edgar, 2nd July 1724, Murray, No. 293, p. 6079; Kilkerran, 5th December 1738, Gordon *contra* Paine, No. 294, p. 6079.

Answered; By that rule, married women may, with impunity, commit scandals, batteries, or any crime the punishment of which is pecuniary. For not only is it a chance whether the wife shall survive her husband or not, but the communion may be so destined, that nothing can be attached on the dissolution of the marriage. Such a departure from the maxim, that *culpa tenet suos actores*, would be alarming to society. Nor are instances wanting in our law of a contrary tendency. Thus, "horning against a married woman for not finding caution in a lawburrows was sustained," Haddington, 27th July 1613, Lord Roxburgh *contra* Countess of Orkney, No. 276, p. 6069; again, "caption was ordained to proceed against a wife, seeing the horning was not upon a debt, but upon her delinquency," Stair, 8th January 1679, — in Glasgow supplicant, No. 286, p. 6074. And "execution was ordered to pass against a wife, for her contumacy in refusing to exhibit writings," Fountainhall, 16th November 1678, Sibbald, No. 285, p. 6074.

Every wife may have effects exclusive of the *jus mariti*; and paraphernalia least are always in that situation. A son living in family with his father, or a bankrupt whose funds have been sequestrated, might, with as much reason, be exempted from diligence, as being not less presumed to have nothing of their own; but since notwithstanding this, it has never been supposed that they enjoy any such immunity, the same circumstance must be an equally insufficient ground for the exemption in question; nor has any other been assigned. The only legal criterion by which to determine in any of the cases, whether an estate from which the debt may be repaid, exist or not, is the use of personal diligence, and therefore in all of them it ought to be alike permitted.

A married woman is as liable to other punishments, to imprisonment, for example, as if she were sole. But if she may be imprisoned *in modum pœnæ*, why not also when this legal step is taken towards the recovery of a fine or of damages?

Replied, All the cases quoted on the other side, were either those of lawburrows, in which imprisonment follows of course until bail is found, or of obstinate refusal in a party legally required *ad factum præstandum*.

The Court were of opinion, that execution ought not to be allowed to pass against the wife's person during the subsistence of the marriage.

[6085] With respect to the second point, viz. Whether execution could proceed against the husband, or the goods falling under the *jus mariti*, he

Pleaded, If execution were to pass either against a husband's person, or against the goods in communion, the maxim already appealed to would be in some measure reversed, one party being punished for the offence of another. No doubt a husband would be interested in the corporal punishment of the wife, as all near relations must be in the fate of one another. But there is a very palpable distinction between such a case, and that where a fine for her transgression is levied out of funds to which he has right; and, therefore, as a husband is not liable for any civil obligation contracted by the wife during marriage, so he is as little responsible for her debts arising *ex delicto*; a conclusion fully warranted by the authorities formerly quoted.

Answered, It seems that no debt can ever subsist against a wife's person, without being extended against the husband. There are but two cases in which a personal obligation of debt can lie on a married woman; one, in which it has been contracted before marriage, and the other where it has originated in her delict. In the first case, it is indisputable that the husband is liable. Why then should a different rule obtain in regard to the second? Not surely, because a debt which is the consequence of the wife's offence, is not to be demanded from a husband innocent of the crime; for it is clear, when a debt has been incurred before marriage, that the husband is equally liable, whether it be *ex contractu* or *ex delicto*. Yet in the latter case, the defender's argument, that those who are innocent should not suffer the punishment of the guilty, would not be less applicable than it is at present. The goods in communion, it must be admitted, are subject to the husband's debts *ex delicto*; but is not this punishing the innocent wife for the fault of her husband?

In the Roman law, and likewise in that of England, it is established, that husbands are liable for their wife's debts arising *ex delicto*. *Voet. ad tit. D. De Judiciis*, § 17; Bacon's Abridgement, *voce Baron et Femme*, p. 294, 295; Blackstone, b. 1, c. 15, § 3; b. 4, c. 2, § 6. And in the above cited case of Lord Roxburgh *contra* the Countess of Orkney, it was found, "that a wife's liferent escheat fell on her denunciation at the horn;" the plain effect of which was, to deprive her husband of his possession *jure mariti*.

The opinion of the Court was, that neither the person nor the effects of the husband could be thus affected.

With regard to the husband's being liable for expenses of process, he

Pleaded, Finding a party liable in expenses of a process, implies some wrong done. But there was nothing wrong in a husband's voluntarily allowing his name to be used, along with that of his wife, in defending an action brought against her, a thing that he might have been compelled to do; or in affording [6086] to her the means of supporting her defence, to which he might have been likewise compelled.

Answered, Such interposition is not to be understood as if it were nothing more than a matter of mere form. The husband became thus the *dominus litis*, and answerable for the impropriety committed by maintaining calumnious and injurious pleas.

The Court considered the husband to be liable in regard to the expenses of process.

With respect to that part of the Commissaries' judgment which decreed a palinode, the Court unanimously thought it improper, and seemed to reprobate the practice in general of requiring palinodes. Accordingly, in another action of defamation and damages, at the instance of George Lowther senior and George Lowther junior, against James Rae, a palinode awarded by the Commissaries was at the same time dispensed with.

In consequence of the opinion of the Court upon the whole cause, the Lord Ordinary pronounced the following interlocutor:

"Remits the cause to the Commissaries, with the following instructions: 1mo, That they adhere to their interlocutor, finding the defender liable in damages, &c.: 2do, That they alter their interlocutor with respect to the palinode, and dispense with the same: 3tio, That they find, that legal execution cannot pass against the person of the defender during the subsistence of her marriage, for any sums awarded in name either of damages, fine, or expenses, and that the effects and person of her

husband cannot be affected for the sums awarded in name of damages and fine: 4to, That they adhere to their interlocutor, finding the defender liable in the expenses of the process, and in the expense of extract; and that they also find the husband personally liable to the pursuer for these expenses."

Reporter, LORD DREGHORN.—Act. LORD ADVOCATE, SOLICITOR-GENERAL, ROSA, CORBET.—Alt. DEAN OF FACULTY, WIGHT, CULLEN.

S.

Fol. Dic. v. 3, p. 283. *Fac. Col.* No. 117, p. 223.

* * This case was appealed.

The House of Lords, 6th April 1791, "ordered, That the part of the interlocutor complained of be reversed, in so far as it finds generally, That James Baillie is personally liable to Mrs. Elisabeth Chalmers for £688 of expenses of process and extract, which Helen Douglas was decerned to pay: But it is declared, That the said James Baillie is responsible for the conduct of the cause, in so far as the same is malicious, vexatious, and calumnious: And it is ordered, That the cause be remitted back to the Court of Session, to inquire how much of the said sum of £688 of expenses of process and extract has been occasioned by the conduct of the defender in the said cause."

No. 317. [6106] GLASFORD v. DAWLING. March 22, 1634.

A bond taken by a man to himself and his wife in liferent, and to her heirs in fee, found revocable *quoad* the wife's heirs, as well as herself.

One Glasford, Clerk of Leith, married upon one Dawling, gives out 1000 merks upon an heritable obligation, "To himself and to his wife, and to the longest liver of them two in liferent, and to the heirs of the wife after her decease." The wife being deceased, and the debtor suspending upon double pointing, against the husband on the one part, and Robert Dawling, brother's son and heir to the wife on the other part; and they being both heard anent their right to the said sum; the Lords found, That the husband had the only right to the said sum, and that the same pertained to him heritably, and not to the heir of the wife; because the Lords respected the bond of the tenor foresaid, as *donatio facta a viro uxori*, and so that it was revocable, likeas he had revoked the same; and therefore, the destination of payment appointed to the wife's heirs by the bond, could not take effect against the husband's will, revoking the same; neither was it respected what the heir of the wife alleged. [6107] that the revocation was made after the wife's decease, and so was not done *debito tempore post ius acquisitum heredi*, who could not be prejudged of that benefit of the obligation, by that revocation done after the wife's decease, and after the heir became clothed with the right, whereof he could not be prejudged but by a deed done by himself; for the wife and the husband once agreeing upon the choice of an heir, to whom they had provided by consent the fee of that money; neither could they, far less one of them alone without the other, alter that choice which they had made, and much less could the alteration be made against the will of the heir, after the decease of the wife, who died in that will; which allegiance was repelled.

Act. —.—Alt. NIELSON.—Clerk, Scot.

Fol. Dic. v. 1, p. 410. *Durie*, p. 717.

No. 318. BESSIE MUIR v. JEAN STIRLING. February 19, 1663.

A donation by a wife, directly in favour of her husband's children, *et e contra*, is not revocable.

The said Bessie Muir pursues her mother, as executrix to her father, for payment of a legacy of 8000 merks left in his testament, subscribed by the defender,

and confirmed by her after her husband's death.—The defender alleged absolutor, because she, by the contract of marriage, was provided to the liferent of all sums to be conquest; and albeit she consented to the legacy, it was *donatio inter virum et uxorem*; and for her confirmation, it cannot import a passing from her own right, but only her purpose to execute the defunct's will according to law, especially she being an illiterate person.—The pursuer answered, That this donation was not by the wife, to, or in favour of the husband, but of their children, which is not revocable; and also the confirmation homologates the same, seeing the wife might have confirmed, and protested to be without prejudice of her own right.

The Lords repelled the defence, in respect of the reply.

Fol. Dic. v. 1, p. 409. Stair, v. 1, p. 183.

No. 326. [6111] JOHN STIRLING v. MARY CRAWFURD. July 31, 1716.

A general disposition betwixt a wife and her husband during the marriage, no contract having preceded, is not *donatio inter virum et uxorem*, even *quoad excessum*.

The deceased Bethia Crawford, Lady Darleith, having been married to the said John Stirling, and no contract of marriage, she nevertheless having a jointure by her first husband, and he a post bearing some proportion thereto, they made a post-nuptial matrimonial settlement, whereby each of them made a testament, and thereafter mutual dispositions for the more security, whereby they dispose, each to the other who should survive, their whole goods and means that should belong to the predeceasing at the time of such decease, so that the longest liver was to bruike all; and, in the husband's disposition, mention is made of his cloaths, watch, sword, &c., as well as plenishing, goods, and sums; the wife also, in her's, expressly disposes the paraphernalia; and both dispositions are of the same date, and before the same witnesses: The wife doth nevertheless thereafter revoke, and grants disposition of the said subject in favour of the said Mary Crawford, her sister; and after the wife's decease, Stirling the husband, pursues the sister for certain sums [6112] and goods which pertained to his wife, and were in the said defender's custody; and, beside the above titles, he libels his legal assignation *jure mariti*.

In this debate, first, with respect to the paraphernalia, it was alleged for the pursuer, That there can be no ground for distinguishing paraphernalia from other goods, except when they are not (as here they are), expressly enumerated in the disposition; and therefore, in such a case, the disposition of them is fully as irrevocable as of the others, especially seeing this was no donation, but a rational matrimonial settlement, onerous and therefore irrevocable. To enforce this, he alleged, That the defunct could have nothing else to dispose to him, except these paraphernalia, the rest being his *jure mariti*; whereas he had disposed in her favour his all, whereof nevertheless she could only have claimed the half, *jure relictae*: Next, he alleged, That if she had, with his consent, for an onerous cause, assigned her paraphernalia; or if, after his decease, she had disposed them to any third party, such an assignation had been irrevocable: Why then shall an assignation of them to him, in a reciprocal marriage-settlement, be revocable?

Answered for the defender; 1mo, That, in the general, postnuptial agreements are much more suspect than those made fairly before the marriage, these after grants proceeding *ex reverentia maritali*; and therefore, wherever there is any extraordinary and exorbitant clause in them (as here surely there is, it being most unusual to dispose paraphernalia), it may justly be revoked; 2do, These postnuptial grants can only be supported, in so far as the subjects are disposed *nomine dotis*; but paraphernalia are not a subject that can be so given, it being a contradiction *in adjecto*; for paraphernalia or parapherna, are those things which belong to the wife *præter dotem*, as the Greek words, whence it is derived, do import; and, beside the sense of the words, the use also for which tochers are given clears this abundantly, viz. *ad sustinenda onera matrimonii*; to which use the paraphernalia are not designed, but are things that afford no use except putting them to sale. 3tio, Suppose such things

could be disposed of in tocher, yet the abulziements of the husband's body, his sword, watch, &c., can be no equivalent to the wife's paraphernalia ; and therefore, notwithstanding that, the disposing these by the wife is a donation betwixt man and wife ; and thus the Lord Stair observes, Tit. Conjug. Oblig. § 22, That though a husband have no communion in the abulziement and ornaments of his wife, which cannot be affected for his debt, yet she hath her share of the abulziements of the husband, which fall in executry. 4to, As to his legal assignation *jure mariti*, answered, That the argument is the quite contrary ; because, since the law by marriage would not have given the husband the paraphernalia, the conveyance of them by disposition being beyond what he would have right by law, was a plain donation. 5to, As to the comparison betwixt disposing to a third party and to the husband ; answered, That no doubt the wife may dispoise to the husband as well as to a creditor, but the disposition to the husband is still revocable, whereas the other's right is onerous.

[6113] Next, as to other things (besides the paraphernalia) disposed to the husband and revoked, it was alleged for the defender, That there being bonds bearing annual-rent, to which the husband had no other right but by the said disposition ; besides the half of the husband's moveables, which truly were the moveables belonging to the wife, as being brought by her to her husband during the marriage ; from these, and also from the bonds bearing annual-rent, he had no other pretence to exclude the nearest of kin, but the foresaid gratuitous disposition, which is now revoked, and which the defenders alleged could not exclude them ; because that right was of its nature revocable, as being a donation betwixt man and wife, and in its nature a testamentary deed.

Answered for the pursuer ; That the deed behoved to be irrevocable, in respect there being no contract previous to the marriage betwixt the parties, the first deed after marriage must be understood to come in place of a contract, and irrevocable, and more especially in this case, where the settlement was equal, viz. a total provision to the wife of the husband's effects, in case of her surviving him, which, though not in the same writ wherein she dispoises to him, yet is done by another of the same date.

Replied for the defender, That the dispositions being posterior to the testaments, it clearly appears that the parties intentions were, that, as to the disposal of what belonged to each of them, it should be alterable during their life, otherwise it is not to be thought that the parties would have conceived the securities in a testamentary strain ; and as the testaments were the first settlement, they must be considered as the rule ; and the disposition, which is posterior, making the right irrevocable, is *in tantum* a donation ; for this is to be considered in the same way as if, in one and the same deed, a person had made a testament, and a general assignation *mortis causa* ; which deed would have been wholly influenced by the testament, and so made revocable, though the disposition had not bore to be revocable ; besides, that though the assignation could be by its nature interpreted irrevocable, yet it was certainly still revocable *quoad excessum*.

"The Lords found the disposition to the husband irrevocable not only *quoad* the wife's moveables, but also with respect to the paraphernalia."

Act. ARCHIBALD HAMILTON.—Alt. BOSWALL.—Clerk, ROBERTSON.

Fol. Dic. v. 1, p. 410. *Bruce*, v. 2, No. 31, p. 41.

No. 327. M'PHERSONS v. GRAHAMS. January 3, 1750.

Renunciation of the *jus mariti* in a postnuptial contract, not revocable as a donation.

Ann Colquhoun, widow of Duncan Graham, second son to Graham of Duchray, intermarried with Alexander M'Pherson, without any contract of marriage ; and he having nothing to provide her in, did, upon that narrative, by a postnuptial deed, renounce in her favour, and in favour of the children of the marriage, his *jus mariti*, whereby he was entitled to the liferent of the annual-[6114]-rent of 5000 merks.

in which she was secured by her contract of marriage with Duncan Graham her former husband ; which the heir of the said Duncan Graham did, during the subsistence of the marriage between the said Ann Colquhoun and M'Pherson, pay, partly to them, and partly, with M'Pherson's consent, to the children of the said Ann by her former marriage.

The marriage having dissolved by the death of Ann Colquhoun without children, M'Pherson, with a view to dispute the payments made to the children of the said Ann, and the effect of his own renunciation, brought a process against the heir of Duncan Graham, for the resting annualrents of the 5000 merks, to which he claimed right *jure mariti*.

And the Ordinary, before whom the question came, found " That his renunciation was, so far as concerned the wife, a donation *inter virum et uxorem* two years after the marriage, and as such revocable, and revoked ; and found the defender liable to account to him for the said annualrents."

But, upon advising a petition against this interlocutor, with the answers thereto, the Lords found, " That the renunciation was not a donation *inter virum et uxorem*, and as such revocable ; but found, that it did not import a discharge to the debtor ; and remitted to the Ordinary to proceed accordingly."

The Lords were of opinion, That a man's renouncing his *jus mariti* in a certain subject, even by a postnuptial settlement, (where there was no settlement formerly made by him) in favour of his wife, or, as in this case, in favour of her and the children of the marriage, is an onerous settlement which he cannot revoke ; but then still the debt was due, and whether to the wife's heirs, other than the children of the marriage, or to the husband himself, notwithstanding his limited renunciation, was the question ; and it seemed to be the opinion of the Court, That there being no children of the marriage with M'Pherson, so far as was unpaid to the wife, it would belong to him.

Fol. Dic. v. 3, p. 288. Kilkerran (HUSBAND AND WIFE), No. 16, p. 268.

No. 329. [6115] BARCLAY v. NAPIER. July 5, 1611.

In an action of suspension pursued by Mr. William Barclay *contra* Napier, who charged him upon the contract of marriage, the Lords sustained the charges upon the contract, *licet matrimonium nunquam fuerit in facie ecclesiæ celebratum*.

Kers, MS. fol. 64.

No. 342. [6126] The LORD and LADY LINDORIS v. Sir JAMES STEWART of Burra.
February 18, 1715.

Found in conformity with Short v. Murray, No. 341, p. 6124.

The deceased Sir Archibald Stewart of Burra having no contract of marriage with his Lady, disposes to her, a little after the marriage, the liferent of his [6127] whole estate, and the property of all his money and moveables ; but six years thereafter, he makes a new settlement far short of the former, upon which she was infert. She now, with concurrence of the Lord Lindoris her present husband, pursues Sir James Stewart her son, for implement of the first disposition.

Answered for the defender ; That the first disposition never came to be a binding obligation upon the husband till delivery, it being always in his power to cancel and destroy it ; and, by the parity of reason, to alter or diminish it by any subsequent deed.

Replied for the pursuers ; That there can be no dispute in this point, not only by reason that the husband is custodier for the wife during the marriage, but that the nature of the writ is such, as could only take effect upon the decease of the husband, and therefore the writ was once a fair constituted obligation betwixt them, whether

delivered or not. Nor could he any more conceal it, than he could a contract of marriage, it being *donatio propter nuptias*, which comes in place of a contract, and has the marriage itself and the natural obligation on the husband to provide his wife, for the cause thereof, which is certainly onerous. 2do, By our constant practice, such provisions have been found irrevocable; as 28th March 1635, Lady Lauriston contra Lady Dunipace, No. 346, p. 6132, where the Lords expressly found, That *tam dos quam donatio propter nuptias*, might be constituted between man and wife after marriage; and which being so constituted was not revocable, being done in competency of proportion. Which decision further determines, that where there was once a prior bond made betwixt the married persons, that behoved to be reputed in place of a contract of marriage.

The Lords found the bond of provision, though lying by the granter the time of his decease, not revocable. except in so far as it exceeded a competent provision.

Act. LORD ADVOCATE *et* GRAHAM.—Alt. NASMITH *et* FERGUSON, Senior.—Clerk, MACKENZIE.

Fol. Dic. v. 1, p. 411. *Bruce*, v. 1, No. 78, p. 94.

No. 345. [6131] *INGLIS v. LOURY*. December 15, 1676.

A disposition by a wife to her husband, of an heritable bond during the marriage, found revocable by her as a donation, though there was no contract, nor had she brought any other tocher with her.

John Inglis pursues William Loury to deliver up to him a bond of 500 merks, granted by East Sheils to umquhile Loury, and which she did assign to young East Sheils. It was alleged for the defender absolvitor, because he offered him to prove that this bond was assigned by the said Loury to her husband, to which assignation the defender hath right by progress. It was answered, That the allegiance ought to be repelled, because that this being an heritable bond bearing annualrent, granted to the wife before the marriage, it did not fall to the husband *jure mariti*; and therefore the wife's assignation *stante matrimonio*, is still revocable, *nisi morte confirmetur*. It was replied, That though this allegiance holds true, while it is in the husband's person, yet it cannot be extended against singular successors, obtaining assignations for onerous causes; 2do, If there was no contract of marriage, this assignation is valid in place of a contract, or at least it did expressly bear for implement of a contract.

The Lords found that the assignation of an heritable bond being a donation by a wife to her husband during the marriage, that the same was revocable by the wife at any time in her life, even after her husband's death, by a posterior assignation, which was effectual against every singular successor, though acquiring *bona fide* from the husband for onerous causes; and found, that albeit a provision to the wife, during the marriage, where there was no contract or prior provision, is not revocable, the man being naturally obliged to provide his wife, this does not hold in an assignation in favours of a wife granted to her husband, [6132] though there were no contract, unless the assignation did bear, in implement of her contract of marriage. See PERSONAL AND REAL.

Fol. Dic. v. 1, p. 411. *Stair*, v. 2, p. 480.

No. 356. [6149] *ANDREW BULLIONS v. JAMES BAYNE and JOHN HEPBURN*. December 4, 1793.

A deed executed by a married woman, which is null for want of her husband's consent, does not become valid on being ratified by him after her death.

John Guernsey, a soldier, husband of Margaret Bullions, went with his regiment upon foreign service.

[6150] After he had been absent about five years, she gave out that he was dead, and married James Bayne, to whom she disposed gratuitously, or at least only under burden of paying the debts affecting them, which were not equal to their value, certain heritable subjects belonging to her.

The subjects were sold by Bayne to John Hepburn.

After the death of Margaret Bullions, John Guernsey returned, and ratified her disposition in favour of Bayne.

In a reduction of this ratification, and of the dispositions in favour of Bayne and Hepburn, Andrew Bullions, the heir at law,

Pleaded ; The husband is the curator of his wife, and in that character his consent is essential to all her deeds, even to those by which his interest is not affected ; Ersk. b. 1, tit. 6, § 27 ; Reg. Maj. b. 1, c. 30 ; b. 2, c. 36 ; Balf. Pract. p. 95 ; Craig, b. 1, d. 12, § 28 ; Stair, b. 1, tit. 4, § 15 ; Sir George Mackenzie, b. 1, tit. 6, § 11 ; Bankt. b. 1, tit. 4, § 4, Parl. 67 ; Dict. voce HUSBAND AND WIFE. The want of it cannot be supplied by a ratification afterwards granted by him ; 12th February 1556, Melville, No. 195, p. 5993, and No. 206, p. 6001 ; Matthew v. Sibbald, No. 163, p. 5959, and No. 207, p. 6001 ; Fount. 23rd February 1698, Lady Cochran v. the Duchess of Hamilton, No. 208, p. 6001 ; Bankt. b. 4, tit. 45, § 40. And, at all events, such ratification, after his office of curator and his interest in her estate are dissolved by her death, can have no effect.

Answered ; The consent of a husband to his wife's deeds is not required, from the idea that she, like a pupil, is incapable of acting for herself, but solely on his account ; Ersk. b. 1, tit. 6, § 27 ; Fount. 17th July 1711, Pringles, No. 172, p. 5970 ; Cockburn v. Burn, No. 29, p. 5793, and No. 32, p. 5794. Although, therefore, his consent be not adhibited, they are not *ipso jure* null, but liable to exception at his instance ; Ersk. ib. § 23, which the ratification bars the husband in the present case from pleading, all imperfect deeds which create a natural obligation being capable of homologation ; Ersk. b. 3, tit. 3, § 47.

Besides, the necessity of the case was sufficient to give validity to the disposition granted by Margaret Bullions ; Ersk. b. 1, tit. 6, § 27 ; Bankt. b. 1, tit. 5, § 4, Par. 67.

The Lord Ordinary reported the case on informations.

Observed on the Bench ; A married woman is *sub cura mariti*, and on that account her deeds are null without his consent. If she survive her husband, she may either ratify them, or bring them under reduction. But the consent of the husband, after his office of curator is at an end, can have no effect ; his marital power has then ceased, and a *jus quæsitum* arisen to her heirs.

The Lords unanimously reduced in terms of the libel.

Lord Ordinary, HENDERLAND.—Act. CULLEN.—Alt. GEO. FERGUSSON.—Clerk, COLQUHOUN.

D. D.

Fol. Dic. v. 3, p. 288. Fac. Col. No. 82, p. 179.

No. 366. [6157] CATHARINE LAWSON v. DAVID MACCULLOCH. November 28, 1797.

A voluntary contract of separation, by which a wife accepted an annuity from her husband, in full of every legal claim, found not to bar an action at her instance for a separation *a mensa et thoro*, on account of bad usage, and for a larger annuity, although she had for some time accepted the one fixed by the voluntary contract, which was equal to the jointure provided to her in a postnuptial contract of marriage.

David Macculloch and Catharine Lawson, his wife, in May 1795, entered into a voluntary contract of separation, by which he became bound to pay her an annuity of £30, which she accepted of, in full of aliment, terce, and every legal claim which might arise to her, either during her husband's life, or at his death.

The parties were afterwards reconciled, and in December 1795, they entered into a postnuptial contract of marriage, by which Mrs. Macculloch was provided in a jointure of £30 yearly.

[6158] In consequence of a subsequent disagreement, they again parted. The former contract of separation was, in March 1796, ratified by the wife, with consent of one of her nearest relations, and she thereafter accepted of two different payments, of £15 and £20 of the annuity thereby provided to her.

Afterwards, in June 1797, she brought an action against her husband, before the Commissaries of Edinburgh, concluding for a separation *a mensa et thoro*, on account of harsh usage, and likewise for an aliment of £200 yearly.

Mr. Macculloch contended, That the action was barred by the voluntary contract of separation, and postnuptial contract of marriage. By the former, he observed, she had renounced every claim against him, in consideration of her annuity; and it was a deed, binding on both parties, especially as she alleged bad usage, which was a legal ground for a separation; Erskine, b. 1, tit. 6, § 30. And as her jointure, after his death, was fixed at £30, it is unreasonable that a larger allowance should be given her during his life.

The Commissaries repelled the defences, "in so far as founded upon alleged private transactions between the parties; and before further answer, allowed the pursuer proof of the facts stated in her libel."

The Lord Ordinary on the bills refused a bill of advocacy for Mr. Macculloch complaining of this judgment; and a reclaiming petition against his Lordship's interlocutor was unanimously refused, without answers.

Lord Ordinary, CRAIG.—For the Petitioner, MONTGOMERY.

R. D.

Fac. Col. No. 44, p. 103.

No. 389. [6183] JAMES DOBIE v. AGNES RICHARDSON. July 17, 1765.

In order to save the *jus mariti* upon the dissolution of a marriage within the year, not sufficient that a child be born alive, unless it also be heard to cry.

Dobie's wife bore a child about nine months after their marriage, and died in child-bed. Agnes Richardson, her sister, immediately took possession of all her moveable effects. Dobie brought an action against her, concluding for exhibition and delivery, and that she should hold count and reckoning, and divide with him Mrs. Dobie's effects, according to the prescription of law.

The defender having alleged that the child was still born, the cause went to proof. It appeared that the child breathed, raised one eye-lid, and expired with the usual convulsive agonies, about half an hour after its birth, but was not heard to cry.

The defender contended, That it was essentially requisite that the child should have been heard to cry, upon the following authorities; Reg. Majest. l. 2, c. 58, § 1; Leg. Burg. c. 44, § 4; Balfour's Practice, p. 100; Craig, L. 2, Dieg. 22, § 41, 42; Stair, l. 1, t. 4, § 19, et l. 2, t. 6, § 19.

Answered for Dobie: The object of the law is a living child. This is evident from the nature of the thing, as well as from the authors quoted by the pursuer, who, in general, say only, that it is necessary the child be born alive. Because most children do cry immediately after their birth, an erroneous opinion seems to have obtained, that all children born alive do so; and hence that circumstance has been mentioned as a proof of the child's life; but this is not to be understood so strictly, as absolutely to exclude other proofs by circumstances equally pregnant and certain. In treating of the law of death-bed, most of our authors mention the defunct's going to kirk or market as the only legal proof of his convalescence; yet Lord Stair gives it as his opinion, that a proof by equipollent circumstances may be admitted; l. 4, t. 20, § 45.

To shew how absurd a construction strictly literal were in this case, the *Reg. Majest.*, which was, no doubt, the original of all the other authorities quoted, requires that the child should be heard to cry within the four walls of a house; but, if a child should chance to be born in the fields, and be heard to cry there, could it be maintained that this should have no effect?

Further, the quotations for the pursuer relate to the courtesy and terce; but the argument from them to the present question is not conclusive, as they and the *jus*

mariti stand on a different foot in several respects. The right to those is only created by the birth of a child ; the *jus mariti*, on the contrary, takes place immediately upon the marriage, but is resolved by the dissolution of the marriage within the year, without a living child ; and there might be some reason for requiring more evidence to create a right, than to save a right already created.

Replied for the defender : Wherever the lawyers treat of the proof of the child's being born alive, they unanimously require it should be heard to cry ; and, as the signs of life may often be uncertain and equivocal, there is a mani-[6184]-fest expediency in establishing some certain criterion, and not leaving a matter of this kind to the opinion or judgment of witnesses.

The *Regiam Majestatem* does indeed say, that the child must be heard to cry within the four walls of a house ; but that addition appears only to be descriptive of what usually happens ; and besides, there is no occasion, in the present question, to canvas whether that be necessary or not.

There is no foundation for distinguishing between this case and that of the courtesy or terce. The lawyers have made no distinction ; on the contrary, Balfour and Stair have expressly laid down the law in the same way as to both.

The Lord Ordinary found, " That as Mrs. Dobie did not live year and day after her marriage, and as it was not proved, that the child or foetus of which she was delivered was heard cry, the pursuer's claims on account of the marriage were resolved."

Upon a reclaiming bill and answers, " the Lords adhered."

Act. ARMSTRONG.—Alt. MONTGOMERY.—Clerk, KIRKPATRICK.

A. R.

Fol. Dic. v. 3, p. 290. Fac. Col. No. 24, p. 40.

No. 5. [10] COLQUHOUN v. COLQUHOUN. March 7, 1804.

A husband having required his wife to leave his house, without assigning any reason, the Court refused to interpose by an interdict, to keep her in possession.

A bill of suspension and interdict was presented by Dame Mary Falconer, wife of Sir James Colquhoun of Luss, Baronet, complaining that she had been ordered to quit her husband's house in Edinburgh, and repair to another house which had been provided for her reception, and praying for an interdict to prevent her husband from turning her out of his family.

The Lord Ordinary appointed the case to be stated to the Court in memorials ; and as the question seemed to be of general importance, the Judges delivered their opinions at great length on the subject. In support of the application, it was observed,—

Every contract affords mutual rights and mutual obligations. A husband, by marriage, acquires certain rights, but at the same time comes under corresponding obligations, and he cannot avail himself of the one without submitting to the other. A woman, by entering into the contract of marriage, leaves her own family, gives up her person, surrenders her fortune, and reduces herself to the situation of a minor. She comes under an obligation to follow the [11] fortunes of her husband : She gives up the right of chusing her place of residence, and binds herself to obedience in all things lawful. In return for what she thus surrenders to the husband, she obtains from him not merely certain pecuniary benefits, but the *status* of a wife, and the right of living in his family. But if a husband were entitled to deprive her of this right, and to turn his wife out of doors when he pleased, a married woman would in fact receive nothing in return for all that she surrenders but a claim against him for aliment ; and, while the husband is furnished by law with full powers to obtain implement of the contract on his part, the wife would be denied the protection of the law in making effectual her part of the obligation. But the matrimonial contract stands upon a more equal and more rational footing, as indeed it is the most onerous and the most important of any, and each party must of course have a right to insist that it shall be performed by the other.

A husband, as the head of the family, is indeed entitled to chuse the place of its residence. But this right of regulating the domicile of the wife arises from her obliga-

tion to live in his family. The husband cannot invert the principle, by turning it to the opposite purpose, and by compelling the wife to have a separate domicile. Accordingly, the law of Scotland, while it makes every provision to preserve marriage, "as the conjunction of man and woman in the strictest society of life, until death shall separate them," makes no mention of the despotic right here claimed by the husband, of turning his wife out of doors at his own pleasure, without even assigning any reason for his conduct.

It is not enough that Sir James has provided another for the reception of his wife. Had he not done so, she might have procured one at his expence. But the evil of which she complains, is the degradation from her rank and condition in life, and the injury done to her reputation in the eyes of the world. If Sir James had shown any cause for a separation, or had established any charge against her in the competent court, the case would have been very different, and his order to remove would have proceeded on the warrant of a judge. But she is made to suffer the punishment of a guilty woman, without having her conduct investigated, and Sir James is at once the accuser, the judge, and the executioner in his own cause.

It cannot be pretended that this is a question with regard to the property of a house. Sir James is certainly the proprietor of his house, and may sell it or dispose of it as he thinks fit; and whenever he does so, the suspender must leave it, and repair to the place of residence he appoints for his family. But it is not alleged that this has been done; and on the contrary, the only motive assigned for ordering the suspender to quit the house, is, that the charger may reside in it with the other members of his family, but without his wife.

Although the law affords redress to a wife who may be abandoned by her husband, by an action of adherence, sentence of excommunication, and decree of divorce, this does not imply a right in the husband to turn his wife out of doors. On the contrary, legal redress, reparation and punishment, are provided for wrongs done, and for rights violated; nor does a party acquire a right to do an illegal act, by incurring the penalty.

And as the wrong in this case has not been actually perpetrated, but is only threatened, the competent mode of proceeding *in hoc statu* is by a bill of suspension and interdict, to prevent any change of possession, till the merits of the case can be tried in another form.

J.

The majority of the Judges, on the other hand, reasoned in this manner.

The question at present before the Court is, Whether, as head of his family, and proprietor of his house, the husband, in the exercise of his powers of administration over his family, is entitled to direct that his wife shall remove from the house which she inhabits, to another which he has provided for her, suitable to her rank and situation in life.

The right of administration, which in every society must exist somewhere, in the married state, both by nature and by law, resides in the husband. Among uncivilized nations, he is always the domestic judge, exercising uncontrolled authority, and enforcing it by punishing even to life and death. As society advances, this unreasonable power is abridged, but a wife is still considered as a minor under the curatory of her husband. She has no person in law distinct from him. The husband is in some measure answerable for her behaviour; so that his right of curatory confers on him, for his own safety, the power of restraint over her person; the right of control of her conduct, and a claim to the disposal of her property. This necessarily comprehends the right to prescribe to the wife her place of residence. The *jus mariti*, so far as it relates to the property belonging to the wife, may now, by the law of Scotland, be renounced and excluded, though formerly it was otherwise; but so necessary has it always appeared for the good order of families, that the husband should retain his natural right of ruling his family, that, in the opinion of lawyers, this right he can in no circumstances whatever waive or relinquish; and, in particular, it seemed to be an absolute perversion of the natural laws of social life, to allow the husband to transfer it to the wife, even by the most solemn contract; Lord Collington, 9th February 1667, No. 50, p. 5828.

The contract of marriage cannot, in its legal effects, be assimilated to ordinary contracts, in which the courts of law will ordain specific performance of the obligations

of parties. From marriage arise rights of various kinds, some natural and some civil ; the latter only can be specifically enforced by courts of law. To provide the wife with a comfortable residence, and a competent provision, suited to the circumstances of the parties, an action at law will be sustained ; but while it is equally the duty of the husband to cherish and comfort his wife, and continue to cohabit with her, can any court enforce these obligations ? yet these are especially the end and object of the contract. Still because they are not fulfilled, the contract is not therefore dissolved. Now, can the suspension of these natural rights, which the law cannot enforce, invert the order of society, and give the wife the right of being her own curator, so [13] as to regulate her situation in life, and fix her domicile, contrary to the will of her husband ? So long as the marriage subsists, with it exists the curatory of the husband.

While the husband exercises this right of control, so far as to prescribe for his wife the place of her residence, he neither dissolves the marriage, nor degrades her from the station she has hitherto held in society.

To every right arising to her from the marriage, which courts can enforce, she still has a legal title : She retains her claims as his wife, and the rights over the children, which the law has given her. Till natural or civil dissolution, the marriage subsists, though the parties may live in a state of separation. But it cannot be maintained, that the wife, if she even had obtained a decree of adherence against the husband, could have personal execution thereon against him, so as to compel him to live under the same roof with her, and much less to keep her society at bed and board. Nor in this respect does his situation differ from her's ; for in case of her desertion, as little could he command the diligence of the law to recover her person, and place it under his roof. Yet, without this, there is a separation of the parties just as much as when the husband, preferring his own house, assigns to the wife another for her residence.

But an injury, it is said, is done to her reputation, if no cause is shown for forcing her to leave the house of her husband. To whom, however, must the husband show the justice he is exercising ? Must he obtain the sentence of a Court before he avails himself of his prerogative ? If so, it is the prerogative of the Court, and not his own, he appeals to. A servant may be turned out of doors by his master ; his reputation is hurt, and he may even suffer a patrimonial loss on the occasion, from the difficulty he may have in finding a new situation ; but the Court will not interfere with the head of the family in his domestic arrangements, or grant an interdict prohibiting him from dismissing his servant, without establishing his reason for doing so. The only remedy is a claim of damages. If a child is banished from the house of his father, upon whom nature and religion impose the duty of protection and assistance, will the law interpose to reinstate him ? Must not his claim be restricted entirely to a suitable aliment ? Yet his prospects in life are blasted, by the necessary conclusion which the world draws from such unnatural conduct, which can originate only, it is supposed, in the faults of the child.

But, again, if the husband separates from his wife, he is assuming, it is said, the character both of judge and party ; punishing, by his own authority, an offence against himself. He equally does so, in turning to the street his servant or his child. They are all consequences of his right of undivided control over his family. This, in the view of expediency, is absolutely necessary for the support of morality and the great interests of society ; as the injury to social order, and the evil consequences to the domestic peace of families, are much more to be dreaded from the establishment of that right which the wife here claims of resisting her husband's authority in matters of domestic regulation, than from the enforcement of that just authority. The dependence of the wife upon the husband, as of the child on the parent, is the great source of conjugal and parental affection ; and whatever weakens and diminishes that dependence, is fatal to both. To allow a partition of power between the husband and wife, and a liberty of resistance of the latter to the will of the former, in the regulation of the household, would induce perpetual discord, and prove destructive of domestic happiness, and the best interests of society. Nor could this authority be controlled by any civil tribunal ; as this intrusion upon the sacred privacy of domestic management, must have been greatly worse than the evil to be prevented : For if, on every difference of opinion, an appeal could be made to the laws, it would be highly inexpedient indeed ; as such public and decided hostility would only widen the breach, the offspring, perhaps, of an unthinking moment of passion, which otherwise might be easily healed. It is only where the wife has

suffered personal injury that the courts of law will interfere with the husband in the regulation of his household : The more delicate, though not less acute sufferings of the mind, come not within the cognisance of any earthly tribunal.

By the law of Scotland, no other remedy is pointed out for this case, but a claim for aliment, and the right of suing for adherence, which, after a certain period, will terminate in a divorce for wilful desertion ; and it is only because there is no means of compelling to actual adherence, that our statutory law has interposed to grant a divorce in case of wilful and continued separation. The wife cannot, however, insist, that she shall retain possession of any particular house, independent of her husband's consent. When a husband desires his wife to remove to a separate home, without assigning any reasons for his conduct, it may in many cases be the plan most delicate and affectionate even to her. His reasons for discontinuing his present connection, may be amply satisfactory to his own mind. But these he would willingly conceal from the world, and from himself if he could, unless he be driven to a disagreeable investigation in proof of his suspicions, and a still more painful disclosure of his own and his wife's dishonour.

The bill was refused.

Lord Ordinary, CULLEN.—Act. LORD ADVOCATE HOPE, JO. CLERK.—Agent, ALEX. DUNCAN, W.S.—Alt. SOLICITOR-GENERAL BLAIR, ROBERTSON, MONYPENNY.—Agent, W. CALLENDER.—Clerk, WALKER.

F.

Fac. Coll. No. 155, p. 347.

No. 5. [6197] Earl of MORTON *v.* SOMMERVILLE. June 20, 1765.

Sequestration by the landlord will have effect in competition, only to the extent of his right of hypothec.

George Sommerville being creditor to Alexander Ranken, a tenant of the Earl of Morton's, in two different sums, executed two pointings of his growing corns upon the 2nd and 14th of June 1763.

The Earl of Morton having brought an action against Ranken for his rents 1760, 1761, 1762, and 1763, applied for a sequestration of the whole growing corns, which was granted, and executed upon the 3rd of June ; and an arrestment laid by his Lordship, in the hands of the sheriff-clerk, on the same day.

Upon the 16th of June, the Earl recovered decree for the rents ; and, upon Ranken's death, which happened soon after, brought an action of forthcoming, in which he called his representatives.

Afterwards, he obtained a warrant from the sheriff for selling the corns by auction, which was carried into execution upon the 30th of August, the corns [6198] being actually sold, and the prices paid in to the sheriff-clerk, notwithstanding a protest taken by Sommerville, that these steps should not hurt his pointing, or prevent him from ascertaining the quantity, by threshing and measuring the corns when they should be cut down.

In the forthcoming, the sheriff preferred the Earl of Morton ; and Sommerville advocated the cause.

Pleaded for Sommerville : To found a sequestration, it is necessary that the subject be in court, and affected by different claimants ; but the Earl of Morton had used no diligence for affecting the growing corns ; and, therefore, the sheriff ought not to have sequestered them, especially as the current rent was fully secured by the hypothec.

But allowing the proceeding to have been regular, the sequestration could go no farther than to secure the effects from embezzlement, for the benefit of all parties having interest ; it could not transfer the property, or bar the diligence of creditors. And the arrestment, an inchoated diligence, could not compete with a pointing.

Answered for the Earl : Originally, the tenant's corns could be taken in execution for the debt of the master, who still retains his interest, so far as that they are

hypothecated for his rent; sequestration is a summary remedy, intended to enable the master to operate his payment, and must have the effect to exclude all others from using diligence.

Whatever might be the effect of a pointing in competition with an arrestment, no preference can be pleaded on the pointings in the present case, because they are irregular in several respects.

For, 1mo, Pointing could not be executed with effect, after the sequestration.

2do, Though it is now established, that growing corns may be pointed, yet that is only to be understood of corns come to such a degree of maturity, as that a judgment may be formed of their value; else the two appraisements would be elusory, and the debtor exposed to have effects disposed of, far above the amount of the debt.

3tio, The pointings never were completed, the common debtor having died before the corns were cut down; and consequently before they could be threshed out or measured.

And, upon this head, it was observed, that pointing is a judicial sale for payment of the debt, in which several regulations are laid down to secure against the rapacity of creditors: Thus, it is required that the goods be valued two different times, and by different appraisers: That the pointing shall not proceed to a greater extent than the amount of the debt, at least that the surplus be restored: That the goods be offered back to the debtor at the appraised value; and only adjudged to the creditor upon his refusing to take them at that rate.

[6199] But none of these regulations can take place in the pointing of growing corns, if it shall be held to be completed before they are threshed and measured. In that view, the second appretiation is no check upon the first; for no man can form a judgment upon a handful of unripe stalks carried to the market-place: The messenger cannot proportion the goods pointed to the debt, because the value cannot be known with any degree of certainty; nor can the debtor redeem at the appraised value, since he can neither foresee the quantity which will be produced, nor ascertain the value of it.

Hence it follows, that a pointing of growing corns is not complete and consequently does not transfer the property, till after the threshing and measurement; and so the court seems to have viewed the matter in the case, 24th Nov. 1677, Lord Hatton supplicant, *voce* POINTING, where, in laying down the rules to be followed in pointings of this kind, they in particular directed the threshing and measuring of the corns as a necessary step; and, in the case, November 1688, Skene *contra* Ld Carlourie, *voce* POINTING, they expressly found a pointing incomplete, where that solemnity had been omitted.

Since then, the property was not transferred while the common debtor lived, the diligence cannot be completed after his death; and things must remain in the situation he left them, till titles be made up by the heir or by a creditor.

Replied for Sommerville; The form used in pointings, and which is the same in pointing growing corns, as in other cases, necessarily implies that the property is transferred before the measurement is practicable. The messenger offers the subject back to the debtor at the appraised value, which would be absurd, unless he had also power to transfer the property to the creditor.

The after measurement is not *de essentia* of the pointing; it is necessary, indeed, for ascertaining the precise quantity; but the property is vested at the beginning, by the sentence of the messenger; Bankt. iv. 41, 4; Forbes, 11th March 1707, Erskine v. Boswal, *voce* POINTING.

Upon these principles, the first pointer was preferred, though another had got the start of him in threshing and measuring; 22nd Dec. 1698, Cathcart v. Paton, *voce* POINTING; June 1727, M'Whirter v. Hamilton, *IBIDEM*.

It is not a clear point that the debtor could retain the corns upon an offer of the debt, at any time previous to the measurement; as the creditor runs the risk of the fall of the markets, perhaps he might be found intitled to the benefit of their rise. But, whatever may be in that, there is no difficulty in supposing the property to be transferred in the same manner as in an adjudication, during the course of the legal, or in a sale under reversion, while the term is unexpired; indeed, the case is precisely similar to a voluntary sale of growing corns made by a sample, and completed by symbolical delivery.

But, though it should be held that the property is not fully transferred, till

[6200] after the measurement, still the pointing may be completed by that solemnity, even after the death of the common debtor.

An adjudication does not divest the debtor till infetment be taken; but an adjudger may infest himself after his debtor's death. An arrestment does not carry the subject, without a decret of forthcoming; yet forthcoming may be pursued, after the death of the common debtor. An assignation is not effectual without imitation; but the death of the cedent does not preclude the assignee from completing his right.

And there is a material distinction between the case where there is a personal conclusion against the debtor, and where no more is in view than to affect his subjects. An arrestment refers nothing personal against the debtor; and, therefore, forthcoming may be pursued, notwithstanding his death. The same observation may be applied to pointings of the ground; and, as the reason is the same in personal pointings, the law cannot be different.

Duplied for the Earl: There is some degree of impropriety in the messenger's offering back the pointed corns to the debtor, before the value can be ascertained, and, indeed, before he is finally divested of the property; but this practice has been adopted by messengers from the usage in other pointings, without attending to the meaning of it.

It is not unreasonable that a preference should be given to the creditor who has first begun to take the effects of the debtor in execution, by having them appretiated while on the ground, if he be not in any culpable *mora* of completing the pointing by measurement; but it does not follow that the property is transferred by that preliminary step.

And there is a clear fallacy in the examples which are adduced of adjudications completed by infetment, arrestments followed by forthcoming, and pointings of the ground put in execution after the death of the debtor. In these cases, every thing was complete, so far as respected the debtor. In the first, the sale is completed by the decree of adjudication; the arrestment is a completed diligence *in suo genere*; and the pointing of the ground, when once obtained, is followed out against the lands without regard to the proprietor.

The Lords "advocated the cause; found the sequestration and arrestment inept, except in so far as concerns the hypothec; repelled the objection to the pointing on account of the immaturity of the corns pointed, at the time of the pointing; and found that the same was competent in the month of June, and the pointing thereby lawfully inchoated."

Memorials were ordered upon the point how far the pointings could be completed after the death of the debtor.

The substance of these memorials has been already stated; and, upon advising them, the Lords found, that George Sommerville can have no preference by his pointings.

[6201] This interlocutor proceeded entirely on the footing, that the pointing was only inchoated in June, and that it could not be completed after the death of the common debtor. See POINTING.

Act. MONTGOMERY.—Alt. WIGHT.

G. F.

Fac. Col. No. 9, p. 212.

No. 8. [6202] ROBERT DOW v. JAMES HAY. June 25, 1784.

Found in conformity with the above.

Dow was the tenant of Mr. Hay in a possession, the rent of which was partly payable in victual betwixt Christmas and Candlemas, and partly in money, on 5th July.

The tenant's credit having become suspected, the sheriff, in consequence of a petition preferred by the landlord, granted warrant on 10th November preceding, "for sequestrating the defender's corn, cattle, and other effects, and appointed a sequestrator, with power to cause an inventory and appraisement to be made; but without prejudice to the defender's applying to have the sequestration removed, upon his finding caution for payment of the rents." And on 19th January, he "granted warrant to the pursuer,

at the sight of the sequestrator, to sell by public roup the effects sequestrated ; at least as much thereof as to pay the rents due, with the expenses of process, sequestration, and roup."

The tenant's effects having been roup'd in consequence of this authority, he brought the whole proceedings, as being oppressive and illegal, under the review of the Court, by process of reduction.

Observed on the Bench, Though a landlord's right of hypothec ought always to be exercised with discretion, yet when his tenant fails in his circumstances, the landlord, *currente termino*, may justly sequester the stocking on the farm. In this power, that of rousing the subjects, especially the cattle, is implied ; since the expense attending their preservation might otherwise, in the mean time, often become equal to their value.

The Lord Ordinary "having assoilzied the defender,"

The Lords, on advising a reclaiming petition and answers, "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, ELLIOT.—Act. H. J. ERSKINE.—Alt. CROSBIE.—Clerk, COLQUHOUN.

S.

Fol. Dic. v. 3, p. 291. *Fac. Col.* No. 162, p. 253.

No. 13. [6208] HENRY BUTTER of Pitlochrie, and Others, Creditors of the deceased GEORGE CUMMING, Sub-tenant of the lands of Colpach and Kilmorie v. DUNCAN M'VICAR, Collector of the Customs at Fort-William, principal Tenant of these Lands. July 27, 1764.

The landlord found preferable to creditors on the steelbow-stock of a tenant who died bankrupt.

Collector M'Vicar having obtained from the Barons of Exchequer a tack of the lands of Colpach and Kilmorie, part of the annexed estate of Lochiel, subset them in May 1758, to George Cumming ; and, by the sub tack, M'Vicar lets, and in steelbow-tack and assedation sets, to Cumming, 30 milk-cows, 30 yeld cows, 15 stirks, &c., at a certain value ; as also, 25 bolls white oats, 5 bolls bear, &c., to be delivered to him under comprisement, at a certain value, of the present standing crop on the ground, immediately before it be cut down ; and delivering to him all the labouring utensils now at Colpach, conform to an inventory, and comprised at a certain value ; and Cumming was obliged to redeliver to M'Vicar, at the expiry of the tack, the said number of cattle, of the different kinds, species, and qualities, of equal value as he now receives them, or the said agreed price of them ; it being optional to M'Vicar to accept of the cattle under comprisement, or the agreed price, upon giving notice of his [6208] election, nine months previous to the term of removal ; and to deliver back all the labouring utensils under a comprisement, or their value, as in the inventory ; as also, the said number of 25 bolls white oats, &c., or the sum of ten merks Scots, for every undelivered boll of each kind, under the comprisement of the standing crop the year of removal ; and it was agreed, that, in case one year's rent shall run into two, or that Cumming should be distressed by legal diligence, or his means and effects any how endangered, so as to prevent him from being in a capacity to perform the articles and conditions of the contract, then, and in that case, it should be in the power of M'Vicar to seize on the said cattle and corn *brevi manu*, and to apply the same to his own use, for extinction of all claims and demands whatever.

Cumming having died bankrupt in March 1762, Butter, and some of his other creditors, took out an edict, in order to get themselves decerned executors *qua* creditors to him, that they might affect his steelbow-stock ; upon which M'Vicar appeared, and insisted, that he was preferable to them thereon ; But the Creditors insisted, that he had no right of hypothec or preference upon it, but could only come in *pari passu* along with Cumming's Creditors.

The Commissary, in December 1752, found M'Vicar a preferable creditor to the

extent of the sums claimed as the value of the steelbow-stock ; upon which the cause was brought by bill of advocacy before the Court of Session.

Pleaded for the Creditors ; Steelbow corresponds to the *contractus mutui* in the civil law. The property of it is transferred to the tenant. It is upon his risk, he has the free disposal of it, and the heritor has only a personal action against the tenant for re-delivery of a like number and quantity, or payment of the agreed value ; consequently it is poidable for his debts during his life, and must be confirmable by his creditors, as *in bonis* of him, after his death.

Lord Stair, lib. 1, tit. 11, § 4, considers steelbow a *mutuum*. " Things cannot fall," says he, " under *mutuum*, which cannot be alienated, and which are not properly fungible ; and I doubt not but oxen, kine, and sheep, are mutuable, as is ordinary in steelbow goods, which are delivered to the tenant with the land for the like number in kind at his removal." In the same way Lord Bankton, lib. 1, tit. 12, par. 2. " In the case of steelbow, the property is transferred to the tenant, and the goods, after delivery, perish to him, or may be distrained or poided for his debt." And that the Court viewed steelbow in the same light, appears from several decisions ; 4th November 1609, *Boyd v. Russell*, observed by Haddington, *voce STEELBOW* ; 24th November 1624, *Turnbull v. Ker*, *IBIDEM* ; 4th December 1638, *Lady Westmoreland v. Lady Home*, *IBIDEM* ; and 28th January 1642, *Dundas v. Brown*, *IBIDEM*, all observed by Durie.

Pleaded for M'Vicar ; The property of moveable goods may belong to one person, when the use and administration of them is committed to another ; and particularly, in the case of an *universitas* or *grex*. An instance of this in the [6210] Roman law was the *dos*, the individuals of which were under the use and administration of the husband ; but the property of the *universitas* remained in the wife ; l. 30, *Cod. de juri dotium* ; *Voet*. lib. 23, tit. 3, § 19.

A steelbow contract is when an heritor or tenant lets lands to his tenant or sub-tenant, with a stocking of cattle, and sometimes corn, straw, and other articles, for a joint rent, to be paid for the lands and the use of the goods ; and the tenant is bound to restore the whole in equal good condition, or of equal value, at the expiry of the lease. Such contract is not a sale of these goods, but only a location of them for a certain time, and for a certain use. The tenant has a reasonable power of administration, by which, if he find it necessary, he may sell a horse or a cow, and put another in its place ; but he must use his right *tangam bonus paterfamilias* ; and, if he was to sell unnecessarily, with a view of dilapidating the *universitas*, it is thought the master, even during the tack, might strike in, and prevent such alienation ; and likewise, for the same reason, he might interpose to prevent the steelbow goods from being evicted by a creditor.

The contract of steelbow was not a *mutuum*, but a location of moveable goods to be possessed along with the lands let. Such goods are not ordinarily fungibles ; cattle and utensils evidently are not ; and though the corn, considered in itself, may be reckoned a fungible ; yet, when considered as part of the *universitas* set in tack, it remains in so far the property of the master, that the tenant is obliged constantly to replace it, as much as he is obliged to replace the individuals of the other part of the stocking.

It is an established opinion, that, when lands are sold, especially by a rental, the property of the steelbow goes to the purchaser, though not mentioned in the disposition, which shows, that the property is understood to be in the master. Upon the same principle, it has been often found, that steelbow goods go to the master's executor, and fall in his single escheat ; and, in one case, it was expressly found, that they did not fall under the tenant's escheat, but the heritor's, *Dict. voce Steelbow*. Nor was there ever an instance of the tenant's executors claiming these goods, nor would such claim be competent ; *Stewart's Answer to Dirleton's Doubts, voce Steelbow*.

Whether the master falls to be considered as proprietor of the steelbow goods during the currency of the tack or not, it is established in practice, that he has a right to these goods preferable to the creditors of the tenant, as appears from a number of certificates from Highland gentlemen and tenants produced, in consequence of an interlocutor of the Court, allowing parties to adduce evidence by certificates, or other ways, of the practice of the country. The method of setting land with a steelbow-stock is attended with many advantages, particularly in the Highlands and northern counties, where the tenants are generally poor ; but, if it were to be found that the

teelbow-stocking might be carried off by the tenant's creditors, and that the master had no more [6211] than a personal action for restitution of the value at the expiry of the tack, an end would be put to the practice of setting in steelbow.

"The Lords preferred Mr. M'Vicar."

For Butter, LOCKHART.—Act. ILAY CAMPBELL.

J. M.

Fol. Dic. v. 3, p. 293. Fac. Col. No. 144, p. 339.

No. 35. [6226] Sir JOHN RUTHERFORD of that Ilk v. WALTER SCOTT.
June 29, 1736.

A purchaser from a tenant is not liable for the current year's rent, if enough was left at the time of the bargain to answer the rent, but which the landlord thereafter poulded for former arrears.

Sir John set his lands of Arks to Thomas Thomson for 1250 merks yearly, payable at Martinmas and Whitsunday, by equal proportions. At Martinmas 1733, the tenant having fallen in an arrear of £71 Sterling, payable at the Whitsunday preceding, Sir John took a decret against him in his own baron-court upon 28th November that year, not only for the £71, but likewise for the rent due at Martinmas then past, and Whitsunday ensuing, the last of these being first come and bygone.

In the March thereafter, the tenant sold 280 sheep to Walter Scott, &c. Soon after which Sir John poulded Thomson's effects; and having imputed the same in payment of the arrears, he insisted in an action against the purchasers of the sheep, for the year's rent betwixt Whitsunday 1733 and Whitsunday 1734, upon this medium, That they were hypothecated for that year's rent; concluding, the defenders ought either to restore them, or pay the rent.

For the defenders it was pleaded, that, when they purchased the sheep from the tenant, and paid the price, there were sufficient goods upon the ground to pay that year's rent, which the pursuer had carried off in virtue of his poulding; and though, by the common law, there was a great variety of legal hypothecs, yet these were in a great measure superseded by modern custom, being inconsistent with trade or commerce: As they are therefore so little favoured at present, it follows, that, as the hypothec of an *universitas* was, by the Roman law, extinguished by alienation, where it was done without fraud, *multo magis* behoved it to be so in our general hypothec of *invecta et illata*. Neither is it any objection to this doctrine, that corn and other fruits of the ground could be recovered from a purchaser; seeing these are reckoned, when growing, as part of the lands, and become the tenant's only by reaping them, with consent of the master, which is understood to be given conditionally, upon payment of a certain *quota* thereof to him. But the *invecta et illata* stand upon a different footing, not being considered as belonging to the master, nor the rent payable out of them, but alienably in money that is supposed to be raised out of the price thereof when sold.

2do, *et separatim*, General hypothecs go no farther than is necessary for that end; so that, if a part remains with the tenant, the purchaser of the other part is only liable *in subsidium*, in so far as the remaining goods are insufficient to answer the debt; which is founded upon the L. 47, *De jure fisci*. 4, *novel*. cap. 2; hence it follows, that a purchaser from a tenant, as he is only liable *subsidiarie*, has a legal right, upon payment of the rent, to demand an assignation of the action competent to the master, against the possessors [6227] of the goods he left with the tenant, even though it should be prejudicial to himself; a demand which, it is acknowledged, would not be competent, was it only founded on equity; nay, even without such an assignation, the defender has a right of relief, which is no more than a consequence of the benefit of discussion.

Answered for Sir John; That there was nothing to hinder a master to pould for the rents of former years, and likewise use his right of hypothec; so that both of them might be available to him for their respective purposes, agreeable to Stair's opinion, L. 4, tit. 25, § 2; where it is observed, that it is not enough there were sufficient goods on the ground at the time of the poulding, because poulders might carry off these goods;

and likewise the master of the ground might point the same for prior rents ; but there should remain a sufficiency for a year's rent at the term of payment, though he himself, before that time, pointed the goods for payment of former year's rents. And to maintain the pursuer could not recover the sheep after they were sold to a purchaser, is arguing in direct contradiction to the constant course of decisions, 3d February 1624. Hays, No. 2, p. 6188 ; 11th December 1672, Crichton, No. 8, p. 6203 ; 9th February 1676, Park, No. 9, p. 6203.

And, if the distinction betwixt the fruits of the ground and the *invecta et illata* was to take place, there would be no subject to fall under the hypothec in all the south country or Highland rooms in Scotland, as they produce nothing but grass to feed cattle or sheep, which, as they are the standing stocking on these farms, must be considered as the fruits thereof. Nor does it make any difference, that the rent is not paid in the goods themselves, but out of the price ; since that is now the case with most of the corn farms ; and yet the hypothec in these is as strong for the money rent, as if it were payable in kind.

To the second defence it was answered, That one is not bound to assign a debt to his own prejudice, whether the demand is founded in law or equity ; and, if there was any right to demand it in this case, it could only arise from equity. Neither is the doctrine of assigning to be restricted to what obtains with respect to cautioners, that being an accessory obligation, whereby the cautioner is not properly bound for the debt, but for the debtor ; so that the present case is very different ; as all intromitters with the tenant's goods are equally and principally liable for payment of the year's rent. The *subsidium* therefore now in dispute is of a quite different nature, and relates only to the order in which the principal debtors may be attacked ; as Sand observes in his treatise *De actionum cessione*, cap. 5, §§ 35 and 36 ; where a general rule is laid down, that one is not bound to assign when it is to his own prejudice ; hence it is, that a creditor, who has a pledge for two sums, is not bound to assign it to a cautioner in one of the debts, unless he pay both ; because such assignation would be to his own prejudice.

[6228] The Lords found, that the defenders, as lawful and onerous creditors to Thomas Thomson the tenant, having *bona fide* received the sheep in payment of their just debts, are not obliged to restore the sheep, or their values, to the pursuer, by virtue of his hypothec ; in regard it appeared, that goods sufficient to pay the current year's rent were left upon the ground, which afterwards were intromitted with by the pursuer ; and repelled the allegation, that the same were pointed for former arrears, in regard the hypothec does extend to no more than the current year's rent ; and, therefore, that the pursuer could plead no preference for former years against other lawful creditors, but according to his diligence.

C. Home, No. 28, p. 52.

No. 38. [6232] ANDREW BLANE v. DAVID MORISON and Others. March 8, 1785.

A landlord having granted to a tenant power to sublet, found to have no hypothec over the effects of the sub-tenants. But there were particular circumstances in the case.

David Morison and others possessed the estate of Kerse under Ronald Chalmers, the tenant, who had powers to sublet ; and to him for many years they paid their rents without any challenge from the landlord.

Their tack-duties for the year 1782, which were due at Martinmas, had in this manner been paid to the principal tacksman before 23d January 1783, at which period Mr. Blane, the factor on this estate, applied to the Sheriff-depute for a sequestration of their crop and stocking, in security and payment of the hypothec-rent due to the landlord.

The question thence arising having been brought into the Court of Session by bill of advocacy, Mr. Blane, the factor,

Pleaded ; The fruits or yearly produce of a farm, as well as the effects which have been brought into it, are viewed by the law of Scotland, as the property of the landlord, and unalienable, until the stipulated rent has been paid to

him. He is accordingly provided with an action, while these are extant, for converting them into money for his payment, to the exclusion of every other person; and when they are no longer to be found, he is warranted to pursue the intromitters, for their value; Kame's Law Tracts, 4, pp. 151, 152; Erskine, b. 2, tit. 6, § 56; Voet, *In quibus causis pignus tacite contrahitur*; Dict. voce HYPOTHEC; Durie, 5th March 1630, Fowler *contra* Cant, No. 25, p. 6219.

Nor are sub-tenants exempted from this general rule. Where, indeed, a landlord has signed as consentor to the sub-lease, or where he has accepted from the sub-tacksman the rents specified in it, there might be some reason for holding effectual against him the performance of an agreement he has so explicitly recognised; and to such cases any authorities which can be quoted for the sub-tenants are alone applicable. But a mere liberty to subset, whether particularly expressed, or implied from the endurance of the principal lease, cannot be attended with the same consequences. A landlord is thereby debarred from insisting on the personal residence of the principal tacksman; but in every other [6233] respect, the rights belonging to him, and his preference in virtue of the hypothec, remain in their former extent.

Hence it is, that a sub-tacksman is not personally bound to the landlord, which would be a necessary consequence of supposing an implied agreement between them; Stair, b. 2, tit. 9, § 2. In the form of removing too, prescribed by the act of sederunt, the summoning of sub-tenants is not required, 14th December 1756, § 3; from which it is plain, that a regular payment of rent to the principal tacksman will not secure them from an irritancy incurred by him, *ob non solutum canonem*. So also, where a farm has been divided among many sub-tacksmen, the landlord may attach the fruits of any one field for the tack-duties of the whole, Fountainhall, 1700, Salton *contra* Club, No. 13, p. 1821; a determination, which seems quite decisive of the present question, since no payment by a sub-tenant, of the rent corresponding to his possession, ought to be more effectual than what is made in virtue of legal diligence to the landlord himself.

Answered for the sub-tenants; The right of hypothec may be limited, not only by express covenant, but also in consequence of the implied will of the landlord; Erskine, b. 2, tit. 6, § 63; Dict. voce HYPOTHEC; Edgar, November and December 1724, Brown *contra* Sir John Sinclair, No. 10, p. 6204. Such a restriction then must unavoidably take place, when, by giving authority to subset, the landlord has delegated the same powers to the tenant for recovery of the sub-tack-duties, as belong to himself with regard to the rents stipulated in the principal lease. After the sub-tenants have duly delivered their rents to the person empowered by him, he surely cannot be heard to insist, that they shall be compelled to make a second payment to himself. No instance accordingly can be given, in which, for rents due by a tenant having special powers to subset, the effects of a sub-tacksman who had paid his promised tack-duties, have been found attachable by the landlord. And the opinions of our lawyers strongly support the contrary doctrine; Erskine, b. 2, tit. 6, § 34; Bankton, b. 2, tit. 9, § 2. Par. 17; 5th February 1667, Lady Traquair *contra* Cranston and Howatson, No. 28, p. 6221, and voce TACK.

The situation of sub-tenants would otherwise be intolerably grievous. The crops reared by each, so long as they were unconsumed, would remain impignorated for the rents of the whole farm, however extensive. And the sub-tenant might afterwards be sued as an intromitter, thus being rendered *subsidiarie* liable, during 40 years, not only for the principal tenant, but also for the other sub-tacksman, against whom, at the same time, he is not, by any form of law hitherto known, provided with the means of securing his relief. Nor could any hardship accrue to landlords from a more equitable construction of the agreement in question. For although payments by sub-tenants, when made without any previous interpellation on the part of the landlord, were to be sustained, it would not follow that his legal preference was altogether derelinquish-[6234]-ed, or that, by anticipating the payment of the sub-rents, by stipulating elusory tack-duties, or by any other similar device, it could be unreasonably diminished.

It was farther contended for several of the sub-tenants, That the sums paid by them had been delivered by the principal tacksman to the factor; from which they derived an additional argument, why the landlord's hypothec with respect to them should be considered as discharged.

The Lord Ordinary's interlocutor was in these terms:

"Finds, That the heritor's real right and security of hypothec for his principal tack-duty or rent, so long as it continued in force, did extend to, and affect the whole

crop and stocking, upon all and every part of the land let by him in the principal tack thereof, whether such crop or stocking belonged to the principal tacksman himself, or to the defenders and others his sub-tenants, and was neither excluded nor restricted in its effect by the principal tack's bearing a power or licence to the tacksman to sublet the said lands: Finds, That it was not necessary, for preserving the said heritor's hypothec, that he should, either before or after the term, interpel the defenders, whom he had not accepted of as his tenants, from paying their sub-rents to the principal tacksman under whom they possessed; but that the said sub-tenants, when making such payments, did it at the hazard of their crop and stocking being still affected by the heritor's legal right of hypothec, in case the principal tacksman should fail to pay up to him the whole of the principal tack-duty, for security of which that hypothec was still subsisting; and that the defenders allegation, that the sums of money paid by them, to account of the sub-rents soon after Martinmas 1782, were paid over by him to the pursuer, in part of the principal tack-duty due at the said term, is neither instructed, nor relevant for supporting their objection to the sequestration: And therefore finds, that as the pursuer obtained a sequestration of the whole crop and stocking on the lands contained in the principal tack, within less than three months after the said term of Martinmas 1782, when the principal tack-duty in question fell due, the intermediate payments made by the defenders to the principal tacksman, or discharges of the sub-rents granted by him to them, could be no bar to the said sequestration and that the sequestration must still subsist accordingly, &c."

The sub-tenants having brought the question under review of the Court, by a reclaiming petition, which was followed with answers, a hearing was appointed. Memorials were afterwards given in for the parties, upon advising which the Lords altered the Lord Ordinary's judgment; thus sustaining the objections urged in behalf of the sub-tenants, to the awarding of the sequestration.

There was a great diversity of opinion among the Judges; and it was observed on the Bench, That this decision was not to be viewed as determining in general, that the landlord's hypothec, when subsetting was not prohibited, could be excluded in consequence of payments made, after the legal term, to the [6235] principal lessee. The special power to sublet, which here occurred, and the long and uninterrupted use of payment by the sub-tenants, seemed to have considerable weight with some of the Judges.

Lord Ordinary, ESKGROVE.—Act. LORD ADVOCATE, GEO. FERGUSSON.—Alt. BLAIR CORBET, W. MILLER.—Clerk, HOME.

C.

Fol. Dic. v. 3, p. 294. *Fac. Col.* No. 206, p. 321.

No. 40. [6237] CUMMING of Altyr v. LUMSDEN. July 4, 1667.

Fishings liable to hypothec. See No. 43.

Cumming of Altyr having set a salmon fishing to Alexander Lumsden, for payment of £60 Scots of tack-duty, he pursues Matthew Lumsden, as intromitter with the fish taken, for the tack-duty, as having an hypothec upon the profits for the rent.—It was alleged for the defender absolvitor, because he intromitted with these fish as donatar to Alexander Lumsden's escheat; at least, having now the right of the escheat, he was not liable for that privilege, preferring masters of the ground; for the rent cannot take place against the King and his donatar, who is more privileged.

The Lords repelled the defence, and found the donatar liable for the rent, in so far as ilk year's intromission would extend to the rent of that year.

Fol. Dic. v. 1, p. 418. *Stair*, v. 1, p. 469.

No. 43. [6239] MOLISON v. SMITH and NICOL. February 1687.

Found, that the master of a salmon-fishing set in tack, had a hypothecation for his tack-duty, of the salmon taken and barrelled, as being *fructus aquæ*.

Fol. Dic. v. 1, p. 418. *Harcarse* (HYPOTHECATION), No. 523, p. 145.

* * Sir P. Home reports the same case :

Gilbert Molison having set a tack to James Peirie of a salmon fishing in Don, for payment of a certain tack-duty ; and after the expiring of the year, Peirie having sold and disposed the salmon to Adam Smith and John Nicol, without payment of the tack-duty, and Molison having obtained decret before the Bailies of Aberdeen, against Smith and Nicol, as intromitters with the salmon taken in his waters that year, for payment of the tack-duty, by virtue of the tacit hypothecation that the masters have of their tenants goods, for a year's rent ; and Smith and Nicol having suspended, upon the reasons, that the Bailies committed iniquity in finding the suspenders liable for the tack-duty by virtue of the tacit hypothecation ; because, albeit landlords of tenants within burgh, or other heritors of lands in the country, have that privilege, yet it is not so in fishings, especially in this case, where the fishes were not in the water, or in any corsehouses, but brought to the shore of Aberdeen, and bought in public market ; and if such a preparative were sustained, it would destroy all trade and commerce as to salmon fishing ; for a tenant and his master could collude in prejudice of the buyer, and the master could force the buyer to pay the price over again, which he had already paid to the tacksman. Also, it was not proved that the salmon bought by the suspenders were the individual fish taken in the charger's water. Answered, That it is a principle in our law, that the tenant's goods, especially the product of lands, and others, set in tack, are tacitly hypothecated to the master, for a year's rent, which ought to be extended to salmon fishings as well as other things, there being the same reason for both, and more in salmon fishings than in other things, because heritors of salmon fishings are many times necessitated to set the same to poor fishing men, who have no stock of their own, and to furnish them salt and casks for making and curing of the fishes, and can expect no payment of their rents, but out of [6240] the product of their fishing ; and if it were otherways, that the heritors of salmon fishings should not have that privilege, then the tacksman might sell and put away the fishes, and so render all salmon fishing altogether useless and unprofitable ; and where a party has right by tacit hypothecation, it is not taken away by selling of the subject, in a public market, because the effect of tacit hypothecation is, that it makes it to be the party's own, without tradition or delivery ; so that a tenant's selling the product of the ground, fishing, or others, can no more prejudice his master of his right of tacit hypothecation, &c., to a year's rent, than if he were selling his master's goods in a public market, " *quia jus pignoris sive hypothecæ ita rei annexum est, ut debitor nec rem alienando neque alteri postea obligando possit creditore suffere ;* " *Leg. 15, Cod. De pignor hypothec.* Perez. in lib. 8, Cod. tit. 18, No. 9 ; and which is clear by several decisions in our law, and particularly *Hay v. Elliot*, No. 26, p. 6219, where the buyers of corn in public market, were found liable to the heritor for a year's rent, upon the account and privilege of tacit hypothecation. And the 4th July 1667, *Cuming of Altyr v. Lumisden*, No. 40, p. 6237, where, in the case of a salmon fishing, the Lords found the donatar of the tenant's escheat liable to the master for the tack-duty, by virtue of the tacit hypothecation. The Lords repelled the reason of suspension ; and found the heritor hath an hypothec in the fish for his yearly rent ; and therefore assolvied from the reduction, and found the letters orderly proceeded. *Sir P. Home, MS. v. 2, No. 875.*

No. 52. [6247] The Earl of SUTHERLAND v. Mr. DAVID COUPAR, Writer in Edinburgh. January 31, 1738.

A superior, in a process of recognition, is entitled to have the writs relative thereto exhibited to him, without paying the agent's account who has the custody thereof.

In the process of recognition at the Earl's instance, as superior of the lands of Skelbo, belonging to the Lord Duffus, Mr. Coupar being charged, in virtue of letters of diligence, to exhibit several writs that were in his custody, which, it was alleged, might be probative of the points admitted to the pursuer's probation, did, in order to stop executing the second diligence, petition the Lords, setting forth, that he having been employed by Lord Duffus the defender, had disbursed some money in his affairs; and therefore, having a right of hypothec in these writs, he was not bound to produce them, as the production thereof would be evidence of the facts the Earl was allowed to prove, which, being all that was wanted, would tend to frustrate Mr. Coupar's payment.

Answered for the Earl; That the account due to Mr. Coupar is prescribed; of course, the right of hypothec, which is only accessory, cannot subsist after the debt, for which it is a security, is extinguished.

2do, Supposing it were not, the right of retention, in virtue of the hypothec, cannot take place here, as the Earl is not insisting for delivery, but only for exhibition in the clerk's hands, *ad modum probationis*; which is a piece of justice he is entitled to demand from every person in whose custody these papers may happen to be lodged; nay, Lord Duffus himself, if he had had the possession thereof, could not have detained them upon any pretence whatsoever; consequently Mr. Coupar's title cannot be stronger than his author's right of property.

[6248] Replied to the first; An exception by an agent against exhibition does not prescribe, so long as the writs are in his custody. And to the second, it was answered, That a right of property, and that of an hypothec, are, in their nature, quite different; the proprietor suffers nothing by exhibiting the writs, if he gets them safely returned; but a writer, who has the custody thereof for security of his accounts, would be precluded from any benefit arising from his hypothec, if he were obliged to exhibit them even *ad modum probationis*; more especially, that, if the pursuer prevail in the process of recognition, there will no subject remain for payment of any of Lord Duffus's creditors.

The Lords found, that the Earl had a title to have the writs exhibited to him, without being obliged to pay Mr. Coupar's account.

Fol. Dic. v. 1, p. 419. C. Home, No. 82, p. 135.

No. 53. Sir ROBERT STEWART, and Others, Petitioners. January 29, 1742.

If a writer or agent be obliged to allow inspection of writings, on which he has a hypothec?

It was reasoned among the Lords, whether or not an agent or writer, who had an hypothec on writs in his hands, was obliged to allow inspection till his account was paid? It was on the one hand said, that all the party wanted, was inspection, whereby the hypothec would be eluded; on the other hand, should a writer be allowed to say, "I have papers, but I will not shew them till I am paid;" he might draw his account for shewing papers that might be no better than a pack of cards. 2do, Why should a writer, on account of his hypothec, have a stronger right than a proprietor has in his own papers, who yet is obliged to exhibit *ad modum probationis*?

The point did not in this case receive a direct determination; but it seemed to be the opinion of the majority, that inspection was to be allowed.

N.B. It is remembered, that in a declarator of recognition, the writs of the lands being called for by a diligence, to shew that they held ward of the pursuer, the defender's

writer, in whose hands they were, was found obliged to exhibit them, notwithstanding his hypothec, which could not bar the third party's interest, to have them produced *ad modum probationis*, January 31, 1738, Earl of Sutherland *contra* Mr. David Coupar, No. 52, p. 6427. *Kilkerran* (HYPOTHEC), No. 2, p. 272.

No. 60. [6255] CHRISTIAN CALLMAN *v.* HAMILTON BELL. November 28, 1793.

An agent's hypothec over the papers of his client, found not to extend to the proceedings in a process which he had been employed to conduct.

Christian Callman employed Hamilton Bell, writer to the signet, to raise a process of declarator of marriage and legitimacy, at the instance of herself and her daughter, against Janet Gourlay, sister, and (as she alleged) representative of the late Robert Gourlay, to whom Mrs. Callman said she had been married. She also employed Mr. Bell to take out an edict in the name of her child, for serving her executrix, as nearest of kin to her deceased father. The same step was taken by Janet Gourlay, who contended, that she ought to be preferred to that office; and, after some litigation, she prevailed before the Commissaries.

Mr. Bell, on the part of his client, brought their judgment under review, by a bill of advocacy, which was refused.

At this stage of the action, Christian Callman notified to Mr. Bell, that she was to change her man of business; and insisted that he should deliver up to her the bill of advocacy, writings produced, and the whole procedure which had taken place upon it in the bill-chamber, and also the process of declarator which was going on in the Commissary-court.

Mr. Bell refused to comply with this demand, upon the ground of his having a right of hypothec over the whole papers in his possession, till he should get payment of the account due to him as her agent.

Upon this Christian Callman obtained a caption against him, for not returning the bill of advocacy, &c., into the hands of the clerk.

Mr. Bell having presented a representation, praying that it should be recalled, the Lord Ordinary on the bills found, "That an agent is not entitled to stop procedure in a depending process, by withholding the steps of process from his client or the clerk; as his hypothec only extends over title-deeds, securities, [6256] and other documents properly belonging to his client; and therefore refuses to recall the caption, so far as it applies to the recovery of the steps of process, either before the Commissary-court or this Court."

Mr. Bell presented a petition, reclaiming against this judgment; in which he founded on the case, 28th January 1784, *Scott v. Lothian*.*

Observed on the Bench; An agent, so far from having an hypothec over the steps of a process, is not even entitled to retain title-deeds or other writings of his client, of which he has got possession merely in consequence of their having been produced in it. But if they were in his hands prior to their production, as in the case of *Scott v. Lothian*, he will not on that account lose his hypothec over them. In the case of *Forsyth v. Sym*,* 18th February 1791, the claim of hypothec was repelled in circumstances similar to the present.

The petition was unanimously refused without answers.

Lord Ordinary, ESKGROVE.—For the Petitioner, W. STEWART.—Clerk, MENZIES.

R. D.

Fol. Dic. v. 3, p. 295. Fac. Col. No. 78, p. 172.

* Not reported.

- No. 63. [6259] SEAMEN of the "GOLDEN STAR" v. PROVOST MILN and LUDQUHARN. March, 1682.

Found, that though mariners and seamen had not a hypothecation upon the ship for their wages of their last voyage, yet they had *jus insistendi* and *retinendi*, while in possession of the ship, even against a person who had bought her after the voyage.

Fol. Dic. v. 1, p. 419. *Harcarse* (HYPOTHECATION), No. 521, p. 145.

- No. 65. [6261] ALEXANDER SANDS and other Seamen in Prestonpans v. WALTER SCOTT, Merchant in Dalkeith. January 6, 1708.

Seamen's wages not a debt affecting the ship or the cargo, but affect the freight.

Alexander Sands and others, having obtained decret before the Admiral, against Walter Scot, as owner of the cargo of a ship navigated by them, and not having paid the freight; he raised suspension and reduction thereof, upon this ground, That the judge committed iniquity in finding him liable for the seamen's wages, because our law knows no hypothecation that seamen have for their wages, on goods aboard belonging to other persons than the skipper and owners of the ship, with whom they contract; and *esto*, they had such a hypothec, yet the suspender having received and disposed of the goods brought home, unaffected by diligence, the seamen can have no interest therein; otherwise merchants and traders might be ruined by processes at the instance of such seamen for their wages, out of cargoes thirty-nine years back.

Answered for the chargers; by the law of all nations, goods imported in ships upon charter-party, are liable for payment of the freight, and such as are [6262] imported without a charter-party (as in this case) are still liable for the seamen's wages; which is founded on material equity, in regard the seamen take the goods aboard, place them where they may be safest, and are liable for any damage arising to them in the ship, without extraordinary stress of weather; they navigate the ship, bring her to the designed port, and deliver out the goods safe. The seamen did indeed suffer the goods to be unloaded before they craved their wages, because they thought they were dealing with an honest man, who would not defraud them; and they could not claim wages till after delivery of the goods. But after all, though the cargo were not affectable for the seamen's wages, the suspender *qua* merchant cannot refuse to pay them, seeing he still owes the freight to the skipper.

The Lords were clear that the seamen's wages were no debt of bottomry affecting either the keel of the ship or the cargo; but found the freight liable for the said wages, and therefore repelled the reason of suspension.

Fol. Dic. v. 1, p. 420. *Forbes*, p. 219.

- No. 69. [6269] ARCHIBALD HAMILTON v. JOHN WOOD and Others. July 29, 1788.

Hypothec does not take place on ships for repairs made in home ports.

In a competition of creditors, Wood, and other persons, by whom a ship belonging to the bankrupt had been repaired in a home port, claimed a right of hypothec, as thence arising on the ship itself. To this claim, Hamilton, the trustee of the creditors at large, objected; and

Pleaded, There is nothing in the situation of persons who furnish labour or materials for the repairing of a ship, to create a right of hypothec, more than in that of all those who perform any other work, or provide any other materials. The contract of sale takes place as to the one, and of *locatio conductio* as to the other; but in neither does any real right remain in the creditor after delivery of the subject. The Roman law admitted a great number of tacit hypothecs, which are altogether rejected in ours; yet among these, the hypothec now claimed had no place. They who lent money for building or repairing, or even buying a ship, had indeed by it a

privilege beyond other creditors, but no right of hypothec; l. 26, *D. De reb. auct. jud. poss.* To the genius of our law, all tacit hypothecs are adverse. Balfour, employing the words of the *Regiam Majestatem*, states it as a rule, "That without delivery there can be no impignoration" (*Pract.* p. 194). Nor, in any of the more early writers is there the least intimation of the right now claimed. When Lord Stair (b. 1, tit. 12, § 18) mentions the hypothecating of a ship "for what was borrowed for the use of the ship's company or voyage," he must necessarily refer to a special contract of hypothec by the master; for a tacit hypothec to such an extent never existed anywhere. As the right in question, then, results not from the nature of the contract to which it relates, so it is as unknown in the common as in the statute law; for it is in vain to talk of a common-law right which was unheard of at the end of the last century.

In the case of *Gay contra Arbuckle*, 16th November 1711, No. 66, p. 6262, it seems indeed, at first view, as if the Court had recognised this tacit hypo-[6270]-thec to the extent insisted on; but when its peculiar circumstances are examined, they will be found not necessarily to involve that conclusion; which, however, appears better warranted by the decision in the later case of the *Rope-work Company of Glasgow contra Crosses*, 4th March 1761, No. 68, p. 6268. The Admiralty-court, too, in several instances during the present century, have given their sanction to the claim now in dispute; but those judgments were combined with others manifestly erroneous and illegal. Nor will the decisions of that court, in whatever series, constitute the law. That is the prerogative of this supreme Court. Yet even here, if not only a single one, but a course of decisions, have proceeded on an erroneous principle, there is nothing to prevent the error from being corrected by a subsequent determination. Of this the decision *Keith contra Keith*, 17th February 1688, *voce PRIVILEGED DEBT*, affords a remarkable example, by which the Court altered what had been determined by a number of preceding judgments, then finding, that a wife was not a privileged creditor for implement of provisions in her marriage-contract.

It is true, that in foreign voyages, the right of hypothec may be necessary to induce strangers to furnish the repairs which are wanted; but with respect to a home port, as in the present instance, no such necessity can be pleaded to justify a claim so evidently adverse to the interests of commerce. This distinction is established in the law of England, which deserves peculiar regard, as that of the first commercial country in the world.

Answered, It has been admitted, that the hypothec in question exists for repairs made in a foreign port; and it is plain, that the *lien* created by bonds of bottomry, is equally latent as any right of hypothec can be. The argument, then, from expediency, is defective; because no new inconvenience can be attributed to the present claim. The law of Scotland makes not any distinction, on the subject of hypothec, between foreign and home ports, more than did that of the Romans respecting their *privilegia*. No such distinction is to be traced in any of our earlier writers on the law; and Mr. Erskine, the latest of them, lays down the rule in general, "That the repairers of a ship have a hypothec upon it, in security of the expense of reparation." The corresponding practice and sense of the nation are evinced by the uniform decisions of the admiralty-court, downward from 1704, sustaining the right in question, whether relative to the ports of this part of the united kingdom, or those abroad; decisions which, though not so authoritative as if they had been pronounced by this Court serve equally to shew the general acquiescence of the country. The decisions of this Court also, during the course of a century, confirm the same doctrine; for example, in the case of *Gay and others contra Arbuckle*, in 1711, No. 66, p. 6262, and of the *Rope-work Company of Glasgow contra Crosses*, in 1761, No. 68, p. 6268. It is difficult to conceive, then, by what other means the point could have been better established [6271] in the common law of Scotland. And being so fixed, no reason can be assigned why it ought to be overturned. Were its conformity to the general commercial law of Europe to be deemed a criterion, it could not be overthrown, since, England excepted, the right of hypothec to the extent now claimed seems to be recognised by all the trading states; and in Holland, in particular, it is undoubtedly admitted. At the same time, it is evident, from what has been already stated, that this question never can arise in our courts, but between Scotsmen, with respect to furnishings made at a home port.

The Lord Ordinary sustained the claim of hypothec. But

The Court, on advising a reclaiming petition against that interlocutor, with answer, as also a case transmitted for the opinion of English counsel, with the opinion, stating the law and practice of England thereon, found, That Wood and the other furnishers had no hypothec or right of bottomry on the ship in question.

And to this judgment, after an intermediate contrary one, the Court finally adhered by two successive interlocutors.

N.B. The Court, at the same time, decided in like manner a similar question between John Syme, and Reynold Pohl in the right of Gavin Kempt.

Lord Ordinary, BRAXFIELD.—For Hamilton, ROLLAND, BLAIR, ROSS.—Alt. DEAN OF FACULTY, M'CORMICK.—Clerk, MENZIES.

Fol. Dic. v. 3, p. 296. *Fac. Col.* No. 40, p. 65.

. This cause was appealed.

The House of Lords, 15th June 1789, "Ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of, confirmed.

No. 2. [6276] COLQUHOUN *v.* WARDROP. February 22, 1628.

The King may grant gifts of curatory to idiots when the nearest agnates do not pursue their interest, but if these agnates afterwards serve themselves curators, the King's gift will fall.

In an action of advocation of the service of brieves of idiotry betwixt Colquhoun and Wardrop, wherein the Lords having heard the reasons of both parties, why the service should proceed, or why no such service should take effect, before they gave answer to the advocation, or remit; and the question being betwixt one, who was nearest agnate to the idiot, and who thereby, conform to the 18th act, Parliament 1585, claimed to be served curator to the idiot, and betwixt another who had obtained a gift of tutory-dative from the King, to be tutor and curator to the idiot, by reason that the agnate had not raised the brieves, and desired that service, but only since the obtaining of his [6277] gift of tutory-dative, which was complete and expedite, and caution found, and the oath *de fidei administratione* given by him before the raising of the brieves by the agnate, and who had not sought them *debite tempore*, but had ceased five years after his majority, before he had raised these brieves; which cessation he alleged made him to fall from that office, as in tutors lawful after the expiring of year and day. The Lords found that the agnate should be preferred in the tutory to the tutor-dative, notwithstanding of the gift expedite to him, and notwithstanding of the agnate's cessation, and therefore ordained the agnate's brieves to proceed, and remitted the cause. See Tutor and Pupil.

Act. HOPE ET NICOLSON.—Alt. STUART.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 420. *Durie*, p. 349.

No. 9. [6286] ALEXANDER MONCRIEFF of Mornipea *v.* JAMES MAXWELL of Leckiebank. February 23, 1710.

The nearest kinsman to a fatuous person on the father's side, has right to be his tutor of law, and the descendants by a sister-german are preferable to the descendants by a sister consanguinean. See Fountainhall's report of this case, which also mentions, that in a brief of idiotry, bearing the party to have been idiot from a certain period, a tack granted by him, within that space, was found null.

Leckiebank having, by a gift of tutory from the Exchequer, found caution and acted as tutor-dative to Mr. John Bonnar of Greigstoun, since the year 1702, when he was legally cognosed to be fatuous and *non compos mentis*; Mornipea (who was minor at expediting of the gift in favours of Leckiebank) now took a brieve out of the chancery for serving himself tutor or curator, as nearest of kin to Mr. John, conform to the act 18th, Parl. 10, Ja. 6.

Alleged for Leckiebank ; 1mo, He being already constituted tutor-dative, there is no place for a tutor of law ; in respect *tutorem habenti tutor dari non potest*. 2do, The act of Parliament requires, that a fatuous person's nearest agnate, according to the disposition of the common law (*i.e. Qui per virilis sexus cognationem junctus est*, § 1, *Inst. De Legit. Agnat. Success.*) be his tutor of law ; whereas Mornipea is not agnate to the fatuous person, the former's grandmother being only the latter's father's sister. 3tio, Leckiebank, being the fatuous person's sister's son, is a degree nearer to him than Mornipea, who is but the father's sister's grandchild.

Answered for Mornipea ; 1mo, The meaning of the brocard, *tutorem habenti tutor non datur*, is, that it is not consistent with the office of a tutor to have another joined to him as *tutor-dativus* ; but it doth not hinder a tutor testamentary, or a tutor of law, to be preferred to a tutor-dative already in office, who is properly considered only as an *interim* curator appointed to manage till the tutor of law should serve. February 22, 1628, Colquhoun *contra* Wardrop, No. 2, p. 6276 ; January 21, 1663, Stuart *contra* Spreul, No. 5, p. 6279. And much rather ought Leckiebank to cede to Mornipea, who was minor, and incapable to act, when the other obtained his gift of tutory. 2do, It was never [6287] intended, by the act of Parliament, that the tutory of idiots should in all points be regulated conform to the civil law ; but only, that the nearest agnates and kinsmen to fatuous persons on the father's side, in the sense of our law, should be served and preferred to be tutors and curators to them ; as, by the civil law, the nearest agnates, according to it, are appointed curators to such. For among the Romans all of the same degree were admitted tutors of law, and the novel constitutions do not exclude cognates and kinsmen by the mother's side ; those in the collateral line had no right of representation beyond the third degree of brother's sons, and the *duplicitas vinculi*, the difference betwixt the full and half blood, is not regarded in the civil law farther than the third degree ; whereas, with us, the eldest, *jure primogenituræ*, excludes others of the same degree ; kinsmen by the mother-side are not regarded ; and the representation of agnates is not stinted to the third degree. That, by agnates, our law understands only kinsmen of the father-side, is yet further clear from the stile of the brieve of tutory, *Quis est legitimus agnatus, i.e. consanguineus ex parte patris* ; and from the rule of lineal succession, which doth not distinguish *inter agnatos et cognatos*. 3tio, Though Leckiebank be a degree nearer than Mornipea, the father hath the advantage of the full blood, his grandmother being sister-german to the fatuous person's father, whereas Leckiebank's mother was only sister consanguinean ; and as Mornipea would be preferred to him in the succession, he must have right to the office of tutory, it being a principle in law, that *ubi est hæreditas, ibi etiam est tutelæ onus*, Nov. 118, c. 5, the tutory must follow the *jus successionis* in heritage, and not that of moveables. For, as it will not be found, that, in any act of Parliament, the interest of the nearest of kin in moveables is called succession, so the office of tutory passeth as heritage *jure primogenituræ*, to the eldest in the direct line, and is not divided *in capita*.

Replied for Leckiebank ; *Interdum alibi est hæreditas, alibi tutela*, l. 1, § 1, *D. De Legit. Tut.* And, in our law, the right of succession is frequently distinct from the office of tutory ; as when a mid-brother dies, the youngest is tutor of law to his children, albeit the immediate elder were to succeed ; and, by the act 51st Parl. 7, Ja. 3, the nearest agnate of twenty-five years of age should be tutor, though he be not to succeed. Again, it were reasonable that the office of tutory should rather go according to the rule of succession in moveables, than that of heritage ; in respect that, as tutory is an office, so the succession in moveables is transmitted by way of office, and is mostly regulated, according to the civil law, by the degree of propinquity, without respect to the *jus representationis*. And the civil law is the standard, conform to which the act of Parliament prefers tutors and curators to fatuous persons ; whereas, in the matter of heritage, we, for the most part, observe the feudal law.

The Lords found, 1mo, That Mornipea being minor the time that Leckiebank got his gift of tutory-dative to the idiot, and now major, or of lawful age, he hath right to serve himself as tutor of law. 2do, Having considered the act 18th, Parliament 1585, anent curators to idiots, with the stile of brieves, they [6288] repelled the objection made against the mover of the edict, as not being agnate to the idiot. And, 3tio, Preferred Mornipea as being of full blood, and nearest in succession to the said idiot.

Fol. Dic. v. 1, p. 420. Forbes, p. 404.

No. 11. [6293] BLAIR *contra* BLAIR. July 25, 1747; June 18, 1748.

An idiot not capable of marriage.

In the process at the instance of John Blair, second son to the deceased David Blair of Borgue, before the Commissaries of Edinburgh, for declaring the [6294] nullity of the alleged marriage of Hugh, his eldest brother, on this ground, "That the said Hugh is, and from his infancy has been, so far in the state of idiocy, as to be incapable of giving consent in any contract, and more especially incapable of the matrimonial vows;" the Commissaries "Allowed either party a proof before answer."

Of which the defender having complained by bill of advocacy, the chief reason insisted on was, that the process depended on an allegation of idiocy, to which the Commissaries were not judges competent, it being only cognoscible before the Judge Ordinary by an inquest of 15 sworn men.

Answered for the pursuer, That though idiocy in general falls regularly to be cognosced by a jury, yet where it is alleged as a medium to annul marriage, it may be *incidenter* cognosced by the Commissaries *ad hunc effectum*; and instances said to be similar were condescended on. If a nearest of kin shall object to a testament, wherein an extraneous person is named executor, that the testament is forged, the Commissaries may *incidenter ad hunc effectum* cognosce upon the forgery, though regularly not judges in forgery; and in the case of Pringle, 25th Jan. 1744, *voce* JURISDICTION, an objection having been made to a testament on which confirmation was sought, that the testament had been elicited by fraud and circumvention, whereon the Commissaries allowed a proof; a bill of advocacy, complaining of that interlocutor, was refused, the Court being unanimously of opinion, that the Commissaries were competent judges in that incident question *ad effectum*.

Replied for the defender, That in this case the idiocy is not an incident occurring in an original competent process brought before the Commissaries, but is the very foundation of the original action; and as the Commissaries are not competent judges of idiocy, the instances of incident questions do not apply, but the process must stop till the idiocy be cognosced before the proper Court.

The Lords "Remitted to the Ordinary to refuse the bill of advocacy."

Upon advising the proof, the Commissaries found, "That the defender had been from his youth a natural fool, and void of that degree of reason and understanding which is necessary to the entering into the marriage-contract; and therefore found the pretended marriage between him and the defender Nicholas Mitchel, to have been from the beginning, and to be in all time coming, void and null."

And the defenders having again brought the matter before the Lords by bill of advocacy, the Lords "Remitted to the Ordinary to refuse the bill"; and this they did, notwithstanding that Nicholas Mitchel, the pretended wife, was in the *interim* delivered of a child. See JURISDICTION.

Fol. Dic. v. 3, p. 297. *Kilkerran* (IDIOT), No. 1, p. 277.

No. 6. [6300] HAMILTON *v.* A DUMB MAN in Glasgow. July 9, 1663.

Consent of a dumb man not inferred from his subscribing a discharge by the initial letters of his name, the money for which it was granted, being delivered, not to himself, but to his sister, in his presence.

This dumb man having right to an annualrent of £20 yearly out of a tenement in Glasgow, thereupon Hamilton, his creditor, having arrested, and obtained decret for payment of this annualrent, in satisfaction of the dumb man's debt, it was alleged for the person whose bond was liable for the annualrents, absolvitor for five years thereof, because he had paid these years to the dumb man's sister by his consent; in so far as he delivered the money to the sister in presence of the dumb man, and obtained her discharge thereupon in his name, subscribed also by him, with the initial letters of

his name.—It was answered, *non relevat*, because the discharge bore not that the dumb man received the same, but his sister ; and bears, that she is obliged to warrant it at the dumb man's hand ; and his presence, and seeing of money delivered, and his subscription, cannot import his consent, because he being dumb, could not know what the extent of the sum was, nor for what years it was.

↓ The Lords repelled the defence in respect of the reply.

Fol. Dic. v. 1, p. 422. Stair, v. 1. p. 197.

No. 21. [6322] WEDDERBURN v. NISBET. February 14, 1612.

A singular successor in the superiority cannot challenge the feu *propter non solutum canonem* of any years in his author's lifetime, but only since the conquest of his own right.

A feu being sought to be reduced by the Laird of Wedderburn v. Nisbet of Swansfield, the Lords found that he could not quarrel the feu *propter non solutum canonem* of any years in the pursuer's author's time, but only for the time of his conquest of his own right ; that payment of three years together in an acquittance, inferred presumed liberation of the duties of all preceding years ; that payment made to a Baron's chamberlain or factor, who was in use to uplift all his master's rents of the barony, and his acquittance given thereupon was sufficient to the vassal, and that factor's acquittance of three terms would save the vassal from danger of the clause irritant ; that the superior's precept of *clare constat* given to the feuer voluntarily, relieved him of the danger of preceding years ; and that the heir of the vassal being minor, and seeking entry to his lands by his superior, if at his lord's command, he delivered his predecessor's charter to any notary or writer being the superior's servant, to form to him a precept of *clare constat*, so long as that notary kept the minor's charter, and expedite not his precept, the vassal could not forfeit his feu for not payment of the duty of these years ; because the retaining from him of his charter, put him in *probabili ignorantia* of the feu-duty addebted by him, and of the clause irritant ; especially if he, recovering his charter, made real offer of all feu-duties owing before the day of compareance in the cause of reduction.

Fol. Dic. v. 1, p. 423. Haddington, MS. No. 2405.

No. 23. [6323] The Earl of ARGYLE v. The Lord M'DONALD. December 15, 1676.

A disposition of the superiority to the vassal himself, found to imply a discharge and assignation of the bygone feu-duties.

The Earl of Argyle having acquired the superiority of some lands from the King, which, before forfeiture, belonged to his father, did pursue the Lord M'Donald to hear and see it found, that he had lost the right of the lands for not payment of the feu-duties, by suffering two years to run in the third. It was alleged for the Lord M'Donald, That Argyle's right being but a disposition of the superiority, could not give him right to any of the bygone feu-duties preceding the disposition ; and therefore, unless there were three years resting since the right and infeftment, he cannot crave the property of the lands to be his, but so it is, that there are not so many feu-duties resting since his right. 2do, After the forfeiture of the Earl of Argyle, the defender did enter vassal to the King or his superior, and any right belonging to this Earl of Argyle, never being intimated until the intending this process, he may lawfully purge by making payment at the bar of all bygone feu-duties. It was replied to the first, That a disposition or charter of superiorities, carries with it all the bygone casualties preceding that right, unless they were either uplifted or confirmed by the executors of the defunct superior. It was replied to the second, That the lands in question, belonging anciently to the Earl of Argyle,

so soon as this Earl did obtain a new right from the King, all the vassals ought to have known thereof, and acknowledged him by payment of their former feu-duties contained in their *reddendo*. The Lords did find, as to the first, That a right of superiority being disposed, carried along with it all the bygone casualties and feu-duties contained in the *reddendo* of the vassal's charter preceding the disposition, and that there was no necessity these should be confirmed and disposed by executors, not being of the nature of moveable goods, but the consequences of real rights *ex pacto feudali*. As to the second, they found, That M'Donald having entered vassal to the King, and Argyle having gotten a new right, but never intimated the same by requiring the feu-duties or pursuing the same, that by a present offer at the bar to make payment of all bygones, the irritancy of the charter, or act of Parliament, might be lawfully purged.

Fol. Dic. v. 1, p. 423. Gosford, MS. No. 922, p. 598.

No. 2. [6327] BELSHES *contra* BELSHES. February 22, 1677.

Umquhile James Belshes did nominate his two daughters, Susanna and Jean Belshes, his executors, and thereafter granted a bond of provision in their favours, payable at their age of fourteen years. Jean died before that age; and, in a process betwixt Tofts and James Belshes, heir to the said umquhile James, [6328] for count and reckoning, for what was due by the said James to his sisters, it was alleged for James, that these bonds of provision being moveable, ought first to affect the executry, and he ought to be liberated thereof *pro tanto*, seeing his sisters were executors confirmed by Tofts. It was answered, That these bonds of provision being posterior to the testament or nomination, and both being no more than a competent provision, they must be understood as over and above the benefit of the executry and nomination; especially, seeing they bear not in satisfaction of their interest of the executry.

The Lords found, that the bonds of provision, albeit posterior to the nomination, were not to be interpreted over and above the executry, but did affect the executry.

It was further alleged for James Belshes, the heir, that Jean's provision was not due, because she attained not to the age of fourteen, *nam dies incertus pro conditione habetur*; and the ordinary tenor of bonds of provision, granted to more children, at such an age, hath this clause adjoined, "That the portion of the deceased should accresce to the survivors," which being obvious and ordinary, and here omitted, evidences the defunct's mind not to burden his heir further, than as his daughter should attain her marriageable age, otherwise it had been easy to express the terms, by the years of God, at which the daughter would have been fourteen years. It was answered, That this bond of provision bears "payable to the daughters, their heirs, executors, and assignees, at their age of fourteen"; which therefore must be meant of the year in which they would have been fourteen, if alive, which is no uncertain term.

The Lords found Jean's provision not due, because she attained not to the age of fourteen, which was the term of payment.

Fol. Dic. v. 1, p. 424. Stair, v. 2, p. 519.

No. 9. [6340] SAMUEL OMEY *v.* JANET MACLARTY. November 19, 1788.

A provision to a grandchild made payable on the grandchild's marriage, or attaining a certain age, lapses by his dying before that period unmarried.

James Crawford, by a trust-deed, settled on Archibald Omev, his grandson, by a son deceased, £600, "declaring, That the interest should be regularly paid to him

from the first term of Whitsunday or Martinmas after the granter's decease, to his (Archibald's) majority or marriage, which ever of these should first happen, when the principal sums were to be paid by the trustees, and not sooner."

[6341] Archibald Omev having died before his majority unmarried, and the money being claimed by Samuel and Mary Omev, his brother and sister, as his next-of-kin, Janet Maclarty, and other executors of Mr. Crawford, who opposed this claim, contended, that the provision had lapsed by the death of the grantee, and

Pleaded, Though in proper bonds of provision, those granted by a father to his children, provisions made payable on the children's attaining a certain age, being intended for answering their occasions at that period, become ineffectual, if they shall die before it; yet the constitution of a legacy is understood to be independent of the term of payment. By the legatee's survivorship, the legacy vests, and the adjection of a term of payment serves only to postpone the time at which he or his heir is entitled to claim possession. Such, in conformity to the Roman law, was the decision of the Court, in the case of Burnetts *contra* Forbes, 9th December 1783, *voce* LEGACY. Now, the sum in question is to be considered as a legacy, and not as a provision to a child; the granter not being the father but the grandfather. Besides, the interest having been immediately payable, the principal sum itself must of consequence have likewise been due.

Answered, As the above admission proceeds on the supposition of bonds of provision granted by a father being the just consequence of a natural obligation, so the same obligation lying on grandfathers in their order, it is evident, that there can be no distinction between that case and the present. As to the interests being due in the mean time, this was evidently a separate provision, and distinguished from that which was contingent on the event specified.

The cause was taken to report, a number of other questions having occurred on the construction of Mr. Crawford's settlements; when

The Court seemed to admit no distinction between the cases of a father and of a grandfather settling provisions to children or grandchildren. Some of the Judges too doubted the propriety of distinguishing between legacies and provisions to children, holding the rule of the Roman law as equally applicable to both, that *dies incertus pro conditione habetur*.

The Lords found, "That as Archibald Omev died before majority or marriage, the sum of £600 provided to him lapsed, and did not transmit to his nearest in kin."

Reporter, LORD HAILES.—For Omev, WIGHT.—Alt. MACLEOD-BANNATYNE.—Clerk, MENZIES.

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Fac. Col. No. 47, p. 82.

No. 14. [6344] The BAIRNS of WALLACE of Ellerslie *v.* Their ELDEST BROTHER.—November 11, 1624.

A father made a bond of provision in favour of his children, obliging himself to pay to each of them a certain sum, with this clause, that if any of them should die without heirs of their body, their share should accresce to the survivors. Two of the children having died before their father, it was found, that their provisions did not accresce to the survivors, the bond having remained in his hands during his life.

Umquhile old Wallace of Ellerslie having made a bond in favour of his bairns, obliging him and his heirs to pay to each of them a certain sum of money, by and attour that which should fall to them by his decease, as their bairn's part of gear, and by and attour any legacy which he might leave to them in his latter-will; upon this bond the said bairns pursue their eldest brother, as heir to their father, to make payment to them of the said sums. In the which process, the Lords sustained the action at the pursuer's instance, albeit it was alleged, that the bond was made 25 years before the defunct's decease, during the which whole time, the bond never became the pursuer's evident, nor at no time during the lifetime of the maker, but

remained still ever till he died beside himself, and since his decease was only recovered by the pursuers, by what means it is uncertain : which allegiance was repelled, seeing now the bond was in the hands of the pursuers the time of their pursuit, as their evident, which the Lords found sufficient. [6345] In this process also, the Lords sustained the pursuit against the defender, albeit it was not year and day bypast since the decease of his father, as was alleged should have been before process could have been moved against him, conform to the 76th act of the 6th Parliament of James IV. in respect he was convened as heir entered to his father, and not as lawfully charged ; and also the Lords found no necessity that the pursuer should produce and intrust instantly that he was heir, but found it sufficient to prove the same *cum processu*.

Act. —.—Alt. NICOLSON.—Clerk, HAY.

November 13, 1624.—In the action mentioned 11th November, betwixt Wallace of Ellerslie and his brothers, the Lords found the exception relevant, whereby it was alleged that the father, in his own time, after the date of the bond, had provided the bairns, in whose favour the bond was conceived, to as great sums, equivalent to the sums provided to them by the bond ; which allegiance bearing the said provision, the Lords found sufficient, being proved, to elide the action upon the bond libelled ; and found that the defender had no necessity to say, that the said last provision made by the father, was given in satisfaction of the said bond ; seeing that behoved to be understood, that the father would rather liberate himself of his preceding bond, than to have given the said last provision to his bairns, and to have the former obligation still to stand over and above his head, for *quisque magis præsumat se liberare quam donare*.

In this same process, two of the bairns, in whose favour the provision contained in the bond was made, being deceased before the father, maker of the bond, which bond bore, " that the part provided to any of the said bairns, who should decease without heirs of their own body, should accrease to the rest of the bairns surviving ; " and the said bairns surviving having pursued for the defunct's bairns part, the Lords found no action for the part of the bairns who died before their father, notwithstanding of the foresaid clause of the obligation, in respect the bond remained still in the father's hands so long as he lived ; so that the same could not be qualified to have come in the hands of the bairns who were deceased, during their lifetime, and so became never their evident ; and as that bond would never have produced an action to the bairns against their father, if they had been all living in the father's lifetime, so now two of them being dead before the father, and the provision being appointed to them for their help and sustentation, themselves being dead, none of their brethren could acclaim that part provided for their sustentation, notwithstanding of the clause foresaid bearing, " that the part of the deceasing should accrease to the survivors." *Fol. Dic. v. 1, p. 425. Durie, pp. 145, 146.*

No. 16. [6346] WALTER DENHOLM v. DENHOLM of Cranshaws. January 1726.

The deceased David Denholm of Cranshaws, by a deed under his hand, bound himself to pay to his children therein mentioned, the sums following, viz. To David Denholm 2500 merks, to Walter Denholm 2500 merks, to Margaret Denholm 2500 merks, and to Jean Denholm 2000 merks, extending in all to 9500 merks ; and that at the terms following, viz. one half at the first term of Whitsunday or Martinmas after his decease, and the other half at their respective majorities and ages of 21 years : But with this proviso, " That in case of the decease of any of the children, before they attain to majority, and the age of 21 years, without being married and having children, the portion of the child deceasing should accrease to the surviving children, and be divided equally amongst them, the eldest son drawing a share with them." Jean Denholm, the youngest child, having predeceased her father, without attaining to the age of 21 years, Walter Denholm brought an action against his eldest

brother the heir, for a share of his sister's portion, in virtue of the provision in the bond.

It was pleaded for the heir, That Jean having died before her father, as in the case of all legacies, her portion was never due, and consequently could not transmit to heirs and substitutes. Bonds of provision to children, payable at a certain term after the father's decease, or at the children's attaining a certain age, have always been looked upon as conditional, "providing they survive the period condescended on"; so that if the condition do not exist by the survivance, the provision and institution is entirely void: But where the institution takes not place, neither can the substitution; because a substitution has no subsistence without an institution.

On the other hand, it was contended, That Jean's provision, though she predeceased her father, ought to accresce to the surviving children, even supposing [6347] it a legacy, much more when it is a bond of provision and a conditional debt. To make out which, the defender insisted, that though in the common case of legacies left to any person nomination, if the legatee die before the testator, he cannot transmit to his heirs the hope of legacy, which is all he has at his death; yet, that the person who devises the legacy, cannot substitute one to him, so as though the institute fail before the testator, the substitute shall take the legacy, is, he believed, founded in no law. And here the intention of the father is most enix; the words are absolute, "In case of the decease of any of the children before their majority:" And no doubt, this case or condition is purified, the children dying before their father as well as after; and the other children come in by force of the clause, whatever time that event happen before majority. Indeed, in this case it is not properly by way of substitution, that the children draw their share of the defunct's portion, but as conditional institutes; which condition is now purified. They have no claim as successors to the defunct; they need no service to her; nor when they get her share, will they be liable for her debts. In all the clause, there is not a word that looks like a substitution or succession; the provision is, that one child deceasing, his or her share shall accresce and be divided. Had the father designed a substitution, he would not have forgot the words, descend, succeeded by, and such like; which are rather more common, and which appear to have been shunned of design. That there was here no substitution intended, will further appear from this circumstance, that the share of the person dying before majority was to go to the rest, which could only be as conditional institutes; for by way of substitution they could draw nothing; seeing by the children's dying before majority, the condition could never be purified with respect to the institute, who never having had a right, none can be derived from him. The same reasoning will apply with rather more force in obligations than in legacies; and these provisions were truly conditional debts, not at all legacies.

"The Lords found, That the provision of the predeceasing child, in this case, accresced to the surviving children."

Fol. Dic. v. 1, p. 425. Rem. Dec. v. 1, No. 77, p. 153.

No. 17. LECKIE v. RENNY. December 7, 1748,

A legacy being left to one whom the testator named tutor to his heir, it was held an implied condition he should accept the office.

James Renny, portioner of St. Ninians, disposed his whole estate heritable and moveable, to James Renny his nephew in liferent, and David the son of James in fee; burdened with his debts and donations, particularly one of 1000 merks Scots to Andrew Lecky, writer, payable with interest from a year and day after his death; excluding James Renny from the administration, which he provided should be in the hands and power of certain persons, amongst whom were the said Andrew Lecky, David Walker, and William Danskin, whom he [6348] named to be tutors to the said David Renny during his minority; declaring any three of them to be a quorum.

James Renny died in July 1728; and the tutors, except Andrew Lecky, having accepted of the office, named William Danskin their factor, without taking caution;

and it was agreed the pupil's effects were embezzled ; but Andrew Lecky alleged he had met with them the first day, inspected the writings, and appointed a time for a second meeting ; before which they met without his privity, and appointed the factor ; and that he often in a year thereafter complained of this conduct, offering to accept if he were removed, and a proper one appointed, and security taken. It appeared also, that, 12th July 1729, he took an instrument against them, complaining of their mal-administration, for which he could not accept the office ; but declared he was still willing to accept, if the factor's accounts should be cleared, and a proper factor appointed, with sufficient security. To which it was answered by David Walker, that he recalled the factory, in so far as it was granted by him, and by the factor, that he was ready to account.

Andrew Lecky obtained decret before the Sheriff for his legacy ; which was suspended, and the suspension discussed at the instance of Robert Lecky his son, to whom the claim was assigned.

Pleaded for the suspender, By the Roman law, a legacy left to a tutor, cannot be claimed, if he excuse himself from the office, l. 28, § 1, b. 32 & 33, *D. De excusationibus tutorum* ; l. 5, § 2, *D. De his quibus ut indignis* ; l. 25, *C. De legatis*. This rule is received in our law ; Dirleton, word Tutors ; Stair, bk. 1, tit. 6, § 6, 2nd February 1675, *Scrymgeour v. Wedderburn*, No. 25, p. 6357 ; 16th June 1675, *Thomson and Haliburton v. Ogilvy and Watson*, No. 26, p. 6362. And this suspender's claim is most favourable, as he has suffered by the mismanagement of the other tutors ; which it was Andrew Leckie's duty to have prevented.

Pleaded for the charger, By the civil law, the tutor did not forfeit his legacy, unless it appeared to have been left as an engagement to serve the office ; but however he cannot be said to have ungratefully refused to accept, which is the ground of the forfeiture, where he had so good reason of abstaining, as the mismanagement of the other tutors ; which was such that his acceptance could have been of no service to the pupil, as he would have been over-ruled in everything, and would only have made himself liable for their mal-administration.

Replied, A good excuse for not accepting, will not entitle him to the legacy ; since by the civil law, the only case where the question could occur was where there was an excuse, for otherwise a tutor could not decline ; and the misbehaviour of the rest was an additional reason why Andrew Lecky ought to have accepted and removed them.

Duplied, He might have been ruined before he could have obtained a decret of removal.

[6349] The Lords found, that in this case the charger's cedent had no right to the sum given him by the disponent.

Reporter, ELCHIES.—Act. LOCKHART.—Alt. HALDANE.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 300. *D. Falconer*, v. 2, No. 19, p. 21.

No. 19. [6350] DOCTOR IRVINE v. JOHN SKEEN of Halyards. March 7, 1707.

A party granted an assignation *omnium bonorum* that should belong to her at the time of her death, reserving her liferent and power to alter *etiam in articulo mortis*. The Lords found this was a *donatio mortis causa*, and therefore void by the cedent surviving the assignee ; and found, that the subject belonged to the cedent's executors, though the deed was never revoked by her.

Elizabeth Ker, the pretended second wife of the deceased Doctor Christopher Irvine, Doctor of physic, having disposed to John Irvine her son procreated betwixt the Doctor and her, all goods and gear belonging to her the time of her decease, reserving her own liferent, with a faculty to dispoise otherways *etiam in articulo mortis*, and dispensing with the not delivery ; this general disposition he transferred to Doctor Christopher Irvine, his father's eldest son ; who, having procured a gift of John's bastardy, and *ultimus hæres*, raised a process of declarator of bastardy

and payment, against Elizabeth Ker's debtors. Compearance was made for John Skeen of Halyards, her executor *qua* nearest of kin, who claimed to be preferred to the said debts, in respect the assignation granted by Elizabeth Ker to her son was *donatio mortis causa*, and void by her surviving the donatar, and consequently the goods and gear disposed belonged to her executor.

[6351] Alleged for Doctor Irvine; that Elizabeth Ker's assignation to her son could not be *donatio mortis causa*, seeing it was not conceived after a testamentary nature, but as a deed *inter vivos*; and *donatio mortis causa* is never presumed, unless it clearly appear from the testamentary conception of the writ, or be granted in contemplation of immediate death, or some eminent danger feared by the disponent.

Answered for Halyards; The disposition in question carries the plainest characters of *donatio mortis causa*, as described, l. 1, & l. 27, *D. De mortis causa donationibus*; for here Elizabeth Ker preferred herself to the assignee, and him to her representative. And as an irrevocable *donatio mortis causa* is reputed *donatio inter vivos*, so *e contrario*, a revocable *donatio omnium bonorum* belonging to the disponent the time of her decease, must be looked on as *donatio mortis causa*. Again, in the general opinion of lawyers, when a donation is expressly to take effect at the disponent's death, *in dubio mortis causa præsuntitur*; because, *nemo præsuntitur velle rem suamjactare*.

The Lords found the assignation granted by Elizabeth Ker to John Irvine her son, being *omnium bonorum* which should belong to her the time of her decease, was *donatio mortis causa*, and so void by the cedent's surviving the assignee. And the subject was found to belong to the cedent's executor, though the faculty to alter was never exercised by the defunct.

Thereafter it was alleged for Halyards; That the foresaid assignation granted by Elizabeth Ker to John Irvine her son, is null by the common law, *Authent. l. 6, Cod. De incest. nuptis*; and our law, July 20, 1622, Weir of Blackwood *contra* Durham, *voce* PACTUM ILLICITUM; and act 119, Parl. 12, James VI. as being granted by an adulteress to her adulterous child. And the adultery is proved by the declarator of bastardy in process, obtained by the Doctor before the Commissaries of Edinburgh, finding the marriage betwixt the deceased Doctor Irvine his father and Elizabeth Ker to have been unlawful, and the children spurious and adulterous, and incapable to succeed to their parents.

Answered for Doctor Irvine; Restrictions in the common law of the natural faculty of alienating and disposing of property take little place with us, who walk therein by our own statutes and customs. Besides, the *Authentic l. 6*, speaks of children born in incest. Nor does the cited decision meet the case, for there the Lords refused to sustain a bond granted to the mother of an adulterous child, because given as a *præmium adulterii et turpitudinis*, which cannot be pretended here where the mother received no premium from the adulterer, either to herself or her son, but disposed after the adulterer's death her own effects, in which there could be no *turpitude*, either *ex parte dantis*, or *accipientis*. And the act of Parliament 119, annuls only dispositions made by a woman who (divorced from her lawful husband for her own fault of adultery) marries the adulterer, or keeps company with him at bed and board; which cannot be said of Elizabeth Ker, who was never married. Besides, the said [6352] act prohibits only the alienation of lands, heritages, tacks, rooms, or possessions, which can never be extended to moveable sums, the present subject of debate.

The Lords repelled this nullity. See PACTUM ILLICITUM.

Fol. Dic. v. 1, p. 425. Forbes, p. 139.

No. 25. [6357] SCRIMZEOUR v. WEDDERBURN. February 2, 1675.

A legacy being left in a testament to a nephew, named with two others to be tutors to the testator's children, he refusing to act as tutor, was found to have no right to the legacy.

Umquhile Major Scrimzeour in his testament nominated three tutors testamentar to his bairns, whereof Alexander Wedderburn of Kingennie was one, to whom he

left 5000 merks of legacy ; and having been killed at Dunbar in *anno* 1650, in *anno* 1651 the tutors met with the relict, and took inventory of the defunct's writs, and the testament is the first writ in the inventory. In *anno* 1652, Kingennie confirmed himself executor legatar to the major, and confirmed 16,000 pounds ; but therein accepted not the office of tutor ; but in Dec. 1653 he did accept the office. The legacy is left in these terms, That if the defunct's wife did bring forth a son, the legacy should not be due. There was no son, but two daughters.—The one being dead, Margaret Scrimzeour the only child pursues the said Alexander Wedderburn, who is the only accepting tutor, both for his intromission and his omission. Whereupon compt and reckoning having been appointed several years ago, and it having been debated, *a quo tempore* the tutor should be liable, whether from the time he knew of his nomination, or from his acceptance.

The Lords, by interlocutor the 19th of July 1670, found the tutor not liable for any diligence before his acceptance.

It was now farther alleged, That if the tutor had not at all accepted, he would have been free, but having accepted, he is liable, as if he had accepted *ab initio*, when he first knew, and is presumed to accept with that hazard ; for *tutorem habenti non datur* ; when tutors are nominated, there is no place for tutors of law, or datives, and therefore the tutors nominated should declare themselves, whether they accept or not ; for if this shall be allowed, that tutors nominated forbear to accept, and accept thereafter, and be liable only from that time, it will destroy pupils, especially the bairns of merchants, whose estates consisting in moveables and accumps, will perish. 2do, In this case there is this specialty, that there is a considerable legacy left to the tutor, which legacy he hath accepted, by confirming himself executor *qua* legatar in *anno* 1652, after which, before December 1653, when he accepted, much of the pupil's means perished ; and it is consequent both from reason, and many cases in the civil law, that he who accepts a legacy left by a defunct in his testament, is thereby obliged to perform any thing else that he is ordered to do by the defunct's will ; which being most favourable, is interpreted as every thing therein were as the cause or condition of the rest, and that the legatar [6358] in gratitude cannot claim the legacy, and neglect the other parts of the defunct's will ; and especially he who by the defunct's will is nominated tutor, and hath a legacy, cannot accept the legacy and reject the tutory. 3tio, This tutor having confirmed himself executor-legatar. *qua* executor is liable for diligence for what is in the inventory. It was answered for the defender, that a tutor can only be liable *ex lege, vel ex contractu, vel quasi contractu*. The Romans were liable to accept tutories, *ex lege*, and therefore so soon as they knew of their nomination, they were obliged to act, unless within fifty days they obtained themselves to be excused, upon the excuses allowed in the law. But by our law no person is obliged to be tutor, but by his own acceptance, and therefore cannot be liable for any thing lost before his acceptance, not being obliged to do diligence till he accepted : And as to the alteration arising from the legacy, it is of no moment ; nor is the Roman law a rule to us further than our customs have allowed the same ; so that tutors are not obliged to know or consider the Roman law, but the law of this kingdom ; nor is the will of defuncts with us of such importance as with them, whereby the whole inheritance was disposeable ; and with us ordinarily but a third of the fere moveables. And even by the Roman law, a legacy left to a tutor, behoved to be for the executing of his office, if it bound him thereto, otherways he was only excluded from the legacy, as taken from him upon ingratitude, *ut ab indigno* ; but here the legacy is neither expressly nor presumptively for execution of the office ; for there are three tutors nominated, and a legacy only left to one ; and there is a special motive presumeable, viz. That the tutor was the defunct's nephew, and the legacy is only left to him, if the defunct had not a son ; neither hath the tutor obtained this legacy, but the Lords have refused to allow it him ; and this is special in the case, that there being three tutors nominated, without mention of a quorum, or conjunctly and severally, it is a question whether this defender could have been tutor alone, without the rest ; but however, time was always to be allowed him to endeavour the concourse of the rest, and he was not in the condition as if he had been sole tutor ; and even in that case there was nothing to oblige him to declare his mind, but the pupil's mother and relations might and ought to have served tutors of law, and cited the tutors testamentar, which would have excluded them if they had not accepted. As to the third, Of the obligation of the defender as executor

legatar for diligence, it is not *hujus loci*, this process being only a tutor's accompt. 2do, Executors-creditors having always been understood only liable for their intromission, until the late act of sederunt, whereby the Lords from thenceforth have found them liable for diligence, as other executors; and legatars are creditors of the executor, though not of the defunct.

The Lords found the tutor only liable from his accepting and acting as tutor, in December 1653; and that his taking up inventory, or confirming executor-legatar, did not import accepting, or acting as tutor, and therefore found him not liable for any diligence before his acceptance, or for what was before [6359] that time lost; especially considering that there were three tutors nominated, and that this tutor was excluded from this legacy by the Lords; but as to that point how far an executor-legatar was liable for diligence, the Lords found it not competent in this process, but reserved the same in any process upon the executry; but the tutor was excluded from the legacy, for not accepting when he first knew the nomination and legacy. See TUTOR AND PUPIL. *Fol. Dic. v. 1, p. 425. Stair, v. 2, p. 314.*

No. 36. [6372] MARION RUSSEL v. JAMES RUSSEL of Astiesteel. March 10, 1769.

A bond of provision to a person, and his heirs and assignees, payable at the granter's death, falls by predecease of the grantee.

William Russel, late of Astiesteel, granted a bond of provision in favour of David, his second son, his heirs, executors, and assignees, payable at the first term after the death of the granter.

David Russel having predeceased his father, an action was brought by his sister Marion, for payment of the bond.

Pleaded for the pursuer; Though, in the general case, legacies and donations *mortis causa* expire *morte donatarii*, the donor being presumed to prefer his own heirs to those of the donee, yet the presumption may be taken off by any clear indication of a different intention; and a clearer indication can scarce be, than what occurs here, where the bond is expressly taken to heirs and assignees. Thus it was found in the case of a legacy, July 16, 1760, Inglis *contra* Millar, *voce* LEGACY. And the present question concerning a donation *mortis causa*, must be determined by the same rule. Nor can it be objected, that the bond never was *in bonis* of David, and therefore cannot be taken up by his representatives; for the pursuer takes, not as representative of David, but as conditional institute, designed and pointed out under the denomination of his heir or executor.

Answered for the defender; The arguments drawn from legacies cannot apply to the present case, to a bond of provision by a father to his child. Bonds of provision are granted in implement of the natural obligation; and, as soon as that ceaseth by the death of the child, they are understood to fall; so it was decided in the case, Bell *contra* Davidson, January 14, 1730, No. 12, p. 6342, and in a still later case, November 17, 1757, Gordon *contra* Ross, No. 13, p. 6343, even with regard to a bond of provision granted by a grandfather.

This general rule of law may no doubt be excluded, if, by fixing a certain term of payment, or by any other means, the father's intention clearly appear, that the bond of provision shall be good, notwithstanding the predecease of the child. But the bare adjection of heirs and assignees will not have the effect. That clause is, for most part, inserted in bonds of provision, that, in the event of the existence of the implied condition, the bond may descend to heirs or assignees; but it would be hard, if, after the death of the father, the extraneous heirs of the children were allowed to claim bonds, which, upon their predecease, he had omitted to cancel. Legacies have no certain destination, and, when bequeathed to heirs and assignees, may be sustained even in their favour; but the stronger presumption, which obtains in the case of bonds of provision, is not removed without some clear and explicit indication of the donor's will.

"The Lords sustained the defence, and assolizied."

Act. MACQUEEN.—Alt. LOCKHART.—Reporter, PITFOUR.

G. F.

Fac. Col. No. 97, p. 177.

No. 38. [6374] PRINGLE v. PRINGLE. February 1, 1671.

A person disposed his whole lands to his eldest daughter, with provisions to his younger daughters. The disposition having been reduced, as granted on deathbed; the provisions to the younger children were also reduced.

Pringle of Soutray having only three daughters, does in his testament, done upon deathbed, dispoise his whole lands to his eldest daughter, and constitute [6375] her universal legatar, with this provision, that she pay 10,000 merks to the other two daughters. The disposition as to the lands being reduced, as being in testament and on deathbed; the universal legacy was sustained, to give the eldest daughter the right of the dead's part; whereupon it was alleged for the other two daughters, that if the eldest insisted for the universal legacy, she behoved to have it with the burden of the ten thousand merks, which was a burden both upon the land and moveables, and doth no more relate to the one than the other; so that albeit the right of the land be evicted, the moveables remain burdened; as if a father should dispoise certain lands to a son, with the burden of portions to the other children, albeit a part of the lands were evicted, the portions would be wholly due without abatement. It was answered for the eldest daughter, that in latter wills, the mind of the defunct is chiefly regarded, not only as to what is expressed, but to what is implied or presumed; and here it is evident, that the mind of the defunct was, that his two younger daughters should only have ten thousand merks in satisfaction of all rights of lands or moveables: Now, seeing they have gotten two third parts of the land, which is much better than ten thousand merks, it cannot be thought to be his meaning to give them any share of his moveables also, but that the half thereof, which was at his disposal, should belong to the eldest daughter without burden.

Which the Lords found revelant, and declared the same to belong to the eldest daughter, without burden of the provisions.

Fol. Dic. v. 1, p. 426. Stair, v. 1, p. 713.

No. 40. [6377] Countess of STRATHMORE and Lady KATHERINE COCHRAN v. Marquis of CLIDESDALE and Earl of DUNDONALD. February 20, 1729.

A final settlement of entail, by which bonds of provision were granted, found to preclude the grantees from taking up as heirs, in prejudice of the entail, subjects accidentally omitted in the settlement, unless they would renounce their provisions.

John Earl of Dundonald, by a bond of entail, made a total settlement of his estate to the heirs of tailzie therein expressed. Two days before subscribing this tailzie, he executed bonds of provision in favour of his daughters, and at the same time, made a will in relation to his moveables; which deeds, jointly taken, and in effect executed at the same time, and kept by him undelivered, made a total settlement of his estate, and shewed his firm intention that the lands should descend to his heirs of entail, and that the ladies, his daughters, should have nothing but their provisions. After the said Earl of Dundonald's death, it being discovered, That some of the lands contained in the tailzie had never been habily vested in the tailzier, but were still in *hereditate jacente* of a remote predecessor, the Lady Strathmore, and Lady Katharine Cochran, his two daughters, insisted in a declarator, That, as heirs of line to the said remote predecessor, they were entitled to serve themselves in these lands that remained yet in his *hereditas jacens*. This was opposed by the heir of tailzie, for whom it was pleaded, That they could not approbate and reprobate their father's will; if they accepted their bonds of provision they could not quarrel the tailzie; and if they quarrelled the tailzie, that they must renounce their provisions. Answered, The bonds are conceived simply, and absolutely without any condition; and the accepting thereof cannot cut them out of any other right, competent to them; that one cannot approbate and reprobate the same individual deed, which would be

an inconsistency ; but there is no inconsistency in one approbating a deed which the granter had power to make, and at the same time reprobating another deed which the granter had no power to make. Replied, since the Earl of Dundonald granted these provisions to his daughters upon this very cause and consideration, That they were to have nothing else out of his estate ; and since he burden-[6378]-ed his heirs of tailzie with the payment thereof, upon this very cause and consideration, that they were to have the fund out of which these bonds were to be made effectual, it follows, That if the Ladies chuse to quarrel their father's settlement and obtain another provision out of his estate, the provisions must fall to the ground as *sine causa*. Found, that the bonds of provision and bond of tailzie are to be judged as of the same date, and as one total settlement, made by John Earl of Dundonald of his whole estate ; and that the pursuers cannot have access to such of the lands contained in the said tailzie, as were in *hereditate jacente* of their grandfather, and provided to descend to the heirs of line, without quarrelling or impugning of the settlement made by their said father ; and that therefore they are not entitled to claim both their bonds of provision, and likewise their succession to the said lands, which were in *hereditate jacente*, but that they are entitled to claim either the one or the other at their option. *Fol. Dic. v. 1, p. 427.*

No. 48. [6397] JOHN WATSON in Barmuir v. JAMES FEDE in Fultoun. February 5, 1724.

A supersedere was granted to a debtor by his creditor, upon the belief that the other creditors would concur. It was found to be not binding ; the whole creditors not having concurred ; but it was declared, that the granter of it could not be the first user of diligence against the debtor.

Fede having suspended a charge at Watson's instance, upon this ground, that the charger had signed a supersedere to him, of which the term was not elapsed ; it was answered for Watson, That he had subscribed the supersedere, upon the faith that all the suspender's creditors were to do the same, which appeared, from the narrative of the writ, to have been the design ; and since not above a fourth part of the creditors had signed, the charger could not be bound ; for it was not to be thought that he could have tied up himself from doing diligence, and left the other creditors at freedom.

The Lords found, that the supersedere was intended to be signed by the whole persons narrated in the beginning thereof, and found it not binding on those who had signed, in respect a small number only, and not the whole, had signed.

Upon a reclaiming bill for the suspender, representing, that though the greatest number of his creditors had not signed, yet none of these had done any manner of diligence since the date of the supersedere,

The Lords adhered to their former interlocutor, with this quality, that the charger could not be the first user of personal diligence against the suspender.

Lord Reporter, FORGLEN.—For the Charger, ARCH. STEWART, jun.—Alt. JA. BOSWELL.—Clerk, MACKENZIE.

Fol. Dic. v. 3, p. 300. Edgar, p. 21.

No. 50. [6398] MAGISTRATES of MONTROSE v. ROBERTSON. November 21, 1738.

In a provision to children, whereby the deceasing's part was declared to fall to the surviving children, it was found that the part of one descended to his children ; it being the implied or presumed will of the father, that the substitution to the survivors should take place only *si instituti sine liberis decesserint*.

Fol. Dic. v. 1, p. 430. Kilkerran (PROVISION TO HEIRS AND CHILDREN), No. 3, p. 455.

No. 51. [6400] BETHIA YULE v. JOSEPH YULE. December 20, 1758.

Conditio, si sine liberis decesserit, does not take place, where the father has known of his children without making any alteration.

Joseph Yule, when unmarried, and near eighty years of age, lent out two sums of 1000 merks each, upon two bonds. Both bonds bore the money to be borrowed from him, and they were taken payable to him; and failing him by decease, to his brother Joseph. These sums were equal to about one-fourth of his fortune.

Afterwards he married, and had children; he lived three years after the date of the bonds, and two years after the birth of his first child; but never made any alteration in the tenor of the bonds.

Joseph had been in use to impress money into John's hands, to lend out for him; and John, before his death, had been heard to say, that he had taken care of his brother. But whether such sums or conversations had any reference to the bonds in question, did not clearly appear.

Upon John's death, his daughter Bethia claimed these bonds, on this ground, that the substitution to Joseph must be understood to have been under an implied condition, *si sine liberis decesserit*, and fell to the ground as soon as that condition failed by the existence of children; and supported her plea on the authority of the civil law, contained in the response of Papinian, in l. 102, *D. De conditionibus et demonstrationibus*; and l. 30, *Cod. De fideicommiss.* extending the limits of that response; and l. 40, par. 3, *D. De pact.*

Answered for Joseph Yule, The response of Papinian, which introduced the implied condition, *si sine liberis decesserit*, does not apply to the case in hand.

[6401] For, 1mo, It supposes the case of an universal *fideicommiss.* to restore the whole succession settled by the granter to a collateral relation, in case of the decease of the heir, or other person *honoratus*. There the condition, *si sine liberis decesserit*, has been implied, because it was thought the testator would not have tied him to give up the whole succession, if he had foreseen the event of his having issue of his own body. Whatever reason there may be for this presumption in an universal succession, it would be taking too much liberty with the express wills of defuncts, to imply such condition in every special legacy, and thereby to interpolate substitutes whom the testator has not called.

2do, It is agreed upon, in the construction of this law, that the implication only takes place when the event was unforeseen by the testator. For instance, if there were children existing at the time, they will not be understood to be *in conditione positi*, if they were not named; for the law will not interpolate, in a settlement, heirs whom the testator had in his eye, and did not think fit to give a place to in it; *Vot. Tit. D. Ad senatusconsulti. Trebellian.* § 18. And, for the same reason, where the children are afterwards born during the testator's life, and he makes no alteration of the substitution in their favour, the presumption is, that he meant the destination to subsist in the terms it was expressed; *Bankton, v. 1, p. 227.*

The Lords found, that Joseph had a right to the bonds.

Act. J. DALRYMPLE, LOCKHART.—Alt. MONTGOMERY, MILLER, FERGUSON.

J. D.

Fol. Dic. v. 3, p. 300. Fac. Col. No. 150, p. 267.

No. 52. Next in Kin of ISOBEL WATT v. ISOBEL JERVIE. July 30, 1760.

A settlement by a man, of his whole effects, on his wife, is not voided by the unexpected birth of a child, who lives but a few months.

In the contract of marriage betwixt William Watt and Isobel Jervie, she was provided to an annuity of 200 merks, and the children to 6000 merks. William Watt, some years after his marriage, having no children, made a settlement of the whole

effects, heritable and moveable, which should belong to him the time of his death, upon his wife Isobel, but reserving a power to alter. At the death of William Watt, which happened about seven months after, his wife was near her time. She produced a female child, who lived but a very few months. The next in kin of the infant, believing that the settlement in favour of the relict was *ipso facto* voided by the existence of the child, brought a process against Isobel Jervie to account to them for her husband's moveables. Isobel Jervie was assoilzied upon the following ground. The settlement in her favour is effectual at common law. It was even effectual at common law against the posthumous child; and that child had no relief against it but in a court of equity. But a court of equity never declares void what is good by the common law. It only gives relief against such a deed as far as necessary to fulfil the rules of justice. Applying this principle to the present case, it is in the first [6402] place uncertain, whether the granter might not intend that the settlement should be effectual, even upon the supposition of a posthumous child. He must have known his wife's pregnancy, as in fact she was delivered no later than five weeks after his death. He had an opportunity to make an alteration; and since he did not alter, it has a strong appearance that he did not intend to alter. 2do, It is not likely, at any rate, that he intended an alteration in the case which happened of the child's living but a few months; for, in that case, the child was not in any degree hurt by the settlement. 3tio, Supposing an intention to alter in that case, yet this supposed intention could not have the effect to void the settlement *ipso jure*. It could only have the effect to privilege the child in equity, to bring a reduction of the settlement; and as this was never attempted, the settlement must stand good. See January 7, 1762, *Jervie contra Watts*, voce LEGITIM.

Fol. Dic. v. 3, p. 301. Sel. Dec. No. 167, p. 228.

No. 54. [6403] WILLIAM and PETER ROUGHEADS v. MARION RANNIE, and Others.
February 14, 1794.

A father having granted a provision to his son, and declared, that in case of his dying in minority, and without lawful children, he should be succeeded by his sisters, "or such of them as should then be in life"; and the son having died in minority, and unmarried, his nephew, by a sister who predeceased, was found entitled to his mother's share.

William Craig, by a holograph settlement, containing several ambiguous and contradictory clauses, and proceeding upon the narrative of love and affection to his wife and children, conveyed to them *nominatim*, and in the [6404] different proportions therein mentioned, his whole heritable and moveable property.

The deed declared, that Marion Rannie, his wife, should have the liferent of part of the subjects; that the provision of Archibald his son should descend to his heirs, executors and assignees; and besides the provisions which the daughters (who were five in number) were to enjoy immediately upon their father's death, it contained, in a subsequent clause, the following substitution in their favour: "To my said five daughters, or such of them as shall be in life, my whole heritage and moveables, at the decease of my said wife and son, and longest liver of them two, if my said son die in minority, and without lawful children."

The children, at the date of the settlement, were all minors, and unmarried.

Archibald died in minority, and without issue.

Jean, one of the daughters, who was married after her father's death, died before her brother.

William Roughead, her son, and his father, as his administrator in law, brought an action against the grandmother and surviving aunts, claiming, *inter alia*, the share of Archibald's succession, which his mother would have been entitled to had she survived him; and

Pleaded; If it had not been for the clause of substitution in favour of the daughters, the pursuer would have been entitled, *jure representationis*, to a share of his uncle's

heritable succession ; and there is no reason to presume that its object was to exclude their children.

Besides, it is a general maxim of law, that when a father grants provisions to his children, without mentioning their heirs, and appoints substitutes to them, the substitution takes place only *si instituti sine liberis decesserint*. The object of such provisions, is to enable the children to settle in the world ; and as it would be contrary to the natural feelings of a father, the law, unless it is expressly declared, will not presume an intention on his part to exclude their descendants, *Erskine*, b. 3, tit. 8, § 46 ; *Kilk. Clerk Home*, 21st November 1738, *Magistrates of Montrose v. Robertson*, No. 50, p. 6398 ; 20th December 1758, *Yule v. Yule*, No. 51, p. 6400 ; 26th June 1789, *Wood v. Aitchison*, *voce* PROVISION TO HEIRS AND CHILDREN.

Answered ; It seems to have been the intention of the testator, that his son should, at his majority or marriage, have the free disposal of his property ; but that, if he died before either of these events took place, such of his daughters as were then in life, to the exclusion of the descendants of those who had predeceased, should succeed to him.

At any rate, as the deed limits the substitution to such of the daughters as should be alive at their brother's death, effect must be given to it, even though there were reason to believe that this was not the intention of the testator ; [6405] *Judgment of the House of Peers*, 26th March 1770, *Baillie v. Tenant*, *voce* SUCCESSION ; July 1778, *Hay v. Hay*.*

The Lord Ordinary sustained the defences ; but the Court, after advising a reclaiming petition and answers, upon the general ground above stated, almost unanimously gave judgment in favour of the pursuers.

Lord Ordinary, HENDERLAND.—Act. CHARLES BROWN.—Alt. WOLFE MURRAY.—Clerk, SINCLAIR.

D. D.

Fol. Dic. v. 3, p. 301. *Fac. Col.* No. 104, p. 232.

No. 10. [6414] *Earl of CASSILLIS v. Lord BARGENY*. February, 1682.

Found, that a precept of *clare constat*, given without any reservation by a superior to his vassal, whereupon he was infeft, purged not only bygone feu-duties and the entry, but also ward-duties intromitted with by the vassal before the entry, unless the superior had gifted the same to some other before the precept.

Fol. Dic. v. 1, p. 431. *Harcarse* (WARD AND MARRIAGE), No. 1005, p. 284.

* * * Fountainhall reports the same case.

“ The Lords found a precept of *clare constat* inferred, and implied in law a discharge of all feu-duties, recognitions, wards, nonentries, and other casualties preceding the date thereof.” This was not so understood formerly, though it seems equitable.

Fountainhall, v. 1, p. 172.

* * * This case is also reported by Sir P. Home.

The Earl of Cassillis having pursued the Lord Bargeny for several bygone nonentry duties, feu-duties, and ward duties, of certain lands holding of him, [6415] ever since the defender's father's decease ; alleged for the defender, That he could not be liable for any such duties preceding the year 1668, because the pursuer had granted him a precept of *clare constat* upon which he was infeft in the lands. And the granting of a precept of *clare constat* doth infer a discharge and liberation from all bygone duties, especially, seeing there was a compensation paid to the superior at the granting of this precept, and which was willingly granted without any compulsion, he not being

* Not reported.

charged upon a retour ; and albeit it had proceeded upon a retour, yet a superior's granting a charter to his vassal does still infer a liberation of all bygone duties, seeing he might have suspended, and could have been compelled in law to have entered the vassal before all these duties and casualties had been satisfied and paid, unless the charter or precept did expressly bear a reservation of the same. Answered, That the pursuer, as superior, having right to these casualties by decease of the former vassal, the granting of a precept of *clare constat* does not discharge the present vassal from the preceding casualties, unless the same had been expressly discharged, being of great concernment and import to the superior, and the effect of an precept of *clare constat* upon which the is infeft is only to stop the course of the casualties in time coming, but not to liberate him from precedings, there being nothing designed by granting precepts of *clare constat*, but only to state the vassal in the right of his predecessor's lands ; and if it were otherways, then a precept of *clare constat* should have the effect of a charter containing a *novodamus*, which were absurd ; as also, in this case, the superior was minor the time of the granting of the precept of *clare constat* ; and albeit there was a composition paid, yet there was no transaction made, nor any thing paid upon the account of these bygone duties and casualties. The Lords found the precept of *clare constat* takes away the bygone feu-duties, ward, and nonentry duties preceding the vassal's entry, which were not gifted the time of the giving of the precept.

Sir P. Home, MS. v. 1, No. 133.

No. 31. [6427] Duke of LAUDERDALE v. The Earl of TWEDDALE. January 23, 1678.

A tack of teinds was found past from, by accepting another tack, of a different duty and endurance, though this last tack contained a ratification of the former.

The Duke of Lauderdale, as having right by infeftment of erection to the abbacie of Dumfermline on the south side of Forth, pursues the Earl of Tweddale and the tenants of Pinkie, for the teinds of Pinkie. The defender alleged absolutor, because he bruiks by tacks of these teinds, yet unexpired ; and produces a tack set by Abbot Pitcairn to M'Gill of Rankeilor, whereby " the [6428] Abbot having feued to Rankeilor the lands of Pinkie, sets to him and to his son, and to two heirs succeeding them in the fee of Pinkie, the teinds thereof." Which tack and lands of Pinkie were disposed by Rankeilor to the Earl of Dumfermline Chancellor, and Tweddale has right thereto by apprising of the lands and teinds of Pinkie from Dumfermline. The pursuer answered, Imo, That the defender cannot found upon this tack, because tacks are *stricti juris*, and not competent to assignees, unless expressed ; and here assignees are not expressed. 2do, This tack is set to the heirs of Rankeilor, succeeding to him in the feu of Pinkie, and so is competent, neither to the heirs of Rankeilor, unless they could succeed in Pinkie, which they cannot, it having been disposed to the Chancellor, much less can it belong to the fiar of Pinkie, not being heir to Rankeilor. 3tio, Dumfermline did accept of a new tack from Queen Ann, as Lady of Dumfermline, his entry to be declared from the date of the new tack to Dumfermline and his son, and two heirs succeeding them, which is incompatible with the first tack, and though it bear a ratification of that first tack, yet being incompatible to take a new tack, and not resting on the ratification, nor including a provision to bruik by either of the tacks, the posterior tack is a clear passing from the former, as is constantly observed in all tacks, that a posterior tack of a different duty or endurance takes off a former ; and here the endurance and whole substantials are different, for in place of Rankeilor and his son, and two heirs after them, the Queen's tack is to Dumfermline and his son, and two heirs after them, not beginning from the ish of Rankeilor's tack, but from the date of the Queen's tack, which is declared to be Dumfermline's entry to these teinds ; and as to the Queen's tack, there is a reduction raised against the same, and now repeated by way of reply, that the Queen's right being but a liferent, her tack could endure no longer than her life, and the tacit relocation thereby was interrupted by inhibition. The defender replied to the first, That though tacks which are short belong not to assignees unless expressed, yet long tacks for several liferents belong to assignees, unless expressly excluded, as hath been often decided. To the second,

The tack being set to Rankelior and his heirs succeeding to him in Pinkie, doth only design what heirs he provides that tack to, to the effect that the lands and teinds of Pinkie should belong to the same heirs, so that if he change the possession of Pinkie to heirs-male of tailzie or provision, *hoc ipso*, the teinds of Pinkie would befall to the same heirs, which is an ordinary clause in tacks of teinds, but is no limitation, or clause irritant, hindering him either to assign or appoint other heirs in these teinds; for if he had sold the lands and not the teinds, or if the lands had been apprised from him and not the teinds, it cannot be imagined that thereby he should lose the right to the teinds, but only that the teinds should belong to his heirs and assignees whatsoever. To the third, Though accepting a new tack from the same author imports a passing from the old, yet here the setters have different rights, and the tacksmen's intention is evident, not to pass from the old, whereof he takes a ratification from the Queen; and it is clear that it is lawful to take incompatible rights by infeftment or tack, which cannot both concur at once, but if either of them [6429] be reduced, or taken away, the other may be founded on against a third party, being author of neither, as here the Duke of Lauderdale is, so that if Tweddale should renounce the tack to Rankelior, he might defend himself thereon, and exclude the Duke. 2do, The defender being an appriser, and finding two tacks in his author's charter chest, he may ascribe his possession to either, as he might have apprised the one and not the other; neither hath he founded upon the Queen's tack, but by a warrant from the Lords both the tacks were produced out of Dumfermline's charter chest, so that if the Queen's tack be reduced, the defender may found upon the Abbot's tack, and having possessed *indiscriminatum*, without ascribing his possession to either tack, law attributes the possession *potiori juri*, and so to the Abbot's tack, if the Queen's be temporary; and the defender and his authors having possessed so long by these tacks, they are not only secure as *bona fide possessores*, or by tacit relocation, but they have the benefit of a possessory judgment, having possessed 7 years without any interruption, which doth still secure them till reduction, which is but now lately raised; wherein if the pursuer insist, the defender hath this relevant defence, that there can be no reduction of his right till Rankelior his author be called, and no objection against Rankelior's tack is competent by reply. It was duplied for the pursuer, That he needs not reduction, nor makes use of it as to Rankelior's tack, nor can it have the benefit of a possessory judgment, because the defender succeeding in Dumfermline's right, continues Dumfermline's possession, which cannot be ascribed to the Abbot's tack, but to the Queen's tack, by which Dumfermline declared his entry to possess, to be of the date of the tack; and whatever might be pretended in case the Queen's tack was reduced *simpliciter* as null, that the first tack might be founded on, because a null tack is no tack, but it is beyond question the Queen's tack was valid, she having unquestionably a liferent-right, whereby her tack was good during her life, but ceased thereafter; and the pursuer hath good interest to allege that the first tack is innovated and passed from, as well as he might allege it were renounced, for thereby it ceaseth, and his right takes place *remoto medio impedimento*.

The Lords found, that the defender could not found upon his tack, unless it were found competent to assignees, and that he produced an assignation from Rankelior to Dumfermline, and that there needed no reduction, or calling of Rankelior as to that tack, because the defence thereon could not be relevant, unless the defender found upon a progress communicating that tack to him, which if it were not communicable, or not communicated, could not defend him; but the Lords found, that the defender's author, Dumfermline having accepted a tack from the Queen, valid in itself during her right, being of a different commencement, endurance, and tacksmen, that he did not innovate and pass from the former tack, and it was incompatible therewith, and yet the ratification of the former tack could have no effect, not being rested in, but another right being accepted, incompatible with the ratification; but seeing the defender and his authors had possessed 7 years by the Queen's tack after her death, before any inhibition or interruption, the Lords found that the de-[6430]-fender had the benefit of a possessory judgment, and freed him from the bygone teind duties before the reduction, but found the reason of reduction relevant against the Queen's tack, that her right was temporary by liferent, *et resolutio jure dantis resolvitur jure accipientis*. But the Lords did not determine or sustain that Rankelior's tack was not assignable, because it exprest not assignees, or that it ceased so soon as Rankelior ceased to be fiar of Pinkie.

Fol. Dic. v. 1, p. 433. Stair, v. 2, p. 598.

No. 34. [6432] LO. CRAIGIE v. his TENANTS. March 20, 1623.

The Lords found a rental null *in toto*, by way of exception, because the rentaller assigned the hail, or most part, of the rented lands, without consent of the heir; and found, if the most part was not annalized, that no more could fall but that which was disposed.

Item, the Lords found, that the receiving of the duty from the Tenants, to whom the rental was assigned, purged the failzie; it being proven, that the master knew that he had disposed the rental to him.

Fol. Dic. v. 1, p. 433. Kerse, MS. fol. 119.

No. 44. [6447] AGNES YOUNG and Her HUSBAND v. BUCHANANS. December 20, 1664.

Agnes Young pursues Buchanans, her children, for her third of her husband's moveables, and for her liferent use of the other two-thirds, conform to her contract of marriage, whereby she is provided to his liferent of all goods and gear conquest during the marriage, moveable and immoveable.—The defenders answered, That the pursuer cannot both have the third and the liferent of the whole, because it must be presumed, that the liferent of the whole was given in satisfaction of the third and all.—The pursuer answered, That this could not be presumed, unless it had been so expressed; no more than a terce is excluded by a provision of liferent, unless it bear in satisfaction of a terce.

The Lords found the defence relevant, that the pursuer could not both have her third and the liferent of the rest, but gave her her option, either of the third, *provisione legis*, or of her liferent of the whole, *provisione hominis*.

Fol. Dic. v. 1, p. 434. Stair, v. 1, p. 243.

* * Newbyth reports the same case :

Umquhile James Buchanan, by contract of marriage past betwixt him and Agnes Young, is obliged to provide her to a liferent of a house in Stirling, and to the annual-rent of the principal sum of 1200 merks; as also there is an obligation that the said Anna shall have her liferent use of whatsoever lands, heritages, moveables, &c., the said parties have presently, or shall happen to acquire. Upon this contract there is a summons raised at the instance of the mother, against the bairns for a terce.—The Lords found, that the wife could only have a liferent right of all sums and heritages provided to her by her contract of marriage; but that she could have no terce of the moveables; and that this is the meaning of all such contracts, and the constant custom in such cases. Yet some were of opinion, that the relict should have it in her option to crave either the terce or the liferent of the whole, in regard they thought she might renounce her liferent of the whole, and take herself to the property of the terce, from which she was not secluded, the provision not being conceived in satisfaction of all she could either ask or crave.

Newbyth, MS. p. 13.

* * This case is also reported by Gilmour :

By contract of marriage betwixt the deceased James Buchanan and Agnes Young his spouse, he is obliged to provide her to a liferent of lands and of a sum of money, with the liferent of all the conquest, heritable and moveable; whereupon she and her second husband, Walter Richardson, pursue the executors of her first husband, not only for her liferent of the hail moveables, but [6448] for a third thereof, to a terce of some lands which she liferents.—It was alleged, That seeing she is provided to a liferent of the hail, she cannot both enjoy the liferent, and also have a third of what she liferents.—It was answered, That the contract doth not exclude her from a third of the moveables, which the law doth provide her to; and the contract providing her to a liferent, doth not say, that it is in contentation of all third. And though a wife be by contract

appointed a liferenter of lands, it will not exclude her from a terce of such lands whereof she is not liferenter.—Replied, That she being provided to a liferent, it imports as much as that she should acquiesce with her liferent, without claiming interest to the property of that which she liferents ; or else, if she will have a third, she must renounce her liferent, as has been ordinarily found in moveable bonds containing sums of money provided to the man and wife in liferent.

Which the Lords found also in this case, conform to the preceding practiques.

Gilmour, No. 117, p. 86.

No. 49. [6451] ELIZABETH TOD, Widow of James Wemyss, Pursuer v. DAVID WEMYSS, the Eldest Son, and the YOUNGER CHILDREN of the deceased James Wemyss, Defenders. December 12, 1770.

The widow's claim to the *jus relictæ*, whether excluded by certain conventional provisions in the marriage contract.

James Wemyss was married in 1730 to Elizabeth Tod, with whom he received 1000 merks of tocher ; and by the contract entered into on that occa-[6452]-sion, the following provisions were made in favour of the wife and issue of the marriage :

1mo, James Wemyss obliges himself to have in readiness 2000 merks, and to employ the same, together with the 1000 merks of tocher, for an annualrent on good security, and to take the rights thereof to himself and the said Elizabeth Tod, and the longest liver of them, in conjunct fee and liferent, and the heirs and bairns of the marriage in fee ; which failing, " to fall and appertain as after expressed."

2do, Whatever "lands, heritage, goods, and gear," shall happen "to be conquered and acquired," during the marriage, the said James Wemyss binds and obliges him to provide and secure the same to himself in liferent, and the bairns lawfully to be procreated of the said marriage in fee ; which failing, the said James Wemyss, his own nearest heirs, executors, and assignees.

3tio, It is hereby expressly stipulated and agreed to by both parties, that if it happens the said marriage to be dissolved by the decease of the said Elizabeth Tod, and that there be no children procreated and existing at the time of the dissolution thereof, then, and in that case, the sum of 500 merks of the foresaid 3000 merks "to fall, appertain, and accresce to the nearest heirs, executors, and assignees of the said Elizabeth Tod," and the remainder of the said 3000 merks to the said James Wemyss, his heirs, executors, and assignees.

4to, In case it shall happen the marriage to dissolve by the death of the said James Wemyss, he binds and obliges himself, his heirs, &c., to content and pay to the said Elizabeth Tod, her heirs, &c., the sum of 1000 merks, at the term of Whitsunday or Martinmas after the dissolution of the said marriage.

5to, James Wemyss obliges him and his foresaids to pay yearly to the said Elizabeth Tod, in case she survive him, such an annualrent as by law shall correspond to the principal sum of 500 merks, by giving the first year's payment thereof at the first legal term, &c. ; all which provisions in her favour are to subsist whether there be bairns of the marriage or not.

6to, James Wemyss thereby disposes to the said Elizabeth Tod, in the event of her survivance, one just and equal half of what household plenishing shall be in common between them, in case there be no children procreated and then existing ; but restricted to an equal half if there shall be children.

In this contract the usual clause, "declaring the same to be in full of all the wife's legal claims," is omitted ; and though it was signed by James Wemyss and James Tod, the bride's subscription did not appear. The marriage took place ; several children were procreated ; James Wemyss proved successful in life, acquired a small estate in land, and, at his death in 1766, left upwards of £2000 in money, having made no other settlement of his affairs.

Elizabeth Tod the widow, conceiving that her provision was very inadequate to the state in which her husband had left his affairs, brought an action against her husband's representatives, concluding, "That as she had not signed the marriage contract, she was not bound by it, but was at liberty to betake her-[6453]-self to her legal claims of terce and *jus relictæ*." But, upon 16th November 1768, voce MUTUAL

CONTRACT, the Court found "the contract of marriage betwixt James Wemyss and Elizabeth Tod, in respect of the subsequent marriage betwixt them, subsisting and obligatory upon all parties." And the Lord Ordinary, to whom the cause as to the other points was remitted, "found that James Wemyss, the father, had a power of division; and having exercised that power by taking the fee of the lands of Lathallan in favour of the defender, his son, the same does belong to him."

The pursuer acquiesced in the interlocutors, but contended that she was still entitled to her legal provision of a third of moveables, as well as to the conventional provisions in the marriage contract, the same not having been expressly discharged. Upon advising memorials, the Lord Ordinary pronounced an interlocutor, finding, that as the pursuer had not discharged her *jus relictae*, she was still entitled thereto, over and above the provision in her marriage contract. David Wemyss, along with the other children, gave in a petition; upon advising which, with answers, the Court found, "That in this case Elizabeth Tod is not entitled to claim her *jus relictae* over and above the provision in her contract of marriage."

Elizabeth Tod, in a reclaiming petition, pleaded;

1mo, The legal provisions to which wives were entitled, if not otherwise regulated by parties, were, a terce of the husband's lands, and a third or half of the free moveables in communion; and, in order to entitle her to the enjoyment of these, no stipulation was required.

These legal provisions, however, were so far to be distinguished from one another, that they rested upon different principles. The terce was a temporary burden upon the husband's estate, of which, in case of survivance, she could not be disappointed by any act or deed of his; whereas the *jus relictae* was not a claim of debt against the husband or his heirs, but a partition of those moveables which were in communion and were extant at the dissolution of the marriage. Hence this right was the creature of the law, and operated *ipso jure* whenever the event on which it depended took place. There was, however, one principle in law common to both, viz. "*Quod provisio hominis non tollit provisionem legis*," if the same was not clearly and explicitly renounced by the previous agreement of parties. Lord Stair, b. 1. tit. 4, § 21, lib. 3, tit. 8, § 45. Lord Bankton, lib. 1, tit. 5, §§ 82, 107, and 123. Craig, lib. 2, Dieg. 22, § 25.

This point was put out of all doubt by the enactment of the statute 1681, c. 10, "concerning wives terces"; which, being a correctory law, was to be strictly interpreted. By that statute it was enacted, that where a particular provision by contract of marriage or other right was granted by a husband in favour of his wife, she should be secluded from a terce of lands or annualrents, unless the contrary was expressly provided. Hence, as no mention was made here of the wife's *jus relictae*, it was the intentment of the statute that the law on that point should be left upon the same footing as it stood formerly; and of [6454] course, that no special provision, if it was not granted and accepted by her in satisfaction, should exclude the wife of that right.

2do, As to the particular circumstances of the case, the tenor of the marriage contract was evidence of the intention of parties; for as it must be presumed the contracting parties knew that a simple provision was a "discharge" of the terce, so they must equally well have known that such provision could have no such effect as to the *jus relictae*; and as that accordingly had neither been discharged nor renounced, the contract could admit of no other construction than that it was to be in satisfaction of one of these legal rights, but not of the other.

The third clause in the contract, by which 500 merks, part of 3000, in the event of the wife's predecease without issue, was appointed to accresce to her nearest heirs, &c., and the remainder of the 3000 to James Wemyss, his heirs, &c., was merely explicatory of the first clause recited, by which the 3000 merks was provided, failing children of the marriage, "to fall and appertain as after expressed." No more was thereby intended but a return of so much of the wife's portion to her nearest heirs in the said event; but it never could be inferred that this agreement, so expressly limited to the 3000 merks, should be construed to import a transaction respecting the claim of the widow's nearest of kin to the whole of the *jus relictae*, with which this sum of 3000 merks had no connection.

The obligation in the fourth clause of the contract, by which, in the event of his predecease, James Wemyss and his heirs became bound to pay to the widow 1000 merks, was clogged with no quality whatever; it was to be paid whether there were

children or not ; it was in fact a debt pendent upon the petitioner's survivance ; and, as it was not given in satisfaction of any other claim, legal or conventional, it fell, like any other debt, to be paid out of the executry, and would no doubt so far restrict the *jus relictae*, but farther than that it could not operate.

The defender answered ;

1mo, It was a principle founded on reason, that a wife, independent of the enactment of any statute, should not be allowed to claim both a conventional provision and a terce out of her husband's lands. This was the law prior to the statute 1681 : and it was to correct the ignorance of writers of marriage settlements, and to prevent an undue advantage from being taken of husbands, contrary to the real meaning and intendment of the parties, that the statute was made ; which, instead of being narrowed, should receive a beneficial and extensive construction. There appeared, therefore, to be the same reason why the law should, in this respect, have been extended to the *jus relictae* as well as the terce ; there was in reality no distinction between them ; and the only reason why the statute 1681 was silent as to the *jus relictae* was, that at that period, moveable estates were of little value, and not an object of legislative attention. Hence it could not be doubted, that where in a marriage contract a provision [6455] was stipulated for the wife in the event of the husband's predecease, it was the intention of parties it should be in full of all she could claim out of her husband's estate.

2do, Upon a fair and just construction of the marriage contract, it appeared that the *jus relictae*, in the present instance, was clearly cut off. All contracts must be construed according to what appears to have been the intention of the contracting parties. The intention of the parties in the present case was obvious ; and, in point of law, an implied or virtual discharge had as strong an effect as a discharge conveyed in the most explicit terms. In this contract, accordingly, a sum of money was expressly stipulated to be given to the wife's nearest of kin, in the event of her predecease ; which could bear no other construction, than that it was meant to come in place of that claim which, from the communion of goods, accresced to the wife's nearest of kin out of the moveables when there was no special settlement. From this clause it was plain, that both the wife's claim of terce and claim *jure relictae* were under view, and intended to be superseded by the conventional provision, 6th January 1747, Crawford *contra* Hay.* Fac. Col., 24th February 1763, M'Kinnon *contra* Macdonalds, No. 49, p. 6451.

This stipulation of 500 merks was, in this view of the question, a reasonable one ; but it never could be the intention of parties, that, in the event of the petitioner's predecease without children, her nearest of kin should not only claim the 500 merks, but carry off from the husband in his lifetime the one half of all his moveable estate. This reasoning was likewise applicable to the 4th clause of the contract ; and as in the one case the 500 merks must be understood as in full of the claim of the nearest of kin, so the 1000 merks in the other must be understood to be in full of the claim competent to the widow in the event of her surviving her husband. One clause, indeed, in this contract, by which the whole conquest was secured in favour of the bairns of the marriage, was decisive of the cause ; as it would be completely inconsistent to allow the wife to claim a share of that which, with her own consent, was provided to her children without any burden or limitation ; 17th June 1732, Stirling of Glorat *contra* Lukes, voce LEGITIM.

The petitioner also maintained, though insisting but little upon it in point of argument, that the meaning of the interlocutor of the Court reclaimed against, was, that though she could not take both her legal and conventional provisions, yet she might betake herself to the one or the other as she should find most beneficial. But this the respondents denied ; for as it had been determined that the marriage contract was binding upon all parties, this necessarily tied her down to be satisfied with the provisions therein stipulated.

In giving judgment, their Lordship were of opinion that the *jus relictae* was not excluded, except by an express clause, or where particular subjects were specially provided. The clause in the contract as to the conquest, by which it [6456] was settled *sub destinatione* to the heirs of the marriage, could not fail to have that import and construction ; and they therefore " found, That the petitioner claiming on her

* Examine General List of Names.

jus relictæ was excluded from any share of her husband's conquest or other moveable estate standing specially provided by the contract of marriage, but not from her share of any other moveable estate belonging to her husband which did not fall under said provisions."

Lord Ordinary, MONBODDO.—For Tod, LOCKHART.—For Wemyss, MACQUEEN.
—Clerk, TAIT.

R. H.

Fac. Col. No. 59, p. 174.

No. 50. HELEN MILLER v. HENRIETTA BROWN. January 19, 1776.

Jus relictæ cut off by a renunciation executed by the wife upon a voluntary separation of the husband and wife.

In the year 1762, some family differences having arisen between the pursuer and her deceased husband, William Scot, taylor in Canongate, they agreed to a voluntary separation, and upon this occasion mutual deeds were executed. The pursuer renounced all right to any of the goods, gear, or other effects belonging to her husband, or to any aliment, or other provision of the law, competent to her as his wife, in the same manner as if they had never been married, and renounced any right thereto, so as that he may freely dispose on his effects, whether heritable or moveable, without her consent. He, at the same time, renounced his right to his wife's effects *jure mariti*, and gave her full power over them.

In May 1774, Helen Miller being informed that her husband was at the point of death, and that he had either executed, or was going to execute, a testament in favour of Henrietta Brown, she caused execute a revocation, by which she revoked the discharge granted to her husband, above recited; and having afterwards sued Brown for her share of the moveables belonging to her husband, at the time of his death, the latter founded her defence upon the testament executed by the defunct in her favour, and on the foressaid discharge executed by the pursuer at the time of the separation.

Observed on the Bench; Although the word *jus relictæ* is not mentioned, yet the words of the deed are sufficiently broad to comprehend it equally as if it had been expressed; and the husband renounced his *jus mariti*, which was a *quid pro quo*. It was plainly dissolving the communion; and it is from the communion the *jus relictæ* and the legitim arise.

"The Lords find, That the pursuer, by the agreement in process, did renounce her *jus relictæ*."

Act. GEO. CLERK.—Alt. ARNOT.—CLERK, GIBSON.

Fol. Dic. v. 3, p. 303. Fac. Col. No. 215, p. 164.

No. 52. [6457] ANNE ELISABETH JANKOUSKA, *alias* GRIEVE v. ANDREW ANDERSON and Others. November 29, 1791.

A relict who had accepted conventional provisions in an English deed, was allowed also the terce of a Scotch estate. See Synopsis.

Mrs. Jankouska, a native of Russia, was married to Tamez Grieve, who was possessed of considerable funds both in Russia and England, and was also proprietor of a small landed estate in Scotland.

Mr. Grieve executed a settlement in the English form, giving to his wife, in case of her surviving him, an annuity of £800 out of his Russian property, a house at Peter-sham near London, and a sum of £2000, secured by mortgage in England. He also

directed his Scots estate to be sold, and the price to be liferented by Mrs. Grieve. But owing to the form of the deed, this last part of it became ineffectual.

Mrs. Jankouska, therefore, claimed a terce out of her husband's lands in Scotland; but in this she was opposed by Anderson and other heirs of her husband, who

Pleaded, To prevent exorbitant settlements in favour of wives, it was provided by the statute of 1681, cap. 10, "That in all time coming, where there shall be a particular provision granted by a husband in favour of his wife, either in a contract of marriage, or some other writ before or after the marriage, the wife shall be thereby excluded from a terce out of any lands or annualrents belonging to her husband, unless it be expressly provided in the contract of marriage, or other writ containing the said provisions, that the wife shall have [6458] right to a terce by and attour the particular provisions conceived in her favour."

The present claim is in direct opposition to this enactment. If, indeed, the pursuer had rejected the settlements executed by her husband, she might doubtless have claimed her legal provisions. But it would be now too late for her, were it consistent with her interest, to repudiate those settlements. The intention of her husband respecting the disposal of the Scots estate cannot be of any importance. Although, in the event of selling the lands, it was meant that she should enjoy the liferent of the price, it does not appear, that while the lands were unsold, she could claim any part of the rents; and besides, the settlement being, as to them, ineffectual and void, the case is to be viewed in the same light as if it never had been intended; Mackenzie's Observations on act 1681

Answered; The enactment of 1681 imposes no restraints on husbands when executing deeds in favour of their wives. It was wholly meant to prevent wives from demanding their legal as well as their conventional provisions, which they were formerly authorised to do, if not excluded by particular stipulations. And therefore, wherever it appears to have been the intention of the husband that his wife should enjoy both, the statute ought to be laid aside as inapplicable.

This is evident from the preamble of the statute, which sets forth, "That sometimes, through the ignorance and inadvertence of writers and notars, clauses are insert in contracts of marriage, containing provisions by husband's in favour of their wives, without mentioning the terce that is due to them by law, or expressing the provisions to be granted in satisfaction of the terce, whereby occasion is given to relicts to claim a terce out of their husbands estate by and attour the provision conceived in their favours, contrary to the meaning of the parties-contractors." In the present case, it was intended that the widow, during her life, should enjoy what the produce of the Scots estate, when converted into money, should yield, although considerably exceeding the rents of the land. Nor could the husband's will to admit his wife's claim of terce be more forcibly expressed, than by a deed giving to her a liferent of the whole. His heirs, therefore, must either ratify this settlement, or they must put it entirely out of view; and, in either case, the determination will be favourable to the widow.

The Lord Ordinary rejected the widow's claim of terce. And to this judgment the Court, on advising a reclaiming petition, with answers, adhered.

But after advising a second reclaiming petition and answers,

The Lords found, That the Lady was entitled to a terce. See TERCE.

Lord Ordinary, HAILES.—Act. HONYMAN.—Alt. ABERCROMBY.—Clerk, MENZIES.

C.

Fol. Dic. v. 3, p. 303. *Fac. Col.* No. 191, p. 397.

No. 66.

[6500] GIBSON v. SCOT. February 2, 1739.

Found, That a charter of confirmation of a disposition granted by the last vassal to his apparent heir, implied a discharge of all former feu duties.

Fol. Dic. v. 3, p. 304. *Kilkerran*, No. 1, p. 297.

No. 75. [6517] The Lord FORBES v. GARRIOCH. November 28, 1673.

A charter of confirmation, granted to a new vassal, does not prevent the superior as creditor to the former vassal, to reduce the disposition, in favour of the new vassal, *ex capite inhibitionis*.

In a reduction of a right made to Garrioch of the lands of Arballoch, upon an inhibition at the late Lord Forbes his instance, against Garrioch's author, it was alleged, That this Lord Forbes could not reduce *ex capite inhibitionis*, he having confirmed the right of wadset, now craved to be reduced, and entered Garrioch his vassal in the said lands. It was replied, That the confirmation by the superior, being only a thing in common course, did not pre-[6518]-judge him as a lawful creditor, of any real diligence, by inhibitions against his vassal's author, as was found in the case of Lord Torphichen v. Mason's Creditors, 11th July 1673, *voce* REDUCTION. The Lords did sustain the reduction, notwithstanding of the answer; and found, that a charter, upon resignation or confirmation, granted to a new vassal, did not prejudice him as a creditor to his last vassal, to reduce upon inhibition, or to make use of any real right or diligence he had used against him; but that the same might affect the right confirmed; but, if the charter of confirmation or resignation had been a *de novo damus*, it might have altered the decision.

Fol. Dic. v. 1, p. 438. Gosford, MS. No. 638, p. 370.

No. 77. [6521] GUILD v. GUILD. February 4, 1623.

An assignation to a sum in a testament, to which the testator's wife subscribed a consent, found not to prejudice her right of third.

In an action pursued by Guild, to hear the right of the sum of 200 merks decerned to pertain to the pursuer, which pursuit was founded upon a testament of the pursuer's father, wherein he assigned to the pursuer the right of that sum which was addebted to him, conform to an obligation made to him thereupon by his debtor, and to the which assignation made by the said testament his wife consented, and the testament was subscribed by her, and she was pursued thereupon; the Lords found the wife's consent subscribed in the testament could not prejudice her, but that notwithstanding thereof she had right to her own third of the defunct's free gear, and of this sum controverted, amongst the rest of the whole free goods, whereof she was not prejudged by the said assignation, contained in the testament, and consented to by her, seeing that assignation was but of the nature of a legacy, which could go no further than the defunct's own third; likeas they found, That the father's giving in tocher with the pursuer since that testament, a certain sum of money, ought to be ascribed by her, to be given in satisfaction of so much of the defunct's part, or of her own part, as the pursuer acclaimed from the defender, as intromitted with by her *pro tanto*, and that the same ought to liberate the defender *pro tanto* anent her intromission with the defunct's goods and gear.

Alt. LAWRIE.—Clerk, HAY.

Fol. Dic. v. 1, p. 438. Durie, p. 43.

No. 78. STIRLING v. Her TENANTS. December 15, 1630.

A wife was provided in an annualrent by her husband, with consent of her father, who was infeft in the lands. Found that though the husband was never infeft, the wife's annuity could not be affected by tacks afterwards let by her father-in-law.

Jean Stirling being provided, by her contract of marriage, to an annualrent out of the lands of Templeland, by her umquhile husband, whereto her umquhile husband's

father was a consenter in the contract, after her husband's decease, she pursuing the tenants for poinding of the ground for that annualrent, by virtue of her sasine following upon that contract, and the tenants defending with tacks, set by the umquhile father of her husband ; so that they alleged [6522] they could only poind the ground for the duty of the tack, specially seeing the husband, who was the author of her right to the said annualrent, was never infeft, but the father, who set the tacks ;—The Lords found, that seeing the father consented to the said contract of marriage, and that the tacks were set after the date of the relict's contract and security, that the same could not stay the poinding of the ground for the whole annualrent, whereof she was not prejudged by the said tack set sinceyne, as said is, albeit her husband was not infeft, in respect of the consent foresaid of the father, before these tacks were set.

Clerk, SCOT.

Fol. Dic. v. 1, p. 438. *Durie*, p. 548.

No. 80. [6523] *Earl of ERROL v. HAY of Crimunmogat.* February 23, 1667.

A wadsetter disponed his lands without mentioning them to be redeemable. Though the person who was substituted in the reversion consented to the disposition, it was found that he was not precluded from using the reversion.

The Earl of Errol pursues a declarator of redemption against Hay of Crimunmogat : It was alleged absolvitor, because the defender stands infeft upon a charter granted by Barclay, with the consent of the Earl of Errol, *pro omni suo jure*, long after the reversion granted by Barclay, whereupon this redemption proceeds. It was answered for the pursuer ; Imo, That the Earl only consents, and the charter bears that the sums were paid to Barclay, whose right produced is a wadset, granted by the Earl of Errol and Hay of Urie, bearing an express reversion to any lawful eldest son of Hay of Urie ; which failing, to the Earl of Errol. *Ita est*, that the time the Earl subscribed this charter, Hay of Urie was alive, and had sons, at least *in spe* ; so that the Earl of Errol had not thereby the right of the reversion, and therefore his consent, without any sums received, or any absolute warrandice, cannot extend to any supervening right, which he then had not actually, but *in spe et in apparentia*. 2do, The Earl's consent to Barclay's disposition, who had only the right [6524] of wadset, not bearing irredeemable, or *absque reversione*, cannot take away the express reversion of Barclay's right ; for albeit an heritable right be presumed irredeemable, *presumptio cedit veritati*, and it cannot take away a reversion where it is.

The Lords found that the reversion granted in Barclay's right was not taken away by this posterior right and charter, but that the Earl's consent imported only his favour and good will to transmit the right to the defender, in respect of the allegiances aforesaid.

Fol. Dic. v. 1, p. 438. *Stair*, v. 1, p. 449.

No. 81. *FORBES v. INNES.* January 8, 1668.

In the case, *Forbes contra Innes and Dalgarno*, the Lords found, That a wife having no right for the time, to lands disponed by her husband, and having, at the desire of the buyer, consented and sold her right, if she thereafter acquire from another person a right to the said lands, is not by her consent concluded, but may pursue and evict the lands upon her right ; her consent operating only, that upon any right from her husband, or then in her person, she cannot question the right whereto she hath consented ; and the brocard that *jus superveniens accrescit* being to be understood of *jus superveniens auctori*, whereas a consenter is not author.—See *JUS SUPERVENIENS*, &c.

Alt. LOCKHART, WEDDERBURN, & THOIRS.

Fol. Dic. v. 1, p. 438. *Dirleton*, No. 128, p. 52.

* * Stair reports the same case :

Mr. John Forbes, as assignee to Margaret Allardice, having obtained decret of removing against Margaret Innes, for removing from the lands of Savet, wherein the said Margaret Allardice is infeft in liferent ; which being suspended, it was alleged, Imo, That this pursuit is to the behoof of Margaret Allardice, who could not obtain a removing against the defender, because the defender's husband being infeft by the said Margaret Allardice's husband, and author of the lands of Savet principally, and of the lands of Govan and others in warrandice, the said Margaret Allardice did consent to the disposition of the warrandice lands, by which she obliged herself to do no deed in the contrary of that right, and is also bound in warrandice with her husband ; *ita est* her pursuing this action is a deed in prejudice of the right of warrandice lands, in so far as thereby the person having right to the principal lands, upon eviction recurs upon the warrandice lands, and so the consenter's own deed prejudices the same. It was answered, That by deeds contrary to warrandice were only understood some right granted by the disponer or consenter, in prejudice of the right consented to, but nowise a pursuit upon any other right of the consenter ; for it [6525] were against reason and justice, that a purchaser, to make himself secure, requiring a wife's consent to lands to which she had no right either in principal or in warrandice of other lands, that her consent should prejudice her as to her liferent lands, of which there was no mention ; and as to her personal obligation to warrant the lands wherein she was never infeft, it is null, and can never oblige her, being a wife.

The Lords found that this warrandice did not oblige the wife, and that her consent did not hinder her to pursue upon her own liferent, albeit *ex consequente* her pursuit excluded one having a posterior right to her liferent lands, who thereupon had recourse to the warrandice lands, to which she consented, seeing she had granted no right prejudicial to the right consented to.

It was further alleged, that the said Margaret Allardice agreed with the person having right to her liferent lands, principally that she should accept the warrandice lands instead of her liferent lands, which *excambion* putting the right of the warrandice lands now in her person, she who consented to the right thereof, can never come in the contrary of her own consent to prejudice the same. It was answered, That a consent cannot exclude any supervenient right of the consenter, but only such rights as the consenter had the time of the consent ; it is true that a disponer with absolute warrandice, if he acquire a right, it accresces to his successor, but it is not so in a consenter, whose warrandice is not found to be obligatory, further than as to the rights in the consenter's person at that time.

Which the Lords sustained.

It was further alleged, That the pursuit as to the behoof of the heir of the disponer, of the lands in question, whose predecessor being bound in absolute warrandice, he can make use of no right prejudicial to his warrandice ; 2ndly, Albeit he be not heir, yet he hath behaved himself as heir, and thereby is liable to fulfil the defunct's warrandice, and so cannot come against it. It was answered, That behaving as heir being a vitious passive title, is not sustainable by way of exception in this case.

The Lords sustained the same, and found both members of the allegiance relevant.

Stair, v. 1, p. 499.

No. 82. MURRAY v. JAFFRAY and MURRAY. January 24, 1674.

A wife consented to her husband's testament, by which he granted to a daughter a bond of provision. Found that this did not affect her third of moveables.

Umquhile Murray, by his testament nominates Isobel Murray, his wife, his executrix and universal legatrix, she renouncing a tack of certain tenements in Aberdeen, granted to her by her husband in satisfaction *pro tanto* of an annualrent of 5000 merks, provided to her in her contract, and paying £1000, which he had left to their only child Marjory Murray. Isobel Murray [6526] did confirm the testament, but under protestation "not to be prejudged thereby of her contract of marriage."

The said Marjory Murray the daughter, and Jaffray her husband, pursue the said Isobel Murray to denude herself of the said tack in their favours, and to pay the £1000, because she had consented to the testament, and subscribed the same. It was alleged for the defender, that her consent was null, being done *ex reverentia maritali*, and so no free consent, in so far as she subscribed "at the earnest desire of her husband," being then on death-bed and *moribundus*, and she in *extremo morore et luctu*; and albeit *reverentia maritalis* alone be not relevant, yet it hath always been sustained conjoint with menaces; and, without question, the importunity of a dying husband the time of the wife's sorrow, is of much more force to disturb her mind. It was answered, That albeit marital reverence, joined with threats of a fierce husband, hath been sustained to import extortion, as *ex justo metu*, yet intreaties and grief were never so sustained, nor can they have any pretence in this case, the husband having been very long sick, and in continual expectation of death; and no sudden surprise, that might have disturbed the wife's mind, made the husband's intreaties more forcible, and the wife did *intra annum luctus convolare ad secundas nuptias*.

The Lords having considered the tack, that it was but a corroborative security for implement of a part of the contract of marriage, they decerned her to denude, reserving to her the implement of her contract of marriage as accords, and decerned also for the £1000, and found it due only out of the deed's part of the moveables, albeit it was simply conceived as a bond of provision to the daughter, seeing the wife's consent was but by her subscribing of the testament, whereby that sum was understood to be but as a legacy. See *VIS ET METUS*.

Fol. Dic. v. 1, p. 438. Stair, v. 2, p. 256.

No. 85. [6528] *BUCHAN v. Sir WILLIAM COCKBURN*. July 14 and December 11, 1739.

Consent of a proprietor to a disposition, implies a conveyance of all right in the consentor's person, but the consent of a creditor implies only a *non repugnantia*.

The Court was unanimous, that the consent of a proprietor to a disposition *a non domino*, implies a conveyance of the property, as what can have no other intention or meaning; but found, that a consent by a creditor only, implies no more than a *non repugnantia*, as what could only be the intention of it. Notwithstanding it was observed, that Lord Stair, in several places, says, That consent is the same thing as if the consentor were resigner; and if consent imports a conveyance in its own nature which was admitted when by the proprietor, so a consent of a creditor should in its own nature import a conveyance of such right as was in him; just as a disposition of the property, when *a non domino*, will imply a conveyance of every lesser right that may be in him, as of a tack or annualrent; and upon which ground the Lords, by their first interlocutor in this case, had "found, That Sir William Cockburn the creditor's consenting to the disposition by Langtoun, the proprietor, to Mr. George Buchan, im-[6529]-plied a conveyance to him of the debts in Sir William's person;" but which was thereafter altered as above.

Fol. Dic. v. 3, p. 304. Kilkerran (IMPLIED DISCHARGE AND RENUNCIATION), No. 2, p. 279.

No. 87. [6534] *GRAHAM v. ROCHEAD*. January 5, 1683.

A factor, after having settled accounts, found not entitled to demand salary.

John Graham, chamberlain to the deceased Alexander Murray of Melgum, pursues Janet Rochead, as relict and executrix, for payment of 6000 merks, due to him as chamberlain for several years; and albeit that he was discharged of his chamberlain accounts, yet the same bore a reservation of all sums by bond, ticket, or otherwise

due by the pursuer to the defunct.—It was alleged for the defender, That the pursuer was only *negotiorum gestor* ; and unless paction were proved the time of the entry to his service, he could not pursue the representatives of the defunct for a salary, after the chamberlain accounts were fitted by the defunct, and a discharge granted to the pursuer.—The Lords sustained the defence, and assoilzied the defender.

Fol. Dic. v. 1, p. 439. P. Falconer, No. 39, p. 21.

! * * Sir P. Home reports the same case :

John Graham having pursued Janet Ruthven, relict of the deceased Alexander Murray of Melgum, for payment of 6000 merks, as his factor and chamberlain fee, for managing of her husband's estate before his decease ; alleged for the defender, There was no salary due, because there was none conditioned ; and the defunct, her husband, in his own lifetime, did entertain the said John Graham and his children in his house, which must be allowed in place of the fees, seeing her husband never promised him any more but to maintain him in his house ; as also, he having counted with her husband, he did grant a discharge of his intromissions, which necessarily implies either there was no salary due, otherwise he would have craved allowance thereof in his accounts ; or if there was any due, it was allowed at counting.—Answered, That albeit there was no express condition for a salary, yet *ex natura rei*, the pursuer having managed Melgum's affairs for the space of five years, he ought to have a salary, seeing by the law, whoever manages another man's affairs, the party [6535] whose affair is managed is liable for a salary to the pursuer that manages the same *actione negotiorum gestorem* ; and it is denied that he got any salary allowed at the fitting of his accounts ; and it cannot be otherwise proved but *scripto vel juramento* ; and the accepting a discharge of his intromission cannot militate against him, because it bears a reservation of all that was due to him by bond, ticket, or otherwise.—The Lords, in respect the pursuer had fitted his accounts with the defunct, her husband, and had taken a discharge of his intromission, without seeking allowance of any salary, and that there was no paction for a fee or salary when he entered to the service ; therefore found there was none due.

Sir P. Home, MS. v. 1, No. 349.

No. 11.

[6548] DICK v. OLIPHANT. January 18, 1677.

Tyrie of Drumkilbo being debtor to Douglas of Kilspindie, in a sum of money, the same was arrested by Janet Mackmath ; and, in a competition betwixt her, as arrester, and Sir James Douglas, as having right to the sum by translation from Douglas of Lumsdale, as assignee by Kilspindie, Sir James was preferred, because, before the arrestment, Lumsdale's assignation was intimated by a charge of horning ; in which process, improbation was proponed against Lumsdale's assignation, which was not sustained by exception, but reserved by action, whereupon reduction and improbation was intended, yet Sir Lawrence Oliphant of Gask purchased the right from Sir James Douglas, and did defend it in the improbation, till at last the assignation was improven. There is now a reduction and declarator intended against Sir Lawrence and others, for reducing the decreet of preference founded upon the false assignation, and for decerning Sir Lawrence, and all those having right from him, to refund the arrested sum, and the annualrents thereof. It was alleged for the Defenders, That there is now produced a true assignation intimated by a horning, which therefore did denude Kilspindie before the arrestment, and so must defend these defenders deriving right from Lumsdale. The pursuer answered, Imo, That Sir Lawrence Oliphant having taken a right after the matter was litigious, and having most tenaciously defended in the false assignation, he cannot now make use of this true assignation. 2do, This true assignation was never Lumsdale's delivered evident, and therefore, did not denude Kilspindie ; for albeit delivery is presumed, and needs not to be proved where the writ is in the hand of him in whose fa-[6549]-vours it was granted ; yet here the true assignation was produced by the arrester, gotten out of the hands of the successors of Alexander Douglas, writer ; and it is evident by the

horning raised upon the assignation, which is alleged to be the intimation thereof, that the keeper of the register marks the same, as produced, not by Lumsdale the assignee, but by Kilspindie the cedent. It was replied, that Sir Lawrence Oliphant being free of the suspicion of the forgery, his using of the false assignation cannot exclude him to make use of the terce, which being produced by the arrester, is emergent to him, and was not in his power or knowledge. 2do, The evidences are not sufficient to instruct the not delivery of the assignation, seeing Alexander Douglas was writer, both to Kilspindie and Lumsdale. 3tio, Though it had not been delivered, yet being intimated by a charge of horning, and granted by the cedent for relief of cautionry, wherein the assignee was engaged, it becomes effectual without delivery for the cautioner's relief, and he might have compelled the cedent to deliver it; for though it be true that any man may take bond, assignation, or other right, in the name of any other, and use all diligence thereon, and if he retain the same without delivery, he may compel that party to denude himself, or declare against him, that his name was used to the cedent's behoof, which cannot hold in this case, where the assignee has a proper interest of relief; and it is inconsistent that Kilspindie could pretend that the assignation made by Kilspindie to Lumsdale, for Lumsdale's relief of his cautionry, was in trust, for the behoof of Kilspindie the cedent, except in so far as exceeded the relief. And it is offered to be proved, that Lumsdale, or those deriving right from him, did pay the sums enumerated in the assignation.

The Lords found, that an assignation whereupon the cedent raised horning and charged in the assignee's name, being for the assignee's relief, was effectual without delivery, in so far as the cautioner was distressed, or made payment.

The defender further alleged, That that member of the libel concluding against Sir Lawrence Oliphant, to make payment of the sums, for which the arrestment was laid on *in quantum lucratus est* (in so far as he took right without any antecedent interest, after the matter was litigious, and by defending the false assignation for several years, did debar the arrester until Drumkilbo's estate was affected with adjudication for other debts, which excludes the arrester, whereby Sir Lawrence had gain, and the arrester had loss) that that conclusion was not relevant, because Sir Lawrence transmitted his right, and might lawfully make his best of it.

The Lords found the foresaid conclusion relevant against Sir Lawrence, in so far as he made profit in getting sums more than he gave out, having taken right after the matter was litigious, but ordained the arrester, upon payment, to assign an equivalent part of the sum to Sir Lawrence.

Starr v. 2, p. 496.

No. 20. [6566] JOHN M'KINNON v. CHARLES M'KINNON. June 16, 1756.

An heir of provision, who succeeded as nearest heir at the time the succession opened, was obliged to denude on the existence of a nearer heir, though the entail contained no denuding clause in that event.

Neil M'Kinnon had, in the year 1731, disposed the estate of M'Kinnon to John M'Kinnon younger, and the heirs-male of his body; whom failing, to the [6567] heirs-male to be procreated of the body of John M'Kinnon elder; whom failing, to John M'Kinnon tacksman of Messinish.

A few years after, John M'Kinnon younger died, but without heirs-male of his body; and at that time there were no heirs-male of the body of John M'Kinnon elder; for which reason John M'Kinnon tacksman of Messinish served himself heir to John M'Kinnon younger, and took up the estate.

After this, in the year 1753, John M'Kinnon elder had a son named Charles.

The tutors of Charles brought an action against John tacksman of Messinish, to denude of the estate in favour of Charles.

Pleaded for John of Messinish; Ever since the decision Lord Mountstewart v. Sir James M'Kenzie, 2d January 1708, *voce* SUCCESSION, it had been a point fixed in the law of Scotland, that the nearest heir to the deceased at the time might serve heir to him, notwithstanding the possibility of a nearer one; and in consequence of that it follows, that as the entering heir is a *modus acquirendi domini*, it must be perpetual in its effects, and no contingency happening afterwards will overturn it.

Answered for Charles ; By the disposition, the estate was plainly to be in the heir-male of the body of John the elder, upon the failure of heirs-male of the body of John the younger ; but as, when this last event happened, the law, to avoid the inconveniency of leaving the fee *in pendent*, had allowed it to be vested in the nearest heir for the time, so, when a nearer, the true heir, appeared, the inconveniency of leaving the fee *in pendent* ceased, and the original disposition was enabled to have its effect. *Vide* decision, 13th November 1707, George M'Kenzie v. Lord Mountstewart, *voce* SUCCESSION ; and Corehouse v. Wier, cited in Bruce v. Melville, 22d Feb. 1677, *voce* SUCCESSION, and Stair, b. 3, t. 5, § 50.

“ The Lords found, That the pursuer has right to the estate of M'Kinnon from the time of his birth ; and that the defender is obliged to denude thereof in his favour.”

Reporter, JUSTICE-CLERK.—Act. FERGUSON.—Alt. LOCKHART.

J. D.

Fac. Col. No. 204, p. 302.

No. 24. [6575] MARK PRINGLE v. Major GEORGE LEWIS MACMURDO. June 30, 1796.

A tenant found not to be entitled to dispose of any part of the fodder raised on his farm, except his hay, and the straw of his outgoing crop, though there was no clause in the lease expressly prohibiting him from selling it.

Major Macmurdo obtained from Mark Pringle a lease of the farm of Fairnilee in Selkirkshire, for eleven years and a half, by which, besides obliging himself to pay a suitable rent, he became bound to lay down a considerable part of the lands with barley, clover, and rye grass, “ two years previous to the issue of the tack, and to leave the same in grass at that period ; the land to be properly manured with lime or dung with the barley crop.”

Major Macmurdo at first resided on this farm, but he afterwards took another in Dumfriesshire, to which he removed, leaving Fairnilee to be managed by servants.

In autumn 1795, Major Macmurdo advertised a sale of the growing crop upon it ; reserving as much as was necessary for the maintenance of the servants and horses employed on the farm.

Mr. Pringle applied to the Sheriff to prohibit the sale.

The Sheriff ordered Major Macmurdo to give in a condescendence, from which it appeared, that the farm consisted of 63 acres, of which 23 were under crop ; that there had been 17 bolls of oats sown on it ; and, that it had been chiefly laboured by two horses.

The Sheriff afterwards appointed certain farmers “ to visit and inspect the corns upon the farm of Fairnilee, and to set off as much thereof as should be sufficient for the maintenance of two horses, from the time the corn should be reaped until Whitsunday next ; appointed the defender to consume the same upon the farm, with such beasts as he should think proper for that purpose ; and granted warrant to sell and dispose of the remainder of the crop, he always finding caution to the pursuer for the current year's rent.”

The sale accordingly took place ; but two days after, Mr. Pringle applied for an advocacy of the process, and an interdict, to prevent the corns from being carried off the grounds.

The interdict was at first granted ; and afterwards the Lord Ordinary on the bills passed the bill, but, “ in respect that part of the crop was sold in terms of the Sheriff's interlocutor, before the bill was presented, removed the interdict, without prejudice to any claim of damages competent to the complainer, on account of part of the crop being sold.”

In the advocacy, the pursuer contended, *Imo*, That it necessarily followed, from the clause in the lease obliging the defender to leave part of the farm properly manured, that he was to consume the whole fodder upon it. 2do, That, at any rate, this was an implied obligation on every lessee of lands ; February 1665, Murray v. Balcanqual, *voce* TACK ; 1776, Macmurray v. Sir William Maxwell ; 1785, Duke of Roxburgh v. Archibald.*

* The two last not reported.

[6576] The Lord Ordinary found, "That though there was no express clause in the contract of lease granted by the pursuer, Mr. Pringle, to the defender, Major Macmurdo, which ties him down from carrying off, or otherwise disposing upon, the whole fodder or straw that may be produced on the farm of Fairnilee, yet that he is not at liberty so to do, in opposition to the will of the landlord; as, were such conduct to be tolerated, it would be attended with ruinous consequences to the ground, as well as repugnant to the general mode of cultivation in the country; and therefore prohibited and discharged the defender from selling off in future, either by public roup or private bargain, the fodder on said farm of Fairnilee, and ordered him to consume the same thereon during the remainder of his lease."

And his Lordship, on rehearing the cause, found the defender "was entitled to sell his hay, and the straw of his outgoing crop, but *quoad ultra* adhered to the former interlocutor."

In a reclaiming petition, the defender stated, in point of fact, that he had made great improvements on the farm since his entry to it; that he proposed to manure it with compost dunghills annually; and that it was the practice in Selkirkshire for tenants to sell corns on the foot without challenge.

In point of law, he pleaded; The lease in question contains no stipulation which infers a prohibition on the tenant to dispose of the fodder produced on the grounds, and no such limitation arises from the nature of the contract. A tenant is absolute proprietor of the fruits, and as such, may dispose of them as he thinks proper. The landlord can require nothing more than that he shall labour the ground *salva rei substantia*, and restore it, at the end of the lease, in as good condition as he found it; Erskine, b. 2, t. 6, § 39. Besides, the prohibition contended for would prevent the inhabitants of towns, and tenants of grass-farms from providing themselves with straw for feeding and littering their cattle, and other purposes.

Observed on the Bench; A tenant cannot sell fodder off his lands, unless he either bargain with the purchaser for the dung produced from it, or purchase as much for the use of his farm.

The Lords unanimously "refused the petition," without answers.

Lord Ordinary, CRAIG.—For the Petitioner, HAY.—Clerk, MENZIES.

R. D.

Fac. Col. No. 227, p. 528.

No. 4. [6585] JOHN SCOTT, indweller in Douglas, GRIZEL WILSON his wife, and JOHN and ELIZABETH SCOTTS their Children, and Mr. WILLIAM M'CUBBIN, Minister of the Gospel at Douglas, their Trustee v. JOHN WILSON. June 22, 1773.

The nomination of a trustee, in a deed executed by a man and his wife, for behoof of their children, is revocable by the father, as their administrator in law, though the deed should contain no express power of revocation.

Grizel Wilson being entitled to a legacy of £1000 Sterling, that was bequeathed by her brother James's last will, she empowered John Wilson, another brother, to uplift that money from his brother's executors, which he did accordingly; but the money remained in his hands.

Thereafter, Grizel Wilson, and her husband John Scott, executed a deed, whereby they assigned and disposed, to the said John Wilson, as sole trustee for Robert, John, Mary, Margaret, Christian, and Elizabeth Scotts, their children, the sum of £740 Sterling, part of the £1000 legated to her, by certain proportions and divisions therein mentioned; the remaining sum of £260 being thereby reserved to the said John Scott, for his own proper use: "Surrogating and substituting the said John Wilson, as trustee for our said children, in our full right and place of the premises for ever; with full power to the said trustee, for behoof of our children, to uplift and receive the sums above assigned, call and pursue therefor," &c. And without prejudice of the foresaid nomination of trustee, "I (i.e. the said Grizel Wilson), hereby name and appoint the said John Wilson to be sole tutor and curator to our children, for

guiding and governing them in their affairs and business, *tam ad lites quam ad negotia*, until they arrive at the age of 21 years complete; with full power to him, as tutor and curator foresaid, to give up inventories of our said children, their means and estate, before any judge competent," &c.

By another deed, proceeding on a recital of the aforesaid settlement, and of their being resolved to alter the same, particularly the nomination of trust in favour of the said John Wilson, in regard they were not satisfied that he should have any concern with their childrens funds or affairs after their death, Grizel Wilson and her husband revoked said settlement, and nomination of trust, in favour of John Wilson; and then they brought an action before the Sheriff against Wilson, for payment of £800, and interest due thereon. To which he objected, That the deed was irrevocable, and that, in respect of the interest the children had therein, he could not be compelled to part with the money.

While this matter was depending, the pursuers, and, with them, their six children, all of full age, except the two youngest, John and Elizabeth, both of them past the age of pupillarity, concurred in executing a new trust-right in favour of Mr. William M'Cubbin; and the Sheriff gave decree against Wilson; who having brought a suspension, the pursuers declared they had no intention to deprive their children of any *jus quasitum* they had by virtue of the first deed; but did only insist, in so far as concerned the nomination of the defen-[6586]-der, that it was under the power of the father, and that it depended on his pleasure to recall the same, and to nominate other managers, as he thought proper.—And the Court being of that opinion, whether Wilson was to be considered in the light of a trustee, or in that of a factor, appointed by the father:

The Lords repelled the reasons of suspension, and found the letters orderly proceeded.

Act. DEAN OF FACULTY.—Alt. M'QUEEN.—Clerk, ROBERTSON.

Fol. Dic. v. 3, p. 307. Fac. Col. No. 72, p. 175.

No. 1. [6587] WEDDERBURN v. SCRIMGEOUR. July 18, 1666.

A father having left a legacy, thinking his wife was with child, in these terms, that if his wife should have a male child, the legatar should have the sum of 4000 merks; and that if she should have a daughter, the legatar should have the sum of 5000 merks.

The Lords found, that though she had no child, the legacy should be effectual *ex præsumpta voluntate testatoris*; seeing it cannot be thought, but that he rather intended a legacy for him, if he had no child, than in the case she should bring forth a child; *Et in conditionibus primum locum obtinet voluntas defuncti, eaque regit conditiones.* L. 19 D. *De conditionibus*.

July 26, 1666.—In the case Scrimgeour and Wedderburn of Kingenny (mentioned before 18th July), a legacy being to be effectual in that case only, if the testator's wife should not be brought to bed of a man child; it was found, that a male child should be understood a living child; and that *homo mortuus* and a dead child is *nullus* in law; and that the legacy should be effectual, though she had been brought to bed of a male child, but dead.

Fol. Dic. v. 1, p. 441. Dirleton, No. 18, p. 9, and No. 32, p. 14.

No. 5. [6590] ANDERSON v. ANDERSON. July 18, 1729.

In a contract of marriage there occurred the following clause: "And in case there should happen to be only one daughter, he obliges him to pay the sum of 18,000 merks; if there be two daughters, the sum of 20,000 merks, whereof 11,000 to the

eldest, and 9000 to the youngest; and if there be three daughters the sum of 30,000 merks, 12,000 to the eldest, 10,000 to the second, and 8000 to the youngest." A fourth daughter having existed of this marriage; in a process betwixt her and the other three, the question occurred, whether she could have any share of the 30,000 merks upon the presumed will of her father, or if she was to be left to insist for her legal provision *ab intestato*? The Lords found the fourth daughter entitled to a proportion of the 30,000 merks, and found her proportion, suitable to the provision made in the contract of marriage, to be 4500 merks; so as to restrict the eldest daughter to 10,500 merks, the second to 8500 merks, and the third to 6500 merks. See APPENDIX.

Fol. Dic. v. 1, p. 441.

No. 6.

[6591] BEIZLY *v.* NAPIER. February 1, 1739.

Where an executor was nominated, with power (which the office implies) to intromit with the whole money and effects of the defunct, with this clause subjoined, "And I hereby debar and seclude all others from any right or interest in my said executry"; in respect of the secluding clause, which was considered as virtually the same as if the executor had been appointed universal legatary, it was found that the testament conveyed the whole effects to the executor.

Kilkerran (LEGACY), No. 1, p. 326.

No. 12. [6599] JAMES WHARRIE, Vintner in Whitehaven *v.* The distant Relations of EDWARD WHARRIE. July 16, 1760.

A residuary legacy was left among the testator's relations not named in the testament. The nearest relation of the testator claimed the whole, upon this ground, That he was not named as a legatee, and that it could not be the testator's intention that the residue should be divided among all his relations in the remotest degree who were not named. The claim was repelled.

Edward Wharrie of Guildford, in the county of Surrey, having resided for many years at Dumfries, executed a testament, by which he appointed William Lightbody of Liverpool his sole executor. He directed him to pay all his debts and a number of legacies, among which there is one in the following words: "To the three children of James Wharrie, vintner in Whitehaven, or survivors of them, share and share alike, the sum of £750 Sterling."

After the legacies is the following clause: "All which legacies being paid, I appoint and ordain my said executor to remit the surplus of my money to Andrew Binnie, in the parish of Graitney, and William Johnston in Langriggs, to be by them divided equally amongst my relations not herein named; and I appoint the legacies to be paid, and the surplus to be remitted, within year and day after my decease."

After Wharrie's death, a competition ensued betwixt James Wharrie, vintner in Whitehaven, to whose children the £750 had been left, and some more distant relations of the defunct, for about £300, which remained after paying the legacies; and for determining the preference of the parties, a multiplepounding was raised in the name of Lightbody, the executor, and of Binnie and Johnston, the trustees above mentioned.

Pleaded for the more distant Relations, That by the very words of the testament, it can never be understood that James Wharrie, or any other person whatever, should be entitled to claim the whole of the money in question. The surplus is thereby directed to be divided equally among the defunct's relations not named in the testament. It is impossible, therefore, that though James Wharrie were the nearest relation, he could pretend an exclusive right to this money.

2do, It is clear, that by the words of the testament, he is cut out from any share in the surplus. It is thereby specially provided, that no person named in the testament could be entitled to any share. But James Wharrie is expressly named, and a con-

siderable sum left to his children. Besides, as he was expressly under the testator's view, and as nothing is left to him, it is evident that the testator did not mean that he should be entitled to claim any thing farther than the £750 left to his children.

[6600] Pleaded for Wharrie; Notwithstanding the clause in the deed, it cannot be pretended, that the surplus falls to be divided amongst the relations of the testator to the remotest degree. The fair meaning and construction of this clause is, that after the legacies are paid, the residue is to be divided among such as would have succeeded to the defunct *ab intestato*, provided they are not named in the will. If, therefore, there is any one person who would have excluded all the rest *ab intestato*, he is entitled, in like manner, to take the surplus in preference to more remote relations. James Wharrie is undoubtedly the defunct's nearest relation not named in the will, and consequently is entitled to exclude all the rest.

2do, It could never be the meaning of the testator, that no person whose name is contained in the testament, should have any title to this surplus. The obvious meaning is, that no person who is honoured, or receives any thing by the testament, could have any title. Wharrie certainly has got nothing by the will, and therefore must be entitled to a share of the surplus. Suppose he had been a witness to the deed, and consequently his name therein mentioned, it cannot be pleaded, that he would have been thereby excluded. The cases are perfectly parallel.

"The Lords having considered the clause in the testament, whereby the residue of the defunct's effects, after payment of his debts, the large legacy to James Wharrie's children, and other legacies therein mentioned, was to be remitted to the trustees in Scotland, to be by them immediately divided among his relations not therein named, found, That James Wharrie is not entitled, as nearest of kin, to claim the said residue to the exclusion of the testator's other relations not named in the said testament, among whom the trustees shall divide the same; and therefore repel the claim of James Wharrie in Whitehaven, as being contrary to the purview of the testament."

For Wharrie, MACQUEEN.—For Lightbody, HEW DALRYMPLE.—Clerk, FORBES.

P. M.

Fol. Dic. v. 3, p. 309. Fac. Col. No. 236, p. 430.

No. 14. [6601] Countess of CROMARTY v. The CROWN. January 26, 1764.

A person settled on his wife a jointure, and in case of no children, a greater. Being attainted, his wife was found entitled to the larger jointure, because, though he had children, they could not succeed to him.

The estate of Cromarty standing entailed in favour of heirs-male, the Earl in his contract of marriage, anno 1724, "became bound, in case of children of the marriage who shall succeed to, and enjoy the estate, to infeft his lady in a liferent locality of 40 chalders victual; and in case there be no children of the marriage, who shall succeed to and enjoy the estate, he became bound to make the said locality 50 chalders." To which there is added the following clause: "That if, at the dissolution of the marriage, there be children who shall succeed to, and enjoy the estate, but who shall afterwards decease during the life of his said spouse, she, from that period, shall be entitled to 50 chalders, as if the said children had not existed."

The Earl of Cromarty being forfeited in the year 1745, having issue both male and female, a claim was entered by his lady for her jointure of 50 chalders, to take place after her husband's death. Objected by his Majesty's Advocate, That she is entitled to 40 chalders only, there being sons of the marriage, who, but for the forfeiture, would succeed to the estate. Answered, That taking the words of the contract strictly, according to common law, the claim must be restricted to 40 chalders, because it cannot be said literally that there are no children of the marriage who can succeed to, and enjoy the estate. But here the forfeiture is plainly a *casus incogitatus*, about which the parties interposed no will; and equity dictates, that the lady ought not to suffer by this over-[6602]-sight, but that the same ought to be supplied by the Court, pro-

vided it can be made evident what would have been the will of the parties, had the event been foreseen. About this there can be no doubt ; for, if the Earl was willing to give a jointure of 50 chalders to his spouse, in case his brother or his nephew should succeed to his estate, *multo magis* in the case of a forfeiture.

“ The claim accordingly was sustained for 50 chalders.”

Sel. Dec. No. 213, p. 278.

No. 15. Dr. JOSHUA M'KENZIE *v.* Legatees of Mrs. ELIZABETH HOLTE.
February 2, 1781.

A lady conveyed to a person, for behoof of his son, a sum which, in case of the son's death, was to devolve to the children of three families equally. This legatee having died, it was found that the sum must be divided among the children of the three families *in capita*, and not among the families collectively ; that children born after the testator's death, but before the legatee's death, had right to a share ; that the issue of those children who died before the legatee, were entitled to their parent's share ; but that the heirs of those who died without issue before the legatee's death, had no claim.

Mrs. Elizabeth Holte, by her last settlement, conveyed to Dr. M'Kenzie her whole funds, in trust, for behoof of his children ; “ but, in case of the death of James M'Kenzie (one of them), she appointed the sum of £700 to be paid and divided by her said trustee, equally among the children of Janet M'Kenzie, and the children of Anne M'Kenzie, and the children of Anne Monro.”

James M'Kenzie having died, the legacy became due to the persons above-mentioned. Some difficulty, however, occurred in the mode of distributing it.

Of the children of the different families, one was not born till after the death of the testatrix, and several others who had survived the testatrix were predeceased at the time of James M'Kenzie's death, and one of these had left issue.

Doubts, therefore, arose concerning the following points ; 1mo, Whether the division prescribed by the settlement should be made *in capita*, or *in stirpes* ; 2do, Whether the child born after the testatrix's death was entitled to a share ; and 3tio, Whether the issue or next of kin of such of the children as survived the testatrix, but died before James M'Kenzie, had also a right to a portion.

In order to obtain, for the direction of his conduct, the judgment of the Court upon the different claims resulting from these particulars, the trustee called all the parties interested into Court, by a process of multiplepoinding, when appearance was made for a considerable number of them.

Some of the Judges, in reference to the first point, were of opinion, that the mode of expression used by the testatrix, in the above quoted clause of the deed, especially in the repeated insertion of the particle “ and,” seemed to indicate an idea of a division between the several families collectively, and not among the children of them all, as mere individuals.

The judgment of the Court, however, was as follows :

“ Find that the sum of £700, bequeathed by Mrs. Elizabeth Holte, in the event of the death of James M'Kenzie, to the children of Janet and Anne M'Kenzie, and Anne Monro, falls to be divided amongst the said children equally *in capita* ; and that each of the said children who existed at the death of the said James M'Kenzie, though born after the death of the testatrix, has [6603] right to an equal share thereof : And find that the issue of such of the said children as died before the said James M'Kenzie, have right to their parent's shares of said legacy ; but that the nearest in kin of the children who died without issue before James M'Kenzie, have no right to any part thereof.”

Reporter, LORD GARDENSTON.—Act. J. M'KENZIE.—Alt. ELPHINSTONE and J. M'KENZIE, JUN.—Clerk, MENZIES.

No. 16. MARGARET OLIPHANT and her Husband v. JOHN OLIPHANT.
June 19, 1793.

An heir of entail exercised a reserved faculty to its full extent, by granting a bond of provision to his younger children then existing. He afterwards married a second time, and had a son and a daughter by the second marriage, but died before making any alteration on the former bond of provision. The son of the second marriage having succeeded to the estate, the Lords found, that he was not entitled to any share of the bond of provision, but reserved to the daughter to claim her share.

The entail of the lands of Bachilton, executed by Patrick Oliphant in 1729, contains the following provision : " That it shall always be liesome and lawful to me, and the hail other heirs of tailzie who shall succeed in time coming, to provide my younger, or their younger children, other than the heir who shall succeed to the lands and estate before mentioned, with suitable and competent provisions, not exceeding three years free rent of the estate for the time."

Under this entail, John, commonly called Lord Oliphant, succeeded to the estate. In 1776, when he had three children, Henry, Margaret, and Eleonora, he granted to the two latter a bond of provision for £1000, or such other sum, less or more, as should amount to, and not exceed three years rent.

After the date of this bond, John Oliphant married a second wife, by whom he had two children, John, who was above two years of age when his father died in the year 1781, and Janet, of whom he left his wife pregnant.

At his death he had no other fund for the provision of his younger children, except the reserved power to burden contained in the entail. Henry, the eldest son by the first marriage, predeceased his father, leaving one son, John Harrison Oliphant, on whom the estate devolved.

In 1785, Margaret Oliphant took a decree of constitution against him, for one half of the sum contained in her father's bond of provision to her sister and her, and having thereafter led an adjudication against the estate, she brought an action of mails and duties.

John Harrison Oliphant, the defender in this action, at the same time brought a reduction of the bond, and whole diligence proceeding upon it ; but having died during the dependence of these actions, the succession opened to his uncle John Oliphant, who thereby became a party to them, and

Pleaded ; The reserved faculty was intended as a fund of provision to the whole younger children of the heir of entail. John Lord Oliphant, therefore, by excluding his children of the second marriage, exceeded his powers, and they are entitled, if not to set aside the bond *in toto*, at least to an equal share of its benefit with his younger children. Upon the same principle, although a [6604] father has the power of distributing the sums provided by a marriage-contract to the younger children, if he should attempt to exclude any one child altogether, that child would be entitled to the same share as if no division had been made.

The case in question is much stronger than if the children of the second marriage had been intentionally excluded. At the date of the bond, the defender and his sister were not in existence, or in the view of the granter. In these circumstances, the law will presume, that it was granted under the implied condition, that if other children should afterwards be born, they should come in for an equal share ; 18th July 1729, *Anderson v. Anderson*, No. 5, p. 6590 ; *Inst. lib. 2, tit. 13, § 1* ; *Vinnius, ad loc cit.* ; *D. lib. 3, § 1, De injust. rupt., &c., test. l. 12, pr. ejus tit.* ; *D. lib. 28, tit. 2, De liber. et post., &c.* ; *Voet. § 4, ejus tit.* ; *Blackst. vol. 2, p. 502* ; *Raymond's Reports, p. 441, Lugg v. Lugg* ; *Peere Williams Reports, v. 1, p. 304, Cook v. Oakly.*

Answered ; The entail gave the heir a power of providing for the younger children, but laid him under no obligation to grant a provision to any one of them, far less to the whole. The spirit of an entail, which is to preserve the estate as free from incumbrances as possible, is adverse to the presumption of such an obligation. As therefore the father might have omitted to take advantage of the faculty altogether, so he is the sole judge of the proper mode of exercising it ; the children here had no *jus crediti*, as they would have had, if they had claimed under a marriage-contract.

How far it was an implied condition in the bond, that the children born after its date should have an equal share of it, is a mere question of intention, and presumption is excluded by the circumstances of the present case, where the granter, the heir under a strict entail, survived the execution of the bond fifteen, and the birth of the defender, two years; Bankt. v. 1, p. 227, § 6, 20th December 1758, Yule v. Yule, No. 51, p. 6400.

The plea of the defender is the more unfavourable, that he has since his father's death succeeded to the entailed estate; and it cannot be presumed, that his father, had he foreseen that event, would have diminished the provisions to his daughters on his account, or at least it is probable that he would have qualified the provision so as that it should cease upon the defender's succeeding to the estate. Little argument can be drawn from the *Tit. De rupt., &c., test.* because by the Roman law *sui heredes* could only be disinherited *nominatim*; so far, however, as its principles admit of a question of implied intention, it is agreeable to the doctrine now laid down; L. 102, *D. De condit. et demonst.* lib. 35, tit. 1; *Voet*, lib. 36, tit. 1, § 18, *ad S. C. Trebell.*

Replied; If the heir of entail had made no provision upon the younger children, the Court, upon the same principles of equity upon which they had proceeded in similar cases, would have found them entitled to the full extent of the faculty; 10th February 1673, *Graham v. Lord Morphee*, No. 10, p. 4100.

[6605] The Lord Ordinary "repelled the defences, and decerned against the tenants and factor in the mails and duties libelled."

At advising a reclaiming petition and answers, it was

Observed on the Bench; If the defender ever had a right to claim any part of the bond of provision, he could not lose it by succeeding to the estate. But as he was born two years before the death of his father, who, during that time, neither revoked the bond, nor made any alteration upon it, the presumption of law is, that he did not intend that this son should have any share of the provision. The defender's sister is in a different situation. She, as a posthumous child, may be entitled to a proportional part of the bond. But as she is not a party in the present suit, all that can be done is to reserve her interest.

The Court accordingly "repelled the defences, so far as the petitioner (defender) claimed any share of the provision in question, as one of the younger children, and found the pursuer and her husband entitled to one half of said provision; reserving nevertheless to Janet Oliphant the petitioner's sister to claim a share of the said provision."

Lord Ordinary, HAILES.—Act. ROLLAND *et alii*.—Alt. MACLEOD-BANNATYNE.—Clerk, SINCLAIR.

R. D.

Fol. Dic. v. 3, p. 310. *Fac. Col.* No. 63, p. 138.

No. 12. [6616] *Mr. JAMES BAILLIE v. SILVERTONHILL*. January 31, 1621.

The Lords found no process in improbations, except the advocate be pursuer, albeit the decret obtained at the advocate's instance was craved to be reduced, and that the advocate was defender.

Found by the Lords, that a decret of improbation, given against a minor of six years not compearing, was reduceable, and that he could not be heard to produce.

In the same cause found, that he should be heard to improve the executions of the summons, albeit the process bore that he compeared and proponed an exception dilator, and thereafter passed from his compearance. *Kerse, M.S. fol. 207.*

No. 140. [6716] *THOMAS DUNBAR of Muchrome v. The VASSALS of the Barony of Muchrome*. December 20, 1662.

It was sustained that the defender had produced sufficient to exclude the pursuer, and that till his rights produced were discussed and taken away, there could be no certification *contra non producta*.

Thomas Dunbar of Muchrome pursues reduction and improbation against the vassals of the barony of Muchrome, wherein all the terms being run, re-[6716]-serving

defences, now, at the last term, it was alleged for Hay of Ariolland, no certification *contra non producta* against him, because he had produced a precept of *clare constat* from the pursuer's father as heir, to whom he pursues. 2do, It was alleged, That he had produced sufficiently to exclude the pursuer's right produced, and so till his rights produced were discussed and taken away, there could be no certification *contra non producta*. The pursuer answered to the first, that the precept of *clare constat* was but in obedience of a precept out of the chancery. As to the ancient rights produced, if the defender would rest thereon, he needed not stand that certification should be granted against any others not produced, seeing these produced are sufficient; but if the certification should be thus stopped, the effect of all improbations and non-entries should be marred by dropping in new writs from time to time, and still disputing thereon, and so dispute the reasons before the production were closed; at least the defender ought to allege, that the writs produced are sufficient, and declare he will make use of no further in this process.

The Lords repelled the first allegiance on the precept of *clare constat* being for obedience, but found the second allegiance relevant *hoc ordine*, and ordained the defender to condescend upon his rights by way of defence to the pursuer, to answer thereto presently.

Fol. Dic. v. 1, p. 450. Stair, v. 1, p. 151.

No. 177. [6755] HENDERSON v. HENDERSON. June 20, 1672.

In an improbation, where a term was circumduced for not abiding by the writ, it was declared to make no faith, as if it had not been produced.

In an improbation betwixt Henderson and Henderson, the production being satisfied, and the writs produced, there was a term assigned to the defender to compear and abide by the same; and the defender not compearing, and the term circumduced, it was proposed to the Lords what should be done thereupon, whether the writs should be improven simpliciter upon that evidence, that the user thereof would not bide by the same, so as to infer a forgery, or if further evidence behoved to be made use of.

The Lords found, That decreet ought to follow thereupon, as upon the certification implied in the act for biding by, that they should make no faith in the same manner as in a certification for not production.

Fol. Dic. v. 1, p. 457. Stair, v. 2, p. 85.

No. 22. [6849] CAMPBELL v. CAMPBELLS. December 15, 1738.

A father who was bound in his contract of marriage to provide and secure a sum of money, and also the conquest during the marriage, to himself and wife in conjunct fee and liferent, and the children of the marriage in fee, having purchased an estate in land during the marriage, and taken the rights thereof to himself, his heirs and assignees, thereafter, by deed, settled his whole estate, heritable and moveable, upon his eldest son, with the burden of such provisions to his younger children as two Noble Lords therein named should appoint.

In a reduction of this settlement at the instance of the younger children, it was pleaded, that they were creditors *per capita*, and each entitled to an equal share; and answered for the defenders, that obligations in contracts of marriage in favour of the children of the marriage, are in law understood to be granted *familix*, so as to restrain alienations *extra familiam*, but not to rank each a creditor *in capita*, or to restrain the father from giving the whole to any one he pleases.

The Lords found, "That each of the children were entitled to a share in the said special sum and conquest, and that the father's taking his whole land estate acquired by him, and disposing his whole moveables to his eldest son, [6850] one of the children of the marriage, was not legal implement of the above provisions; but found that the father had a power of division of the said special sum and conquest amongst his children, in such manner as might be found rational; and therefore found that he

might lawfully acquire a land estate, and take the rights thereof to his eldest son, and might also dispoise his moveable estate to him, with the burden of rational provisions to his other children; and found, that as the father had himself power to settle and determine the extent and proportion of the provisions to be paid to the younger children, he might also delegate that power to any other person in whom he confided; and superseded further procedure till a day certain, betwixt and which notice was to be given to the said Noble Lords to declare their will in the matter."

And they having declined to interpose, the Lords "found the foresaid deed of settlement void, and the whole children entitled to an equal share of both heritage and moveables, and found that they had no powers to interpose in the modification of rational provisions to the younger children."

N.B. Heirs or children in provisions in contracts of marriage receive their construction from the nature of the subject provided. If it be a land estate, then whether the provision be to heirs or to children, it is the heir of the marriage who is creditor in the provision; if it be a sum of money that is to be laid out and secured, or a tenement in burgh that is provided, where there is no view of the continuation of a family, then whether the expression be heirs or children, the whole children are creditors.

Kilkerran (PROVISION TO HEIRS AND CHILDREN), No. 4, p. 456.

No. 27. [6870] *LIVINGSTONE v. FULLERTON*. February 28, 1627.

One Livingston seeking decree to be transferred in one William Fullerton, as lawfully charged to enter heir to his father, it was alleged, That the summons was raised before year and day had past after the defender's birth, though his father had died year and day before; for the child was posthumous. It was found, that he should have waited year and day after the child's birth before he had raised summons upon his charge. *Fol. Dic. v. 1, p. 467. Spottiswood* (HEIR), p. 137.

No. 32. [6873] *HAMILTON v. BONAR*. February 6, 1677.

An apparent heir intromitting with moveable heirship and rents of land, within year and day after the defunct's decease, may be pursued for his debts, *et non habet animum deliberandi intra annum et diem*.

The Lords found, that apparent heirs may be pursued, as behaving before the year expire; seeing *eo ipso* that *miscent, adeunt passive*; and as to that pretence, that they would be wronged if it should have appeared by the probation that they did not meddle; it is of no weight, seeing the Lords may modify expenses.

Fol. Dic. v. 1, p. 468. Dirlston, No. 450, p. 219.

No. 35. [6876] *JANET PITCAIRN v. ROBERT WALWOOD*. December 4, 1702.

Poinding of the ground may be pursued *intra annum deliberandi*.

Janet Pitcairn, relict of William Walwood of Touch, being infeft in a liferent annuity of 1000 merks per annum, pursues a poinding of the ground against the tenants, and Robert Walwood, now apparent heir to the fiar, her husband; who alleged, No process against him till his *annus deliberandi* expire. Answered, In pursuits for personal debts a year is allowed to deliberate, but in actions *contra fundum*, where the ground is principally debtor, and the heir only called *pro more*, it was never pretended; and at this rate liferenters might be delayed from their jointures

a whole year after their husband's death, and the heir might as well plead an *annus deliberandi* as here; or what if a stranger come to be heritor of the lands craved to be poinded, shall he have a year to deliberate? And there is no charge here to enter heir, and therefore no deliberation; and it was so found in real actions, 2d January 1667, Oliphant *contra* Hamilton, No. 6, p. 2171. Replied, *Quorsum* is the heritor called if he may not propone a defence without the hazard of incurring a passive title? and a declarator was not sustained against an apparent heir within his years of deliberation, 26th June 1667, Dewar *v.* Paterson, No. 31, p. 6873, only, that it was in a count and reckoning, and not in a poinding of the ground. The Lords found the *annus deliberandi* took no place in this case.

Fol. Dic. v. 1, p. 468. Fountainhall, v. 2, p. 163.

No. 37. [6878] GEORGE LOCKHART of Carnwath *v.* The Heir of CHEISLY of Kerswell.
December 21, 1708.

A declarator of non-entry was sustained, though executed within the year, the day of compearance falling without the year.

George Lockhart of Carnwath, being superior of the lands of Cheisly of Kerswell, and likewise a creditor-adjudger, he pursues the heir in a declarator of non-entry. Alleged, No process, because you not only raised your summons within my year of deliberation, but did likewise execute the same within the year; and though it was to a day of compearance without the year, yet the citation within my privileged time was preposterous and a nimious anticipation, the whole year being indulged to apparent heirs by law. Answered, There is nothing more ordinary in practice than to raise and execute the summons within the year, providing it be to a day without it, and charges to enter heir have ever been so executed; and Stair, book 4, tit. 8, § 6, allows the same in the very case of non-entries, which, though they seem penal as a feudal delinquency, yet are more favourable than the ancient feudal law giving the whole rents was, whereas the retoured duty is only payable before citation by our customs.—The Lords repelled the allegiance against the execution of its being executed within the year, seeing the day of compearance was without it. But what influenced this decision much was, the pursuer having suffered his summons to sleep for several years; and, having raised a wakening, he passed from all the preceding years, and restricted his non-entry to the date of the execution upon his wakening, and declared he made no other use of his process but only to get payment of the debts Kerswell owed him, though this fell heavy on the creditors. It was started among the Lords, if a summons, whereon nothing had followed but a citation, without any judicial minute of process, could regularly be wakened; or if it did not expire, even as a charge of horning does, if denunciation be not used within the year of the charge; for why should a messenger's execution of a summons last longer than his execution on a horning? Only this difference may occur, that, on a citation in a summons, arrestment or inhibition may be used, and why should they perish by the summons not being called within the year; and why may not a wakening make this revive and convalesce? But this argument seems to yield where no such diligence is done on the dependence, that there it should totally perish. Sir Thomas Craig, in his book *de feudis*, screws the casualties of superiority too far, because they were anciently gratuitous donations, yet now when acquired for onerous causes, they cannot be so favourable, for *mitiores pœnæ nobis semper placere*, and the vassal was allowed year and day for applying to his superior to be entered and infeft, *ergo* the apparent heir within that space ought not to be pursued.

December 15, 1709.—George Lockhart of Carnwath, being superior to Cheisly of Kerswell, and his lands being affected by his creditors' diligence, he pursues a declarator of non-entry both against him and his creditors. Alleged, I mo, No [6879] process, because your action is raised within the *annus deliberandi* allowed to apparent heirs, and executed within the same, though the day of compearance be without the year,

which is a preposterous diligence. Answered, There is nothing more ordinary than raising and executing of summonses *intra annum deliberandi*, providing the day you cite him to be *extra annum*. Replied, Whatever may be tolerated to sustain ordinary summonses *ad fundandam litem*, yet it can never be extended to odious unfavourable cases, such as non-entries, which are penal. The Lords repelled the dilator. 2do, Alleged, I purged the *mora*, in so far as I offered a precept of *clare constat* with a year's rent. Answered, *Non relevat*; for I being minor, the offer should have been made to my curators, as well as to myself, and I was not bound to sign your precept; but the legal compulsitor was to run the charges out of the Chancery, which method you took not. The Lords repelled the allegiance. 3tio, Alleged, You have adjudged the lands for a debt owing you by the vassal, and so may come in *pari passu*, or made yourself preferable for your expenses, and they were ready to prefer him *quoad* his debt, as far as his diligence would carry him, but it cannot import a consolidation of the property with the superiority. The Lords laid hold on an offer made by Carnwath, that he restricted the effect of his non-entry to his summons of wakening, and made no farther use of the casualty of non-entry but singly to prefer him to the other creditors, in so far as might secure the payment of the true sums owing him, viz. principal, annualrent, and debursed expenses; therefore they repelled the creditors hail defences, in respect of his declaration and restriction foresaid; which imported, that, if he had not made this concession, but extended the non-entry to the full, over and above his debt, some of the Lords would not have been so clear to repel the defences. For, when feus were gratuitous donations, it was no wonder that these feudal delinquencies were allowed; but now, these 200 years bygone, they being onerous and bought at a full adequate price of 20 years purchase or thereby, it seemed mighty unfavourable to forfeit a poor vassal upon the matter, for his negligence in not entering *debito tempore*. The Lords determined nothing about the year's rent for entering the creditors, seeing that was due by law, and came not to be considered in this process. The heir's own entry was only the duplication of the feu-duty; but the first adjudger or purchaser being a singular successor, behoved to pay a year's full rent, if the superior refused any ease.

Fol. Dic. v. 1, p. 467. Fountainhall, v. 2, pp. 473, 541.

No. 42. [6882] EDWARD SUMMERS v. SIMSON and GARDNER. December 23, 1757.

The objection, That diligence was *intra annum deliberandi*, not personal to the heir, but competent also to creditors. A person left a daughter, and his wife pregnant, who brought forth a posthumous son. This son died a few months after his birth. Found that in computing the *annus deliberandi*, the time between the father's death and the birth of the son was not to be reckoned.

On the 23d March 1751, Thomas Summers died considerably in debt, leaving a daughter Margaret, and his wife with child, who, on the 23d October thereafter, was delivered of a posthumous son, named Thomas.

On the 28th January 1752, Simson, one of the creditors of Thomas Summers the father, took decret of constitution against Thomas the son, as charged to enter heir to his father, and on the 16th June 1752, decret of adjudication. Thomas the son died in August 1752.

In a competition betwixt the creditors of Thomas Summers, it was objected by Edward Summers, one of them, to this diligence, That it had been taken *intra annum deliberandi*.

Answered for Simson, The objection was never made by Thomas Summers, the son, to the diligence. The objection was personal to the heir himself; and if he did not make it, no competing creditor could found upon it.

Replied for Edward Summers; By the nullity of the two decreets, there was a *ius quæsitum* to him, which the failure of the heir to object, could not disappoint. The objection, That decret was taken *intra annum deliberandi*, is known to make the defender as much free from the effects of the decret, as the objection, That a bond

wanted writer and witnesses names, is known to make him free from the effect of the bond. In the last case, a creditor can ob-[6883]-ject to the bond, though the defender did not; and in the other case, he ought to be allowed to object to the decret, though the defender neglected to do it.

The objection of minority and lesion, or on the head of interdiction, appear to be abundantly personal; yet the creditors of a minor, or of an interdicted person, may make use of these objections for themselves, bring a reduction on them, and turn the fruits of them to their own account. The objection of deathbed is, from our old law-books, and the nature of the thing, as personal as can well be conceived; and yet it is competent to the creditors of the heir to reduce *ex capite lecti*; Creditors of Balmerino *contra* Lady Coupar, No. 25, p. 3203. And from the analogy of law in many other cases, the bent of it appears to be, to give creditors the power, not only of affecting every right in their debtor, but likewise of pleading, each for himself, every relevant ground of challenge which the debtor could have pleaded.

With regard to the present species of objection, if the validity of it was made to depend on the heir's proponing or not proponing it, this would be giving a power to the heir, and not to the law, to unhinge interests, and create preferences. Or even, though the heir was not partial, yet chance preferences might happen, altogether contrary to equity. Every one knows, that he ought not to attack the heir for a year, and that adjudications within year and day of each other are equal; trusting to this, a creditor might not use his adjudication till the end of the second year, and during the first, another creditor has proceeded: If it was deemed that the objection was only personal to the heir, then it might happen, that by the heir's neglecting to use it, a creditor might be cut out altogether, who had conformed himself exactly to the known procedure of law.

"The Lords found Simson's adjudication null, as *intra annum deliberandi*."

In this competition it appeared, that Gardner, another creditor, had, on the 9th of May 1753, taken decret of constitution against Margaret Summers, as charged to enter heir to her father, and on the 7th of August thereafter adjudged.

Objected by Edward Summers to this diligence, It was taken *intra annum deliberandi* of the year which Margaret had, after the death of her brother Thomas the son.

Answered for Gardner, That adding together the time betwixt the death of Thomas the father, and the birth of Thomas the son, when Margaret was heir; and the time betwixt the death of Thomas the son, and the date of the diligence, when she likewise was heir; she had more than a year to deliberate.

Immediately after the death of any person, the *annus deliberandi* must run every moment against some person or other; and as it is an established point, [6884] That it does not run against a child *in utero*, it must have been running against Margaret the daughter.

"The Lords found Gardner's adjudication void, as *intra annum*."

For Edward Summers, J. DALRYMPLE.—For Simson and Gardner, MACQUEEN.

J. D.

Fol. Dic. v. 3, p. 317. Fac. Col. No. 76, p. 131.

No. 8.

[6887] MUIR v. MUIR. January 1588.

In double resignations the first was preferred, though sasine was first taken upon the other.

There was one Robert Muir burgess of Kirkcaldy, and Moreston his mother, pursued John Muir his brother, to hear and see a pretended renunciation, made in the Bailie's hands of a tenement of land, together with the infetment and sasine that followed thereupon, to be reduced and rescinded, because the said tenement being wadset to one Smellie, burgess of the said burgh, and who compeared personally before the bailies of Kirkcaldy, and there granted [6888] the lands lawfully redeemed by the said Moreston, who had the right of the reversion, and thereafter resigned the lands in the said Moreston's hands, for sasine to be given to her heritably, as to her that had

the undoubted right of the reversion, to redeem the said tenement ; and so the said resignation made thereafter, with the infeftment and sasine past thereupon, in liferent to the said Moreston and Muir her spouse, and his heirs, in fee and heritage, ought to be rescinded ; because, in respect of the first resignation, the maker thereof was denuded of all title and right, and had no power to make the same. It was excepted by the defender, That the first resignation took not effect by sasine, but by the space of 20 years after the same was made, and so was *actus imperfectus*, and the resignation, with the infeftment and sasine that was given in the mean time, was *actus perfectus* ; and the matter being reasoned among the Lords *cum summa contentione*, it was alleged, That the second resignation, with the sasine that followed thereupon, ought to have place and be preferred to the first resignation, whereupon no sasine following, *quia de jure in acquirendo dominio ubi plures concurrunt, potiores esse causas ejus cui prius traditio facta est, ut in L. 15, Cod. De rei vindicatione ; textus est apertissimus, et est quasi declarativa juris, questione proposita in L. 6, C. De hæreditate vel actione vendita. " Qui tibi," ait lex, " hæreditatem vendidit, antequam res hæreditarias traderet, dominus earum perseveravit, et ideo vendendo eas aliis, dominium transferre potuit "* ; and so, by the text, the first resigner and the first resignation being made, and no tradition of sasine following thereupon, remained still, *et ut ait lex, " perseveravit in dominio,"* and might aye resign again in favour of the second, with sasine and tradition following thereupon ; *quia fuit actus perfectus ; et tenet Bald. conclusive in dicta lege, 15, C. quod prioritas tituli non attenditur, sed prioritas traditionis, et 45, ibid. ait, quod quoties ad confirmationem alicujus, actus requiruntur duo, ille potior est, in cujus persona illi duo reperiuntur, titulus et sasina ; quæ vero sasina resolvitur in terræ et lapidis traditione, ut moris est ;* and so the first resignation, without the sasine following thereupon, could never be judged to be *actus perfectus quoad domini traditionem* ; but the resignation made thereafter, with the sasine and tradition, behoved to be preferred as before is rehearsed ; *et Bald. quod non prioritas tituli sed traditionis attendebatur.* It was answered upon the other part, That the first resignation being made, the resigner thereof was utterly denuded, *et quod postea plus juris in alium transferre non potuit quam ipse habuit* ; and albeit there was no sasine that followed immediately after the same, and that in the meantime, sasine was obtained upon the second resignation, yet the last sasine behoved to be drawn back to the first resignation, and made the same *actus validus et perfectus.* The Lords, after long reasoning repelled the exception, and found the reason of the summons relevant.

Fol. Dic. v. 1, p. 469. Colvil, MS. p. 435.

No. 11. [6890] Sir WILLIAM PURVES v. STRACHAN. November 14, 1677.

Resignation *in favorem* does not denude the former vassal ; and, till the new vassal be infeft, the casualties of superiority fall by the resigner and not by the acquirer.

Sir William Purves as donatar to the marriage of the heir of the Laird of Elsieck, who died last infeft in the lands of Creichie, holden ward of the King, whose son is unmarried, and marriageable, pursues a poinding of the said lands for the avail of the marriage. Compareance is made for Strachan of Kinaldie, who alleged, That the lands of Creichie could not be affected with the marriage of Elsieck, because his father was denuded by an absolute disposition in favours of Kinaldie, and a resignation made thereupon, accepted by the King as superior, whereupon there is a charter granted in Exchequer, "changing the ward with a *novo damus*." The pursuer answered, *non relevat*, unless Kinaldie had been infeft before Elsieck's death, because Elsieck continued vassal until he was divested, which a resignation *in favorem* could not do ; it is true, a resignation *ad remanentiam*, which requires no more for its accomplishment, would fully denude the vassal, and consolidate the property with the superiority ; but the acceptance of a resignation *in favorem*, doth import no more than the superior's being willing to admit a new vassal, who could not become vassal till he were infeft, and so the acceptance did only import an obligation upon the superior, whereby he might be obliged to infeft the new vassal, which also might

oblige that vassal to complete his infectment ; but there is neither law nor practise to take from the superior, by this free deed of his accepting of a resignation, the whole casualties of his superiority, except only the non-entry, which reaches only the retoured duties, till it be declared ; for the person in whose favours the resignation is made, till he be infeft, is no vassal, and hath no real right, and so no casualty can fall to the superior by his ward or marriage, or his liferent-escheat ; neither can the fee recognise by any deed of his, and therefore there being neither example nor rule to burden the new intended vassal, the old vassal remains vassal, and all the casualties fall upon his account ; for the property remains in him, though it be in the superior's hands by non-entry, in the same way as it is before the vassal's heir be infeft ; and therefore an appraising against the old vassal, and infectment thereon before an infectment upon the vassal's resignation, will be preferred ; yea a voluntary infectment upon a posterior resignation, being first expedie, will be preferred to a posterior infectment upon a prior resignation, albeit there might appear fraud in the superior and prior vassal, in granting and accepting double dispositions, which are declared fraudulent by act of Parliament ; yet the purchaser of the first infectment not being *particeps fraudis, dolus auctoris non obest successoris*, so his right is good ; and it is certain by the present custom, that superiors accepting resignations, do never notice when the new infectment is expedie, knowing the old vassals remain till then ; so that Kinaldie *sibi imputet*, that he did not expedie his infectment before his author died. It is true, if the superior be *in culpa aut mora*, in not expediting his infectment, he might justly lose the ca-[6891]-sualty incurred by his own fault or delay. It was replied for the defender that the resignation accepted denudes the resigner, so that in him there is no real right, but the feudal contract betwixt him and his superior is fully dissolved ; for as he was infeft by solemnity of sasine by earth and stone, so he is divested by a symbolical re-delivery of his fee and possession by staff or baton, which he delivers to the superior, and he takes it in his hands, in evidence of his acceptance, and delivers the same to the acquirer, who receives it, in token of his becoming vassal, which dissolves the first feudal contract, and makes up the second ; and as all casualties fall by the apparent heir, though not infeft, so the casualty should occur by the new vassal, as if he were infeft, who can never pretend that by his own delay to infeft himself, he should shun the casualties of the fee ; for it is certain that *refutatio feudi* is always competent to the vassal, he satisfying anterior casualties ; which refutation is upon resignation by staff or baton, which truly carries the fee to the superior ; though when it is *in favorem*, there be an obligation upon the superior to resign the fee to another ; and therefore the mails and duties belong to the superior by the resignation only, *ex pleno dominio* ; because the former vassal cannot pretend to the duties, having resigned the fee ; nor can the new vassal, till he hath perfected his infectment ; so that the superior having the fee in his own hands, and the full profit, he can have no other casualty ; for if the question were now of the ward-duties, they could not be claimed by reason of the ward, but the whole duties by the resignation ; so that the superior should have no casualty after resignation, while the fee is in his hand ; or if any, it should not fall by the old vassal but by the new ; wherein neither the King nor any other superior will have detriment as to the future ; because they may qualify their acceptance of the resignation, that the new vassal should be liable in all the casualties, through his death, rebellion, or injury, as if he were presently infeft ; which would do better for the superior, the acquirer being always more opulent than the seller ; who having sold the lands with the superior's consent or acceptance, and likely to be free of a ward, should at the option of the buyer, who might lie uninfeft so long as he pleased, incur the marriage of his heir ; which oftentimes would be of greater value than this fee ; seeing the marriage respects the apparent heir's whole estate heritable and moveable.

The Lords found, that the acceptance of a resignation *in favorem* did not denude the former vassal ; and therefore till the new vassal was infeft, they found the casualty of superiority fallen after the resignation, to arise from the resigner, and not from the acquirer ; and so found the land to be burdened with Elsie's marriage ; for they considered that the real right of property is not in the superior by a resignation *in favorem*, and he only liable to a personal obligation ; so that an original infectment by the superior to a third party might give the first real right, and exclude both resigner and purchaser ; and though the question were of the ward-duties, the superior

might take himself to the ward, which needs no declarator, and continues during the vassal's minority; [6892] and not to the non-entry falling by the resignation; though the fee be in the superior's hand during the ward, &c., yet not *jure proprietatis*, but *jure superioritatis* by a casualty of the superiority.

Fol. Dic. v. 1, p. 469. *Stair*, v. 2, p. 558.

No. 13. [6894] Countess of KINCARDINE v. Earl of MARR. February 1686.

The Lords found, that an infetment of burgage lands from the King was not from the right superior, though the Magistrates of Royal Burghs are reputed only the King's Bailies, and burgage holds of the King; and, therefore, preferred a posterior infetment from the Bailies and Town-clerk. 2do, They found that a few acres, bought by my Lord Kincardine from several heritors, being imparked, and so naturally united, and contiguous with some other parcels of his own land, a disposition, given by a subject, for taking sasine at the manor-place for all these acres and park, was sufficient, without a formal erection and union from the King.—See UNION. *Fol. Dic.* v. 1, p. 470. *Harcarse* (INFETMENT), No. 604, p. 168.

No. 14. [6895] BESSEY BENNET, &c. v. JAMES SCLANDERS, &c. July 5, 1711.

A base infetment of annualrent in burgage lands, given by a Bailie of a burgh, as Bailie in that part, and the Clerk as a common notary, was sustained. A liferent infetment in burgage lands, upon a precept of sasine in an heritable bond, to be holden blench of the granter, was sustained.

Bessey Bennet and James Sands, her first husband, being infet in an annualrent of £48, out of some tenements and burger acres in Culross, belonging to the deceased John Sands, upon a precept of sasine in an heritable bond for the principal sum of 1200 merks, granted by John Sands to James, his eldest son, and Bessey Bennet, his spouse, the longest liver of them two, in liferent, and to the children of the marriage, in fee; Bessey Bennet and Mr. William Drummond, her present husband, for his interest, craved to be preferred in a competition of John Sand's Creditors.

Alleged for the other Creditors, 1mo, Bessey Bennet's infetment is null, not being given by one of the Bailies of the burgh, and common Clerk thereof as such, upon resignation, in the terms of the act 27th, Parl. 1, James VI. and Young v. Town of Montrose, 15th Dec. 1629, *voce* SUPERIOR and VASSAL; but a base infetment, granted only by a Bailie of the burgh, as Bailie in that part, and the Clerk as a common notary, upon a precept of sasine from the granter of the heritable bond, to be holden of himself blench; whereas, by a long tract of custom, a precept of sasine is never in use to be inserted in dispositions of burgage lands, but only a procuratory of resignation. 2do, Suppose base infetments in burgage lands could be sustained, yet this cannot, [6896] because not recorded in the books of the shire, or general register, but in the Town-clerk's books, which are only a proper register of sasines, given to be holden burgage upon resignation in the Bailie's hands, as representing the community.

Answered for Bessey Bennet, The act of Parliament, in King James VI.'s time, dischargeth private infetments to be given by any other than the Bailies and Clerks of the burgh, as being a casualty due to them; who cannot complain for being deprived thereof, when they voluntarily give sasine upon the granter's precept. The decision, 15th December, 1629, relating only to the tinsel of superiority, hath no contingency with the point. 2do, It is ridiculous to assert, that any infetment within burgh, whether base or not, should be registered in the shire, and not in the town books. 3tio, Whatever might be pretended for transmitting the property of burgage tenements by public resignation, nothing could hinder a servitude upon

these to pass by a base infetment ; especially considering that this is only a temporary right of liferent provision, and the precept of sasine was executed by the Bailie and the Clerk, and recorded in the town Court books, in the terms of the act of Parliament.

The Lords sustained the infetment in favour of Bessey Bennet.

Fol. Dic. v. 1, p. 470. Forbes, p. 517.

No. 34. [6917] The Daughters of Mr. JAMES MORTON Supplicant. November 26, 1668.

The daughters and heirs of Mr. James Morton gave in a supplication to the Lords, making mention that their father being infet in an annualrent, effeiring [6918] to the principal sum due to him by the Lord Balcombie, they did thereafter obtain decret for the principal sum, and thereupon apprised the property wherein they stand infet, holden of the King ; in which apprising there is a reservation exprest, without prejudice of the infetment of annualrent ; and now being desirous to be infet in the annualrent, as heirs to their father, and that themselves were superiors by the infetment on the apprising, and conceived it proper for them to infet themselves, did therefore desire the Lords to grant warrant to direct precepts forth of the Chancery, for the King to infet them.

The Lords having considered the case, and argued the matter amongst themselves, whether it were more secure and legal, that they should be infet by the King upon their supplication ; or that they as having right to the property by their infetment on the apprising, should grant precepts for infetting themselves in the annualrent, as heirs to the annualrenter ; or whether their infetment in superiority would consolidate the annualrent without infetment ; the difficulty against the King's infetting of them was, that the King infetts none but those that hold immediately of him, or upon the disobedience of the immediate superior, *supplendo vices*.

To which it was answered, That the King may supply the place of the immediate superior, either when he will not, or cannot infet his vassal, and the petitioners conceive that in this case they cannot ; and both being extraordinary remeids, the Lords may do the same, and have done it in former cases. The difficulty as to infetting themselves was, that the right of property, and *jus nobilius*, did extinguish the right of annualrent ; and yet the right of property may be reduced, and then they would be necessitated to defend themselves by the annualrent ; and therefore it is not an absolute extinction, but *in tali casu* ; and therefore they have reserved the same in the apprising. The difficulty as to the third way was, that if the right of the superiority should be reduced, they should be without infetment at all.

The Lords found that they might either infet themselves by their own precept, or might get precepts from the King, as desired, *periculo petentium*, or they might make use of both together.

Fol. Dic. v. 1, p. 471. Stair, v. 1, p. 567.

No. 36. [6919] WALLACE v. DALRYMPLE. June 23, 1742.

Where an heritable bond bore an obligation to infet in an yearly annualrent out of particular lands, and forth of all other lands belonging to the granter, and lying within the shire of Ayr, as the same are enumerated in the granter's infetments, with a precept of sasine in the same precise terms, whereon the notary extended a sasine, in which he comprehended other lands as contained in the granter's infetments than those particularly mentioned in the heritable bond and precept, but without expressing any such infetments to have been produced to him ; the Lords " Found the sasine null as to all the lands [6920] other than those particularly expressed in the heritable bond and precept, which were the only warrants produced and published for taking thereof."

Fol. Dic. v. 3, p. 317. Kilkerran (SASINE), No. 4, p. 504.

No. 43. [6831] The Children of WILLIAM GRAHAM, &c. v. Captain JOHN GRAHAM, &c.
July 4, 1759.

Asasine, bearing delivery of liferent state and sasine, though proceeding on a disposition of the fee, vests only the real right of liferent.

Thomas Glover was proprietor of part of the lands of Baltillie, holding of the Crown. In order to convey the superiority of these lands to Sir Thomas Hope of Craighall, and to continue the property to himself and his heirs, he, in 1678, entered into a contract with Sir Thomas, whereby he disposed to him the lands; and Sir Thomas became bound to get himself infeft in the same by the Crown, and then to redispone the lands to Glover, and his heirs, to be held of Sir Thomas, and his successors in feu.

Sir Thomas Hope dying before the contract was implemented, Sir William Hope, his son and heir, in implement thereof, at Glover's desire, granted, in 1694, a feu right and disposition of the lands of Baltillie, "to Alexander Reid, and Anne Glover, his spouse, eldest lawful daughter to the said Thomas Glover, the longest liver of them two, in conjunct fee and liferent, and the heirs procreated, or to be procreated, betwixt them; which failing, to the said Alexander Reid, his heirs and assignees, heritably and irredeemably." The deed contained an obligation upon Sir William to infeft the said Alexander Reid, and Anne Glover, in the same terms with the above words of the dispositive clause; but the precept of sasine, thrown into the clause of registration, was thus expressed:—"And to the effect the said Alexander Reid, and Anne Glover, his spouse, may be infeft and seised, as above written, I desire and require you, &c., my bailies in that part, that, immediately on sight hereof, ye pass to the grounds of the said lands, and there give and deliver liferent state and sasine, with actual, real, and corporal possession of the same, to the said Alexander Reid, and Anne Glover, spouses, or their certain attornies in their names, bearers hereof, by deliverance of earth and stone of the ground," &c.

Upon this disposition and precept, Alexander Reid, in March 1712, after the death of his wife, Anne Glover, took infeftment, in this manner. The instrument recited the tenor of the dispositive clause, and obligation to infeft, as above, and afterwards the precept of sasine, *verbatim*. Then it described the act of infeftment thus:—"After reading and publishing of the foresaid disposition, and precept of sasine, above written, therein contained, &c., the said bailie gave and delivered liferent state and sasine, corporal, actual, real, and peaceable possession of the samen lands, to the said Alexander Reid, and that by deliverance to him, in his hands, of earth and stone of the ground of the said lands, accepting thereof, as use is, none opposing or contradicting the same, after the form and tenor of the foresaid disposition, and precept of sasine, above written, therein mentioned, in all points."

The said Alexander Reid and his wife contracted considerable debts. In 1699 they granted an heritable bond on the lands of Baltillie to John Graham, [6832] for 550 merks, on which he was infeft the same year. In May 1712, Reid granted an heritable bond of corroboration to Thomas Gourlay, for a debt of £526 Scots, on which infeftment was taken in March 1725. The children of William Graham, and William Seton, writer to the signet, being also considerable creditors, adjudged the lands of Baltillie in 1726; and Captain Graham of Greigston, and James Smith, who came to have right to the above heritable bonds, likewise adjudged.

In a process of ranking and sale, after Reid's death, the other creditors-adjudgers claiming to be ranked *pari passu* with Graham and Smith on their adjudications, the latter insisted to be preferred to them on their infeftments in 1699 and 1725.

Objected by the adjudgers, That the real or complete feudal right to the fee of the lands was not vested in Alexander Reid, the common debtor, by his infeftment in March 1712, but only the right to the liferent of those lands; and, therefore, he was not in a condition to grant any heritable bond or infeftment, to burden or affect the subject beyond the endurance of his own life.

Answered for Graham and Smith, 1mo, It is incontestible, that the property of the lands was disposed by Sir William Hope to Alexander Reid, as it was never doubted, that a conveyance to a husband and wife, in conjunct fee and liferent, and their heirs; whom failing, to the husband's heirs, vests the fee in the husband. Nay, even sup-

posing the dispositive clause had been conceived in favour of the husband and wife, in *liferent*, and to the heirs to be procreated betwixt them ; whom failing, to his heirs and assignees, without the words "conjunct fee," the fee must have been found to be in the husband, descendible to his heirs, and affectable by his creditors ; because, it is a principle in our law, that the fee or property of lands cannot be *in pendente*, but must be vested in some person existing at the time ; and where lands are so disposed, the *liferent* is to be constructed an *usufructus causalis* in the husband, else the fee would be suspended till the succession should devolve on his heirs by his death. Their being called as heirs, shew they are to have no right till that event happen ; and they could not succeed as heirs to him, if he had not the property, but only a *liferent*.—So it has been established by many authorities and decisions ; particularly, 25th November, 1735, *Creditors of Robert Frog v. his Children*, No. 55, p. 4262. That such must be the construction of the *liferent*, so provided in the precept of *sasine* in question, is equally clear ; as that precept is only a clause relative to the former parts of the same deed, which shew the undoubted intention of the parties to vest the fee in the husband. Even supposing the precept had been so extended in a separate writing, the import of it would be the same ; as it bears to be granted, "to the effect the said Alexander Reid, and Anne Glover, his spouse, may be infert, and seised, as above written." And it will not be presumed, that a precept, granted for the purpose of implementing the obligation on Sir William Hope, [6933] to infert, as therein mentioned, will fall short of its intent, when the words can admit of a meaning agreeable to it. 2do, The same argument holds as to the instrument of *sasine*, where the conjunct fee and *liferent* and substitution are twice repeated, both in the recital of the dispositive clause, and of the obligation to infert, and *liferent* state and *sasine* is given, "after the form and tenor of the foresaid disposition and precept of *sasine*, in all points" ; which could only be by vesting in Alexander Reid the property intended to be given him ; and he was accordingly considered to be proprietor by the other creditors themselves, who adjudged from him as such.

Replied for the adjudgers, 1mo, The distinction between the *jus in re* and the *jus ad rem* of the Roman law, has been adopted in ours ; and thence is derived the difference between a real and a personal right to lands. The rule, *nulla sasina, nulla terra*, is well understood and established. A disposition, charter, or precept of *sasine*, may give the grantee a personal right or title to lands, but it is the infertment which vests the complete real right in him. It is admitted, in the present case, that, by the tenor of the dispositive clause, the personal right to the fee, or *usufructus causalis*, was given to Reid ; but it is apprehended, the *sasine* only vested in him the real right to the *liferent*. A right of fee comprehends a *liferent*, but not *e contra* ; and, therefore, the disposer of the fee certainly might have granted a warrant for inferting, or the dispoinee have taken infertment in the *liferent*, distinct from the fee ; which appears to have been done in this case. The reference in the precept to the dispositive clause, can be of no stronger effect than it would have been, had the lands by that clause been disposed to Reid singly, his heirs and assignees. A precept subjoined to such an absolute disposition, ordering only *liferent* state and *sasine* to be given, could never have authorised an infertment in the fee ; because the maxim would have applied, *Quod potuit et voluit, non fecit*. Besides, a *liferent* was here certainly intended to be given to the husband as well as the wife ; and had she been infert, her *sasine* must have been conceived in the same terms ; and, consequently, it may be well supposed, that the real right to be given him was intended to be no broader ; especially as the rule, that a fee cannot be *in pendente*, was not so well understood when this disposition was granted, as it is now. 2do, Had the precept, as well as the dispositive clause, been clearly intended to give the real right of fee, yet, as it is the infertment which vests that real right, the same can be no broader than is *de facto* given by the infertment. *Sasines* are by law ordered to be recorded, and not the warrants of them, as the right given by the infertment is alone to be regarded by the lieges. Infertments are not made by reference, for nothing is understood in them but what is expressed. Craig, and all our Lawyers, agree, that the utmost precision is requisite in instruments of *sasine*. Thus, an infertment of annualrent was found null, because it did not bear expressly delivery of the symbols contained in the precept, but only, that [6934] state and *sasine* was given, conform to the tenor of the precept, February 1684, *Murray v. Hope, voce SASINE*. The words of this infertment, "*liferent* state and *sasine*," are by all our writers on Stiles, and the universal practice of notaries,

understood to mean an infectment in the liferent alone, according to the common sense and meaning of those words, and in opposition to heritable state and sasine, which are constantly used to denote an infectment of fee; the other words, actual, real, and peaceable possession, being common to both. 3tio, In the case of *Frog* it was indeed found, that a grant of lands to a man in liferent, and to the heirs of his body, in fee, made him fiar; but there the dispute turned upon the import of the destination, not of the infectment, which bore, that the bailie gave *statum et sasinum hereditarium*; a circumstance which has escaped the Reporter of that case. And, further, the question was there between the creditors of the disponee and his own children, who could, at any rate, only take as heirs to him, and, consequently, be liable in his debts; whereas, here it is between creditors equally onerous, and who cannot be hurt in their present plea, by their having, for some time, mistaken the nature of the right which was in their debtor.

“The Lords found, that only the liferent was vested in the person of Alexander Reid, by his infectment; and remitted to the Lord Ordinary to proceed accordingly.”

Reporter, LORD JUSTICE-CLERK.—For Graham & Smith, D. GRAHAM, FERGUSON.—
For the Adjudgers, RAE.—Clerk, KIRKPATRICK.

D. R.

Fol. Dic. v. 3, p. 318. Fac. Col. No. 189, p. 337.

No. 45. [6936] FRANCIS PINKERTON DRUMMOND v. WILLIAM ABERNETHY
DRUMMOND, &c. May 17, 1793.

A charter and sasine, altho' containing a destination of heirs erroneously expressed, will be interpreted according to their warrant, so that the original intention may not be disappointed.

William Drummond, Elder of Hawthornden, in the marriage-contract of his only son William, in 1722, became bound to infect his son, and the heirs-male of his body; whom failing, the heirs-male of his own body; whom failing, the heirs-female of his son's body; whom failing, the heirs-female of his own body, &c., in the lands of Hawthornden, and others.

The contract contained procuratory and precept. Upon the precept, William the son, took a base infectment in 1723, and, in 1724, he executed the procuratory, by resigning the estate into the hands of the Barons of Exchequer. The instrument of resignation, and the signature authorising a charter, were both in the precise terms of the substitution in the marriage-contract. But, by a mistake in translating the charter, its dispositive clause bore, that the lands were to devolve to William Drummond, Younger of Hawthornden, “et hæredibus suis masculis; quibus deficien. hæredibus masculis dict. Gulielmi Drummond senioris; quibus deficien. hæredibus femellis dict. Gulielmi junioris; quibus deficien.” &c., whereas, in conformity to the contract, the words *de corpore* ought to have been added to each substitution.

To this charter a general clause was subjoined, confirming “omnia jura et evidèntia per quoscunque fact. et concess. in favorem dict. Gulielmi Drummond junioris, ejusque prædict. eorumque auctorum, et predecessorum quæ ad dict. terras aliaque supra mentionat. pertinent.” &c.

Upon the precept in this charter William the younger was immediately infect. His sasine recited the clause of destination in the same erroneous manner with the charter, and he possessed upon these titles till his death in 1760, when (there being no heirs-male of the body of William the elder) Mary Barbara Drummond, his only surviving child, soon afterwards married to Dr. Abernethy, was of course entitled to succeed, in terms of the marriage-contract.

The blunder in the charter was then discovered, and, in order to correct it, she, without making up titles, brought an action of declarator and reduction, which concluded, 1mo, That it should be declared, that the mistake in the charter should not affect her right, but that the substitution should proceed, in terms of the marriage-contract, and that warrant should be given to the proper officers to alter the record; or, 2do, That the charter should be set aside *in toto*.

In this action the Court did not reduce the charter, but found it erroneous, and that the pursuer was entitled to serve herself heir of provision in special to her father, in the same manner as if the charter had been properly expedite, 27th February 1761, No. 44, p. 6934.

[6937] Mrs. Drummond was so served and retoured accordingly, in March 1761. She immediately took infetment upon a precept from the Chancery, proceeding on the retour of her special service; and, at the same time, lest, in consequence of his base infetment, the property should be considered as *in hæreditate jacente* of her father, she, *qua* superior, granted a precept of *clare constat* in her own favour, and on this she was also infet. And she afterwards resigned *ad remanentiam* in her own hands.

Mrs. Drummond executed different deeds affecting the estate, and, in particular, after the death of her only child, a disposition in favour of her husband in liferent, and Mary Ogilvie, a distant relation, in fee.

Mrs. Drummond died in 1789.

The heir at law, under the marriage-contract, brought a reduction of the charter 1724, the decree of declarator, Mrs. Drummond's service and retour, and of the subsequent deeds she had executed; and

Pleaded, The charter granted in 1724, as being inconsistent with its warrant, is, no doubt, liable to reduction, but, while unreduced, it excludes Mrs. Drummond from the succession; She, therefore, died in apparency, and her service and subsequent gratuitous deeds are inept.

The decree in 1761 is also nugatory, the judgment being such as the Court had no authority to pronounce; for, though they may reduce the titles to a landed estate, they cannot, without doing so, allow them to be disregarded.

Answered, A total reduction was unnecessary. The charter was faulty only in one particular, which the Court did no more than explain, according to the warrants on which it proceeded.

The defender further stated the following defences, unconnected with the decree in 1761, and

Pleaded, 1mo, Mrs. Drummond was served heir in 1761. Her retour is therefore secured from challenge by the vicennial prescription, 1617, c. 13.

2do, By the clause of confirmation in the charter, Mr. Drummond's base infetment became public. His infetment, therefore, upon the charter, together with the precept of *clare constat*, and the resignation *ad remanentiam*, executed by Mrs. Drummond, were unnecessary.

3tio, Mrs. Drummond was a creditor under the marriage-contract, whom her father could not gratuitously disappoint; Nov. 1717, Feb. 1718, *Fea v. Traill, voce* PROVISION TO HEIRS AND CHILDREN; 15th June 1710, *Leslie v. the Creditors of Leslie, IBIDEM*. If he has not fulfilled his obligation so as to entitle her to carry the estate by a special service, as heir of provision, that service, as including a general one of the same description, was at least sufficient to enable her to transmit her *jus crediti*.

Answered, 1mo, Before the statutes 1494, c. 57, and 1617, c. 13, no lapse of time prevented the legal heir from asserting his right. By the former, it was enacted, that after three years; by the latter, that after twenty years, from the date of the service, the person served should not be disturbed at the in-[6938]-stance of the legal heir. Both apply only to the case where there is a competition between the person actually served, and him, who, had he claimed in proper time, was alone entitled to have been so; Bankton, b. 3, tit. 5, p. 353; Erskine, b. 3, tit. 7, § 19. In the present case, there was no competition: While Mrs. Drummond was alive, no person had an interest to challenge her service; and as she herself might have brought a reduction of it after twenty years, 11th July 1701, *Lady Edinglassy, voce* PRESCRIPTION, so may the pursuer.

2do, The few general words thrown in at the end of the charter of resignation, cannot be presumed to confirm an infetment not specially mentioned. The charter 1724 has all along been considered as a charter of resignation.

3tio, As the marriage-contract was carried into effect by an actual conveyance of the lands upon which infetment has followed, there remained no *jus crediti* in the heirs of the marriage, which could be transmitted without a special service; 9th March 1757, *Livingston v. Lord Napier, voce* TAILZIE, 9th Dec. 1760, *Porterfield v. Gray, voce* PROVISION TO HEIRS AND CHILDREN, 21st July 1676, *Hay v. the Earl of Tweeddale*

IBIDEM ; 23d February 1682, Clerk v. his Sisters and David Forbes, No. 3, p. 6330 ; 28th November 1684, Irvine v. Macitrick, voce PROVISION TO HEIRS AND CHILDREN ; 26th July 1715, Lyon v. Garden, IBIDEM ; 27th December 1716, Macintosh v. Laird of Aberairder, IBIDEM.

Replied, 1mo, It would be singular, if Mrs. Drummond, whose right is not alleged to have been defective, except in point of form, should be in a worse situation than a person not entitled to succeed. The statutes make no such distinction. The passage from Mr. Erskine, founded on, relates to the case of an heir wishing to set aside his own service, where it has very properly been found, that the vicennial prescription does not run against him.

2do, It is not necessary that a charter of confirmation should mention the deeds confirmed. The infetment on the contract was a "right and evident" in favour of William Drummond, and therefore was included in the general clause of confirmation.

The Lord Ordinary ordered informations ; upon advising which,

The Court were unanimously of opinion, that the decree pronounced in 1761 was liable to no objection ; that even if no process had been brought, the charter in 1724 must have been interpreted according to its warrant, the discrepancy between them having arisen merely from a mistake, and that therefore Mrs. Drummond's reitor and subsequent deeds would have been effectual.

The Court had therefore no occasion to give a special judgment upon the separate defences ; but it was observed, that the vicennial prescription does not apply to the case of inaccuracies in the service of the true heir, and that the charter 1724 was truly a charter of confirmation, and effectual as such, [6939] though it did not specify the deeds confirmed. The after infetment, as on resignation, was therefore useless.

It was further observed, that as the contract of marriage contained a disposition of the lands upon which infetment had followed, there remained no personal *in re crediti* in the heir of the marriage, which could be carried without a special service.

The Lords repelled the reasons of reduction.

A reclaiming petition was refused without answer on the 6th June 1793.

Lord Reporter, DREGHORN.—Act. DEAN OF FACULTY, HONYMAN.—Alt. SOLICITOR GENERAL.—Clerk, MENZIES.

D.D.

Fol. Dic. v. 3, p. 319. Fac. Col. No. 53, p. 109.

* * This case was appealed.

The House of Lords, 26th April 1797, "ordered and adjudged, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed."

No. 48. [6974] JOHN LITHGOW v. The Other CREDITORS on the Estate of Whitehaugh January 23, 1747.

The deficiency caused by an inhibition found not to affect the whole creditors who contracted after it, but to fall solely upon the least preferable.

In the ranking of the Creditors on the estate of Whitehaugh, Jean Lithgow, in whose right John Lithgow, writer in Edinburgh, afterwards succeeded, was preferred *primo loco*, upon an heritable bond over the whole estate, and two other creditors were preferred next to her upon heritable bonds, each over a several portion of the estate contained in their respective rights, and other creditors were postponed to them.

There was an inhibition affecting the whole, and in the division of the price this question occurred, Whether the sum drawn by the inhibitor should be deduced from the shares of all the creditors in proportion to their sums ? Or if it should be wholly drawn from the postponed creditors, and those preferred draw their whole debt ?

Pleaded for John Lithgow, That an inhibition was only a ground of reduction, in so far as the debts contracted after, were in prejudice of that secured by the inhibition.

It was true, while the subject remained unsold, the inhibitor might attach any posterior right, reserving to the owner his relief, and could not be put off by an allegation of a sufficiency of funds remaining, because this delay, and obliging him to dispute with other purchasers or creditors, would be a real prejudice to him ; but when the price of the lands was upon the table, which he immediately drew, he sustained no prejudice in not being suffered to reduce the prior rights, while he could save himself out of the posterior ones ; that it would be hard upon creditors, who contracted upon seeing the estate incumbered with an inhibition for a small sum, which was notwithstanding a sufficient security for their debt, if that could be pared away by after-contractions ; this would be a great infringement of the faith of the records ; whereas the subsequent creditor saw the estate burdened with the after-contraction as well as the inhibition ; that a reduction upon an inhibition was like the *actio pauliana* in the Roman law, which required an eventual prejudice, and was so described by Craig, l. 1, D. 12, § 31, who, on these principles, doubted if it could reduce a deed where there was sufficiency of funds ; and though the Lords of Session then found otherwise, and it was admitted now to be law, that proceeded from its being a real prejudice to be delayed ; but there could be none where the price was ready : That the effect of the infetment quarrelled stood good against all but the inhibitor, who got the better of it by a rescissory action, but it was not in itself null ; and, however the thing might be expressed in words, the inhibitor in effect was first ranked, and the rest after him, in their order : That a case might be put where an inhibitor would draw nothing ; and yet a creditor posterior to him draw ; as, suppose a subject of 12, affected by two heritable bonds, A for 6, and B for 4 ; then suppose infetment taken by C for 8, on a ground of debt prior to them all, and an inhi-[6975]-bition by D, intervening between A and B, they would be ranked, A *primo loco*, B *secundo*, C *tertio* ; A would draw 6 ; and then D, seeking to reduce B's right, would be answered, it was not to his prejudice, because he was cut out by C's infetment, the ground of whose debt was not struck at by the inhibition ; and thus B, whose infetment was preferable to C, would draw in his place 4, and C *ultimo loco* 2, and the inhibition be entirely excluded.

Pleaded for the postponed creditors, That where an inhibition occurred, no argument could be drawn from the danger accruing to the lender, by posterior contractions ; for in no case of an inhibition did the records give security ; suppose a small debt secured by inhibition on the largest estate, the only way to lend safely, was to see it cleared, else the remainder might be carried off by a subsequent infetment, the ground whereof was prior to the inhibition.

Lithgow was in an error in supposing the inhibitor to be ranked *primo loco* ; for he was never ranked, but the infetments in their order, and an interlocutor pronounced, reducing them, in so far as they were struck at by that diligence, in consequence whereof he drew as if these were not in the field, which being drawn from them all, must be proportioned upon them. Suppose a security over A and B, then securities given first on A, and then on B, to different creditors, the preferable creditor behaved to draw proportionally from the two subjects, notwithstanding that on A was preferable in time to that on B, and so ought it to be in the present case ; or supposing the rule otherwise, there would be a difficulty whether the loss ought to fall on the last infetment, or on the last lender, though first infet ; if upon the last infet, no argument could be drawn from there being left a sufficient fund after the inhibition ; for the last infet might have lent, when he saw a fund ; and afterwards another, who was quicker in his diligence, be the person whose debt exhausted the subject.

For Lithgow, That in the case put by the Creditors, the infetments on A and B had no preference betwixt themselves ; they were both preferred in the same rank on their respective subjects ; that in rankings, where it did not appear what sums would fall to the several creditors, it was necessary to pronounce hypothetical interlocutors, reducing all the debts posterior to the inhibition ; but this applied only according to the prejudice done by them to the inhibitor's debt, and if that was not prejudged by any other, which might be two ways, either by there being left sufficient fund to answer it, or its being itself otherwise excluded, the inhibition did not operate.

For the Creditors, That an inhibition was a ground of reduction, whether a fund of payment was left or not, and in this was unlike the reduction on the statute 1681, and the *actio pauliana*.

This case was similar to two prior creditors consenting to a debt, which, in virtue thereof, would be drawn proportionally from both, and not from the last of them.

[6976] That according to the argument pleaded for Lithgow, cases might frequently happen, wherein a creditor would be benefited by another after-contraction ; for suppose first A, 2dly, B, two annualrenters, each for 4, then C and D, two adjudgers, each for 1, of whom C had an inhibition, striking against both the annualrenters, and the subject only 6 ; A would be ranked for 4, B for 2 ; then C, in virtue of his inhibition, would come to take from them what he would have drawn if they had been out of the field, to wit, 3, for the other 3 would have fallen to D, who is supposed not affected by the inhibition ; thus he must draw, according to Lithgow's pleading, in the following manner, 2 from B and 1 from A ; but, supposing B not to have contracted, his share would have remained to the adjudgers, and C getting only 1 of it, must have drawn 2 from A, who is thus profited by B's after-contraction ; whereas in the other way of drawing proportionally, his draught from A is in either case 2.

That this had been the uniform manner of proceeding, and was determined to be the rule, in the ranking of the creditors of Nicolson, No. 35. p. 6963, and directions given to the accomptant to proceed accordingly, which had since been constantly followed.

For Lithgow, That the practice had not been so strong as was alleged ; for in Nicolson's case, the rules were not laid down by the Court after mature deliberation, but were only the interlocutor of an Ordinary, perhaps upon the suggestion of the accomptant, as what he thought proper to be followed, and not controverted, because not adverted to by the parties ; and there had occurred some cases wherein the contrary rule had been followed, as in one that happened in the ranking of Langton, and was determined anno 1703,* wherein Brown an inhibitor was not ranked upon his subsequent adjudication, and an interlocutor reductive pronounced, of the prior rights in his prejudice, but directly *primo loco* on his inhibition, the consequence whereof behoved to be the throwing the deficiency on the last debt affected thereby ; and the rule now insisted for was precisely followed, 1729, in the case of Ross of Galston ;* and in the ranking of Mr. William Stirling's Creditors, the scheme of division wherein was approved, February 17, 1743,* the accomptant having followed the rule contended for on the other side, a prior creditor who was thereby lesed, and who happened to be the person who made up the scheme in Galston's case, took care to have the scheme rectified with regard to him, though others not adverting, it was negligently suffered to stand as it was, as to them ; and thus, creditors prior to him were affected by the inhibition, while he was saved ; that the contrary practice was only that of the accomptant's following Nicolson's case, and not adverted to by the parties, in a matter of abstract and not very easy consideration.

For the Creditors, That in a partial ranking of some creditors upon Langton, a preference was granted to an inhibitor irregularly, there being no person in the field but he and the annualrenters, who were postponed to him, and whose interest was to have the interlocutor pronounced in that form, as otherwise they [6977] must have been subjected proportionally to his debt ; whereas this threw the whole on others to whom they were preferable : That in the case of Stirling, an interlocutor reductive had not been pronounced against one debt, by which means no charge was laid upon it, but the rest of the procedure was in the ordinary manner ; so that there remained only the case of Galston, which was the work of an accomptant, approved of in course by the Ordinary.

The Lords, 13th January 1747, found that the inhibition being prior to, and therefore affecting all the annualrent-rights, the deficiency arising from the shortcomings of the funds, did not affect equally, or *pro rata*, all the annualrenters who stood preferred one to the other, but behoved to affect the last preferable.

Act. LOCKHART & R. DUNDAS.—Alt. FERGUSON.—Clerk, FORBES.

Fol. Dic. v. 3, p. 321. D. Falconer, v. 1, No. 160, p. 206.

* See APPENDIX.

No. 55. [6988] SCOT v. COURTTS and Others. June 15, 1750.

Inhibition does not affect the alienation of annualrents due on an heritable bond.

It would appear from the stile of an inhibition, that originally it has affected moveables, as it prohibits the alienation of moveables no less than of heritable subjects in prejudice of the complainer : But however that may have been, there is no record of its having ever in practice affected moveables ; which has justly, and one may say necessarily obtained *favore commercii*. But in no time did inhibition ever affect *nomina debitorum* ; and therefore that an heritable bond on which infetment has not followed, or a bond heritable, as bearing annualrent, as the law once stood, or heritable, as secluding executors, as the law now stands, have never been reached by an inhibition, has not proceeded from the favour of commerce, which would not be much affected though they fell under inhibition ; but from this, that an inhibition even by its stile does not reach *nomina debitorum*.

It follows however from this, that the criterion of what subjects are, and what are not affected by inhibition, is not whether they be heritable or moveable, as between heir and executor, though it should not be further observed, that there are also instances of subjects which fall to the executors, viz. Heritable bonds, whereon infetment has followed, but whereon the creditor has used requisition and charged, which yet fall under inhibition, although not used till after the requisition and charge. It remains therefore to say what the criterion of it is ; and the present case gave occasion to a reasoning on this point.

Archibald Cockburn younger of Langton, who had acquired certain debts secured by heritable bonds and infetments upon the estate of Langton, to the extent of about £2000 Sterling, conveyed the principal sums, with the interest thereof from Martinmas 1723, to certain persons, who advanced the money upon that security, but retained the bygone annualrents due preceding that term ; and, in 1732, he conveyed these annualrents to John Courtts and others. In the ranking of the creditors of Langton, William Scot of Thirlestain, who was creditor by progress to the said Archibald Cockburn, in a debt, whereon Jean Joissy, one of his authors, had raised inhibition in 1730, repeated a reduction *ex capite inhibitionis* of the said conveyance to John Courtts of the bygone annualrents, which being still *in medio*, he pleaded were affected by the [6989] inhibition. The point was reported by the Ordinary ; and being new, the Lords appointed a hearing in presence.

And upon the hearing, they found unanimously, " That the disposition to the bygone annualrents was not affected by the inhibition."

Nor could they have found otherwise, without introducing a material novelty : For as the bygone annualrents on an heritable bond descend to the executor, the consequence of finding them affected by an inhibition must have been, that when they were devolved to the executor, they should fall under inhibition used against him for his own debt ; a thing unheard of, and which no body will say.

And all the question was, Upon what principle they were to put this judgment ?— It has been already said, that moveable or descendible to executors, and not affectable by inhibition, are not correlate. It had also been pleaded as an argument against the inhibitor, that an inhibition does not hinder the annualrenter's extinguishing the annualrents by intromission ; and that it was inconsistent that an inhibition should affect a subject, which the person inhibited could, notwithstanding the inhibition, extinguish by intromission. But neither was that satisfying, there being nothing inconsistent in it, as an inhibition forbids not deeds of extinction, but only deeds of alienation ; therefore, where an annualrenter intromits, so far the annualrent-right is extinguished, because the intromission is not *spretæ inhibitione*.

But what the Lords generally put it on was this, That as an inhibition is only a prohibitory diligence, no deed can be reduced *ex capite inhibitionis*, but where the inhibitor can draw the subject conveyed by an adjudication, the only diligence known in the law to connect with an inhibition : But so it is, that an adjudication, as it only carries the rents of lands from the first term following the date of the adjudication, so it carries the profits of an annualrent-right only from that term ; and the bygones of both are only affectable by arrestment.

Another objection was made to this inhibition, that supposing a formal inhibition

could have affected these bygone annualrents, yet this inhibition was null, in respect it had proceeded upon the production of the horning only, without producing the ground of the horning, "because the Lords have seen the letters of horning."

And the Lords were inclined to have sustained the objection, as there is no other legal ground for an inhibition, but either a decree, a liquid instruction of a debt, or a summons executed; and a horning is neither. A creditor may have got payment of his debt, and not delivered up the horning; and by the same rule, an inhibition might proceed upon a caption. But no interlocutor was pronounced upon it, as unnecessary, after having found the inhibition ineffectual, even if it had been formal.

Fol. Dic. v. 3, p. 323. Kilkerran (INHIBITION), No. 14, p. 294.

No. 60. [6995] CREDITORS ADJUDGERS on the estate of Langton, not infeft v. The ADJUDGING CREDITORS infeft on that estate. January 8, 1760.

Inhibition affects the least preferable of the rights against which it strikes, and not all the rights *pro rata*.

In the ranking of the Creditors of Langton, it was insisted for the Adjudging Creditors not infeft, That the sums to be drawn by the creditors-inhibitors, in virtue of their inhibitions, ought to be allocated proportionally among the whole debts that are struck at by their diligence.

On the other hand, it was contended for the Creditors infeft, That the inhibiting adjudgers ought to draw their payment out of the first and readiest of the price, and then the other creditors be ranked upon the remainder in their order; by which the sums drawn by the inhibitors would first affect the creditors not infeft, and next the least preferable infeftments, agreeably to the decision, 23d January 1747, in the case of Lithgow v. The Creditors of Elliot of Whithaugh, No. 48. p. 6974.

Pleaded for the Adjudging Creditors not infeft, That inhibition is only a prohibitory diligence, calculated to prevent the debtor from alienating to the prejudice of his creditor; but gives the creditor no preference, nor real right upon the lands, till he establish it by other diligence; that, to consider inhibition as giving a preference, would lead to absurd consequences; for instance, if there are two annualrenters in the field, the first of whom only is struck at by the inhibition, if the inhibitor, as having a preference, is ranked *primo loco*, and then the annualrenters in their order, this absurdity will follow, That the first annualrenter, though struck at by the inhibition, may draw his full debt; and yet the second annualrenter, against whom the inhibition does not strike, be cut out. To prevent such absurdities, the real rights affecting the lands must be [6996] ranked in the first place, and draw according to their order; after that it falls to be considered, what personal claims may lie against any of these creditors. An inhibition, though not a real right, affords a claim against those who obtained real rights from the debtor after he was inhibited. This is of the nature of a claim for damages; and the question is, In what manner those damages are to be ascertained among the several creditors struck at by the diligence? They ought to affect the whole equally and proportionally, for the following reasons.

First, Every one of the debts and securities subsequent to the inhibition is equally liable to reduction. This is evident from the stile of the diligence, whereby the debtor is expressly prohibited to make any alienation, contract any debt, or do any deed, and the lieges are prohibited to accept of any right or obligation from him, to the prejudice of the creditor. Every alienation and every contraction is prohibited. It is no defence to one who contracts *spreto mandato*, That he left sufficient fund. The fund must be left unimpaired, as it was at the date of the diligence. To diminish it the law considers as a prejudice done to the inhibitor. It is not necessary for him to qualify any other prejudice, or to say, that he is disappointed of his payment by the deed which he seeks to reduce; nor is he obliged to enter into a litigation concerning the circumstances of his debtor. That such has always been the construction of this diligence, appears from Craig, lib. 1, dieg. 12, § 31; and the decision, November 27th, 1630, Douglas *contra* Johnston, No. 17, p. 6947; as also from the constant tenor of the decreets of the Court, *ex capite inhibitionis*.

Secondly, Whatever a party struck at by inhibition is obliged to repay to the inhibitor out of the sums he stood ranked for by his infetment, he can have no recourse against creditors afterwards infett, who are not subject to the same diligence ; and who are therefore not obliged for relief of a sum drawn from him, upon a defect in his own right. This rule is laid down by Lord Stair, lib. 4, tit. 35, § 29, and confirmed by decisions of the Court ; in the ranking of the Creditors of Sir Thomas and Sir William Nicolsons, No. 35, p. 6963 ; and, February 1730, Campbell *contra* Drummond, No. 96, p. 2891.

Thirdly, Where an inhibition strikes against several purchases or annualrent-rights, affecting different parts of the same debtor's estate, the effect of it is allocated proportionally upon the several lands or heritable debts ; and if the inhibitor insists to draw his whole debt out of any one subject, he must assign his diligence to the person from whom he draws, that he may operate a proportional relief ; upon the same ground that a creditor having a catholic infetment over several tenements, when he recovers his whole debt from the purchaser of one tenement, is obliged to assign to him his infetment, that he may recur against the rest. In the same manner, a proportional allocation ought to take place where the inhibition strikes against several annualrent-rights or securities affecting the same tenement, as each of them is subject to a separate reduction at the inhibitor's instance. If one creditor obtains infetment from the common debtor after inhibition, in the tenement A. and another in the tenement [6997] B. they are no doubt equally liable to a proportion of the inhibitor's debt. It seems incongruous, then, to suppose that the proportional allocation should be excluded, because the creditors had got both tenements comprehended under their infetments.

In conformity to these principles, the rule universally followed in all rankings down to the case of Whithaugh, was, That all the creditors whose securities were struck at by an inhibition, were subjected proportionally to the debt of the inhibitor.

This case is similar to a reduction upon the second clause of the act 1621, cap. 18, where it was never doubted, that all the securities granted by an insolvent debtor, after diligence against him by a prior creditor, are equally subject to reduction at the instance of that creditor ; and therefore the law divides the burden amongst them proportionally.

Upon the same principle, if two heritable creditors consent to a subsequent contraction, the creditor consented to may insist against either ; but as he who pays is entitled to demand an assignation, the result must be a proportional distribution. This case is extremely analogous to the present ; it may be said, without impropriety, that one who contracts after inhibition, virtually consents to the payment of the inhibitor's debt.

In the same manner, where a number of cautioners bind for the same debt at different times, as they are all equally bound to the creditor, any one who is forced to pay, is entitled to an assignment. So it was found, 15th December 1722, Murray *contra* Heirs and Creditors of Orchyardton, *voce* SOLIDUM ET PRO RATA, and affirmed by the House of Lords.

Pleaded for the Creditors infett, That the tendency of an inhibition, as is evident from the stile of it, is not absolutely to restrain the inhibited person from contracting debts, or the lieges from dealing with him ; but only in so far as the inhibitor may thereby suffer prejudice ; in other respects, the creditors fall to be ranked, and draw their payment, without regard to the inhibition. The inhibitor sustains no prejudice, so long as there is a sufficient fund for paying his debt ; he cannot therefore interfere in the ranking. What proves that inhibition has no effect, unless the inhibitor can qualify a loss, is, that debts, though contracted posterior to the inhibition, if the inhibiting creditor sustains no prejudice from them, will draw a part of the price, while the inhibitor draws nothing. If, for example, there are adjudications against which the inhibition does not strike, sufficient to exhaust the whole price, the inhibiting creditor must be entirely set aside, while, at the same time, other adjudgers, though posterior to the inhibition, if within year and day of the former, will be ranked *pari passu* with them.

It would be destructive of the security of the records, that a person who lent his money, and for security took infetment upon a large estate, which he saw from the records was liable to no prior incumbrance, but an inhibition for a [6998] small sum, should suffer prejudice by posterior infetments granted to other creditors.

The prior infetment upon record has, by law, the same effect against posterior infetments, as the inhibition has, with respect to all debts posterior to it ; as therefore the inhibitor is entitled to draw his payment out of the first and readiest of the price, any loss arising from the deficiency of fund ought to fall upon the least preferable infetment.

The analogy of a reduction upon an inhibition, to that upon the act 1621, is just : but in neither case is the creditor who used the diligence entitled to reduce all posterior contractions, further than to secure payment of his debt. A challenge *ex capite inhibitionis*, though in the form of a reduction, is in reality no other than a declarator, that notwithstanding the posterior contraction, the inhibitor should have the same access to affect the lands, as if such posterior deeds had not been granted. It is personal to the inhibitor, and no third party is entitled to avail himself of it ; as was found, 26th January 1636, Lady Borthwick *contra* Kerr, No. 20, p. 6952, and 7th January 1680, Hay *contra* Lady Balledgarno, No. 27, p. 6959.

With regard to the case put, of two annualrenters, the first of whom though struck at by the inhibition, may draw his full debt, while the second, against whom the inhibition does not strike, draws nothing, if the inhibitor is to have a *primo loco* preference ; it is answered, That where any of the annualrenters is prior to the inhibition, the inhibitor cannot be ranked *primo loco* ; but the annualrenters must be ranked amongst themselves in their order, and then the inhibitor draws his payment from the annualrent-right struck at by his inhibition.

The argument from several purchases or infetments, affecting different parts of the same debtor's estate, does not apply to the present case, where all the creditors have their security upon the same subject ; for here the first annualrenter is as much preferable to the posterior ones, as the inhibitor is to them all ; whereas, in the other case, the different purchasers or annualrenters have no connection with one another.

In the same manner, where the annualrenters are all *in pari casu*, and there is one catholic infetment preferable to the whole, equity obliges the creditor to take his payment proportionally from the whole, or to assign ; but where the creditors have their security upon the same subject, preferable amongst themselves, according to the priority of their infetment, no equity can entitle the last infet to draw any thing, while a preferable creditor is unsatisfied.

Upon these principles, the judgment of the Court was founded in the case of the Creditors of Whithaugh, which solemn decision, pronounced with great deliberation, was understood to fix the rule in all time coming ; and which accordingly has been uniformly followed in all the rankings that have since occurred.

[6999] Answered for the Adjudgers not infet, That it is true, cases may be figured, where the inhibitor can draw nothing, and yet the debts struck at by his inhibition may draw. This can only happen, when the debtor's estate is wholly exhausted by securities which cannot be affected by the inhibition ; in which case the inhibitor cannot challenge any of the subsequent debts, as his reduction is only to this effect, that he may draw what he would have drawn if the posterior debts had not existed ; and therefore, when the fund is exhausted by prior creditors, the reduction cannot have any effect ; but when there remains fund not pre-occupied, the inhibition affects the whole and every part of it.

With regard to the security of the records, it is evident that the rule contended for on the other side can give no security ; as inhibition is a prohibitory diligence which gives no preference. One who lends a sum of money, after an inhibition, even for a small sum, cannot have absolute security, however large the estate be, unless he see the inhibitor either paid or secured ; for although he take infetment, another infetment may afterwards be taken upon an heritable bond prior to the inhibition, for a sum perhaps near equal to the value of the estate ; and as the inhibitor must be paid out of the remainder, the creditor lending after the inhibition will be entirely cut out ; or there may be personal debts, not struck at by the inhibition, which may, by diligence, evict the greatest part of the estate, leaving no more than to pay the inhibiting creditor ; or the person inhibited may die, and his heir give an heritable bond for near the value of the estate, which bond would not be affected by the inhibition.

The creditor has many ways to secure himself against this hazard. He may, when he lends his money, see a part of it applied to clear the inhibitor's debt ; or he may take care to get the inhibitor secured by infetment ; or he may insist, that

the debtor to whom he lends his money, give him real warrandice against the effect of the inhibition ; or he may use inhibition against the debtor upon his personal warrandice. By these methods, a creditor, lending after inhibition, may attain full security, which, from the nature of the diligence, the records cannot afford him.

Great deference is due to every judgment of the Court ; but the variation of the single decision in the case of Whithaugh, is not of equal consequence with departing from a rule anciently settled and invariably observed, and so closely connected with the system of our real preferences, that departing from it may endanger other parts of that system.

“ The Lords found, that although the inhibitions, being prior to the competing annualrent-rights, did strike against them all equally ; yet any deficiency arising from the shortcoming of the fund of payment, did not affect equally, or *pro rata*, all the competing annualrent-rights, which stood ranked and preferred one to the other according to the priority of their infeftments, but that the same must affect the annualrenters least preferable.”

For the Adjudgers infeft, FERGUSON.—Alt. LOCKHART.—Clerk, JUSTICE.

W.N.

Fol. Dic. v. 3, p. 322. Fac. Col. No. 209, p. 374.

No. 63. [7007] Dr. ANDREW HERON of Bargaly v. PATRICK HERON of Heron.
July 2, 1774.

After appeal taken from judgments of this Court, and served *hinc inde*, it is competent to the pursuer to use an inhibition against the defender, as on a dependence.

After much litigation between these parties respecting the estate of Bargaly, the Court ultimately fixed certain rules, according to which Patrick Heron was to account for the possession of the estate, which was held for some years by him and his predecessors ; and a remit was made to an accomptant to examine and report a state of the accompts, who had accordingly stated the accompts in different views, by all of which he established balances, as due to the Doctor, at Whitsunday 1773, by Patrick Heron, who surrendered to him the possession of the estate at the said term.

Patrick Heron having taken an appeal to the House of Lords, and served the same, the Doctor entered a cross appeal, and he afterwards executed an inhibition against Mr. Heron, to the full extent of the sum concluded for by his libel, and recorded the same in the general register.

Upon an application to the Court, on the part of Mr. Heron, to recal this inhibition, the Court, by their first interlocutor, found, That, after an appeal taken in the cause by both parties, *hinc inde*, and served, there was no dependence in this Court, upon which inhibition could proceed ; therefore recalled the inhibition complained of, &c. But, upon reviewing the case, the Court were of opinion, that this was still a depending process, and that the inhibition ought to stand good ; and, therefore, gave the following judgment :

“ Repel the objection to the inhibition, and find it valid and subsisting.”

Act. DEAN OF FACULTY.—Alt. MURRAY, CROSBIE.—Clerk, TAIT.

Fol. Dic. v. 3, p. 321. Fac. Col. No. 119, p. 320.

No. 65. [7008] Dr. ALEXANDER GORDON v. ALEXANDER MILNE. February 29, 1780.

The Court was of opinion, that inhibition is no bar against granting tacks.

Isabel Gordon, heiress-apparent to her brother in the estate of Edintore, disposed these lands to Dr. Gordon, under the reservation of her own liferent.

Soon afterwards, Dr. Gordon used inhibition, in order to prevent her from doing any deed to the prejudice of his right thus acquired.

In fact, however, posterior to the inhibition, she let to Milne a lease of the lands for the term of nineteen years ; before the expiration of the half of which she died.

Of this tack, Dr. Gordon, having at length led an adjudication in implement of the aforesaid conveyance, and been infeft, brought an action of reduction ; and he likewise insisted in a process of removing from the lands.

Pleaded for the defender ; When the lease in question was granted, the disposition in favour of the pursuer was merely a latent deed, no infeftment till long after having been taken by him ; while, on the other hand, Mrs. Gordon was publicly known to have succeeded to her brother in the lands ; and therefore the defender is entitled to reap the full benefit of a lease thus *bona fide* obtained by him. For tacks, however long their endurance may be, when granted by apparent heirs, like her, " three years in possession," with whom the lessees have *bona fide* contracted, are unquestionably valid ; 27th June 1760, Knox *contra* Irvine and Forsyth, No. 33, p. 5276. It is true the pursuer had executed a prior inhibition ; but that diligence extends not to the granting of tacks, being limited in its effect to those deeds which touch the property, not merely the possession of lands ; Lord Stair, b. 4, tit. 50, § 2 ; Erskine, b. 2, tit. 11, § 2.

Answered ; By the disposition in the pursuer's favour, prior to the granting of the lease, the grantor's right in the lands was restricted to a naked liferent ; the consequence of which was, that the tack could not be effectual beyond the period of her life. The pursuer, it is true, was not then infeft ; and his right, like that of his author, remained personal ; but he had already used inhibition, which was sufficient to protect it from any encroachment. For as the granting of the tack in question to subsist after the death of the liferentrix, was an ex-[7009]-ercise of the right of property of which she was divested, and thus a wrong or tortious act with respect to her ; so, after inhibition, all *bona fides* on the part of the person deriving right from her is necessarily precluded ; and the deed, which it was wrong in her to grant, becomes, in the construction of law, an equal wrong in him to receive, and therefore is to be reduced *ex capite inhibitionis*. The defender indeed has supposed, that inhibition is not competent to guard against the granting of tacks to the prejudice of the inhibitor's right, as if that diligence could be of any service in such a case as the present, were the right of property nevertheless to be defeated at pleasure by the granting of leases ; which it might be as effectually as by any alienation whatever.

The Court, however, seemed not to consider the inhibition as of any consequence in the case ; but appearing to rest their judgment on this ground, that the defender, who had derived his right from a person not infeft, was not entitled to compete with the pursuer holding in his hands a charter and sasine of the lands ;

" The Lords decerned against the defender in the actions of reduction and of removing." See PERSONAL AND REAL.

Lord Ordinary, ELLIOCK.—Act. W. STEWART.—Alt. ELPHINSTON.—Clerk, MACKENZIE.

S.

Fol. Dic. v. 3, p. 323. Fac. Col. No. 109, p. 205.

No. 66. JOHN WATSON v. SARAH MARSHALL and Others. June 19, 1782.

Inhibition effectual against a bond of corroboration, granted to the heir of the creditor.

Barclay was a creditor of Henry Alcorn by bond. Jean Crookshank, decerned executrix-dative *qua* nearest of kin to Barclay, sued James Alcorn, as representing Henry his grandfather, for payment of that debt. Crookshank, however, did not expedite a confirmation ; but, during the dependence of the action, obtained from James Alcorn a bond of corroboration of the original bond, upon which she obtained decreet, and afterwards led an adjudication.

Prior to this bond of corroboration, Sarah Marshall, another creditor, had executed inhibition against Alcorn.

In the ranking of Alcorn's Creditors, Watson, in the right of Jean Crookshank,

produced, as his interest, the adjudication obtained by her ; to which Sarah Marshal, and the other Creditors of Alcorn,

Objected ; First, That Crookshank not having obtained confirmation, was never vested in the right of the debt. But

The Lords having considered the bond of corroboration as supplying the want of confirmation, and repelled the objection ;

Marshall next objected ; The above mentioned bond of corroboration, the only title upon which the decreets of constitution and of adjudication proceeded in favour of Jean Crookshank, was posterior to the inhibition in question, and therefore is void *quoad* the inhibitor ; the granting of that deed being an act [7010] entirely voluntary, and which could not by any action have been enforced ; Stair, b. 4, tit. 20, § 28 ; b. 4, tit. 50, § 11 ; Bankton, b. 1, tit. 7, § 138 ; Erskine, b. 2, tit. 11, § 11 ; Fountainhall, 29th January 1696, Wilson and Logan *contra* Penman, No. 103, p. 7036.

Answered ; This inhibition did not strike against the original ground of debt, which still subsisted. Neither did the corroboration create any new debt ; its only effect was, to preserve against prescription, or to save the expense of expeding a confirmation.

The Lords found the inhibition to strike against the bond of corroboration, as being posterior to it, and serving to create a title to the prejudice of the inhibiting creditor.

They therefore sustained the objection. See SERVICE AND CONFIRMATION.

Lord Ordinary, ALVA.—For the Objectors, ILAY CAMPBELL, CRAIG, MAT. ROSS.—
Alt. CURRIE.—Clerk, COLQUHOUN.

S.

Fol. Dic. v. 3, p. 323. *Fac. Col.* No. 45, p. 72.

No. 68. Lord ANKERVILLE and Others v. JAMES SAUNDERS and Others.
August 8, 1787.

Inhibition not competent to render effectual against creditors a deed by which a person obliges himself, in favour of others, not to sell or impignorate his lands, nor to contract debt by which they may be burdened.

Mr. Rose-Monro of Newmore entered into a contract with Lord Ankerville, and other persons, nominated as his successors in that estate, by a deed of settlement executed by Lieutenant-Colonel Monro, his predecessor, which, however, left him at liberty to sell the estate or burden it with debts.

By this contract, Mr. Ross-Monro "bound and obliged himself, and his heirs, that he should in no wise alter, innovate, or change the course and order of succession of the said estate, as established by the disposition and destination executed by the deceased Lieutenant-Colonel John Monro, nor do any act or deed, directly or indirectly, that may frustrate the same : And further bound and obliged himself, and his aforesaid, that he should not sell, dispone, wadset, or impignorate the lands and estate above mentioned, or any part or portion thereof, nor grant infestment of annualrent or annuity forth of the same, or any other right, redeemable or irredeemable, whatsoever ; nor should he [7011] contract debt, nor do any other fact or deed, whereby the lands may be any wise burdened."

Upon this contract letters of inhibition were raised, which were regularly recorded.

Afterwards Mr. Ross-Monro contracted various debts ; and Mr. Saunders, as creditor in these, having deduced an adjudication of the estate, Lord Ankerville instituted a reduction of those debts ; and

Pleaded ; As a proprietor may sell his estate, or affect it with debt, so he may oblige himself, in favour of another party, to preserve it free from debt. This personal obligation may be rendered by inhibition, as in the present case, effectual against singular successors. Every lawful obligation, whether respecting the payment of money, or the conveyance of land, may be thus secured : For example, a minute of sale, or (as was found 22d July 1724, Douglas *contra* Douglas, *voce* PROVISION TO HEIRS AND CHILDREN), an obligation in a marriage-contract by the husband, to settle a land-estate upon the wife and children. Nor does the case of entails afford any

exception to this rule; being regulated by a special enactment, and not by the common law.

Answered; Inhibition is limited to such cases as admit of that diligence being purged by payment of the debt on which it proceeds, or by finding caution, and does not, as here argued, operate a permanent or general incapacity to contract debts. This appears from Lord Stair, b. 4, tit. 20, § 28, where a specimen of the proper style of inhibition is given. Such restraint is only permitted with respect to entailed property, guarded by irritant and resolute clauses; for prohibitory clauses have not that effect, though followed by inhibition; 22d January 1760, Bryson *contra* Chapman, *voce* TAILZIE. And if so, the use of that diligence in the present case must be equally unavailing. It is indeed an attempt to construct an entail in a way which the law does not authorise.

The Lord Ordinary reported the cause; when

The Court were clearly of opinion, That the inhibition was inept and unavailing; but decerned in favour of the pursuer, on a different ground.

Reporter, LORD HENDERLAND.—Act. ROLLAND.—Alt. BLAIR.—Clerk, MENZIES.

S.

Fol. Dic. v. 3, p. 322. *Fac. Col.* No. 347, p. 531.

No. 79. [7016] L. BRACO *v.* OGILVY. March 22, 1623.

Inhibitions affect only heritable rights and lands.

L. Braco pursuing a reduction of an assignation made by Mr. David Wood to Ogilvy of Carse, of all the corns, goods, and gear, being and growing upon [7017] the lands of Carse, the time of making the said assignation, which was in the month of July, the corns being then growing, unseparate from the ground; the reduction being upon this reason, because the cedent was inhibited by the pursuer long before the assignation, upon an anterior debt, and obligation made to him by the cedent;—The Lords assoilzied from the reason simpliciter; because they found, that an inhibition only affects party's heritable rights and lands, that he cannot dispose thereupon after lawful inhibition served against him, but it affects not the moveable goods; so that, notwithstanding thereof, the person inhibited may dispose upon the same; for letters of arrestment, and not inhibition, affect moveables; and moveables are of that nature, that, falling under daily commerce, the dealing and trafficking therein ought not to cease by simple inhibition, without arrestment proceeding upon a lawful cause.

Clerk, GIBSON.

Fol. Dic. v. 1, p. 473. *Durie*, p. 61.

No. 81. [7018] M'MILLAN *v.* GORDON. June 23, 1627.

A tack of teinds, clad with possession, preferred to a prior tack let by the same author, but on which there was no possession, altho' inhibition was executed on the first tack, before granting the second.

Mr. John M'Millan being assignee by Thomas Ferguson to certain teinds, which Thomas was made sub tacksmen of the same to Mr. Gilbert Gordon of Shirmes, who was principal tacksmen of the same, pursues John Gordon of Troquhan for the same, and refers the quantity to his oath; and, after the day of compareance, a term being assigned to his procurator to exhibit him to depone, at the term he compeared by his procurator, and proponed an exception, which the Lords found might be proponed *in eo statu processus*, albeit it was contended, that it could not be received then; and the exception being, that the defender had a sub tack of the said teinds from the said

Mr. Gilbert Gordon, their common author, by the space of four years before the year controverted, which albeit it was after the alleged subtack set by him to Thomas Ferguson the pursuer's author, and who also had served inhibition thereupon before the excipient's subtack; yet, seeing the excipient's tack was clad with possession continually since the date thereof, and seeing that he offered to prove, that the said Mr. Gilbert was ever in possession of the teinds for all years, until the time of the defender's right, notwithstanding of the said subtack set to Ferguson, which took never effect by possession; the same therefore, albeit preceding his right, and inhibition executed thereupon, also before his subtack, cannot put him in *mala fide* to have taken his tack, and bruiked the teinds since the date thereof, viz. anno 1622. This exception was sustained to elide this pursuit, and was admitted to probation.

Act.—Alt. BELSHES.

Fol. Dic. v. 1, p. 473. Durie, p. 299.

No. 1. [1] GEORGE MONRO of Pointzfield v. The Creditors of ADAM GORDON of Ardoch. July 19, 1777.

An inhibition found effectual to secure a preference, in competition with arresters of the price after sale.

In 1761, Adam Gordon, by a minute of sale, sold his estate of Ardoch to George Monro, at a price of 30 years purchase of a rental produced. The rental was found to be in some respects erroneous, and the estate was much encumbered; so that there came to be a submission for adjusting the amount of the price, and a multiple-pounding for dividing it.

Gordon executed a disposition in April 1765, and Monro paid off preferable debts to a considerable amount, taking conveyances. One of the debts so paid, supposing it to be preferable, was a sum of £400 due to a Captain George Sutherland, upon which he had used inhibition against Gordon prior to the sale.—Upon this and the other debts conveyed, Monro obtained decree of adjudication, on 29th January 1766, which was followed by horning against superiors; and upon 19th February 1766 Monro was infett upon a charter of resignation, in execution of the procuratory contained in the disposition mentioned.

In the multiple-pounding, a remit was made to an accomptant to settle an order of ranking, which was done and reported. The business lay over in this state for some years. At last objections were given in by Monro to the accomptant's report, by which creditors whose debts had been contracted prior to Sutherland's inhibition, and who had arrested the price in the hands of the purchaser, were preferred, and that inhibition was rendered entirely unavailing, as the price was exhausted by the debts so preferred.

The Lord Ordinary (Ellick) repelled the objections, and approved of the report.

[2] The question was brought before the Court, in a petition for Monro the purchaser of the estate, as in right of Sutherland's inhibition, and in answers for the creditors preferred.

Argument in support of the inhibition.

The inhibition secured the creditor resorting to that mode of diligence against any sale of the estate to his prejudice. The assignee, therefore, who followed out the security by an adjudication, could not be disappointed by the sale, or by arrestments consequent of the sale. Whatever objection to the sale would have affected the late proprietor himself, must militate equally against his creditors arresting subsequent to the sale. These could not be in a better situation than he himself would have been; and it is implied in all sales, as in this it was particularly stipulated, that all incumbrances should be purged before payment of the price: In reality, therefore, the sale could not take place, till the inhibiting creditors, and all others who had done any diligence of whatever kind, by which the lands might be affected, were satisfied.

It is true an inhibition is only a prohibitory diligence, giving the creditor a right to reduce posterior voluntary deeds, from which he could qualify a prejudice. It has no positive and immediate effect towards transferring the property or possession of the debtor's estate to the inhibitor—nor has it any retrospect against prior creditors, who are notwithstanding at liberty to operate their payment by every mode of diligence known in law. Consequently, if the inhibiting creditor cannot qualify any damage by any after sale, he will not be allowed to reduce,—because as he could derive no advantage, were he to prevail, he would have no interest. This was what was found in the case of *Carlyle v. Trustees of Mathieson*, 1st February 1739, No. 44. p. 6971.

That case, although it has been cited in aid of the plea on the other side, is in fact illustrative of the argument in favour of the inhibition. It is stated only shortly by Lord Kilkerran, who is the reporter of it. The circumstances more at large were these :

Gilbert Mathieson was proprietor of some houses in Leith, on which he contracted heritable debts nearly equal to their value. He also had personal creditors, one of whom raised inhibition, but which was posterior to his other contractions. Soon thereafter he executed a trust-deed of all his effects for behoof of his creditors. All of them led separate adjudications within year and day of each other, by which it is obvious they all came to be *pari passu* with the inhibitor. The Trustees sold the property for behoof of all concerned. The inhibitor raised a reduction of the sale. The Trustees pleaded in defence :—"The pursuer could not better himself by the reduction, as the heritable creditors were preferable to him, and the personal creditors behoved at any rate to come in *pari passu* with him in virtue of their adjudications. The sale being for an adequate value, and the price *in medio*, no prejudice whatever had been done to the inhibitor ; therefore he ought not to be indulged in objecting to the sale. If it were set aside, the subjects might perhaps not bring so good [3] a price again."—In these circumstances, the Court most properly assuolized the Trustees. But the present case is entirely different. The inhibiting creditor has a substantial and clear interest to challenge the sale, to the effect of making good his adjudication of the lands, and consequently securing his preference as an adjudging creditor, in competition with the other personal creditors, who have no such diligence, but have only arrested the price in the hands of the purchaser. In order to this, it is obvious that the minute of sale must be so far set aside as to give effect to the adjudication. There can be no room for arresting the price, while the debt in question remains unsatisfied. The arrestments used could only affect the price, but no price was due until the lands should be freed of incumbrances. The adjudication was indeed used by the purchaser himself, but that is of no importance. He adjudged, not *qua* purchaser, but in right of the debt, by means of Captain Sutherland's assignation. If Captain Sutherland was entitled to adjudication, so was his assignee. Thus did the debt in question remain a burden upon the lands, which was clearly preferable to the personal debts, upon which no diligence had been done prior to the sale. The challenge of the sale by the inhibiting creditor could communicate no benefit to the personal creditors, whose debts may have been contracted prior to the inhibition : for an inhibition does not found a catholic reduction, as if proceeding upon the head of fraud, or of facility and lesion. An inhibitor can go no farther than to reduce, so far as the deed is to his prejudice. He has no interest to proceed greater length. The minute of sale, therefore, must remain good as to every other creditor.

It has been said, that the adjudication, being posterior to the sale, could not be effectual, the common debtor having been denuded. But Gordon of Ardoch was not denuded, by entering into a personal minute of sale. He remained in the feudal right of the lands until after the adjudication was led. The adjudication was led in January 1766, the purchaser was not infert until the February following. But there is no occasion to insist on this ; for supposing the fact to have been otherwise, and that the purchaser had been infert before the adjudication was led, still the inhibition remained effectual, and was a legal ground for setting aside the sale. The effect of it never could have been removed by a voluntary sale, or any other posterior act or deed whatever of the common debtor, without payment of the debt. To say that the common debtor was denuded by the sale, is in other words to say, that an inhibition may be defeated and rendered of no avail whatever, by the voluntary act of a bankrupt in selling his lands. A voluntary sale may be good to all other pur-

poses, but *quoad* the inhibitor is certainly not so. It is reducible at his instance *ex capite inhibitionis*, and he is entitled to adjudge the lands, as if no sale had been made. Nor is it of importance whether the purchaser has been infeft or not. *Quoad hoc* the purchase is illegal, and contrary to the judicial prohibition contained in the letters of inhibition. One purchasing notwithstanding the prohibition, does so *lege prohibente*, and he knows the consequence, [4] viz. so far as the interest of the inhibiting creditor goes the sale is reducible; therefore he never can be safe until the inhibiting creditor be paid off and the incumbrance removed.

An inhibition strikes against all posterior voluntary rights of whatever kind, whether onerous or gratuitous, and all rights are considered as voluntary, to grant which there is no previous specific obligation, such as can be made effectual by way of process. See INHIBITION, Sect. 4.

It is not enough to say that the sale is onerous and the price adequate.—To support it against reduction *ex capite inhibitionis*, it is necessary further to say, that the interest of the inhibitor is not affected by the sale, for that he will still draw according to his legal right by the inhibition, as if the sale was not yet made. If the interest of the inhibitor would be affected by a sale, and he consequently may reduce it *ex capite inhibitionis*, in order that he may attach the lands and secure his payment out of them, surely he must be preferable to a mere personal creditor, who has no inhibition, and has done nothing to attach the lands. See 7th January 1680, Hay, No. 27, p. 6959, Bankton, v. i. p. 196; Ersk. b. 2, t. 11, § 11. These authorities show that a challenge *ex capite inhibitionis*, though in the form of a reduction, is in reality no other than a declarator that the inhibiting creditor shall have the same access to affect the lands, as if no posterior deed had been granted. Captain Sutherland, then, or the pursuer in his right, had no occasion to arrest the price, nor would that have been the proper mode of proceeding. He had a right to adjudge the lands and to hold the sale as null *ex capite inhibitionis*; not because the price was inadequate, or the sale unfair, but because it was made *spreto inhibitione*; of which circumstance he was entitled to avail himself in competition with other personal creditors, who had neglected the same steps of diligence.

The price is not *in medio* in the present case in the same sense in which it was so in the case of Mathieson above mentioned. There the interest of parties was not varied by the sale. Here the arresting creditors are contending to be entitled to exhaust it to the prejudice of the inhibitor. If the plea of the arresting creditors were good, the consequence would be that a debtor might at pleasure at any time disappoint inhibitions by making a private sale, and giving notice to favourite creditors to arrest the price—or even without arrestment he might sell to a postponed creditor, who having the price in his hand, might set it off against his debt by the simple operation of compensation or retention. Thus would inhibition, so easily frustrated, be the most inept and idle of all diligences.

The case is not altered by the consideration, that after a minute of sale is entered into the price becomes moveable, and descends to executors. The present question neither regards the seller's interest in the price, nor the purchaser's obligation to pay it. The adjudication must be good against the lands, whether the price was heritable or moveable. The claim of preference founded [5] on the inhibition goes to the lands themselves, and to the price only as coming in place of the lands.

The process of multiplepoinding was brought before the adjudication was led upon the inhibition, from whence it has been argued, that, the matter having been rendered litigious, *pendente lite nihil innovandum*. But this maxim can have no application in the present question regarding the effect of an inhibition. If an inhibition may be defeated by a sale, then arresters of the price will carry it, and an inhibitor will be cut out. But if an inhibitor's interest remains entire notwithstanding of a sale, and may be rendered effectual at any time by an adjudication, then certainly this adjudication cannot be prevented by means of the purchaser raising a process of multiplepoinding, or any other process whatever.

Argument for the creditors, against the inhibition.

The adjudication was *funditus* void and null, and an inept diligence at the time it was led, because Gordon of Ardoch was at the time denuded; 11th July 1637, Robertson v. Brown, No. 64, p. 2820; Smith v. Hepburn, 2d March 1637, No. 47, p. 2804; 26th February 1724, Stirling, No. 69, p. 2831.

An inhibition does not *ipso jure* void a sale, but is only a ground for voiding it,

and the sale is in all respects to be held effectual, till the date of the decree reducing it. See *Crichton*, No. 117, p. 7050. Now, the inhibitor ought not to be permitted to plead that he has suffered prejudice,—for why did not he or his cedent immediately on the sale arrest the price? If therefore he be disappointed, that is the consequence of his own negligence.

It is not by the sale that the inhibiting creditor suffers prejudice. Nothing happened by the sale except that *Ardoch's* whole creditors (none of whom had done any previous diligence for appropriating the estate to themselves), behoved, for that purpose, to apply themselves to the proper diligence against a moveable estate, in place of that against an heritable one. The law was equally open to them all in the one case as in the other. The inhibitor then cannot say he suffered that injury by the sale, which has arisen only from his own neglect of the proper step to secure himself a preference, viz. arrestment.

The circumstance that it is the purchaser himself who is pleading that in virtue of an inhibition the sale is null, ought to found a strong personal exception against him.

If an inhibitor suffer another creditor to adjudge year and day before him, that creditor becomes preferable; *Stair*, b. 4, t. 50, § 23; *Bankton*, v. i. p. 196. Inhibition then may be rendered ineffectual by posterior diligence upon prior debts. This is totally adverse to the idea of an inhibition being an incumbrance on the lands. In that view, no posterior diligence or infeftment, in implement of a prior personal obligation, could defeat it; which it cannot be disputed may be the case. If an inhibition were an incumbrance, and there were a variety of inhibitions to an amount in whole exceeding the value of the estate, without other diligence, a ranking of inhibitions would take place on a [6] sale, and the first would be preferable, a thing unknown in the law of Scotland. An inhibitor cannot even rank with an adjudger, against whom his inhibition strikes, but can only draw back from him his proportion of the sum which that creditor draws, in the same way as if that creditor was not in the field; and if he would draw nothing, although that creditor were not in the field, he draws nothing from him in consequence of his inhibition. If then an inhibition is not an incumbrance, which must at all events be purged, but may be cut out by posterior diligence upon prior debts, the claim of preference in the present case is void of foundation, and the ranking must proceed upon the footing of the arrestments.

The case figured on the other side, of a debtor privately selling his estate to a favoured creditor, or giving private information of a sale to certain creditors that they may arrest, supposes fraud, and fraud is an insuperable objection to any transaction whatever; but sales will not be reduced, merely because it is possible to commit fraud in them.

Fraudulent schemes may be figured for preferring an inhibiting creditor, as well as any other. If, for instance, it be true that an inhibiting creditor after a sale is entitled to a preference to other creditors, prior as well as posterior, although if the estate had remained unsold the prior creditors to the inhibition would have been at least equal, if not preferable to him; the consequence might be, that the moment a man knew himself to be bankrupt, he might desire a favourite creditor to use inhibition, and proceed instantly to sell his estate, by which the inhibition would obtain a preference over the whole creditors: In short, it is possible to figure the commission of fraud in every transaction among men; but this is no reason for setting them all aside. If there is evidence of positive fraud having actually been committed in a particular case, when the transaction is annulled no one is entitled to complain.

The decision of the Court was as follows: (19th July 1777) "The Lords having advised this petition with the answers thereto, and heard procurators, they find the petitioner as in right of Captain Sutherland preferable upon his inhibition, and that he is entitled to retain the sums contained in the said grounds of debt, and that the other creditors fall to be ranked in their due course upon the remainder of the price and interest thereof, and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *ELLIOCK*.—For the Petitioner, *ILAY CAMPBELL*.—For the Respondents, *CHAS. HAY*.

W. M. M.

No. 2. [7] TOPHAM, DAVIES, and Misses JARRATS, and JOHN WHITE, their Mandatory
v. THOMAS HAY MARSHALL. January 26, 1808.

An inhibition executed and published at the market-cross of the head burgh where the person inhibited resides, is effectual against foreigners.

On the 2nd June 1796, Mr. Thomas Hay Marshall raised letters of inhibition against Mrs. Rose Anderson, his wife, which were duly published, and executed against her on the 22d of the same month at the market-cross of Perth, the head burgh of the sheriffdom within which she then, and for many years before and after, resided. Previous to this date, a process of divorce had depended between these parties; an aliment of £100 Sterling had been modified to Mrs. Rose Anderson, and she had lived in a state of separation from her husband, but the marriage was not dissolved by sentence of divorce till the year 1804. Thus separated from and inhibited by the defender, Mrs. Rose Anderson incurred with the pursuers, who were hatters in London, an account amounting to £30, 8s. 6d. commencing in February 1799, terminating in October 1800, and contracted when she resided in London.

Mrs. Rose Anderson, while living in family with the defender, had been in the custom of employing the pursuers in their line of business.

The defender declined to pay this account; and the pursuers raised an action concluding against him for payment of it.

The cause was discussed before Lord Meadowbank, Ordinary, who called upon the defender to prove, 1st, That intimation of the inhibition and separate aliment of his wife had been made to the pursuers; or, 2dly, That the account was extravagant. But neither of these points could be established.

The Lord Ordinary pronounced the following interlocutor, 15th February 1805: "In respect the inhibition used by the defender was not executed so as to operate against persons forth of the kingdom, and that no proof is offered of special notice having been given to the pursuers not to trust Mrs. Marshall, and that the charge of extravagance in these articles furnished does not appear to the Ordinary well founded, —Decerns against the defender for the amount of the account libelled, finds expenses due, and allows an account therefor to be put in; and dispenses with any representation."

The case came before the Court by petition and answers.

Argument for the defender.

The inhibition was regularly published and executed according to the forms prescribed by the law of Scotland. These forms are regulated entirely by the situation of the inhibited person, and not by the situation of those with whom such person may possibly contract, and who therefore may eventually be affected by the diligence. If the diligence be regularly executed against the person inhibited, it must be effectual against the whole world. The form of inhibition against a wife is the same with that against any other person; so like-[8]-wise must be the effect. The act of Parliament (1597, ch. 268), which dictates the form of executing inhibition, makes no distinction in this respect; and therein no regard is had but to the situation of the person inhibited. To have executed and published at the market-cross of Edinburgh, pier and shore of Leith, an inhibition against a person residing in Perth, would have been absurd; and, at any rate, would not have more effectually warned foreigners. The maxim of law, "*Quicumque debet scire conditionem ejus cum quo contrahit*," is of general application, but more particularly regards those cases wherein parties contract with married women. The slightest inquiry would have satisfied the pursuers that Mrs. Rose Anderson lived apart from her husband, was inhibited by him, and had a separate aliment. The law applicable to this case is accurately stated in an early decision (6th July 1677, Allan v. the Earl and Countess of Southesk, No. 213, p. 6005). On the supposition that an inhibition duly executed and published, according to Scotch forms, is insufficient, there would be no other remedy but to follow the party inhibited, wherever caprice might lead him, and there to take the steps dictated by the peculiar laws of his casual residence: Such a proceeding, it is believed, is not required by the jurisprudence of any independent state where law is a science.

Argument for the pursuers.

I. Inhibition is directed not only against the party who is the object of it, but also the lieges in general. In the present case, Mrs. Rose Anderson is inhibited from delapidating her husband's effects; but, secondly, the lieges in general are inhibited from dealing with her to her husband's prejudice; and it is by the prohibition against themselves only that they are barred. The execution and publication at the market-cross of Perth might be sufficient against the Scotch lieges; but to render the diligence effectual against foreigners, that publication, at least, ought to have been made, which the law requires as equivalent to intimation against natives being without the territory of Scotland. This kind of diligence is subjected to the utmost strictness of interpretation; because, whatever the presumption of law may be, it is necessarily unknown to many who, *optima fide*, may contract with the person against whom it is used. —26th Feb. 1695, *Watson v. Baird*, No. 34, p. 6963; 2d Dec. 1748, *Creditors of Kinninnity*, No. 50, p. 6982.

But, farther, the diligence of inhibition can have no operation beyond the territory of Scotland. Thus, as an inhibition directed against a person in Scotland to prevent the alienation of his heritage, could not prevent him from disposing of an estate situated in England; on the same ground, an inhibition executed for the purpose of preventing the disposal of personal effects, and the contraction of personal debts, ought to have no effect in a foreign territory. No diligence, writ, or decree, is effectual, unless it is executed according to the forms of the country within which it is to have operation. Voet, b. 42, tit. 1, § 39. See likewise b. 23, tit. 2, § 60.

[9] II. During the subsistence of the marriage, and while the parties lived together, the pursuers had been employed by Mrs. Anderson. To their accounts the defender had never objected, and they had been regularly paid. The defender was therefore bound to have intimated to them his altered situation, and that he no longer was liable for his wife's debt. Besides, at the date of this account, the marriage was not dissolved; and Mrs. Anderson was entitled to contract such debts as were necessary and suitable to her situation. *Grant v. Sir William Jardine*, 23d June 1796 (not reported).

The Court differed in opinion from the Lord Ordinary.

It was observed, that every one is bound to inquire and satisfy himself with regard to the condition of the person with whom he contracts; and if he fails in this, he must suffer the penalty of his own credulity. The party with whom the pursuer contracted was a native of Scotland, and her *status* was determined by the laws of that country. In the execution and publication of the diligence of inhibition, regard is only had to the domicile of the person who is the object of it; and in the present case, the diligence, being regular according to the law of Scotland, must be effectual against all mankind.

The following interlocutor was pronounced (11th Dec. 1807).

"Find the inhibition a valid and subsisting diligence; and therefore alter the interlocutor reclaimed against, and assoilzie the defender from the conclusions of the libel."

And on advising a petition, without answers, the Lords adhered, 26th January 1808.

Lord Ordinary, MEADOWBANK.—Act. JA. FERGUSSON.—Alt. ADAM GILLIES.—Agents, JOHN WHYTE and JAMES FRASER, W.S.—Clerk, W.

J. W.

Fac. Col. No. 25, p. 85.

No. 2. [7057] MARION BINNY v. GILBERT SCOT. February 5, 1675.

A party had three sons. The eldest son, after his father's death, renewed a bond due by the father. The eldest son having died, the second son retired the bond, and himself granted a new one. He died in a state of apparenacy. The third son succeeding to the estate, refused to pay this last bond, as not representing the granter of it. Found liable.

The deceased William Scot of Bonnington having three sons, William the eldest, and Robert, and Gilbert; the said William, by his contract of marriage, had the lands and estate of Bonnington disposed to him by his father Mr. James Scot, but was not infett therein; and after his decease, his brother Robert having succeeded to him, did renew a bond granted by the said William in favours of Robert Riddel; and

having retired the said William's bond, did grant a new bond for the sum therein contained; and the said Robert having also deceased before he was infert in the estate or served heir to the said William; and the said Gilbert the third son having succeeded, a pursuit was intended at the instance of the relict and executrix of the creditor against the said Gilbert, as representing the said William and Robert his brothers; at least, to hear and see it found and declared, that the said bond granted by Robert, was granted by him in contemplation and lieu of the said [7058] William's debt and bond; and that it ought to affect any estate that did belong to the said William; and in special, the benefit of the said contract of marriage, and disposition therein made in favour of the said William.

It was alleged for the defender, That he did not represent Robert nor William upon any passive titles; and though he should represent William, neither he nor the estate would be liable to the said debt, in respect the same was extinct, and innovated by a new bond granted by the said Robert, whom neither he did nor would represent. And the said bond being granted only by Robert, could not affect any thing belonging to William; and he was not concerned to debate upon what account the said bond was given by Robert.

The Lords did incline to sustain the declarator, upon that head that the said innovation was only to the effect the creditor might be the better secured and satisfied, the said Robert being apparent heir for the time; and who, if he had lived, would have perfected his right, and obtained himself served heir to William; but being prevented by death, so that the said bond was altogether ineffectual, the pursuer had *condictionem causa data, causa non secuta*, to be reponed against the said innovation; and the defender was *in dolo pessimo* to question the same, seeing *nemo debet locupletari cum aliena jactura*; and he ought not to have William's estate without payment of his debt. And some of the Lords did urge and instance the case after mentioned, viz. If the younger of the two brothers, the elder having gone abroad, and thought to be dead, should obtain himself served as heir to his father; and the creditors of the father, conceiving that he had right, should renew their bonds, and give back those that they had from the father, and thereafter the elder brother should return, and should be served heir to his father, whether in that case the creditors might have action against the elder brother and estate, notwithstanding of the said innovation?

But because the case was new, and not without difficulty, the Lords, before answer, thought fit to try what way it could be made appear that the said bond was in lieu of a bond granted by William.

Reporter. NEWBYTH.—Clerk, GIBSON.

Dirleton, No. 240, p. 115.

No. 6.

[7061] DAVIDSONS v. RANKEN. June 20, 1733.

Blyd and Ranken in company gave commission to Rankens, merchants in Rotterdam, to load a certain cargo, the amount of which they promised to pay; and the cargo being safely arrived, Blyd soon thereafter advises Davidson of the same, and among other things has these words, "You may transfer the account [7062] of the Company's goods to my particular account." By return to this letter, Davidsons tell Blyd, "That at his desire they shall place the amount of the cargo to his particular account." Upon the sight of this letter, Ranken, the other partner, paid to Blyd his proportion of the price of the cargo; and Blyd soon thereafter becoming insolvent, an action was raised against Ranken for the whole price. His defence was, that Davidsons the pursuers had betaken themselves entirely to the faith of Blyd the other partner, by transferring the account of the Company to his particular account, whereby there was a novation of the debt that released him the defender; especially having upon the faith of the pursuer's letter paid his proportion to Blyd. The Lords sustained the defence, this weighing with them, that the transaction could have no other sensible meaning than to liberate Ranken, which was obtained by Blyd, in this view, to afford him credit against his partner.

Fol. Dic. v. 1, p. 479.

No. 9. [7069] JAMES RUTHERFORD v. ELISABETH ANDERSON. February 25, 1785.

The acceptance of a new real security, without renunciation, does not innovate the former one.

John Mason granted an heritable bond to James Anderson, on which he took infetment. Afterwards Rutherford likewise obtained from Mason an heritable security over the same subject. James Anderson died, and was succeeded by Elisabeth Anderson, who delivered up to Mason her predecessor's bond, though not accompanied by a discharge or renunciation, being herself in a state of apparenacy; and in return received a new bond by Mason in her own favour, upon which infetment followed. She afterwards recovered the possession of the old bond, and likewise of the infetment, which had not been in the custody of Mason. In a competition of Mason's creditors, Rutherford claimed a preference before Elisabeth Anderson, on this ground, That the heritable right [7070] granted to her predecessor, which was prior to his own, had been innovated and done away by the security obtained by herself, and which was posterior; so that this question occurred, Whether, by substituting the one security for the other, but without a renunciation, an extinction of it had been effected.

Pleaded for Rutherford; By accepting the latter bond, Anderson directly relinquished and renounced the preceding security. In other words, this obligation was changed into the other by novation; l. 1, *pr. D. De Novat*; Stair, b. 1, tit. 18, § 8; Erskine, b. 3, tit. 4, § 22; Select Decisions, 14th February 1752, Duke of Norfolk, No. 7, p. 7062.

Answered; The feudal right constituted by the prior bond and infetment still subsisted, notwithstanding the mere delivery of the bond to the debtor. It could not be extinguished otherwise than by a proper discharge and renunciation, which was not given, nor could proceed from an apparent heir. Of course, the right might have been adjudged at the instance of any creditor of James Anderson, or it might have been taken up by any supervening heir.

The Lord Ordinary found, "That the former debt was innovated; and therefore preferred Mr. Rutherford." But

The Lords altered that interlocutor; found that innovation had not taken place; and preferred Elisabeth Anderson.

Lord Ordinary, HAILES.—For Rutherford, NAIRNE.—Alt. BUCHAN-HEPBURN.—Clerk, COLQUHOUN.

S.

Fol. Dic. v. 3, p. 325. *Fac. Col.* No. 205, p. 320.

No. 7. [7181] LA. of Wedderburn v. NISBET. February 13, 1612.

In an action of reduction pursued by the La. of Wedderburn v. John Nisbet of Swansfield, for not payment of the feu-duty, first, The Lords would grant no action for the feu-mails preceding La. of Wedderburn's infetment, who acquired the superiority from the La. of ——. Second, The Lords found, That the acquittance granted of the years of God 1604, 1605, and 1607, by David Home of —, factor and chamberlain for the Laird of Wedderburn, who was in use to uplift the mails and duties, was sufficient to induce a liberation of all bygone years, and so in effect found the factor's discharge might purge the clause irritant *postquam cecidit commissio*.

Kerse, MS. fol. 109.

No. 14. [7184] Sir ANDREW DICK v. ——. November 29, 1683.

“The Lords found, a back-tack in a wadset-right became null, and (irritancy) incurred through not payment of the back-tack duty by the space of two years together, like a feu by the 250th act of Parliament 1597; though it contained not the usual clause irritant, that in case two terms run in the third unpaid, then it should expire; and found that irritant clause equally inherent *de jure* as if it were expressed; but found it purgeable at the bar, or before extracting, by paying the bygone back-tack duties.” The Lords sometimes now allow them to be instantly purgeable, even where the writ contains an express clause irritant *in gremio*. They had decided the same with this before in the case of tacks, where two years duty runs in the third unpaid.
Fol. Dic. v. 1, p. 483. Fountainhall, v. 1, p. 246.

No. 24. [7191] L. AITON v. TENANTS. July 5, 1625.

The inputting of a subtenant has not the effect of a forfeiture where there is no sub-tack or other written deed.

In a removing pursued by the L. of Aiton, who had bought some lands from L. Wedderburn, against the tenants of the lands, for removing therefrom, the Lords found, that albeit the defenders, who had rentals of their lands, had put other tenants in possession of the lands, wherein they were personally rentalled themselves, yet by the putting of others in possession thereof, they had not tint nor annulled their rentals, except that they had expressly disposed the right of their rental; and that the putting of others in the real possession of the land, was not a sufficient cause, to debar them from the [7192] right of their rental; but the setting tacks by the rentaller annuls the rental, except they be only set to his eldest son.—See No. 21, p. 7189.

And in the same process, the Lords found, that albeit the L. of Wedderburn, author to the pursuer, had before the pursuer's right, written with his own hand, in his own rental-book, and had insert therein, the defenders to be rentalled to him, tenants and rentallers of the lands, during their lifetimes; and that they offered to prove, that it was the custom of the barony, that those who were so rentalled, bruiked during their lifetime; yet that that was not sufficient to maintain them against this removing; for albeit it might maintain them against the writer himself, so long as he remained heritor, yet it was not enough against a singular successor, they never being lawfully nor formally rentalled, by a perfect writ subscribed by the heritor before witnesses, and delivered to the party, whereby both the setter and receiver might be *hinc inde* obliged to the other; for that writing in the book would not bind the defenders, nor be a good ground, which would produce action thereupon, against the defenders, if they pleased to refuse the same; and so that allegiance was repelled. In this same process also, the Lords found, that a rental perfected, and delivered to the defenders, bearing the defenders to be rentalled to the setter, and his heirs, without adjecting therein of any certain, special, and definite time for the which the rental should endure, was sufficient to maintain the defenders, in the right and possession of the lands contained in the rental, so long as the setter and receiver were in life both together; and that the same expires with the death either of the setter or receiver; so that how soon any of the two died, the same became extinct, with the death of the first of the two deceasing, and endured no longer; and it was found, that the excipients needed not to prove, that it was the custom of the barony, that rentals set after that manner, should endure during the space foressaid; but that albeit there had been no such custom, yet that such rentals should be sufficient to maintain the rentaller, during that space, but no longer, albeit the rental bore, “them and their heirs to be rentalled to the setter, and his heirs”; likeas, the Lords found, that albeit the rental was but personally set to the receiver, and that no mention was made, neither of the setter's heirs, nor receivers, yet the same, albeit containing no definite time, should last during the same space.

Also upon February 4, 1629, it was found betwixt Maxwel and Graham, that a rental set by the Master of Nithsdale, having power from the Earl to set rentals, insert in the Earl's court-books, and extracted by the ordinary clerk, who was the Earl's servant, was enough to defend from a removing pursued by a tackman, acquiring tack from the Earl's self, after that rental, viz. the defender therewith proving, that about the time of his rental, there are other rentals inserted in that same court-books, by virtue whereof the rentallers bruik; and found the rental sufficient, albeit it was not subscribed by the setter. See TACK.

Act. HOPE & BELCHES.—Alt. NICOLSON.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 484. Durie, p. 172.

No. 25. [7193] E. GALLOWAY v. TAILZIFER. June 26, 1627.

A rentaller having excambd his lands with another rentaller who had an equal quantity of ground, the parties exchanged possession. Found, that the rental was thereby extinct, though the contract of excambion bore, that if the setter should not consent, the contract should be null.

In a removing at the E. of Galloway's instance, against Tailzifer, who defended himself with a rental of the lands libelled, which was set to his father, and his heirs *ad perpetuam remanentiam* by the town of Wigtoun, of whom the said lands were holden, the Lords found the exception upon this rental of the tenor foresaid, sufficient to defend this defender, as apparent heir to his umquhile father, to whom and his heirs the rental was set; he proving that it is the custom of the town of Wigtoun, that the rentals of the like tenor, viz. set to men and their heirs, have ever been sufficient to maintain the heir of the first rentaller, after the first rentaller's decease, in possession of the lands, during the heir's lifetime; and which was sustained, albeit the pursuer replied, That that rental behoved to be found expired after the decease of the first rentaller; and that it could last no longer, neither was of any force to defend his heir, being against the nature of a rental; and albeit by the custom of that burgh, setters of the rental, it might be maintained against themselves, if they were pursuing the defender to remove, yet it could not be respected against this pursuer, who was heritably infest in the lands libelled, by the town of Wigtoun, upon the resignation of his author, who was also heritably infest therein by them, long before the date of this rental; which reply was repelled, and the exception sustained, as said is; but the custom was found by the Lords ought to be proved by some sentence, given in *foro contradictorio* betwixt parties, where the Judge allowed the said custom, and found the same proved; and found it not probable by the testimony of the burgh, declaring that that was their custom, nor by any trial showing that the rentaller's heirs bruicked so *de facto*, which was not found sufficient.

Act. STUART & NICOLSON.—Alt. —.—Clerk, SCOT.

February 10, 1631.—Earl of Galloway pursuing removing against certain burgesses of Wigtoun, from certain lands, wherein he was infest by an heritable feu-charter, upon the resignation of M'Dougal of Mathermuir, who was infest in feu therein also of before, by the town of Wigtoun, to whom the lands pertained in burgage, as part of their common good; and the defender alleging that the said heritable feu was null, in respect by the 36th act, 3d Parl. James IV., and by the 185th act, 13th Parl. James VI., it is statute, "That the burrows may not set their common good for longer space than three years"; this allegiance was repelled; for it was found, that this right, which followed upon another prior heritable right standing, there being two heritable infestments, could not be found null *ope exceptionis*, being proponed in this removing, and not being quarrelled by the town, nor by any party, who had any other better lawful right; and it being alleged, That the sasine was null, for all the lands libelled therein contained, except that land only, whereat express sasine

was taken, and was recorded in the clause, *Acta erant hæc, &c.* The Lords repelled the allegiance, and sustained the sasine for all the lands lying contiguous [7194] to the land, whereat the sasine was taken, seeing that the same held of one superior, and was one tenor of holding; but it was not respected that the superior had united them, and had appointed a sasine taken at such place, to serve for all the lands, seeing it was not confirmed by the King.

Act. STUART & NEILSON.—Alt. NICOLSON & GILMOUR.—Clerk, SCOT.

March 15.—In this cause of the Earl of Galloway, mentioned February 10, 1631, the Lords found, that a rental to a man and his heirs, should endure after the decease of the first rentaller, to one heir for his lifetime, and should not expire by the decease of the receiver, it being proved by other rentals of the like tenor, that the setters have been in use to set such rentals, and that the first heirs have been in use to possess the same, without question therein made to them; after the which first heir's decease, the Lords found the rental should expire, and endure no longer. Item, It was found, that a rentaller by contract excambing with another rentaller, where the rentals were both of a like quantity of land, and where the excambion took effect, by exchanging of possessions conform thereto, that thereby the rental was extinct, and the parties had tint the benefit thereof; albeit in the contract of excambion, it was provided, that if the setter should not allow of the excambion, that the contract in that case should be null; for that provision was found to be elusory, and not to be respected, no more than if a vassal of ward lands had given charter and sasine thereof to another, and had provided therein, that if the superiors consent should not be obtained thereto, that it should be null, which provision could never save from the recognition; even so after possession following upon that contract, the provision could work nothing against the setter of the rental; but because the defender, to maintain his rental, duplied, That the contract took never effect, seeing he offered to prove, that either party, notwithstanding thereof remained in continual possession of the lands, contained in their own proper rentals; this duply was admitted, and the excipient was preferred to prove his possession, for sustaining of his rental against the pursuer's triply of possession, tending to annul the said rental. *Partibus ut illic comparentibus.* See JUS TERTII. PROOF. TACK. UNION.

Fol. Dic. v. 1, p. 484. Durie, pp. 300, 567 & 582.

* * Spottiswood reports this case :

June 22, 1627.—In an action of removing pursued by the Earl of Galloway against his Tenants, it was excepted for one John Taylor, That his father was rentalled in the lands libelled by the town of Wigton, he and his heirs *ad perpetuam remanentiam*; it being found by the Lords, that that rental should endure only for the setter's and receiver's lifetime *conjunctim* (as had been found before between Wedderburn and the Tenants of Kymergham): It was duplied by the defender in fortification of his rental, That he offered to prove, that by [7195] the custom of the burgh of Wigton, such rentals were extended to the first heir of the receiver, which he would prove by a testificate of the Bailies and burgh thereof. The Lords found the custom of the burgh of Wigton only probable by writ or oath of party.

Spottiswood (RENTAL), p. 289.

No. 28. [7197] LA. MAXWELL v. Her TENANTS. July 28, 1630.

An assignation made by a rentaller to his children, was found not to be such a deed as to make the rental fall. In this case, the rentaller retained possession with his children.

In a removing La. Maxwell *contra* Her Tenants, one of the defenders alleging, that he was rentalled by the pursuer, in the lands libelled, during his lifetime, and by

virtue thereof in possession ;—the pursuer replying, That the rental bore a clause and provision, “ that if the rentaller disponed his lands to any other person, it should be null,” and that he had disponed it to his own bairns, who were in possession of the lands ;—the defender duplying, That the disposition to any of his bairns made it not to fall, seeing that disposition could not be reputed, as if he had disponed his rental to a stranger, which behoved to be the only meaning and interpretation of that clause of the contract, specially seeing he and his bairns, to whom the disposition was made, remained in household, and dwelt together, and possest altogether ;—The Lords found the exception and duply relevant ; and found the disposition, made by the rentaller to his own bairns, not to be such a deed as to make the rental fall, specially seeing he retained the possession with his said bairns ; whereas, if he had not been in possession, but only the bairns, to whom he disponed, the matter would have been the more disputable.

Act. — *et* DOUGLAS.—Alt. — Clerk, HAY.

Fol. Dic. v. 1, p. 484. Durie, p. 536.

* * Auchinleck reports this case :

The Lady Maxwell *v.* the Tenants of —. It is excepted by some of the tenants, That they had rentals set to them by the pursuer. To which it was replied, That the said rentals were null, because they were granted with [7198] provision, that in case assignation or disposition were granted or made of them, without consent of the setter, the rentals should be null ; and true it is, that sundry of the defenders had made assignation to their bairns, and put them in possession.—The Lords found, that such dispositions and assignations, made to men's own bairns, could infer no nullity.

Auchinleck, MS. p. 204.

No. 43. [7206] Earl of TULLIBARDINE *v.* MURRAY of Ochtertyre. February 1, 1667.

Clauses irritant in wadsets purgeable before declarator.

The Earl of Tullibardine having wadset the lands of Logie-Almond, to Murray of Ochtertyre, he did thereafter discharge the reversion, and at that same time, got a back-bond, bearing, That for payment of 56,000 merks, with all other sums that should happen to be due to him by Tullibardine, and all expenses, that he should dispoise the lands back to Tullibardine, or the heirs or assignees of his own body ; but with this provision, that if he were not paid before Martinmas 1662, the bond should be null without declarator. Tullibardine premonishes, and after premonition, dispoises the lands to Sir John Drummond, and they both jointly consign, and now pursue declarator. It was alleged for the defender, Ochtertyre, 1mo, No declarator upon this order, because the back-bond is personal to my Lord, and to the heirs or assignees, being of his body ; so that Sir John Drummond, nor any stranger, can have right thereby to redeem. 2do, The back-bond is extinct, and null, by committing of the clause irritant, in so far as payment has not been made before 1662. The pursuer answered to the first, that albeit the reversion had been personal to my Lord, only excluding his heirs and assignees ; yet my Lord, in his own lifetime, might redeem, and being redeemed, the right would belong to any to whom my Lord had, or should dispoise. 2do, This clause irritant is *pactum legis commissoriae in pignoris*, which, by the civil law, and our custom, is void, at least may be still purged before declarator obtained, as being rigorous and penal, and so abiding the Lords' modification, as well as penalties in bonds modified of consent of parties, especially in this case, where the performance is not of a single liquid sum, but comprehends a general clause of all debts that were, or should be after due. The defender answered, that clauses irritant in wadsets are not rejected by our law, but are valid ; only where declarators are requisite the Lords may reduce them to the just interest of parties before declarator ; but here there needs no declarator, because the defender is in

possession, and may except upon the clause irritant committed, and the clause bears to be effectual without declarator ; and albeit this clause could now be reduced to the just interest, it is only this, that [7207] seeing Tullibardine hath sold the land, the defender should give as great a price as it is sold for to Sir John Drummond, which the defender is willing to do.

The Lords sustained the order, in so far as it is at the instance of Tullibardine, but not as to Sir John Drummond, without prejudice to Sir John Drummond's disposition ; they found also, that this clause irritant might be purged now at the bar, or any time before declarator, which is always necessary, though renounced, that *medio tempore*, parties may purge ; and the Lords inclined, that Ochtertyre should have the lands for the price Sir John Drummond gave, which is 80,000 merks ; but, upon examining him and my Lord, it appeared, that my Lord had offered the land to him, *re integra*, and that he had never been special, as to so great a price as this ; but only general, that he would give as great a price as any other would give, which they thought not sufficient, seeing any other thereby would be scarred from bargaining.

February 12, 1667.—In the declarator at the instance of Tullibardine v. Murray of Ochtertyre, disputed the first of February last, it was now further alleged for Ochtertyre, That clauses irritant in wadsets, not being illegal, or null by our law, albeit the Lords do sometimes restrict the effect thereof, *ad bonum et æquum*, to the just interest of the parties against whom the same is conceived, they do never proceed any further ; but here Ochtertyre is content to make up to the Earl his just interest, by paying a greater price for the land than Sir John Drummond ; and whereas it was alleged, that this was not receivable now, after the Earl had made bargain with Sir John Drummond, Ochtertyre now offered to prove, that before any bargain was agreed, in word or writ, he did make offer to the Earl of fourscore ten thousand merks, which he offered to prove by witnesses above all exception, who communed betwixt them, viz. the Lord Stormont and the Laird of Kylar. It was answered, That the pursuers adhered to the Lords' former interlocutor, whereby they have restored the Earl against the clause irritant, he satisfying Ochtertyre his whole interest, *cum omni causa*, the same point being then alleged and disputed, and both parties being judicially called, and having declared their minds concerning any such offer, whereby the Earl, upon his honour, declared, that before the agreement with Sir John Drummond, Ochtertyre offered not so much by 4000 merks. 2do, Any such allegiance, albeit it were competent, were only probable *scripto vel juramento*, the Earl now having disposed to Sir John Drummond, so that the effect would be to draw him into double dispositions, which is of great consequence, both as to his honour and interest, especially seeing that Ochtertyre did not take an instrument upon the offer. It was answered for Ochtertyre, that the former interlocutor cannot exclude him, especially seeing he did only allege then that he made a general offer of as much for the land as Sir John Drummond would give therefor, but now [7208] he offers to prove, that he offered 90,000 merks, which is 2000 merks more than Sir John's price.

The Lords found that they would only restrict the clause irritant, to the effect that the granter of the wadset might suffer no detriment, which they found to be effectual, if the wadsetter offered as great, or a greater sum than the other buyer, before any bargain agreed between them, either in word or writ ; but found it not probable by witnesses, but by writ, on the Earl's oath ; and found that a general offer was not sufficient, unless it had expressed a particular sum.

Fol. Dic. v. 1, p. 487. Stair, pp. 433, 441.

No. 51. [7216] POLLOCK v. STORIE. November 10, 1738.

Irritancy in *pacto legis commissoriae in pignore* becomes effectual by the lapse of 40 years.

Where lands were disposed in security of money lent, under reversion, but with an irritancy, that, in case of not redemption at the time limited, the lands should

irredeemably remain with the disponee ; it was found, " That the reverser not having offered to redeem since the term, when, by paction, the right of redemption was to become void, which is more than 40 years ago (it was Whitsunday 1695), and that the disponee and his father had possessed since the year 1705, the right was now irredeemable."

This was by the narrowest majority ; the point just turned upon this, Whether the paction was void till declarator ; or, if the paction was *stricto jure* valid, and only a remedy competent against it *ex equitate*, which was barred by the lapse of 40 years ?

Fol. Dic. v. 3, p. 337. Kilkerran (IRRITANCY), No. 1, p. 297.

* * C. Home reports the same case :

In September 1688, Archibald Anderson, burgess in Paisley, granted a bond for 250 merks, to John Park, which he obliged himself to pay (with interest from Martinmas then next) to him at Martinmas 1695 ; and, for his better security, he disposed to Park a house and yard, &c., in the burgh of Paisley, and which contained this clause of reversion, That, in case the said Archibald Anderson should make payment of the principal sum, &c., at the term above specified, then, and in that case, the house, &c., was declared to be redeemable from Park and his foresaids, without necessity of a declarator ; but in case he and his foresaids should fail in the payment of the said sums at the term of Martinmas 1695, then the house, &c., is declared to be irredeemable from Parkin all time thereafter.

Upon this disposition he took infetment that year ; and, in the 1694, he disposed the subject to John Storrie, who was also infett ; however, it would seem that Storrie did not obtain possession of the subjects disposed for upwards of ten years after the irritancy of the reversion was incurred ; for, by a decret of removing obtained by him against Archibald Anderson before the Bailies of Paisley, anno 1705, it appeared that Anderson was decerned to remove, to which he gave obedience by quitting the possession to John Storrie, who, and his son George, continued to possess the same for more than 40 years after Martinmas 1695, when, by paction, the reversion was to become void.

Robert Pollock having obtained a right to these subjects from the heirs of Archibald Anderson, brought a process of mails and duties thereon.

Pleaded for George Storrie ; That his sasine, as heir to his father, was dated in the year 1725 ; from which it was plain he had the benefit of a possessory judgment, even by more than seven years possession, on his own infetment ; [7217] and that the process of mails and duties was a little too summary after the lapse of so many years, as it required at least a reduction or declarator of redemption to proceed, before the right acquired by the pursuer could be effectual for a possessory action. 2do, By the rights produced, it appeared the pursuer's authors were long ago denuded ; and, though that was under reversion, from seven years, ending at Martinmas 1695, and whereof the irritancy being incurred, yet the disponent might be entitled to be reponed against the lapse of the time ; but, having made no application for such remedy, in any shape whatever, till more than 40 years were elapsed after the conventional irritancy was incurred ; that any relief or claim to be reponed, was now cut off by the negative prescription.

It was answered for the pursuer ; That the real right was granted for security of the sum lent ; so that it was plain, if Park or his assignees had possessed the tenement for a thousand years, he was still possessing only as a creditor for payment of his principal sum and annualrents that became due yearly, by the express stipulation of parties, even after the expiry of the limited reversion ; and it was never heard that a creditor could plead the benefit of a possessory judgment, that privilege being only competent to proprietors or tacksmen of land ; and the benefit of it is, that the possessor must continue in the same state till his right is reduced : But as to a creditor, his possession must impute in payment of his debt ; and, whenever that is done, his right evanishes, and he must yield the possession. Indeed, if a declarator of irritancy had proceeded, the defender would have thereafter possessed as heritor, and thereby gained the irredeemable right of property, whereby he would have been entitled to the possessory judgment ; but, while he possessed as creditor for security of his debt, it is absurd to pretend he could thereby gain that privilege, more than he could the

irredeemable right of property upon the positive prescription ; for both must go hand in hand ; and, where the one does not take place, it is impossible that the other can. Surely he could not acquire an irredeemable right of property by the positive prescription, as it would have been contrary to the very title of his possession ; of course, the possessory judgment cannot defend him.

2dly, As to the defence, with respect to the negative prescription, it was answered, That the defender might have thereby lost his right ; but it was not tenable to plead, the pursuer, who is proprietor, could lose his property in that manner, especially as there is a great deal more here than an incorporate reversion, the very title of the right being a security for payment of principal sums and annualrents ; so that, without the aid of the statute 1617, the creditor's right would vanish whenever his debt was paid, and the reverser's right become disincumbered ; therefore the question here is, Whether the proprietor can lose his right of property through not payment of a debt secured thereon for the space of 40 years ? the very stating of which is absurd. Neither can it vary the argument, that the reversion was limited, and 40 years run since the [7218] expiry of the term for redeeming, seeing it was competent, at any time before declarator, to offer payment of the sums resting : And, if these were paid before declarator (which is the case here), by the creditor's possession, no declarator could ever be obtained, or was competent.

In short, this paction is reprobated as much by our law as it was by the civil, with this variation only, that we, to bring matters to a certainty, whether the wadsetter or reverser shall have the property, allow the latter to redeem, by payment at any time before decret ; and, in case the wadsetter shall obtain a declarator, voiding the reversion, then he becomes proprietor ; but this is the effect of the judgment of Court, and the presumed acquiescence of the reverser, by not offering payment before decret is obtained. This being the case, it cannot be denied it is *meræ facultatis*, and purely in the debtor's option to pay any time before the declarator is extracted against him : Our law has allowed him to be silent, till he is quickened by such process, and then, or never, he must take care to save his property.

Replied for the defender ; Though no declarator for not redemption was ever obtained by the disponee or his successor, there appears plainly to have been the equivalent to that, by the process and decret of removing in the year 1705, obtained against the very person who was entitled to the reversion, or to be reponed against the lapse of time, and to plead that the same was still redeemable, and offer the money in order to avoid being removed by the then pursuer as heritable proprietor of the subject, who, by that process, did, in as strong terms, assert his right to the same, as if he had libelled a declarator of irritancy ; since a removing is certainly a stronger exercise of a right of property than a process of mails and duties : And, as it must be allowed that a declarator would have foreclosed all future claims to the reversion, it likewise proves, that the *pacta legis commissoriae etiam in pignoribus*, are not absolutely reprobated by our law, otherwise it could be no foundation of a declarator in order to foreclose any after redemption. In the next place, with respect to the argument, That the lapse of 40 years, since Martinmas 1695, is sufficient to cut off the pursuer from any claim for relief, it was observed, That the irritancy is not *ipso jure* void, but only purgeable *ex æquitate* before declarator ; and, if the omission to purge before the extract of a decret would for ever foreclose the disposer from being reponed to the reversion, which was once forfeited by the terms of the clause itself, upon the lapse of the time limited for it ; the defender apprehends, that much more must that equitable claim of relief be cut off by the long prescription of 40 years, which is a much greater negligence on the part of the disposer, and, by the general principles of law, serves to cut off all obligations and actions whatsoever ; and therefore seems fully to supply the want of a declarator in favour of a disponee : Besides, this remedy or relief the Court is in use to grant *ex æquitate*, can never be stronger than any other perfect right which may be the ground of an action of reduction ; and yet all these are cut off by the lapse of time.

[7219] As to the negative prescription on the statute 1617, it is true, the same bears an exception of reversions *in gremio*, or registered apart ; but that can afford no objection, seeing the act is plainly to be understood of perpetual reversions, which being taken as *meræ facultatis*, are excepted from the prescriptions in these two cases : But this cannot be applied to a reversion limited to a certain time, which, though it be *in gremio, juris*, yet, upon the face of the right, it cannot appear otherwise than as it

is expressed, that is, temporary, and, *ipso jure*, perishing by the lapse of time, though *ex officio judicis*, the reverser may be reponed; but this title to be reponed is then the only reversion that remains, and, like all other actions or reversions, must be subject to a negative prescription.

Duplied for the pursuer; The decret of removing can never supply the want of a declarator, since neither the nature of the action, nor the inferior judge before whom it was carried on, was competent for that purpose; more especially, as it might have been intended immediately after the date of the right; which demonstrates, that it could stand in no stead of a declarator of irritancy of the reversion. It is true, the reverser might have taken that opportunity of paying the money, but his circumstances were then such as he could not procure it, and therefore behoved to submit to a removing; but that could not exclude him from paying at any time thereafter, and claiming his right before declarator was obtained.

The Lords found, That in respect the reverser or his successors have not offered to redeem since the term of Martinmas 1695, when, by paction, the right of reversion was to become void, which is now more than 40 years ago; and that the defender and his father have possessed the lands without quarrel ever since the 1705, the right is now irredeemable.

C. Home, No. 102, p. 160.

No. 64.

[7234] PHIN v. PHIN. November 1682.

The Lords sustained a declarator for finding a tack null, *ob non solutum canonem*, although the tack wanted a clause irritant, unless the tacksman would purge by payment of the tack-duty betwixt and a certain day, and find caution for payment thereof in time coming.

Fol. Dic. v. 1, p. 488. *Sir P. Home*, MS.

No. 68. [7237] Sir JAMES CLERK of Penycuik, Baronet v. WALTER BENNET, and ALEXANDER MILES, his Assignee. March 6, 1759.

Conventional irritancy of a tack *ob non solutum canonem* not purgeable after decree of removing is extracted.

In January 1748, Sir John Clerk granted a tack of the farm of Burghlie to Walter Bennet, his heirs and assignees, for the space of 19 years after Martinmas 1749, at the yearly rent of £411, 10s. 8d. Scots, payable by equal portions at Whitsunday and Martinmas; but under this condition, "That if one year's rent should be resting unpaid half-a-year after it falls due, then, and in that case, the tack should become void and null, and of none effect."

Bennet the tacksman committed the management of this farm to his wife, who made sundry payments to Sir John Clerk, and, after his death, to his son and heir Sir James; but there still remained a balance due at Candlemas 1758 of £1051, 16s. 6d. Scots. Bennet himself, in the 1757, fell into such bad circumstances, that he was imprisoned by another creditor for a small debt, and took the benefit of the act of grace.

In January 1758, Sir James Clerk raised a process before the sheriff of Edinburgh against Bennet, concluding both for payment of the above arrear, and that he should be removed from the farm, as having incurred the irritancy. The libel recited the tack, and irritant clause thereof, and concluded, "That in regard the said Walter Bennet has incurred the irritancy of the foresaid tack, by suffering more than a year's rent to be unpaid half-a-year after it was due; therefore, and in terms of the late act of sederunt, he should be decerned and ordained instantly to flit and remove," &c.

To this process Bennet compeared, denied his wife's *præpositura*, and claimed allowance of sundry articles of compensation. The sheriff, on the 8th of March, found the *præpositura* proved, and repelled sundry of the articles of compensation. Bennet presented a reclaiming petition; and upon advising the same, with answers for Sir

James, the Sheriff, on the 22d March 1758, allowed a proof as to one article, adhered as to the others, "and in regard there is more than one year's rent due by the defender, after allowance of the said article, decerned in the removing, as libelled." Upon this decerniture a precept was extracted, and a charge to remove given on the 31st of March; upon which Bennet presented a bill of suspension, and obtained a sist.

The process, so far as respected the conclusion for payment of the arrears of rent, was still carried on before the Sheriff; who, on the 5th of April, found Bennet liable for the sums libelled, and decerned.

On the 13th of April, Bennet assigned his tack to Alexander Miles, a brewer, in security, as he alleged, of the sums Miles should advance for him, and in trust *quoad ultra* for Bennet's behoof; but *ex facie* the assignment was absolute, and Miles immediately entered to possession. On the 14th of April, he inti-[7238]-mated his right to Sir James, and made offer to pay the arrear found due by Bennet; which Sir James refused to accept of; and thereupon Miles consigned the money in the hands of the Clerk of the Bills, together with a bond of caution for the five subsequent crops.

On the 15th April, the Sheriff refused a petition for Bennet, in which payment was offered, and adhered to his interlocutor of the 5th of April; as also, "decerned the officers to charge Bennet to flit and remove within forty-eight hours after the charge, under the pain of ejection." On this a decret was extracted.

In the suspension of the removing, it was objected for Bennet and Miles, 1mo, That, upon a proper count and reckoning, it would appear, that the irritancy was not incurred. 2do, The Sheriff's interlocutor of the 22d of March was only founded on the act of sederunt, as it simply found, that a year's rent was due; and did not find, that that year's rent had been resting half-a-year after its becoming due, in terms of the irritant clause of the tack; and therefore the interlocutor was erroneous, as, by the act of sederunt, the Sheriff ought first to have assigned a term for the tenant's finding caution for the arrears, and five subsequent crops, and not to have summarily decerned in the removing. And, 3tio, Supposing the decerniture to have proceeded on the conventional irritancy, yet the Sheriff ought not to have decerned in the removing, at the same time that he found the arrear due; but ought to have allowed a reasonable time for the tenant's paying that arrear after it was found due, as he could not know till then how much he was to pay, where the balance was the subject of dispute. It would be very hard, if a tenant's being mistaken in the grounds of his counter claims should afford the means of forfeiting him of his tack, before he could be aware of his danger; and here an offer of payment was made, and the money consigned, while matters were yet entire, and even before the final interlocutor was pronounced.

Answered for Sir James, 1mo, That Bennet's claims of compensation were all groundless, and had been justly over-ruled; and the extent of the arrear found due, clearly shewed, that the conventional irritancy had been incurred. 2do, The Sheriff's interlocutor of the 22d March, decerning in the removing, must be applied to the conventional irritancy, which was specially libelled and insisted on; and not to the irritancy introduced by the act of sederunt; for the act was only mentioned in the libel, as regulating the manner of removing, when once the conventional irritancy was found to be incurred. And, 3tio, It is an established rule, That conventional irritancies of tacks *ob non solutum canonem*, cannot be purged when found incurred, but by immediate payment at the bar. Here no such offer was made till long after the precept of removing had been extracted, and a charge given upon it. If a tenant's proponing groundless claims and defences against such an action were to stop the removing till all of them were discussed, such removings might be defeated or postponed for almost any length of time. It is sufficient to support the Sheriff's decerniture, that it [7239] appears the fact was such as he found; so that the irritancy had been then truly incurred; and it was in such a case *ultra vires* of the Sheriff, to have assigned terms, *ex proprio motu*, for purging that irritancy. Nor could the offer and consignment made by Bennet's assignee, after extracting and executing the precept, stop the effect of the irritancy, which was already declared, even before the assignation was granted by Bennet, who had never offered, and was unable to pay. The decerniture to remove, contained in the interlocutor of the 15th of April, was altogether superfluous.

"The Lords found the letters orderly proceeded, and decerned."

For Sir James, RAE.—Alt. MACQUEEN.—Reporter, COLSTON.

N.B. As Bennet's bill of suspension had been passed by three Ordinaries, "in respect of the consignation of the bygone rents found due by him," a warrant on the clerk to deliver up the money to Sir James was afterwards demanded; but as the money was proved to have belonged to Miles, who advanced it in expectation that his right to the tack would have been sustained, the Lords ordered it to be redelivered to him.

D. R.

Fol. Dic. v. 3, p. 338. *Fac. Col.* No. 181, p. 322.

No. 71. [7244] THOMAS LOCKHART, Esq. v. ARCHIBALD SHIELLS, Portioner of Inveresk. November 14, 1770.

The irritancy in a feu contract *ob non solutum canonem*, not incurred *ipso jure*, and capable of being purged before declarator.

By a feu-contract, dated 24th December 1734, Archibald Shiells, the defender's father, disposed to Thomas Brown, his heirs and assignees, &c., several acres of land near Inveresk, for which Brown became bound to pay the sum of £6, 15s. 10½d. of feu-duty, doubling the same at the entry of every heir or singular successor; and it was also provided, "That if two terms feu-duty shall run into the third unpaid, then, and in that case, the said Thomas Brown and his foresaids shall thereby *ipso facto* forfeit their right to the subject above disposed." This contract contained no precept of sasine; but instead thereof, Shiells became bound to grant a sufficient charter, containing precept and all other clauses.

Brown entered into possession, but fell very much in arrear of the feu-duty. In 1746 there was due £19, 9s. 1d., for which bill was granted; and in 1755, when Brown died, nine years' feu-duty was unpaid. Brown left three daughters, Mary, Margaret and Jean. The two eldest were married and from home; Jean, the youngest, continued in possession of the feu till the year 1759, when she granted a conveyance of what right she had, to the defender, who entered into possession of the whole subject.

But as his right to possess the whole was evidently defective, he proceeded in the following manner.

Having charged the two eldest sisters and their husbands to enter themselves heirs to their father, he, on the 20th December 1758, took decret in absence [7245] against them for the following sums, viz. for the sum of £81, 10s. 5d. as the amount of feu-duties due at the term of Lammas 1758; the sum of £6, 15s. 10d. yearly, as the feu-duty from the year 1758, in all time coming; the same sum of £6, 15s. 10d. as the duplicate of the feu-duty at the death of Thomas Brown in 1755, the sum of £30 as the penalty in the feu-contract, the sum of £19, 1s. 1d. contained in the bill, and another sum of £20 in name of damages, the whole amounting to £185, 9s. 4d.

Upon this decret the defender raised letters of special charge against the three sisters, charging them to enter themselves heirs in special, in the said lands, to their father, said to have died last vest and seased therein, but who never had been infet; and thereafter, on 19th December 1759, he obtained a decret of adjudication of the subject.

In the year 1767, a demand was made upon the defender by Alexander Kerr, who had obtained a disposition from Mary and Margaret Browns, the two eldest sisters; and Kerr having thereafter conveyed his right to Mr. Lockhart, he brought an action against the defender, concluding for reduction of the foresaid decret of adjudication, and that he should be decerned to cede the possession to the pursuer, and account to him for his bygone intromissions with the rents and profits of the subjects.

In support of his action, the pursuer stated several objections to the decret of constitution and of adjudication: 1st, That the decret of constitution was taken against the three sisters conjunctly, instead of being against each for her third share; 2dly, That the adjudication proceeded upon a special charge to enter heir, when the

father had only a personal right to the subject, having never been infeft; and that a special charge was in these circumstances inept, and could not be the foundation of an adjudication; and 3dly, That the adjudication was led for sums that were not due.

The defender, on the other hand, maintained, 1st, That at any rate he had a good right to one-third of the lands; 2dly, That his decret of constitution and adjudication were liable to no nullity; and, 3dly, Independent of these collateral rights, he was entitled to the absolute property of the subject, the feu-right having been forfeited to his father, and to himself, as representing him, *ob non solutum canonem*.

The Lord Ordinary, upon the 4th August 1769, pronounced the following interlocutor: "Sustains the reasons of reduction of the decret of adjudication, at the instance of the said Archibald Shiells v. Mary, Margaret, and Jean Browns, produced, void and null; and reduces, decerns, and declares accordingly; repels the defences pleaded by the said Archibald Shiells, that the feu-contract is void *ob non solutum canonem*; finds, that Archibald Shiells, defender, is liable to account for the rents of the lands contained in the said feu-contract."

The defender gave in a reclaiming petition; and upon the 1st point, the objections to the adjudication, pleaded,

[7246] 1mo, The debt pursued for was the feu-duties payable to the superior by the feu-right; and as it could not be denied, that as long as the feu remained undivided betwixt the heirs portioners, it would have been competent for the superior to poind any part of the ground for his feu-duty, or to distrain the goods, or any part thereof, so it was competent to adjudge all and every part of the feu for the whole feu-duty; and as the foundation of such adjudication, to take a decret *in solidum* against each of the heirs portioners. Nor could any objection lie to the adjudication on this account; for whatever might be the terms of the constitution, yet as the defender had attached the whole land for payment of the whole debt, that would necessarily lay the debt proportionally upon the shares of each of the heirs portioners.

2do, The objection, that a general special charge, not a special charge, was the proper diligence, when attentively considered, though plausible, was not a solid one in point of law. There was a capital mistake in the pursuer's argument: The adjudication did not proceed on account of the heir's contempt, but because a charge was *fictione juris* held as equivalent to a service; and as it could not be denied that a special service, which included a general one, would carry every right and interest which the predecessor had in the lands, whether vested by infeftment or not; so an adjudication, proceeding upon a special charge, would carry every right and interest which the defunct had in the lands, without distinction, whether it was a personal right or established by infeftment.

Though, in the present case, therefore, a special service was not absolutely necessary as a general service would have been sufficient, yet it did not from thence follow, that because it was unnecessary it would be null and void. Though it would not have been effectual for infefting the heirs of Thomas Brown, upon a precept to be granted by the superior, in common form, it would certainly have been effectual to carry the feu-contract, the only right Thomas Brown had to the subject; and that being the case, there was no reason why an adjudication of that right might not very properly proceed upon a special charge.

The point had been established, Falconer, Feb. 5, 1745, Ramsay v. Clapperton's Creditors, *voce* PASSIVE TITLE, where the objection, that as the predecessor had only a personal right, a general special charge should have been used, was repelled. The decision, July 10, 1737, Monro v. Creditors of Easterfairn, No. 9, p. 2173, and the opinion of Lord Bankton, l. 3, t. 5, § 114, founded on that judgment, had no connection with the present question. The point then decided was, that a general charge did not supply the want of a service of any kind, but was solely intended to establish a passive title against the heir; from which it could not be inferred, that a special charge would, in that case, have been ineffectual to support the adjudication challenged.

3tio, The objection, that as the adjudication was led for sums not due, the effect thereof should be to vitiate the whole diligence, was neither founded on truth, nor did the conclusion follow. The articles of £6, 15s. 10d., with the [7247] duplicates of the feu-duty, that of £30 as the penalty in the contract, and £20 for expenses, were all authorised charges; and although objections did lie to certain articles, the decret

would nevertheless stand good as to the other articles that were well founded ; for as each article was adjudged for separately, there were as many accumulated sums and as many adjudications as there were articles.

Upon this point, the pursuer answered :

1mo, As to the decret of constitution—though he did not mean to state any objection to the sum of £19, 1s. 1d. contained in the bill, nor to the bygone feu-duties from 1746 to 1758, yet as to all the other articles, the decret was groundless and irrelevant. The third article in the decret of £6, 15s. 10d., as the feu-duty from the year 1758, and in all time coming, was not a debt due at the time, but to arise *a futuro*, and could not therefore with propriety be included in the decret. The fourth article of the same sum, as the duplicate of the feu-duty on the death of Thomas Brown in 1755, was a manifest *pluris petitio*. A *duplicando* was only claimable upon an entry or renewal of the investiture in favour of the heir. But, in the present case, not only had there been no renewal, but there could be none ; for though Archibald Shiells, the granter of the feu, was bound to grant to Mr. Brown a charter and precept, yet that never had been done ; and of course a composition could no more be demanded from Brown's heirs, than it could have been from Brown himself upon taking infeftment, had the charter been granted. The fifth article of £30, said to be the penalty incurred through Brown's neglect in payment of the feu-duty, was an erroneous charge. The penalty stipulated in the contract could have no relation to the termly failzie in payment of the feu-duty, which would have come to be more exorbitant than any penalty that ever was heard of ; but as that was not specially declared in the contract, this penalty could only be meant to secure performance of the general feu-contract ; and as, in that view, Archibald Shiells had failed to implement what was prestatable upon his part, by granting a charter and precept of sasine, neither he nor his heirs, could have action against Brown or his heirs, for implement of what was to be performed on their part. The sixth article, of a penal sum of £20, in name of damages and expenses, was an additional *pluris petitio* ; it being an established rule, that the other penalties claimed could be intended or admitted only as an indemnification of whatever expenses should be incurred.

2do, As the decret of constitution was taken against the three heirs portioners in *solidum* and not *pro rata*, it was *funditus* null and void. This rule was acknowledged by multiplicity of authorities and decisions. Stair, b. 3, tit. 5, § 14. Dict. *ver* SOLIDUM ET PRO RATA, in the Section relative to Heirs Portioners ; where, in the case July 1687, Jordanhall *contra* Edmonstone, a decret in absence against three heirs portioners was suspended, because they were decerned in *solidum* and not *pro rata*. The distinction taken, that as the feu-[7248]-duties were *debitum soli*, and affected the whole subject equally, and consequently the share of all the sisters jointly, could not bear the defender through. For, allowing it to be just, it could apply only to one of the articles concluded for, viz. the feu-duties ; and although it might hold with regard to diligence competent in law against the estate itself ; yet whenever the creditor betook himself to a personal action against the heirs portioners, he was bound to follow the rule of law, and to take decret against each only *pro rata*.

As upon both of these grounds, therefore, the decret of constitution was *funditus* null and void, the adjudication proceeding thereon was equally ineffectual.

3tio, The charge given in the present instance being a special charge, and as Brown, the predecessor of the heirs charged, did not die last vest and seised in the lands, there were not *termini habiles* for a charge against his heirs to enter to him in special. The distinction as to the different kinds of charges rendered this proposition extremely obvious. A general charge answered no purpose but to establish the debt *passive* against the heir, if he did not renounce, or *cognitionis causa* if he did. A special charge, again, as it necessarily supposed an infeftment in the person of the predecessor, so it also required a specification of the particular lands in which the predecessor was supposed to have died seised, and to which the heir was specially charged to enter. A special charge, without such specification, would be *funditus* null and void, and upon which no after diligence could proceed. This kind of charge, therefore, related, and could relate, only to those heritable subjects wherein the predecessor died vest and seised ; but as there might be some other heritable estate belonging to the predecessor in which he was not infeft, some other species of charge was requisite to be the foundation of diligence, which was what was called a general special charge. Lord Bankton, v. 2, b. 3, tit. 5, § 114.

This last charge accordingly was that which should have been given in the present instance; the estate in question was one of that description, to attach which the general special charge was alone applicable. And as the sole foundation of the diligence which the law authorised upon these charges, was the contempt of the heir in not giving obedience; if the charge was either erroneous in point of form, or such as the heir could not possibly comply with, no adjudication could pass thereon, the method chalked out by law not having been followed.

The argument, that as a special charge stood in place of a special service, it must *ex paritate rationis* include a general charge, and of consequence carry every right and interest which the predecessor had in the lands, was fallacious. A special charge, as coming in place of a special service, could only be effectual when the special service could have been expedited. As in a special service the claimant was required by the brief, to prove the predecessor's [7249] death, and that he then stood infeft in the lands; the heirs, in the present instance, as they could not have answered these heads, and have shewn that their father was seised at his death, could not of course have made up a title by special service, and hence as there could be no special service, the special charge, as coming in its place, though to a particular effect only, was irregular and inept. As it could not therefore be denied, that the general special charge was the proper diligence in cases of the present nature, and had as such been followed by the universal practice of the country, the adjudication avowedly led upon a different form of procedure, not applicable to the nature of the subjects attached, could not, to any effect whatever, be sustained.

Upon the second point, the alleged forfeiture of the right *ob non solutum canonem*, the defender pleaded:

1mo, As all contracts should be regulated by the agreement of parties, so when a feu-right was granted, under the express condition that it should be forfeited *ipso jure* without declarator, in case two years feu-duty should remain unpaid, there was no reason why that condition should not strictly take place.

The statute 1597, c. 250, which established the legal irritancy of feus, made no distinction, but declared, in express terms, that the right should be lost; and, though a distinction had been received between the effect of legal and conventional irritancies, the first being purgeable at the bar, before decret of declarator; yet the latter being regulated by the convention and agreement of parties, to which the law gave full effect, operated *ipso jure* without declarator. Erskine, b. 2, t. 8, § 14.

There was no material distinction in the present case from that of a lease for a long endurance, in which a conventional irritancy was not purgeable. The only obligation the vassal came under was to pay a yearly feu-duty, adequate to the annual value of his possession; so that, though equity might interpose in allowing an irritancy to be purged, where it was exorbitantly penal, there was no room for such interposition in the present case; where, by declaring the irritancy, the vassal forfeited nothing, but returned the fee to the superior, upon the same terms he had received it. Lord Stair, b. 4, t. 18, § 3.

2do, The pursuer's argument, that though the convention of parties might provide an *ipso jure* irritancy, yet a declarator was necessary, in order to give it effect, proceeded on not duly considering the nature of the right. The necessity of a declarator could not aid that argument, unless it could, at the same time, be maintained, that, whenever a declarator was necessary, it was competent to purge in the course of it; the contrary of which was admitted, with regard to the irritancy of a tack, which was determined upon the convention of parties alone.

The necessity of a declarator, in cases of this nature, was founded on the principle of law, *nemo jus sibi dicere potest*; the superior, or proprietor, was [7250] not entitled *brevi manu* to turn the vassal out of possession; so that, when a surrender was refused, it became necessary to have recourse to a Court of law. It could not from thence follow, that the right of the superior was only created by the decret of declarator; on the contrary, the decret only declared the right that was *ab ante* existing, and obliged the vassal to submit to it.

3tio, However necessary a declarator might be, where the vassal continued in possession after the irritancy was incurred, yet, when the vassal after that made a voluntary surrender of his right to the superior, or where he deserted the subjects, and allowed the superior to enter to the peaceable possession, no declarator was necessary. The deserting of the possession was a renunciation of the right *rebus*

ipsis et factis; and, after the superior had got full possession of the subject, a declarator of irritancy would be an idle form.

This was precisely what had occurred in the present case; and the principle was supported by the decision, 28th November, 1728, *Taylor v. Sir William Maxwell, voce TACK*; and in a still later case,* 1763, *Henderson v. Purdie*, the vassal having deserted, and the superior having assumed the possession, was found sufficient to bar the wife of the vassal's interest, who had a liferent infestment in the feu, though no declarator had been obtained, voiding her right.

Upon this point the pursuer answered,

Imo, Forfeitures and irritancies were not now the favourites of the law; conventional penalties of every kind were subject to modification and restriction, to answer merely the end proposed, an indemnification or security to the party, for performance of those articles to which the penalties were annexed. It was upon this principle that penalties in bonds of borrowed money, however strongly secured by the convention of parties, were restricted to the real expenses debursed. Irritancies in tailzies were also allowed to be purged, before decret of declarator was obtained. The same principle operated as to irritancies or forfeitures of feu-rights; it being an universal rule, that a declarator was necessary to close the right, and that, before such action was obtained, the contravention might be purified.

This was admitted by Lord Stair in the passage referred to, b. 4, t. 18, § 3, and the distinction he made betwixt rights merely gratuitous, and onerous contracts, might safely be admitted, as it could never apply to the present question. The irritancy incurred here was said, indeed, not to be of a penal nature; but the very reverse was the fact. For, allowing it to be a moot point, whether any, or what price was paid for the original purchase, the agreement, at any rate, was not gratuitous, but an onerous mutual contract: The subject had also been greatly improved; so that the forfeiture of that right, for a neglect to pay two terms feu-duty, must, to the feeling of every impartial mind, appear highly penal. Bankton, b. 2, tit. 11, § 48.

[7251] 2do, The distinction maintained between legal and conventional irritancies was neither solid nor applicable to the present question. The statute 1597, c. 250, admitted no such distinction, but made the case, by the provision of law, equivalent to the express provision in the charter. Lord Stair, b. 1, t. 13, § 14, and b. 4, t. 20, § 36, laid it down as fixed law, that, though the convention of parties might provide an *ipso jure* irritancy, a declarator was still necessary; because that, being matter of fact, must be proved. That it was optional to the party, in whose favour the irritancy was provided, to take advantage of it, was undoubted; but, if he was to do so, it must be by declarator; which, operating only from the time of the decret, of course admitted the failure to be purged by actual payment. The passage in Erskine, b. 2, t. 8, § 14, which seemed to favour that distinction, supposed the case of a declarator actually brought into Court, for declaring the irritancy already incurred, and time demanded for purging; which was perfectly different from the present question, where no such declarator had ever been attempted: And though, in the more early periods of the law, such a distinction, in one or two cases, had been allowed, it had afterwards been departed from, and the privilege of purging allowed, even after declarator had been brought into Court, sometimes by payment at the bar, at other times by indulging a reasonable delay.

3tio, The plea stated, that, by deserting the possession, there was a renunciation of the right *rebus ipsis et factis*, which superseded the necessity of a declarator; and the case referred to in support of that doctrine, *Taylor v. Sir William Maxwell*, had no analogy to the point in dispute. Though the heritor should be entitled, upon the possession's being deserted by his tenant, to enter *brevi manu*, no other mode being left of recovering the stipulated rent, it did not follow, that the same rule would hold in the case of a superior and his vassal. The feu-right stood on a very different footing. The lands were the property of the vassal, not of the superior; so that his deserting the possession of his own property could never return the same to the superior; and whatever claims he might have against the lands, could only be recovered by prosecution in the due course of law. The other case, founded on in 1763, *Henderson v. Purdie*,† as an authority in the present instance, was still less

* Not reported.

† Examine General List of Names.

applicable. The irritancy in that case had not only taken place in the husband's lifetime, but the forfeiture of the right had been fully ascertained by a proper decret and declarator.

The Lords adhered to the Lord Ordinary's interlocutor ; and, on advising another reclaiming petition, with answers, the same judgment was pronounced.

Lord Ordinary, ELLIOCK.—For Lockhart, LOCKHART.—For Sheills, MACQUEEN, CROSBIE.—Clerk, ROSS.

R. H.

Fac. Col. No. 43, p. 121.

No. 73. [7252] JOHN BALLENDEN v. The Duke of ARGYLE. July 6, 1792.

After decree of declarator of irritancy, *ob non solutum canonem*, has been pronounced
 , and extracted, the irritancy cannot be purged.

The statute of 1597, cap. 250, enacts, "That in case it shall happen, in time coming, any vassal or feuer holding lands in feu-farm of us, or any other superior, immediately in feu-farm, to failzie in making payment of his feu-duty, by the space of two years hail and together, that they shall amit and tyne their said feu of their said lands, conform to the civil and canon law, sicklike, and in the same manner, as if a clause irritant were specially engrossed and inserted in the said infeftments of feu-farm."

Ballenden held the lands of Wester Pitgober in feu of the Duke of Argyle, the feu-duty being £4, 14s. Scots, together with 10 bolls of barley, and 2 bolls of oats.

He having failed to make payment of the feu-duties during five years, the Duke raised against him, on the above mentioned statute (his charter not containing any irritant clause), a process of declarator of irritancy, in which appearance was made for the defender. But, as he failed, nevertheless, to purge the irritancy, the Duke obtained decree.

An action of reduction of this decree was afterwards brought by Ballenden ; in the course of which he made offer of full payment of the arrears of feu-duties, with interest upon interest, and whatever else should be necessary for affording complete indemnification to the superior ; and insisted on the hardship of his property, estimated at £3000 Sterling, being forfeited, on account of a demand comparatively so trifling, and which, to the utmost limits of justice, he was ready to satisfy ; the political circumstances which gave occasion to this ancient enactment having now undergone a thorough change.

[7253] "The Lord Ordinary, in respect of the decree having been obtained *in foro contentioso*, repelled the reasons of reduction."

And, on advising a reclaiming petition and answers,

The Court, considering the statute in question as still in force, and that, though irritancies, such as the present, might be purged at the bar, this opportunity had been here neglected, and could not be renewed, found themselves under the necessity of assoilzieing from the reduction, as the Lord Ordinary had done ; but not without expressing regret, that it was not in the power of the Court to give relief to the pursuer.

A petition, reclaiming against this judgment, was appointed to be answered ; but, upon being advised, along with the answers, it was refused.

Lord Ordinary, DREGHORN.—Act. HONYMAN.—Alt. CRAIG, A. CAMPBELL, JUN.—Clerk, GORDON.

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Fol. Dic. v. 3, p. 339. Fac. Col. No. 221, p. 465.

MOR. I.

28

No. 97. [7283] CHARTERIS of Amisfield v. The KING's ADVOCATE. July 18, 1749.

A gentleman conveyed his estate to the second son of a relation, with the burden of a sum to the eldest son, provided the father did not interfere in the education of the second. Upon the forfeiture of the estate of the eldest for rebellion, the second claimed the sum from the Crown, as having become his, in consequence of his father having incurred the irritancy of interfering in his education. The claim was dismissed.

Colonel Francis Charteris of Amisfield disposed his whole estate, which he should have at his death, to his grandson, Francis Wemyss, afterwards called Charteris, second son to the Earl of Wemyss, burdened with £10,000 Sterling, to the Lord Elcho, the Earl's eldest son; which he appointed at the said term to be laid out for purchasing the most preferable debts due by the family of Wemyss, the rights of which to be taken in favour of the said Lord Elcho, and his heirs in the honour and estate of Wemyss, descended of the Colonel's body. He also named tutors and curators to his heir, and appointed four of them, to wit, Mrs. Helen Swinton, his spouse, the Duke of Argyle, Earl of Islay, and Sir Robert Walpole, or any three of them, his Lady *sine qua non*, to have the sole direction and ordering of his education; or of that of any other of his grandchildren who might succeed to him in his estate; and the appointing of with whom they should reside, or travel; and that neither the Earl of Wemyss, nor any of their tutors or curators, except those named, nor any other person, should have any power or voice therein: And in case the Earl of Wemyss should interpose and endeavour to hinder the same, that the Lord Elcho should have no right to the said sum. And in another place, that in case the Earl, or any other person, should claim any power or voice in the education of his said heirs, or should interpose and hinder the same, that the Lord Elcho should lose any right or title to the said sum. He also appointed certain sums to be annually allowed for the aliment and education of his heirs of tailzie, which he proportioned to the age they should be of, increasing as they advanced in it.

Colonel Charteris died, leaving his heir in minority; during which the money was paid by his tutors and curators, part of it upon a decret of the Court of Session, and properly applied for purchasing in the family debts. In corroboration of which, the Earl granted to Lord Elcho an heritable bond for £10,000.

Lord Elcho engaged in the late rebellion, and was attainted; and Mr. Charteris, within four years after his majority, revoked the payment, and raised a reduction thereof; and on Elcho's estate being surveyed, entered his claim therefor, at least, that he was creditor upon it for the sums paid; for that the [7284] Earl of Wemyss had claimed voice and power in his education, and in appointing with whom he should reside and travel; or had interposed and hindered his education, residence, and travelling, as directed by the trustees; at least Lord Elcho, or some other person, had done so; whereby the said sums were forfeited, and returned to him.

Answered, 1st, The condition was *contra bonos mores* to exclude a father from interposing in the education of his son, to which he was in duty bound; and therefore ought to be held as not adjected.

Replied, To have forbid the Earl from interposing in his son's education, and to have made no provision for it, would have been a condition which could less have been justified; but as the Colonel suspected his Lordship not to be a fit person to be intrusted with the education of his heir, and knew that by law he could not exclude him from it, he left a sum of money to his family, to be forfeited in case he interposed; and at the same time, laid down a method by which he should be well educated; so that the complying with the condition being attended with no breach of parental duty on the part of the Earl, the sum, which was entirely a gratuity from the Colonel, must be forfeited on the failure thereof. Though supposing no method had been laid down for the pupil's education, yet even in that case, he would have been under the tuition of the law, and would by it, upon application, have been put under proper direction.

Answered, 2d, The persons to whom the education was committed, did not accept of the trust, nor give any directions therein. There is no pretence that any person meddled except the Earl of Islay, who petitioned the Chancellor, on the suggestion

that the claimant was neglected ; upon which his Lordship referred to a master to consider of a proper method for the care of his person and education, and therein to have regard to any proposal to be made by the Earl of Islay ; which being done, the Chancellor approved the master's report, and ordered accordingly : Thus, the Earl declined giving any directions, and put the claimant under the tuition of the law ; or if he should be understood to have acted, yet it was not under the powers committed by the Colonel's will ; for these were to a quorum, with a *sine qua non*, which having failed, no authority was competent to any one of the nomination ; and therefore the condition could not exist, which was the Earl of Wemyss hindering by himself and others the nominees to superintend the claimant's education. If even the power given to a quorum should be interpreted as competent, on failure thereof, to any of the nomination, this would be an extension as in a favourable case ; but the irritancy would not be extended, that case being odious.

Reply, A nomination of tutors and curators, with a quorum, has been often found to empower any one of them to act, on the failure or not acceptance of the rest ; and the Earl of Islay's application to the Chancellor was a direct taking upon him the trust.

[7285] Answer 3d, There is no proof that the Earl of Wemyss claimed any power or voice, or hindered at all the nominees in their procedure : The clause of other persons interposing, must be understood of the Earl's doing it by their means ; for it were absurd every bad advice a boy might get, should infer a forfeiture against him and his family ; and it seems Mr. Charteris did get bad advice, for he run away from his governor, Doctor Ramsay, whom the Chancellor had put about him ; but the Earl had no hand in this. Afterwards, he went abroad in company with Doctor Alexander Mackenzie, who had been Lord Elcho's governor ; but neither was this by interposition of the Earl of Wemyss, or by whomsoever it was, he had then thrown off Doctor Ramsay. The nominees were taking no further concern, and he was in a condition exposed to all the dangers of youth and opulence, if no care was taken of him.

Reply, The Earl's interposal was, during its whole continuance, concealed as much as possible, as he was sensible of the hazard ; but that he had a hand in his son's elopement, is plain from his having expressed his satisfaction at it to a confidant, as not thinking Doctor Ramsay a proper governor, and declared that he had recommended Doctor Mackenzie, who was much fitter ; all which is proved. As also, that he had recommended to his son, and used pains to make him take another gentleman, in which he did not succeed ; and when Lord Elcho, who was the Earl's agent, prevailed with his brother to accept of Doctor Mackenzie, he communicated it to his ordinary doer, ordering him to inform the Doctor, and hasten him to Hornby Castle, where the claimant then was ; and this step was contrary to the Earl of Islay's inclination, who would not see the Doctor.

Answer 4th, The condition is suspensive of the payment of the money ; which being paid, especially after the alleged infraction, cannot be repeated.

Reply, It is resolute, and otherwise could not have been effectual, as the money was payable at the Colonel's death ; which, it is supposed in the deed, might have happened in the infancy of his heir, after which the infringement could only happen ; and the payments were made in minority, revoked *intra annos utiles*, and a reduction of them raised, which was all the claimant could do, as he could not enter his claim till the estate was surveyed.

Answer 5th, Irritancies cannot be declared after a forfeiture, if not insisted on before.

Reply, All debts are preserved to creditors on forfeited estates, which claims upon irritancies are ; and several were sustained after the rebellion in 1715 : And in this case, the claimant was minor till 21st October 1744, and *intra annos utiles*, till after the forfeiture.

The Lords, 3d July, dismissed the claim ; and this day refused a bill, and adhered.

Act. R. CRAIGIE, FERGUSON & LOCKHART.—Alt. ADVOC. SOLLIC. & A. PRINGLE.

D. Falconer, v. 2, No. 88, p. 94.

No. 99. [7289] WILLIAM GEORGE, &c., ROSS v. WILLIAM MONRO of Newmore.
November 18, 1766.

An heir of entail allowed to purge an irritancy, after an action was brought by the next substitute in the entail, for declaring the forfeiture.

By the two entails of the lands of Aldie and of Newmore, it appeared to be the intention of the proprietors, the makers of the entails, that the two estates should not centre in one person ; for, by a clause in the entail of the estate of Aldie, it is provided, "That the heirs therein mentioned shall be obliged to assume, and constantly use and bear, the surname of Ross of Aldie, and arms of the family of Balnagown, without any alteration or diminution whatever, as their surname, designation, and arms, in all time after their succession to the proper estate of Aldie, under the pain of incurring the irritancy of tinsel of the estate." And by a clause in the entail of Newmore, it is provided, "That the heir, whether male or female, and their heirs, who shall succeed to the estate of Newmore, shall be obliged to assume, and take, and ever thereafter use, the name and arms of Monro ; and the title and designation of Newmore, without joining or bearing any arms, names, or title therewith."

In virtue of the tailzie of the estate of Aldie, William Ross succeeded, and enjoyed the possession of that estate, without making up titles thereto ; but bore the arms of the family of Balnagown, and used the name of Ross of Aldie, as appointed by the tailzie.

William Ross, by the death of the former heir of tailzie of Newmore, came to have a title by the entail to that estate ; also, in virtue whereof, he assumed possession of the estate of Newmore, keeping also possession of the estate of Aldie ; but allowing himself to be designed Monro of Newmore, and designing himself also that way by his subscription.

William George Simon David Ross, the next substitute in the entail of Aldie, thinking that the defender had thereby incurred an irritancy, sufficient to forfeit him of his title to that estate, brought a process for declaring the same, in which he pleaded, That, from the anxious clauses in the entails of the estates of Aldie and Newmore, it was plainly the intention of the makers of these entails, that the estates should be possessed by different proprietors, and [7290] their families differently represented ; and, therefore, that the will of the different proprietors of these estates, which was clear, ought to be followed as the rule in judging of the cause ; and, if it was so, there could be no doubt, from the *species facti* above set forth, that the irritancy was incurred, and would be declared, according to the rule laid down by Sir George M'Kenzie in his Institutes, b. 2, t. 5, p. 13, and Dic. Decis. Tit. IRRITANCY, where a distinction is made betwixt statutory and conventional irritancies, the one being purgeable at the bar, the other not ; and it was said, that there was no doubt, that the irritancy, sought to be declared, was a conventional one ; and, therefore, not purgeable : And the case of Denholm of Westshield, February 1st, 1726, No. 94, p. 7276, was appealed to, where it was found, that an irritancy in an entail could not be purged.

Answered for the defender, That, whatever rigour prevailed in the ancient law, with regard to the not allowing irritancies of this kind to be purged ; yet that, at present, that rigour was softened ; and wherever no damage could be alleged to have accrued to the estate, the law now allowed an omission, such as the present, to be purged by a compliance with the terms of the entail, which the defender has now done, by re-assuming the name of Ross of Aldie, and the arms of the family of Balnagown, in so far as he is allowed. 2do, It was pleaded, That the obligation imposed by the tailzie of the estate of Aldie, of assuming the name and title of Ross of Aldie, &c., without any alteration or diminution whatever, was not inconsistent with assuming the name, &c. of any other family, as an addition to those of Aldie, *esto* that, from the words in the entail of the estate of Newmore, the doing so would incur a forfeiture of the defender's right to that estate ; yet, that being *jus tertii* to the pursuer, it was not competent for him to found an argument upon it. 3tio, It was pleaded, That, as the obligation imposed by the tailzie of Aldie, of assuming the surname of Ross of Aldie, and bearing the arms of Balnagown, made but one condition in part inprest-able, the not complying with that part of the condition that was prestable could not

forfeit the defender of his title to the estate. And, lastly, it was said, That the decision in the case of Westshield was altered in the last resort; and, therefore, could have no weight; and the case of Sir John Gordon v. Mr. Charles Hamilton Gordon, No. 96, p. 7281, and that of Cromwell Price,* were appealed to, to shew that irritancies, such as the present, were purgeable at the bar.

“The Lords sustained the defence, assoilzied the defender, and decerned.”

Act. BURNET.—Alt. LOCKHART.—Clerk, —.

Fol. Dic. v. 3, p. 338. Fac. Col. No. 45, p. 79.

No. 16.

[7304] M'DUFF v. DOIG. July 1586.

The contrary of the above case was found, a decree of an incompetent court being declared *ipso jure* null; but here the incompetency was clear.

There was one M'Duff that pursued one Doig for ejecting him forth of a room held of the Earl of Gowrie, of the barony of Strabran.—It was answered, That he had committed no spulzie; because the said M'Duff's father, present occupier of the room, being convicted of a slaughter, and executed for the same, and his goods and gear being come into the King's Majesty's hands, and [7305] his Treasurer; the defender was put in possession by the Earl of Gowrie, Treasurer for the time; and also thereafter, and after the decease of the Earl of Gowrie, the pursuer being summoned to compare before the Secret Council for the violent intruding of himself in the said room, was decerned by the Secret Council to have done wrong, and ordained in time coming to flit and remove, as he who had *vi majori et armata manu* intruded himself in possession of the said room.—To all this was answered, That in one part it was contrary; for the pursuer libelled, that he was in possession by the escheat obtained by him of his father, and put in possession by the Treasurer; and as to the decret obtained before the Secret Council against him, it was *decretum a non suo judice latum*, and in no manner of way ought to have effect.—The Lords repelled the exception, and found, That the decret given by the Secret Council could not take away the ejection nor purge the spulzie, because they were not judges competent.

Fol. Dic. v. 1, p. 493. Golvil, MS. p. 409.

No. 17.

SERVICE v. CHALMERS. February 23, 1627.

A Sheriff's jurisdiction may be prorogated against a party living without it, by his compearing and pleading, without objecting to the jurisdiction, and he is thereby barred from challenging the decret, as a *non suo judice*.

In a suspension and reduction betwixt Service *contra* Chalmers, both being upon one reason, viz. That the decret desired to be reduced, was given by the Sheriff of Stirling, against the party reducer, who dwelt within the sheriffdom of Perth, and so not within his jurisdiction; therefore the decret was null, as a *non suo judice*; and that the said decret was given for non-compearance to explain the defender's oath, the summons being referred to his oath, and the party having compeared and deponed; after which deposition, the inferior judge had no power to summon over again the party, to compare to explain his oath; but when he first compeared, the judge might have interrogated him, as far as to make the deposition so clear as whereon to pronounce his sentence, and ought to judge conform thereto; and no inferior judge could summon any party to depone over again: These reasons were not found

* Not reported.

relevant, because the party reducer having compeared in the first instance, as the decret proported, he could not thereafter be heard to quarrel the decret, upon that reason, *a non suo iudice*, which he ought to have proponed in the first instance, he then compearing.—And also the Lords found, That no inferior judge might summon any party to compear to explain his oath, after it was given in the same process; and likewise found, That albeit in this reduction, the party offered to come, and to depone and explain his oath, yet for his contumacy, being holden *pro confesso*, in the first process, that they would not admit him now to depone.

Act. NICOLSON.—Alt. —.—Clerk, HAY.

Fol. Dic. v. 1, p. 493. Durie, p. 280.

No. 20. [7307] KENNEDY, Taylor in Maybole *v.* HEW KENNEDY of Garrihorn, and Bailie-depute of Carrick, and QUINTIN TOD. July 6, 1611.

No inferior judge in this kingdom has power to decide in actions of contravention of lawburrows in their courts, albeit they may cause parties find caution of lawburrows in their courts; and if they proceed and give process and sentence of contravention, albeit against a defender compearing, the same will be null by way of exception.

Fol. Dic. v. 1, p. 493. Haddington, MS. No. 2265.

No. 30. [7314] Sir JOHN SHAW *v.* Mr. JOHN BUCHANAN. July 29, 1696.

A party proponed declinator of an inferior judge, which being repelled, he gave in other defences. Found, that he did not thereby pass from the declinator.

Crocerig reported Sir John Shaw of Greenock *v.* Mr. John Buchanan and the Creditors of Clackmannan, for exhibition of an interdiction of Shaw of Sauchie, to sundry of his friends. Alleged, The decret of exhibition obtained against him before the Commissaries of Edinburgh, was *ipso jure* null, the affair being nowise consistorial; and he having proponed the declinature, they unjustly repelled it and proceeded. Answered; You have prorogated and homologated the jurisdiction by proponing other defences *in causa*. The Lords found this was no passing from the declinature of the incompetency of the Court; for what can a defender do, but adhering to his declinature, propone his other defences, when the judge will proceed? Though some were of the mind, that he should, after that injustice done him, either advocate or be absent. Then Greenock pressed that *ante omnia*, his decret being now turned into a libel, the paper should be put in the clerk's hands, lest they die *medio tempore*, or it miscarry. The Lords refused this, as contrary to form, *hoc ordine*, till they were heard against his title.

Fol. Dic. v. 1, p. 494. Fountainhall, v. 1, p. 730.

No. 70. [7335] HAMILTON *v.* BOYD and Others. July 28, 1741; June 15 & 22, 1742.

Found, that the crime of importing Irish victual was cognisable in the Court of Session, in lieu of the Privy Council abolished.

Upon advising a bill, with the answers, against an interlocutor of an Ordinary, finding the importation of Irish victual probable by oath of party, two preliminary points were stirred upon the bench, which were thought to merit a hearing in presence, viz. 1mo, Whether the jurisdiction for cognizance of this crime was not by the act

3d Parl. 1672, privative in the Privy Council now abolished ? and if it was, Whether any more is committed to the Judge Ordinary by the act 9th Parl. 1703, which ratifies the act 1672, than the power of convicting and transporting such offenders as are under the degree of heritors ? 2do, Supposing the jurisdiction in the Judge Ordinary, Whether, by said act 1703, the time for trying the offence be not limited to six months, which in this case were expired.

And upon hearing in presence, it was upon the 28th July 1741, found, "That the importation of Irish victual, prohibited by the act of council 1668, ratified by subsequent statutes, is competent to be tried by the Judge Ordinary ; and that the limitation of six months for trying the offence by the statute 1703 does only respect the superadded penalty of transportation" : But then, it was also at the same time found, "that such importation was not probable by the oath of the party, and that therefore the offenders could not be obliged to depone against themselves."

The Court was so unanimous upon the point of jurisdiction, that parties acquiesced ; but it was much divided upon the other two points, of the prescription and proof by oath ; and both parties having reclaimed, the Lords, upon the 15th June 1742, "Refused the defenders petition upon the prescription, and so far adhered" ; but, upon answers, altered their former interlocutor as to the mean of proof, and "found the offence probable by the oath of party," and thereto again "adhered" upon the 22d.

As it cannot be denied, that it had been reasonable enough for the Legislature to have extended the limitation in point of time to the whole offence, the [7336] Lords, who were for the interlocutor on that point, would willingly have been for that construction of the statute ; but they could not bring themselves to think that the statutory words could bear it. Besides, there is a clause in the after part of the act which did not appear to be consistent with it. It is that which declares the vessel, though not seized when the importation is first made, to be seizable at any time within two years thereafter ; a reasonable enough limitation, on supposal that action lay for the trespass, but not so consistent that the vessel should be seizable for two years, if the offence itself ceased in six months as to all other effects.

And as to the other point, the mean of proof, as the expression in the statute, to be proved *prout de jure*, is in the constant stile and language of the Court, a proof of all kinds, by oath, writ, and witnesses, and as such, may be said to have received a determined signification, with which no one can suppose the penman of the statute to have been unacquainted ; so it had been idle to have mentioned any thing of the proof at all in the statute, if no more had been intended, but that the offence should be proved as accorded of the law : Nor is there any instance of a statute providing any thing as to the proof, except where something is intended to be ascertained, which might on the strictest rules of proof have been disputable. It was also in itself reasonable, that this offence should be probable by oath, for, in many cases, it would have been very difficult to prove it otherways.

It may at the same time be true, that, were this mean of proof inconsistent with the principles and genius of the law, it might be hard from technical words to draw such construction ; but it is far otherways : For with us all the *crimina leviora*, the breach of the penal statutes as they are called, as woodcutting, breaking orchards, stealing bees, &c. are probable by oath ; and in general, in all cases where the punishment is not *corporis afflictiva*, the crime is thus probable ; and, though in one particular in the statute, there is the penalty of transportation, yet that affects only the lower rank of men. And we even have other instances, where, notwithstanding the punishment be transportation, the offence is probable by oath, viz. The exportation of wool, which the statute declares to be probable by oath and otherways, as accords of the law ; so that all the question was, Whether the technical words in this statute should not receive that construction, which is agreeable to their known import.

N.B.—It must at the same time be admitted, that the authority of this as a decision will be the less when it is remembered, that both points were carried by a small plurality : That for proof by oath, by the narrowest majority, when some of the Lords were absent, who had been for the prescription and against the oath ; and that against the prescription first and last, but by one vote.

No. 88. [7356] Sir ROBERT GORDON of Gordonstone, Baronet v. JAMES GRANT of Knockando; WILLIAM ANDERSON and WILLIAM FORSYTH, Tenants to Knockando; and ALEXANDER and JAMES FINLAY, Tenants to Sir Robert. January 19, 1765.

Not competent for the Court of Session to make regulations, or enact penalties for preventing muirburn.

Sir Robert Gordon brought a process against the said Tenants, setting forth, that, in May and June 1762, when no muirburn was lawful, they had kindled a muir near a valuable wood of his, on the hill of Molundy, without taking any precaution to prevent the spreading of the flames; the consequence of which was, that the fire reached the dike enclosing his plantation; caught hold of the turf on the top of the dike; scorched a number of trees in the outer rows; and would probably have consumed the whole, had it not been extinguished by a number of people assembled by him and others; and therefore concluding against the tenants for payment of damages and expenses; and that they should be prohibited from raising muirburn within such a distance of the pursuer's wood as their Lordships may think necessary for its safety, and decreed to observe such rules and regulations as the Lords should prescribe, and under such penalties as they should determine. Knockando was called in this process; but nothing was libelled or concluded against him.

[7357] The tenants, defenders, all except the Finlays, appeared, and denied the libel. Knockando insisted that the process against him should be dismissed, with costs, as nothing was so much as alleged against him. Sir Robert offered to prove the libel against the tenants, and insisted Knockando was properly made a party, because of the declaratory conclusions. "The Lord Ordinary allowed a proof before answer."

Knockando having again contended in a representation, that the process should be dismissed as to him, the libel was amended, and he concluded against, as being equally guilty and liable with his tenants.

From the proof it appeared, that Knockando and his tenants had no hand in the muirburn libelled, but that it had been kindled by his own tenants, the Finlays, against whom Sir Robert did not insist; and the question came to be as to the declaratory conclusions.

Pleaded for the defenders; It is both profitable and necessary for them to burn the muir of Molundy. Profitable, because it improves the ground; and necessary, because it affords them firing, of which they would otherwise be destitute. No man can use his property in *amulationem vicini*, by erecting works, or doing any thing which yields him no advantage, and serves only to hurt his neighbours; but, no man can be restricted from profitable or necessary acts of property, though they may, or even must, hurt that of his neighbour, unless he be liable to a servitude. But, if Sir Robert's demand be well founded, there never will be any occasion for a servitude. Lord Bankton, b. 2, t. 7, par. 15; l. 21, *D. De aq. et aq. pluv. arc.*; *Zoes. ad Pand.* lib. 39, tit. 3, §§ 4, 5; Gaille, lib. 2, Obs. 39. And this very case is put and determined for the defenders, in l. 30, § 3, *D. Ad leg. Aquil.* "Si quis in stipulam suam, vel spinam, comburendæ ejus causa, ignem immiserit, ut, ulterius evagatus et progressus ignis, alienam segetem vel vineam læserit; requiramus, num imperitia ejus, aut negligentia, id accidit? Nam, si die ventoso id fecit, culpæ reus est; nam et qui occasionem præstat damnum fecisse videtur. In eodem crimine est, et qui non observavit ne ignis longius procederet. At, si omnia quæ oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa." The defenders would, no doubt, be liable *ob dolum aut culpam* to Sir Robert, if they should kindle muirburn in a windy day, or by carelessness allow the fire to reach his woods. But, if they kindle muirburn, *optima fide*, to improve their land, or for fuel, when there is no apparent danger from the wind, or any other accident, they cannot be liable to Sir Robert, whatever the consequences may be. The defenders, therefore cannot be restrained in their property or possessions. And it is incompetent for a court of justice to make regulations or inflict penalties, as demanded, especially in such a case as this, which has been already regulated by several statutes.

Answered for Sir Robert; The law which protects one person in the exercise of

his property, likewise maintains his neighbour in the preservation of his ; and, without enforcing a mutual *comitas*, there would be an end to the peace and [7358] good order of society. Where a man's operations are confined to his own property, and the effect of them is not *immittere* any thing destructive upon that of his neighbour, or where an act is necessary for the preservation or defence of a man's property, great latitude would be allowed, though hurtful to neighbouring property. But, where the act is intended solely *in majus emolumentum*, or *lucris faciendi causa*, the law will not gratify an avaricious spirit, which desires to make profit to itself at so great an expense as the destruction of the property or interest of a neighbour. And, upon this principle, it is laid down in the title *D. De aq. et aq. pluv.* that no person can, *opere manufacto*, drain up the water on his own property, so as to occasion an unnatural and destructive emission of it.

If damage, therefore, were to be done to the pursuer's property by the muir-burning of the defenders, it is clear that he would be entitled to reparation. The only question, then, is, Whether the pursuer be entitled to any security for preventing a danger which is daily imminent ? or, if he must calmly wait the destruction of his property, and then betake himself to an action for damages, which would very probably be frustrated by the poverty of those who have occasioned the loss ? The pursuer ought to have some remedy, upon the plan and principles of the Roman edict *de damno infecto*, or of our own caution in law-burrows.

If the Court shall be of opinion, that no such remedy shall be granted him in the present case, the pursuer submits, if the old statutes, discharging muirburn from March to Michaelmas, should not be enforced by additional penalties, the old ones being insufficient. If this were done, the pursuer would have some security, as muirburn is most dangerous from March to Michaelmas. Such encrease of penalties is not without a precedent ; for, in the late dispute between Scot of Brotherton and Carnegie of Craigie, No. 84, p. 7352, this Court enforced the observance of the old statutes, regulating the exercise of the right of fishing, by a penalty of £50 Sterling for every transgression.

Replied for the defenders ; The edict *de aq. et aq. pluv.* does not at all apply to this case, as it relates singly to an *opus manufactum*. The caution *de damno infecto* was not introduced to prevent a wrong done intentionally, or by negligence ; for such wrongs were understood to be sufficiently guarded against by the law which punished these wrongs when committed ; but it was introduced to prevent a mischief apprehended *vicio rei, loci, vel operis* ; and the reason of the distinction is obvious. The law can regulate the actions of men, but cannot prop a leaning wall or falling tree ; and, if this remedy were to be extended from things to persons, there would be no knowing where to stop. In the case of law-burrows, the damage feared must be from intention and deliberate purpose.

As to the case of Brotherton v. Carnegie, the Court was much divided, and different judgments were pronounced ; and the cause was afterwards appealed, and the judgment reversed of consent. Besides, that case differed in [7359] several respects from this. For, first, with respect to the cruives, every single act of contravention was a damage to the superior heritors ; whereas the heather on the hill of Molundy may be kindled, and has been kindled, thousands of times, without any danger to the pursuer. 2dly, In that case, the damage to the superior heritors, though certain, was incapable of estimation, as it was impossible to say what part of the fish, intercepted by the legal cruives, would have been taken by any of the superior heritors. And, lastly, in that case, there was a continued practice of delinquency, for several years, proved against the defenders.

“ The Lords assoilzied, and found expenses due.”

Act. Advocatus, Solicitor, LOCKHART, HENRY DUNDAS.—Alt. BURNET, MACLAURIN.

J. M.

Fol. Dic. v. 3, p. 342. Fac. Col. No. 2, p. 3.

No. 143.

[7426] MORRIS v. ORROCK. July 20, 1678.

The Lords found, that *ex officio* they might supply defects in apprisings, to make them subsist as securities.

Morris pursues a reduction of several apprisings led against him by Orrock of Balram, wherein the penalties of the sums were exorbitant, yet the Lords did not abate the same; but it being alleged against one of the comprisings, that it was null, proceeding upon a registration on a clause in these terms, "To be registrate in the books of Session, or any other competent judicature of the kingdom"; it was registrate where the creditor lived, but the debtor was not in that jurisdiction, and so there was no competent judge. It was answered, 1mo, That, by competent judge, was understood any judge having ordinary jurisdiction; 2do, In the apprising there were diverse other sums for which the apprising ought to stand, and to be sustained, though not in this sum.

The Lords considering, that *ex officio* they might supply defects in apprisings, to make them subsist as securities for the just interest, without the extraordinary advantage of expiring of the legal, or unequal penalties, did declare, that if the defender would restrict his whole apprising to the ordinary penalties (for the Lords had deducted the termly failies, and would not allow them) they would then sustain this apprising for the whole sums; but he having refused, the Lords reduced the apprising *in toto*. See LEGAL DILIGENCE. *Stair, v. 2, p. 637.*

* * Fountainhall reports this case :

July 19, 1678.—A comprising found null because led on a bond registered in Kirkcaldy town books, within whose jurisdiction the debtor dwelt not; and the appriser here refused to restrict to his just sums; and as the Lords maintain comprisings as a legal security, so they embrace every opportunity to cut them off where they are rigid.

Fountainhall, MS.

No. 146.

[7429] WRIGHT, Petitioner. June 19, 1701.

A factor on a burdened estate asked advice of the Court relative to his management. Refused.

Mr. Robert Wright, factor to the estate of Bruce of Kennet, gave in a bill, representing, that, by the tenants' late delivery of their farm bear, the prices were fallen, so that he could not win to the Sheriff of Clackmannan's fiar (within which shire the lands lay), which was £8 Scots, and therefore craved the Lords' warrant to sell it at the best avail, as the markets now rule. This was to get it allowed when he came to fit his accompts; but the Lords thought it not regular to give him any directions in the matter, but left him to his own method; and this course they also take in setting of lands, as in the case of Meik of Leidcassy, who, by bill, shewed that he had 15 bolls of bear, 3 bolls of oats, some turses of straw and capons, as a feu-duty payable to him yearly out of the kirk-lands of Coupar's Grange; and that Souter and Crockat, the heritors, being either dead or bankrupt, the lands had lien lea these two years bygone, none offering to meddle with them; and seeing not only he, but the minister's stipend, and King's cess, and other creditors, were all disappointed by this course, therefore he craved a factor might be put in to set or labour the lands, that their debts might not perish; the Lords considered, if they had not adjudged already, they might do it, and then, by their own right and authority, they might put in a factor; and therefore refused the bill. Likeas, when factors cannot get lands set to the full avail to what it paid formerly, the Lords refuse to interpose their authority, because it is frequently sought with no other design but to give down the rental, that at the roup it may be

sold at an unworth to the prejudice of the posterior creditors ; and so they are left to act in these things as rational provident men would do, as they will be answerable on their peril.

Fol. Dic. v. 1, p. 499. Fountainhall, v. 2, p. 114.

No. 149. [7431] Sir WILLIAM BAIRD of Newbyth, JOHN BAIRD his Eldest Son, JOHN WAUCHOP of Edmonston, and ANDREW WAUCHOP his Brothers, Supplicants. July 3, 1711.

The deceased William Wauchop of Niddery having named by his testament the petitioners who are Protestants, and five others of his Popish relations, to be tutors to Andrew Wauchop now of Niddery his son, and appointed three to be a quorum, James Wauchop brother to the defunct, who is Roman Catholick, being always one ; the Lords authorised the petitioners to officiate and act as tutors by virtue of the foresaid nomination, and held the *sine quo non*, and other Popish nominees (who are incapable by law to officiate) *pro non adjectis*.

Fol. Dic. v. 1, p. 499. Forbes, p. 516.

* * * Fountainhall reports this case :

The lately deceased William Wauchope of Niddery having named 10 friends to be tutors and curators to his son, any three to be a quorum, his brother James Wauchop being always *sine quo non*, who being a Papist, and other four of them being of the same persuasion ; Sir William Baird of Newbyth, Wauchope of [7432] Edmiston, and the rest of the other five who were Protestants, gave in a bill to the Lords, representing that they were willing to accept the office, and that the other five were incapable by law to be tutors, being expressly debarred by the third act 1701, against the growth of popery, and offered to compear before the Lords, to qualify themselves *de fidei* and be admitted, that they might make up inventories of the pupil's estate, conform to the second act, Parliament 1672. There being no compearance made for the Popish tutors, nor any answer returned to the bill ; it was reasoned by the Lords, whether the nomination of the rest could subsist, seeing the *sine quo non* failed ; even as in the case of a mother nominated *sine qua non*, who, by her re-marriage, forfeits the office ? It was answered, That the appointing Roman Catholics to be tutors, being contrary to law, it was *conditio impossibilis de jure*, and therefore to be held *pro non scripta* and as not adjoined ; for *id tantum possumus quod de jure possumus, et nemo potest cavere ne leges in suo testamento locum habeant*. Therefore the Lords sustained the nomination in the persons of the Protestant tutors, and admitted them to the office.

Fountainhall, v. 2, p. 655.

No. 154. [7434] Earl of DUMFRIES, Petitioner. January 23, 1745.

The Court appointed an interim Sheriff-depute.

Upon a petition from William, Earl of Dumfries, shewing, That the deceased Colonel William Dalrymple of Glenmuir, the petitioner's father, being heritable Sheriff of the Sherifffdom of Clackmannan, stood infest as such : That, since his death, which happened upon the 30th day of November last, the office of Sheriff has been vacant, to the great prejudice of the lieges : That the petitioner has right to the lands and barony of Clackmannan, and to the heritable office of Sheriff of the same, not only as heir to, but as having right by disposition from his said father ; but as he has not hitherto had time, either to expedite a service as heir, or obtain a charter under the Great Seal, and be thereupon infest, till which be done, he cannot appoint a Sheriff-depute to administrate justice to the lieges, and do the other necessary parts of the office, such as calling an inquest for striking the fiars, summoning the jury before the Circuits of the Justiciary Courts, and making the proper returns to the Justiciary Court at Edin-

burgh, and obeying any orders that may be issued from the Court of Exchequer; the petitioner is advised, that the Lords of Council and Session are in use, during such vacancies of any public office, to authorise a fit person to act in these offices in the interim; and as Robert Rollo, who was appointed depute under the petitioner's father, acted for several years in that capacity, with a fair character, and, in the petitioner's opinion, is a fit person for the office; craving therefore, it might please their Lordships, to authorise and appoint the said Robert Rollo, the former Sheriff-depute, to exercise the office of Sheriff-depute of the said shire of Clackmannan, with power to him to hold Courts from time to time in the ordinary form, to hear and decide in all causes competent before the Sheriff, and jurisdiction thereof; and to nominate and appoint deputies, in case of his necessary absence, procurator-fiscals, and serjeants of court, to issue precepts, summon juries, and generally to do all and sundry other things pertaining to the said office and jurisdiction, as freely, in all respects, as any other his predecessors in the said office have done, and that ay and until the petitioner make up his titles, and be infeft in the said office of principal Sheriff, and appoint a new depute, and other members of court, or until further orders be issued from their Lordships. The said Lords authorise and appoint the above Robert Rollo, to exercise the office of Sheriff-depute of the said shire of Clackmannan, and that ay and until the petitioner is infeft, and appoints another [7435] Sheriff-depute, or that this warrant is recalled by this Court; and ordain the same to be recorded in the books of sederunt, and dispense with the reading hereof in the minute-book. *Acts of Sederunt*, p. 387.

No. 167. [7446] Sir ALEXANDER DICK of Prestonfield v. Mrs. FERGUSON and her Children. January 22, 1758.

The Lords found a trust lapsed by the non-acceptance of the trustees; and, as the deed conferred a discretionary power, the Lords refused to exercise themselves that power.

Dame Janet Dick, Lady Prestonfield, executed, December 1751, a settlement of considerable funds to Sir John Cunningham her eldest son, and Anne Cunningham her eldest daughter, and the survivor, as trustees for the ends and purposes following: 1mo, The trustees are appointed to add and join together the subjects disposed, so as to make up a total of £6000 Sterling, to be lent out upon land or other sufficient security; 2do, They are appointed to apply and bestow the yearly interest toward the education and support of such of the [7447] grantor's descendants as should happen to be in want, or stand in need thereof; and that at the discretion of the trustees; 3tio, Failing descendants, the capital is to return to her nearest heirs. This deed being whimsical and irrational, the trustees refused to accept. A process for reducing the settlement was brought by the heir at law, in which were called all the descendants in being of Dame Janet Dick. None of them made opposition but Mrs. Fergusson for herself and children. Several grounds of reduction were insisted on, chiefly the non-acceptance of the trustees. And it was urged, That the present event is a *casus incogitatus*, for which there is no provision made in the settlement. The deed is at an end by the common law; for it supposes the acceptance of the trustees, and there are no means prescribed to carry it on independent of them. The matter then resolves into this, Whether this Court, as a court of equity, ought to supply the defect? The answer to this question is obvious. Seeing the settlement has fallen at common law, and that the subjects contained in the settlement belong to the nearest heirs, it never can be equitable to deprive them of their right; especially to support a whimsical intention in favour of remote descendants, who possibly may never be in want, and never have occasion for the money.

2do, The defender has no proper interest to oppose this reduction. The settlement leaves the distribution entirely upon the discretion of the trustees; and, therefore, suppose the trustees had accepted, no descendant of Dame Janet Dick could have a claim in law for any sum out of the trust-subject. If so, they cannot, by the repudiation of the trustees, qualify any loss or lesion that can be regarded in a court of justice.

"The Lords found the deed ineffectual by the non-acceptance of the trustees." See TRUST. *Fol. Dic.* v. 3, p. 349. *Sed. Dec.* No. 143, p. 199.

No. 174. [7452] MARY COWAN and ANDREW COWAN her Father, Petitioners.
January 19, 1788.

In the appointment of a factor *loco tutoris*, where the application was made in name of the mother of the children, and her father, the Lords ordered intimation to be made to the two nearest agnates.

The husband of Mary Cowan died possessed of property, both heritable and moveable, leaving several infant children by her, but without having made any settlement of his effects, or nomination of tutors or curators to his children. Along with her father, she presented a petition to the Court, stating these circumstances, and adding, that the tutor of law was, by reason of infirmity, incapable of discharging that office; and therefore praying, that she might be appointed *factrix loco tutoris* to the children during her widowity. On advising the petition, it was

Observed on the Bench, The granting of factories *loco tutoris*, is in itself a stretch of the powers of the Court, and in every instance ought to be strictly guarded by the established rules. In the present case, as the application is only made in the names of the mother of the children, and of her father, intimation ought to be given under form of instrument to the two nearest agnates, not because their consent is deemed essential, but in order that they may have an opportunity of stating any relevant objection to the proceeding.

[7453] The Court having unanimously acquiesced in this opinion, the above mentioned intimation was accordingly ordered.

For the Petitioner, DICKSON.

S. *Fol. Dic. v. 3, p. 348. Fac. Col. No. 16, p. 28.*

No. 177. [7454] CARMICHAEL, Petitioner. July 12, 1700.

Sir George Lauder of Iddington being deceased, and his immediate younger brother Robert, and apparent heir, being abroad as chirurgion to a ship in the [7455] Indies, there is a bill given in to the Lords by my Lord Secretary Carmichael, and other creditors of the said Sir George, craving that, till the return of the heir, or certioration to be given him, they would appoint Mr. Lauder, the youngest brother, to be factor, for shearing the crop, disposing of the stock on the ground, and uplifting the rents, upon caution, to hold compt to the heir, when he returns, and to the creditors *medio tempore*. The Lords demurred, because the estate was not encumbered, nor affected by diligence or adjudications, in which case only, during the ranking of creditors, the Lords used to name factors; yet, the case being extraordinary, they interposed their authority to his being factor only for a year, in which time the apparent heir might return, and only to intromit with what falls to the heir; for as to the bygone rents and stocking, these falling under executry, they might apply to the Commissaries and get a warrant to dispose on these; for, where law has provided a remedy, we are not to recur to extraordinary methods. In such cases the Lords have varied, sometimes allowing a factor, and at other times refusing, and leaving parties to follow their own way, as they think best, without interposing their authority.

Fol. Dic. v. 1, p. 499. Fountainhall, v. 2, p. 103.

No. 181. [7460] JOHN GLASWELL v. JOHN DURHAM. December 28, 1710.

Where Magistrates allow a greater aliment than is reasonable, the Lords are competent to modify it.

John Durham, merchant in Montrose, being debtor to Mr. John Glaswell, merchant in London, in £53 Sterling by bond; he grants a factory to Harry Hawthorn, mer-

chant in Edinburgh, to prosecute Durham for the said debt. Hawthorn raises caption, and imprisons him in the tolbooth of Forfar, who, after some weeks, applies to the Magistrates on the 32d act 1696, craving he may be either alimented by his creditor incarcerator, or set at liberty in terms of that law. Whereupon the Magistrates take his oath, that he was not able to maintain himself, and modified sixpence *per diem*; but order him to intimate the same to his creditor, which he does by way of instrument to Hawthorn, the factor; and upon the return of this, he requires the Magistrates to set him at liberty, seeing no obedience was given, nor aliment paid him. But the Magistrates demurred, seeing no intimation was made to the creditor. This forces him to apply to the Lords by bill, that they may ordain the Magistrates to liberate him, seeing he had done all the law required, and yet they refused to set him at liberty. Answered for the creditor, That intimation to the factor was not sufficient, seeing his trade lay mostly in England, and so they would know better than the factor the fraudulent conveyances of his effects. Replied, This would put an intolerable hardship upon the poor prisoner where his creditor lived in another kingdom; for, 1mo, He behoved to take out letters of supplement to cite him, whereas he had not bread to put in his mouth; 2do, It would oblige him to wait 60 days ere he could be relieved; whereas strangers in such cases should design a domicil, at which they may be cited. The Lords thought the factor, who had power to put him in, had likewise power to [7461] discharge, and take him out; and therefore sustained the intimation made to the factor as sufficient. The next point was, Whether the act of Parliament laid any obligation on the Magistrates to liberate him, when aliment was not secured or paid by the creditor? or if it was in their power and option still to detain him! It was certain, before that act they had no power to liberate them; but the royal burghs having addressed the Parliament in 1696, that they were overcharged with the maintenance of poor prisoners for debts, where the creditors declined to aliment them; for redress of this grievance and heavy burden, the Lords declared it should be leisome for Magistrates to liberate them, if the creditors did not secure an aliment on them, which was neither command nor injunction, but merely permissive and discretionary. Though it was urged against this, That, by this interpretation, poor debtors might starve, if Magistrates might still detain them; yet the Lords, by plurality, thought they might renounce the privilege of this act introduced in their favours, and that it was a discretionary power which they might use or not as they pleased. The 3d question was anent their modification, whether the Lords might not restrict it, if exorbitant? For it was observed, that, since this act, bankrupts sought no more the benefit of the *cessio bonorum*, but came out of prison without any stigma, or deserved note of infamy, by persuading the Magistrates to modify a greater sum than the creditors could comply with. But the Lords found this act correctory and unfavourable, nowise to be extended; and if they colluded with the prisoners, they might rectify it, and were as competent judges of the party's circumstances as they. All knew that there was a mistake in the act, which should have fixed a maximum (beyond which they should not go), as well as it had made threepence the minimum; but this was forgot. *Canis festinans, &c.* The 4th question started was, Whether the Magistrates should not oblige him, before he came out, to dispoise all his effects in favours of his creditor-imprisoner, as is done when one craves a suspension on juratory caution; there being no reason that he, against whom there is ultimate diligence by caption, should have less security than he who had only charged with horning. Answered. That though it was reasonable, yet the act of Parliament had adjected no such quality to his liberation, and therefore we might not do it; it was remembered, that the act of Parliament introducing sales, and ordaining the purchaser to pay the price to the creditors, spoke nothing of caution; and yet the Lords, for the creditors' better security, caused the highest offerer always find caution to make the price forthcoming. The Lords here would not burden the liberty with a disposition, but left it to the Magistrates to require it if they think fit; and in Edinburgh they always exact such a disposition from them before they let them out.

December 13, 1711.—In the cause mentioned, *supra* 28th December 1710, about alimenting a prisoner, the Lords then found that Glaswell, the creditor, being at London, the requisition to Hawthorn, his factor at Edinburgh, was [7462] sufficient; and that, by the 32d act 1696, the Magistrates had a discretionary power, either to retain the prisoner, though not alimented by the creditor, or to set him at liberty, the

words being conceived in permissive terms ; “ it shall be leisome to them ; ” and the act being introduced in favours of the royal burghs, to free them of the aliment of poor prisoners, they can renounce it if they please. Since that time, Durham, by deceiving the keeper, having made his escape, Glaswell and Hawthorn pursue the town of Forfar, in a subsidiary action for payment of the debt. Alleged, This being *ex quasi delicto*, it must be strictly interpreted against the pursuers, and favourably for the Town ; for *esto* he had escaped, yet they can never be liable, for it was optional to us either to detain him or let him go : For though you once sent him 10s. Sterling, yet that was spent many months ere he went out ; and you failing to send more, we were not obliged to keep him any longer, but might by the act dismiss him when we pleased ; and cited two cases, Baird *contra* The Magistrates of Elgin, Jan. 25, 1665, *voce* PRISONER ; and Feb. 14, 1671, Bairn *contra* The Town of Culross, *IBIDEM* ; and the Magistrates were assolizied in both. Answered, Whatever power they had to set him at liberty, yet they did not use it ; for the truth is, he beguiled his keeper, whom they imprisoned for his negligence, and they ought to have done it in a legal way, by a judicial act of their Town Council, ordaining him to be set out, in regard the creditor did not aliment him ; but this they did not. And so *fecerunt id quod non potuerunt, et non fecerunt quod jure facere potuerunt*. The Lords, by the plurality of one vote, assolizied the Town, and found them not liable.

Fol. Dic. v. 1, p. 500. Fountainhall, v. 2, pp. 616, 687.

No. 192. [7479] The MINISTER of KIRKDEN *v.* The HERITORS. July 8, 1784.

An appeal to the House of Lords, from a judgment of the Court of Session, as Commissioners of Tithes, is competent.

The stipend payable to the ministers of the parish of Kirkden was augmented in the year 1716. The present incumbent, however, dissatisfied with that allowance, brought a process of augmentation, which was dismissed, in respect of the rule of court, that no new augmentation should be granted where one had been obtained since the Union.

The action was afterwards carried, by appeal, to the House of Lords ; when it was objected by the heritors, that because the Court of Session judged in questions of this sort as a Committee of Parliament, and as vested with special powers from the legislature, their decisions were not subject to review. In support of this objection, they

Pleaded ; The subject of the jurisdiction granted to the Commissioners of Tithes before the Union, was not a matter of civil right, nor cognisable by the ordinary courts of law. The Judges were composed of a certain number of persons out of the three Estates in Parliament, and their proceedings were declared to have the strength and authority of an act of the legislature ; 1617, c. 3 ; 1621, c. 5 ; 1633, c. 19 ; 1661, c. 61 ; 1663, c. 28 ; 1672, c. 15 ; 1685, c. 28 ; 1686, c. 22 ; 1690, c. 30 ; 1693, c. 23. The same authority must undoubtedly belong to the Court of Session, erected by the statute 1707, c. 9, into a perpetual commission of tithes, and empowered “ to cognosce and determine in all matters referred by the former laws to the courts of commission, conform to the rules laid down, and powers granted by the statute 1633, and other acts already mentioned.”

Answered ; That the Commissioners of Teinds, before the Union, were not a Committee of Parliament, is apparent from their having continued to act [7480] after the Parliaments which created them were dissolved ; Forbes on Tithes, pp. 274, 275. Their determinations indeed were not subject to the review of any other court ; a circumstance which did not arise from the nature of their jurisdiction, but from the special clauses occurring in the statutes quoted on the other side. Nor were the parties aggrieved by their proceedings altogether destitute of redress, as would infallibly happen at present, if no appeal lay from the Court of Session, as coming in their place. A power was lodged in the commission of 1633, in those of 1663, 1672, 1686, 1690, and 1693, to rectify “ whatsoever valuations led, or to be led, to the enormous prejudice of titulars, or of the heritors, or to the hurt and detriment of the church, and prejudice of the ministers maintenance and provision.”

After the establishment, however, of the perpetual commission in 1707, though the forms of procedure and rights of the parties remained the same, the other peculiarities of the former courts were completely done away. Not only were the anxious clauses, giving the strength and permanency of an act of Parliament to the sentences pronounced by the old commissions omitted, but it is also expressly declared, that the efficacy of the judgments of the Court of Session, in this branch of their jurisdiction, shall be the same as in other civil causes. The course of the common law then being no longer obstructed, as in the temporary commissions, the superintendence of the House of Lords, as the universal appellate jurisdiction, seems altogether unquestionable. In effect they have frequently exercised in this matter their power of review; 20th March 1710, *Durham contra* the Heritors of Largo; 13th July 1713, Sir Hugh Paterson *contra* the Moderator of the Presbytery of Stirling; 11th June 1714, Lord Blantyre *contra* Currie; 15th June 1714, Scott *contra* the Magistrates of Montrose; March 1735, Earl of Galloway *contra* the Heritors of Whithorn; 26th February 1757, Marquis of Tweeddale *contra* Anstruther; 25th July 1757, Marquis of Tweeddale *contra* Dundas; 15th March 1758, King's Advocate *contra* the Duke of Montrose; 17th February 1766, the Magistrates of Edinburgh *contra* the Ministers. See APPENDIX.

On the merits of the judgment of the Court of Session, the heritors farther

Pleaded; Without some regulation, limiting within certain bounds the right of applying for an increase of stipend, the authority of the Court of Tithes would be the source of perpetual litigation and disquiet, both to laity and clergy. The determination of the Court, therefore, to refuse a second augmentation since the year 1707, which has been matured into an invariable rule, is in itself most wise and salutary; nor is it altogether unsupported by the statute, the powers of the Court of Session, with regard to tithes, not being more ample than those of the ancient commissions, which had no authority, without a special warrant from the legislature, to review or vary their own decreets.

Answered; It cannot be from any defect in the jurisdiction of the Court of Session as a commission of tithes, that it refuses to increase stipends augmented [7481] since the Union; for the statute, by a reference to such of the former commissions as had a power of reviewing their own decreets, has invested it with the same authority. Nor can it be well supported on any other ground, it being the province of the legislature alone to limit, by a regulation so general and arbitrary, the interposition of courts of law. Indeed the propriety of such a restriction may justly be called in question; for if, by an alteration in the mode of living, or by an enlargement of the fund out of which the stipend is payable, the situation of a parish be greatly altered since the year 1707, why should the incumbent be restrained from obtaining a suitable addition to his income? or where is the justice in determining that a liberal provision, granted on the day the commission 1693 expired, should yet admit of increase, while the most scanty one bestowed by the commission in 1707 must remain unalterable? Nor are precedents wanting to justify a deviation even from this rule, which, it is to be remarked, is neither published in the records, nor in any book of practice.

Ordered and Adjudged, "That the interlocutors complained of, be reversed, and the cause remitted to the Court of Session to proceed accordingly."

C.

Fac. Col. (APPENDIX), No. 2, p. 3.

No. 237. [7517] HAIG, DAES and Company v. CAMPBELL. July 16, 1768.

Inferior Admirals not competent to causes purely mercantile.

The Admiral-depute of Alloa having pronounced decree for the price of some Norway logs, the defender advocated the cause on the ground, that inferior Courts of Admiralty have no jurisdiction in causes purely mercantile.

Answered for the pursuer; The act 1592, c. 160, was only intended for repressing extraordinary and oppressive clauses in grants of Admiralty. The act 1681, c. 16, though it has been denominated the great charter of the Court of Admiralty, is not the measure of its jurisdiction. It relates only to the privative jurisdiction enjoyed by

that Court in maritime causes. The connection of maritime and mercantile causes had naturally led the High Court of Admiralty to judge in both, long before that statute. That jurisdiction has been uniformly exercised, as far back as the practice can be traced, and it has been supported by several decisions.

If the jurisdiction of the High Court of Admiralty extends to mercantile causes, that of inferior Admirals, derived from the same authority, though limited in territory, must be equally extensive in kind. And the decision 27th June 1759, *Miller contra Sawyers*, No. 233, p. 7514, proceeded on the ground, that the defender did not live within the territory of the Admiral-depute, as fixed by his commission.

Replied, The jurisdiction of the High Court of Admiralty, derived from statute, relates to maritime causes only. Its jurisdiction in mercantile causes took its rise from custom, and cannot be carried farther than that custom has gone, or extended to inferior Admirals, who have not been in the practice of exercising it, as appears from the decision, *Miller contra Sawyers*, which shows, that, [7518] in 1759, it seemed a novelty to the Court, for an inferior Admiral to judge in causes not maritime.

For illustrating the point, the defender referred to Balfour, p. 629, c. 83, and 634, c. 100. See APPENDIX.

“The Lords found, That the Admiral-depute had no jurisdiction in this case, and therefore sustained the declinature, assoilzied the defender, and found the pursuers liable in expenses.”

Reporter, AUCHINLECK.—Act. CROSBIE.—Alt. ARMSTRONG.

G. F.

Fac. Col. No. 73, p. 317.

No. 246. [7532] WILLIAM CLARK v. JOHN ROBERTSON, and Others. August 8, 1783.

Action, on a policy of insurance, not competent before the Court of Session, in the first instance.

An action founded on a policy of insurance, was brought before the Court of Session, in the first instance, by Clark, the insured, against Robertson, and certain other persons, underwriters.

A doubt concerning the competency of the jurisdiction, having occurred, both parties declared their readiness to prorogate it; and referred to the case of *Ritchie contra Wilson and Company*, determined July 5, 1780, No. 244, p. 7527.

The Lord Ordinary reported the point to the Court; and, in consequence of the opinion delivered by their Lordships,

“Found, that the case was maritime, and therefore that it could not, in the first instance, proceed before this Court; and therefore dismissed the action.”

Lord Ordinary, KENNET.—Act. MORTHLAND.—Alt. SOLICITOR-GENERAL, CAMPBELL.

S.

Fol. Dic. v. 3, p. 352. *Fac. Col.* No. 119, p. 187.

No. 300. [7584] ELIZABETH NEILSON and FARQUHAR her Husband v. DONALD. February 22, 1750.

The Dean of Guild has no more jurisdiction than other inferior judges, to judge in a competition of heritable rights, but only in possessory questions; and even in these, where the possession has been very long, declarator of property is the only competent process.

Fol. Dic. v. 3, p. 355. *Kilkerran* (JURISDICTION), No. 2, p. 305.

No. 303. [7588] SMELLIE and Another v. STRUTHERS. May 12, 1803.

A Dean of Guild has no power, for the sake of widening a street, to prevent a proprietor from building upon the limits of his property.

Robert Struthers, brewer in Glasgow, being desirous to build upon a piece of ground which he possessed on the north side of Green Street, applied to the Dean of Guild Court, according to the practice of the burgh, to have the line of his intended building along the front of this street ascertained. The breadth of the lane was only 24 feet 9 inches; but the Dean of Guild ordained the building to be placed at the distance of 30 feet from the opposite side; by which judgment the front would have been made to recede several feet within the limits of Struthers' property.

A bill of advocation was presented by him, complaining of this judgment of the Dean of Guild; and the Lord Ordinary found, "That the Dean of Guild court has no power to line the south wall of Robert Struthers' intended tenement, so as to cut off any part of his property, in order to widen the public street or road."

A reclaiming petition against this interlocutor was presented to the Court by Richard Smellie, the master of works of the city, and the procurator-fiscal of the Dean of Guild court, in which they

Pleaded; Public utility requires, that individual proprietors of urban tenements should be prevented from an unlimited exercise of their right of property. Hence the regulations which prevail in most burghs with respect to the police of the town, and the form and height of the buildings, which are certainly encroachments upon the rights of individual proprietors, on account of general expediency. The rules of each burgh with regard to such matters, are to be explained by custom and usage; Erskine, b. 1, tit. 1, § 45; and the Dean of Guild, under the controul of the Supreme Court, is entrusted with a discretionary power of directing the buildings of the town; in the exercise of which he may, in particular circumstances, prevent a proprietor from building upon the extreme verge of his property; Erskine, b. 2, tit. 9, § 9. The Dean of Guild of Glasgow has immemorially exercised this power, which has been found greatly conducive to the convenience and elegance of the city; and the circumstances of the case require, that this lane, which has become one of the principal avenues of the town, should be made more spacious, which will not only be of advantage to the public, but will encrease the value of the adjacent tenements.

But the petition was refused, without answers, and expenses were found due from the date of the first interlocutor of the Lord Ordinary. The Court were decidedly of opinion, that neither the alleged usage of the Dean of Guild, nor [7589] the expediency of widening this particular street, could confer upon that Magistrate the power of taking away any part of the property of individuals.

Lord Ordinary, CRAIG.—For Master of Works, CAMPBELL, CONNELL.—Agent, Wm. BUCHANAN, W.S.—Alt. SOLICITOR-GENERAL BLAIR, JARDINE.—Agent, Jo. DILLON.—Clerk, FERRIER.

J.

Fac. Col. No. 99, p. 219.

No. 314. [7596] Mr. CHARLES EYERS, Solicitor of her Majesty's Customs, Captain JOHN MUIR, late General Surveyor, and Provost JOHN BALLANTINE, Collector at Ayr v. MUNGO HUNTER, Skipper of the "Hopewell," and ALEXANDER CAMPBELL, one of the owners thereof. January 19, 1711.

The Justices of Peace can only take a precognition against transgressors in the matter of the customs; the final trial of which, in order to condemn or clear ships and goods, belongs properly to the Court of Exchequer.

John Muir and Provost Ballantine having convened Alexander Campbell and Mungo Hunter, the one for running a certain quantity of tobacco and brandy ashore without owning the custom-house, and the other for receiving and concealing thereof, before the Justices of Peace of the shire of Ayr; the pursuers, with the concurrence of the

Solicitor of the Customs, after witnesses were examined, raised an advocacy of their own process upon this ground, That the Justices of Peace could only take a precognition against transgressors in the mat-[7597]-ter of the customs, the final trial whereof, in order to condemn or clear ships and goods, belongs properly to the Courts of Exchequer.

Answered, Ballantine and Muir having owned the jurisdiction of the Justices of Peace by pursuing before them, could not thereafter disown it, and remove the cause, otherwise nothing but confusion would ensue, and processes would be endlessly tossed from court to court, to the unspeakable vexation and oppression of the lieges.

Replied, The public law, and the interest of the Queen's revenue cannot be prejudiced by her inferior officers, who are but informers, and not *domini litis*, going, through ignorance, with her causes before an incompetent court.

The Lords advocated the cause from the Justices of Peace, and remitted it to the Barons of Exchequer.

Fol. Dic. v. 1, p. 508. Forbes, p. 481.

No. 319. [7602] Earl of HOME, Sir JOHN BAIRD, and other JUSTICES of the PEACE of the Shire of Berwick *v.* Sir ROBERT PRINGLE, and Others. June 30, 1741.

Found, that the head burgh of the shire is the place where the Justices of the Peace ought to hold their quarterly courts or sessions, and that the Justices could not appoint their sessions to be held at any other place, although there is no special statute for that effect.

Fol. Dic. v. 3, p. 359. Kilkerran (JURISDICTION, &c.), No. 2, p. 308.

No. 327. [7610] BLAW of Castlehill *v.* ROBERT GEDDES and Others, Justices of Peace. July 9, 1754.

Justices have no power of imprisoning for civil debts.

Mrs. Blaw, the pursuer's wife, having done diligence against him, upon a decret for her separate aliment, the expense of that diligence amounted to £13, 15s. Scots; she brought action against him for that sum, before the defenders, as Justices of Peace in the Culross district of the shire of Perth; and, in her libel, she craved not only decret for the said sum and expenses of plea, but also a warrant of warding, in case payment should not be made within fifteen days after the charge.

The defences made for Mr. Blaw were; 1mo, That Mrs. Blaw, being clothed with a husband, could not pursue without his consent. 2do, That the Justices of Peace were not competent judges in this cause.

"The Justices decerned, and granted warding in common form."

The pursuer being thereon put in jail, brought an action of wrongous imprisonment against the Justices; wherein it was insisted, 1mo, That the Justices of Peace have no general jurisdiction in civil debts; and, 2do, Though they had such jurisdiction, yet they have no power of warding or committing to prison.

Pleaded for the defenders; That such was the constant practice of the Justices in that shire, as well as in many other shires in Scotland; and that this practice was founded on public utility.

The Lord Ordinary repelled the defence; and, upon a reclaiming petition,

"The Lords found, That the Justices of Peace did wrong in granting warrant for warding; but, in respect that the pursuer does not now insist, and that the Justices were in practice of granting warding, they assoilzie, and decern."

Act. LOCKHART.—Alt. HALDANE *et* BRUCE.

S.

Fol. Dic. v. 3, p. 358. Fac. Col. No. 111, p. 162.

No. 335. [7620] The JUSTICES of PEACE of the Counties of Mid-Lothian and Fife v. ROBERT GALLOWAY and Others, Pinnacle-men in Leith. August 1, 1775.

The regulation of ferries belongs to the Justices of Peace. See Earl of Moray v. Magistrates of Kinghorn, No. 332, p. 7617.

Great complaints having been often made of the abuses and delays committed by the boatmen and pinnacle-men plying the passage between Leith and Kinghorn, in 1773, a body of regulations was made out and approved by the Justices of Peace of the two counties above mentioned.

The boatmen and pinnacle-men generally acquiesced in these regulations, excepting the masters of three of the pinnaces, and the owner of two of the three, by whom a suspension was preferred of these regulations, and in particular the two following. By the fourth regulation for pinnaces it is declared, that "no pinnacle shall take on board carriers baggage nor luggage, nor more than six passengers, nor receive more than ten pence for each passenger, and shall account to the birth-boat, either at Leith or Kinghorn for the time, for each passenger above that number, at the rate of ten pence, and shall be subject beside to a penalty of five shillings for each offence for the use of the poor. 5to, No pinnacle-man shall interfere with any of the boats, when shipping, or offer their services to passengers, unless called for by them, under the penalty of five shillings Sterling for each offence."

The reasons of suspension insisted on were, 1mo, That the passage over the Firth of Forth from Leith to Kinghorn, does not seem to be one of these ferries committed to the care and oversight of Justices of Peace, and Commissioners of Supply, by the law of this country. It is, at any rate, free to any subject of Great Britain to ply on; and seems to have been viewed by the legislature *ab origine*, not as an inland ferry, subject to the jurisdiction of Justices, but as any other arm of the sea *inter regalia*. And accordingly, it appears, that, when regulations were meant to be made for freight or otherwise at this passage, they were enacted by the acts of Parliament. Thus, there are two statutes, viz. 1425, c. 59, and 1474, c. 61, relative to this passage, which seem to indicate a difference between this passage and ferries over rivers, &c., subject to the jurisdiction of Justices of the Peace and Commissioners of Supply. But, 2do, The regulations in question are not at any rate binding upon any person, even supposing the jurisdiction of Justices to extend over this passage; for the regulation of ferries, bridges, and highways of this kingdom is, by a special statute (5th Geo. I. c. 29), committed not to the Justices of the Peace alone, but to the Commissioners of Supply and Justices jointly. No regulations, therefore, even of the common ferries, made by Justices without the concurrence of the Commissioners, are binding either on passengers or ferrymen; and it will not be pretended that the regulations in question were either enacted or recognised by the Commissioners of Supply, either for Mid-Lothian or Fife. 3tio, What is still more material, in point of authority and jurisdiction, is this circumstance, [7621] that neither the Justices of Peace for the county, nor the Commissioners, have any jurisdiction whatever over the port of Leith. The Lord Provost, Magistrates, and Town Council of Edinburgh, have ample grants of Admiralty from the Crown over that port, and they consequently, and they only (if any judges at all can) have power to make regulations and by-laws binding at that port. Now, it cannot be shown that the regulations in dispute have been sanctioned by the authority of the Magistracy of Edinburgh to this day. But, 4to, Independently of objections to the jurisdiction of Justices, what they chiefly rest their plea upon is, the grievous hardship imposed upon them by these regulations, equivalent to depriving them of their bread altogether, while, at the same time, not one good purpose can be thereby promoted to the public.

Answered to the first reason of suspension, The suspenders might have seen that the freight for the Queensferry, Dundee, and Partincraig, are all fixed by the acts of Parliament quoted by themselves; so that, by this rule, the whole ferries in Scotland would be taken out of the jurisdiction of the Justices of Peace; which certainly never was intended. But, supposing that their argument was good, and that these particular ferries were not, at the time of passing these acts, under the jurisdiction of the Justices of Peace, still it would not avail them now, as, by a much later act (1669, c. 16), than any of those referred to, special powers are given to the Justices as to the regulating every thing relating to ferries.

To the second, Was this ground of suspending relevant, the short answer that could be made to it is, that the gentlemen who enacted these regulations, were Justices of the Peace and Commissioners of Supply. But, independently of that, it is maintained, that there is no necessity for the concurrence or approbation of the Commissioners of Supply in making these regulations. For, by 1669, c. 16, it is expressly provided, That the Justices of Peace have a power "to visit the ferries in their shires; and, where the ferry lies betwixt two shires, that they correspond with the Justices of the other shire, to the end they may appoint fit and sufficient boats, and convenient landing places; and so to regulate all things concerning the ferries." The ample powers given to the Justices by this statute are not diminished or taken away by that of Geo. I.; but only the same powers with the Justices of Peace given to the Commissioners of Supply, which they had not before. And it is expressly provided by that statute, that all laws and statutes made in that part of Great Britain called Scotland, concerning the repairing high-ways, bridges, and ferries, &c., be still in force and put in execution.

The Justices of Peace for the county of Fife apprehend they have still a later authority than the statutes above quoted in support of their jurisdiction; and that is a solemn judgment of the House of Peers, within these few years, in a dispute betwixt them and the town of Kinghorn; by which it was fixed and determined, that they had a joint power with the Magistrates of Kinghorn to regulate the ferry on the Fife side of the water.

[7622] To the third reason of suspension it is answered; Were the argument upon this head admitted, it would exclude the powers of the Justices of Peace entirely, as there is no ferry but what is comprehended under the boundaries of some one Admiral or another; and it is absurd to say that a grant from the Crown would exclude the legal authority of a Magistrate, who derives his right from the legislative body. And as to all these three grounds of suspension, supposing them relevant, they cannot now be pleaded, as the suspenders themselves have acknowledged the jurisdiction of the Justices, by applying to them by petition for an alteration of the regulations; and even some of the suspenders have acquiesced in these regulations, by entering and registering their names in the court-books of Leith, in terms of one of the regulations concerning pinnaces, and have also exacted the 10d. of freight. Surely, had they meant to call in question the validity of the regulations, they ought to have rejected the whole, and not have laid hold of such part as makes for their private interest.

The bill of suspension was refused as to the point of jurisdiction, but passed singly with regard to the merits on the two regulations in question; and the regulations continued in the mean time. *Fol. Dic. v. 3, p. 358. Fac. Col. No. 190, p. 118.*

No. 341. [7628] WILLIAM MURRAY, with concurrence of the Procurator-fiscal of the County of Haddington *v.* ROBERT TURNBULL and ADAM RUSSELL. January 19, 1797.

A complaint for shooting pigeons, founded on the acts 1567, c. 16, and 1597, c. 270, cannot be competently brought before the Justices of Peace.

William Murray, portioner in the village of Tranent, and proprietor of a pigeon-house in it, which had been built by the family of Winton, while the barony of Tranent belonged them, presented a complaint to the Justices of Peace for the County of Haddington, with concurrence of the procurator-fiscal *v.* Robert Turnbull and Adam Russell, for shooting pigeons. The complaint stated, "That, by sundry laws and acts of Parliament, and particularly acts 1567, c. 16, and 1597, c. 270, all persons are discharged from shooting at or slaying of doves (pigeons) with hagbuts, hand-guns, cross-bows, and pistols, and taking of them with nets and girms, under certain penalties, payable [7629] to the judge and apprehender; and more particularly, by the British statute, 2d Geo. III. c. 29, persons are discharged from shooting with intent to kill, or by any means killing, or taking with intent to destroy, any house-dove or pigeon, under the penalty of twenty shillings, upon conviction on oath of party, or one witness, payable to the informer or prosecutor."

The defenders admitted they had killed a few pigeons; but they stated, that there were no less than thirteen pigeon-houses in the village, twelve of which belonged to persons not qualified to build a pigeon-house; and that what they had done was absolutely necessary to protect a field belonging to the father of Turnbull, in the immediate vicinity of the village, while it was sowing with barley.

The Justices ordered Turnbull to pay fifteen shillings, and Russel five shillings, in name of fine and expenses.

An appeal to the Quarter-sessions was dismissed, with expenses.

In a suspension, the Lord Ordinary found the letters orderly proceeded, and expenses due.

In a reclaiming petition and answers, besides arguing the case on the merits, parties differed as to the competency of the complaint. The suspenders

Pleaded; The two Scotch acts founded on introduced a general prohibition against killing game with fire-arms, and are now in desuetude. Besides, if they were in force, the Justices, under them, would be limited to inflicting the special penalties therein mentioned, which are escheat of moveables, imprisonment, placing on the stocks, and cutting off the right hand. From the nature of these penalties, it is farther evident, that such complaints can only be insisted in *ad vindictam publicam*, and not at the instance of an individual, particularly when no proof of the damage sustained is offered.

The statute 2d Geo. III. c. 29, was passed merely for the purpose of amending certain English statutes, and does not apply to Scotland.

Answered; The Scotch acts founded on are still in force. It is no objection to the judgment of the Justices, that a severer punishment might have been inflicted by them. The action introduced by the statutes is popular; and accordingly part of the penalties is declared payable to the "apprehender."

The Court had no occasion to determine the merits of the complaint. But it was observed, that Lord Bankton's opinion, as to the legality of shooting pigeons, b. 2, tit. 3, § 167, is ill founded, and that his Lordship afterwards admitted it to be so.

As to the competency of the complaint, it was

Observed; The right to have a pigeon-house is inseparable from property in land. The complainer, therefore, having no right to a pigeon-house, has no title to insist in the action. Besides, the Justices of Peace have no jurisdiction under the Scots statutes founded on, which were passed long before their appointment; and the 2d Geo. III. c. 29 does not apply to Scotland.

[7630] The Lords dismissed the action as not competent in its present shape.

Lord Ordinary, CRAIG.—For the Charger, CHA. BROWN.—Alt. LORD ADVOCATE DUNDAS.—Clerk, MENZIES.

D. D.

Fac. Col. No. 9, p. 19.

No. 347. [7636] REID v. FINLAYSONS. December 1730.

In a suspension of a sentence of the Justices of Peace, fining some persons for breaking or defacing a grave stone, the Lords found that two Justices made a quorum; it being urged, that by the act 6to *Anna*, cap. 6, the powers of the English Justices of Peace are transferred to the Justices of Peace in Scotland; from whence it was inferred, that, as two make a quorum in England, the same must obtain here. A further argument was added from the stile of the commission, bearing *duo plures*, and also from the constant practice of two Justices judging in matters of excise. See APPENDIX.

Fol. Dic. v. 1, p. 508.

No. 349. [7637] MARGARET MACKAY v. WILLIAM HERCULES, Tailor. July 10, 1760.

In an advocacy from the Justices of the Peace, it was pleaded, That the decree had been pronounced by a single Justice, whereas two or more are by law required, for holding a court, or for pronouncing any sentence.

“The Lords remitted the cause to the Justices of Peace, with this instruction, That this cause should be judged by two or more Justices of the Peace.”

Act. WIGHT.—Alt. MONRO.—Clerk, JUSTICE.

P. M.

Fol. Dic. v. 3, p. 358. Fac. Col. No. 230, p. 422.

No. 350.

MELDRUM v. BROWN. December 23, 1746.

Found that a constable might apprehend without a written warrant.

Walter Meldrum had some years ago been banished the shire of Fife, by sentence of the Justices of the Peace, with certification, that in case of his return to the shire, he should be scourged by the hands of the common hangman, &c. Alexander Brown, one of the constables of the bounds, getting information that he had returned to the shire, and was harboured in the house of Walter Meldrum, junior, his son, repaired to the said house with assistants, in order to apprehend him; but being deforced by the said Walter Meldrum, junior, a process was brought against Meldrum before the Justices, in name of the said Alexander Brown, with concurrence of the head constable, and of the procurator-fiscal, libelling “His haunting and harbouring his said father, a banished person; 2dly, His refusing to open the door of a room in his house, wherein [7638] his father was suspected to be concealed, though required in the King’s name to assist in apprehending him; and 3dly, That after the constable had discovered the said Walter, senior, getting out by a back door of the said room, and had actually laid hold on him, the defender had assisted him to make his escape; and concluding the pains of law”; which the Justices “found relevant, and admitted the libel to probation.”

Of this process, a bill of advocacy was presented on iniquity; 1st, Because the defence had been repelled, that the constable had no warrant from a Justice of the Peace; 2dly, That the several grounds libelled on were *in cumulo* found relevant, although, in some of them, there was no relevancy; particularly the harbouring or entertaining a banished person was said to be no crime, unless he were intercommuned, and even the refusing to assist in apprehending a father, in order to his being scourged, was what the laws of humanity could not construct to be a crime in any man; 3tio, That notwithstanding an appeal made by the defender to the Quarter Sessions, against an interlocutor of the Justices, repelling an objection to a witness, they had proceeded to examine the witness, on pretence that an appeal to the Quarter Sessions did not stop examination of the witness.

This bill being reported by the Ordinary, the Lords were of opinion, that a constable might of himself apprehend and commit for a crime, without any warrant from a Justice of the Peace; and that neither was there any iniquity in sustaining the libel *in cumulo* relevant to be judged of, as the fact should come out upon proof, although certain of the particulars charged should not *per se* be relevant; but as to the particulars objected to in this case, gave no opinion. They were also of opinion, That an appeal to the Quarter Sessions does not stop the Justices from proceeding and finishing the cause by sentence; but that if against such sentence an appeal be entered, they should admit the appeal, and not proceed to execution till the same be discussed; and therefore, as it appeared from the proceedings, that after taking the oath of the witness objected to by the defender, the pursuer had declared his proof concluded, the Lords “Remitted to the Ordinary to refuse the bill”; but with this instruction, “To proceed to give judgment, reserving to the defender to appeal thereagainst as accords.”

Fol. Dic. v. 3, p. 355. Kilkerran (JURISDICTION), No. 1, p. 304.

No. 356. [7649] JOHN and JOSEPH HERIOTS v. JAMES FLEMING, Messenger, and Cautioners. January 19, 1666.

Found, that the Lyon was not competent to judge in an action of damages against a messenger and his cautioner.

John and Joseph Heriots having obtained decret before the Lyon v. James Fleming, messenger, and his cautioners, depriving the messenger upon malversation; in so far, as being employed to execute a caption, he had taken the debtor, and had denounced, and apprized his lands, and suffered the debtor to escape, and would not subscribe the decret of apprizing, whereupon he was deprived, and decerned to pay 500 merks, conform to the act of Parliament 1587, cap. 46; and both he, and his cautioners were decerned to pay the sum, as damage, and interest, to the pursuer. They suspend, and allege, that the decret is null, in so far as it was pronounced by the Lord Lyon, without the concurrence of the heralds, which is required by the said act. 2do, Albeit the Lyon be empowered to deprive messengers by the said act, yet their cautioners are not under his jurisdiction, nor the damage, and interest of parties by messengers' malversation, which is only competent to the Judge ordinary. It was answered to the first, Oppones the decret wherein the cautioners compared, and so acknowledged the Lyon's jurisdiction as he then sat, likeas the decret itself bears to be by the Lyon, with the heralds. To the second, The cautioners having enacted themselves in the Lyon's books, they have made [7650] themselves liable, and for the damages, they are consequent to every jurisdiction; and the Lyons have been constantly in use to determine the same, as to this point.

The Lords were of different judgments, for they thought, that by the act of Parliament, the Lyon had no such power, but as to long custom, some thought it was sufficient to give that power, and there was no inconvenience, seeing his decreets might be suspended. Others thought that custom being clandestine, and without the contradiction of parties, who might voluntarily submit themselves to any authority, could not be sufficient.

The Lords ordained, before answer, the Lyon's books to be produced, to see if there were such a custom, before it were decided, and how far that custom would work.

June 27, 1673.—John and Joseph Heriots having employed one Fleming, a messenger, for apprehending James Heriot with caption, for not fulfilling of a decree-arbitral, who having taken him, suffered him to escape; and thereupon they pursued the messenger and cautioners before the Lyon, and obtained decret, depriving the messenger for his malversation, and the messenger to pay 500 merks of penalty, conform to his bond of cautionry, whereby he became obliged for the messenger for faithful administration of his trust, under the penalty of 500 merks, and likewise to pay the whole sums contained in the decree-arbitral, as the damage sustained by the party, in not executing the caption. The cautioner suspended on this reason, that the Lyon was not judge competent to determine the damage of parties by the default of messengers, which is a process of very great importance; and the old and late acts of Parliament establishing the Lyon's Courts, gives him only power to deprive messengers, and to decern their cautioners to pay their penalties in their bond of caution, without any mention of the damage of parties. It was answered, That there is a particular unprinted act produced, ratifying the privileges of the Lyon, and including a power to determine the damages of parties. It was replied, that the said ratification, not being a public printed act, but past of course amongst the ratifications unread, was *salvo jure*, especially seeing the last act in the last Session of Parliament gives no such power, but only what the Lyon had by law or custom before.

The Lords having ordained the Lyon to produce his books, to instruct what hath been the custom of the Lyon before, they found no such custom proved thereby, and had no regard to the private ratification, and found the two public acts gave the Lyon no power to determine the damages of parties, and therefore reduced the decret.

No. 357. [7651] ANDREW GREIRSON v. PATRICK M'ILROY. February 13, 1668.

The Lyon competent to judge of deprivation of messengers, and the penalties in their bonds of caution ; but incompetent as to the damage of parties.

Andrew Greirson having employed Patrick M'Ilroy, messenger, to use inhibition and arrestment against Sir James M'Dougal of Garthland, and having failed to make use thereof in time before he disposed, did pursue him and — Houston of Cutreoch his cautioner, before the Lord Lyon, whereupon the said Patrick and his cautioner were decerned to make payment of 500 merks of penalty, and of the damage and interest sustained by the pursuer, to the value of the sums, whereupon the inhibition and arrestment should have been used. The messenger and his cautioner raise suspension and reduction, and insist upon this reason, that the decret is null, as a *non suo iudice*, because albeit the Lyon be authorised by act of Parliament 1587, cap. 46, to take caution for messengers' discharge of their office, and upon default may summon messengers and their cautioners, and may deprive the messengers, and decern them and their cautioners in the pains and penalty for which they became cautioners, yet the Lyon is not warranted thereby to determine the damage of parties, through default of messengers, which may be of the greatest [7652] moment and intricacy ; and would be of dangerous consequence to give the Lyon such jurisdiction over all the kingdom. The charger answered, that the messenger was unquestionably liable to the Lyon's jurisdiction, and that both he and the cautioner had made themselves liable thereto, by enacting themselves in the Lyon's books, and granting bond registerable therein ; and it would be great inconvenience to pursue messengers before the Lyon only for deprivation and penalty, and have need of another process for damage, and interest ; and that the Lyon has been accustomed to decern cautioners so before.

The Lords found the reason of reduction relevant, and turned the decret into a libel, but sustained the decret as to the penalty of 500 merks, in which the messenger was enacted, but not for the damage and interest, neither against the messenger nor cautioner.

Fol. Dic. v. 1, p. 509. *Stair*, v. 1, p. 522.

No. 358. JOHN CAMPBELL-HOOK, Lyon King at Arms, and his Depute v. JOHN COPLAND and JOHN M'COLL. January 21, 1766.

The Lyon by his decree deprived several messengers *de plano* ; upon the following grounds : 1mo, That they had not attended the head-court ; 2do, That they had not paid their bygone annuities ; 3tio, That they had not compeared, in order to answer any complaint which might have been preferred against them, and to instruct that their cautioners were alive and solvent. The Lords found the decree irregular and void.

The statute 1587, c. 46, appoints Lyon King at Arms to hold two courts, upon the 6th of May and 6th of November, yearly, " for all complaintes to be maid to him, upon the default of officers in time cumming."

For many years these courts had been little attended to. But, in 1763, Mr. Campbell-Hook, Lyon King at Arms, resolved to hold a court, and intimated his resolution in the public newspapers, requiring all the messengers in Scotland to attend, for inspection of their books of executions, for inquiring into the situation of their cautioners, and for payment of their annual dues, being ten merks to the Lyon himself, and about half that sum to his clerk ; and that under pain of deprivation.

Many of the messengers attended at this court ; others did not ; and the Lyon deprived about fifty of them *de plano*, upon the following grounds ; 1mo, That they had not attended the head-court ; 2do, That they had not paid their bygone annuities ; 3tio, That they had not compeared, in order to answer any complaint which might have been preferred against them, and to instruct that their cautioners were alive and solvent.

Most of these deprived messengers were re-admitted on their application ; but two

of them continued to act as formerly without applying ; and, being charged on the decree, suspended it as contrary to law.

Pleaded for the Chargers ; The precise limits of the jurisdiction of almost every court are fixed, not by statute, but by custom. The Lyon-Court appears even to have been introduced in that manner. The first statute which mentions it is 1587, c. 46. It proceeds upon the recital, that a great number of messengers had entered into that office, in a confused and uncertain manner. It [7653] restricts the number of messengers, including the Lyon and heralds, to 200 for all Scotland, and authorises such messengers as should be recommended by the Court of Session, after an inquiry by certain commissioners for each shire.

The statute also appoints caution to be taken from messengers, for observation of " the injunctions contained in the end of this present act."

These injunctions do not appear in the printed editions of the statutes, nor have they been discovered in the record. But it has been the immemorial practice to deliver a written copy of injunctions to every messenger at his admission, one article of which requires, " That he present his book, containing his executions, to the Lyon King at Arms, upon ilk 6th day of May, and 6th day of November yearly," under pain of deprivation.

A clause is likewise inserted in the bond of cautionry, for enforcing this attendance, and the payment of ten merks yearly to the Lyon, with the ordinary dues to the clerk ; and consenting that failure in these articles shall be held to be a lawful cause of deprivation.

The act 1592, c. 127, renews the Lyon's power of depriving messengers, with advice of the Lords of Session ; authorises him to exact caution ; and ordains all judges to concur with him in executing the statutes in his favour. And there is an act of the Lyon-court, 28th June 1630, ascertaining the annual sum to be paid to the Lyon ; and appointing it to be specified in the bonds of cautionry.

The act 1672, c. 21, declares, " That the Lyon and his brethren heralds are judges in all such causes concerning the malversation of messengers in their office, and are to enjoy all other privileges belonging to their office, which are secured to them by the laws of this kingdom, and according to former practice."

Upon these grounds, it was pleaded, That the annual dues were exigible in virtue of usage, sanctified by statute. That, as these trifling payments could not afford the expense of a process, so they were exigible in a summary manner, in terms of the clause in the cautionary bond.

And though, in the special cases mentioned in the statutes 1587 and 1592, the consent of the Lords of Session was made necessary, that is not to be extended to ordinary deprivations ; the jurisdiction of the Lyon is founded on custom as well as statute, and many instances of deprivation, by his own authority, were pointed out from his books. These sentences have been respected by the Court of Session, and executions by messengers deprived by the Lyon found null, as in the case 18th February 1732, *Hunter contra Montgomery*, No. 7, p. 3097 ; *voce* CONSUETUDO. In other cases, indeed, the execution has been sustained, where the party had been in *bona fide*, and upon the principles of the law *Barbarius Philipus*, l. 3, *D. de Off. Præf.*

There may be a hardship in obliging messengers to attend the courts personally ; but there is no hardship in their attending by a procurator ; and the advertisement in the newspapers was not intended to supply the want of citation. It was meant to put the messengers on their guard ; but there was no necessity for a citation, as they are bound to attendance upon the courts by statute and by custom, as well as by the express clause in the injunctions, and bond of cautionry.

Answered ; The only statutes respecting the jurisdiction of the Lyon King at Arms, are those of 1587, 1592, 1672 ; and, except in one special case, none of them give him any power of depriving messengers. On the contrary, the two first require, that he shall proceed with the advice of the Court of Session ; and the last, which relates chiefly to his jurisdiction in matters concerning bearings armorial, contains only a general clause, and cannot extend his powers beyond the limits of the preceding statutes.

There is nothing in those statutes which can justify any of the grounds of deprivation resorted to in this case. There is no law, which obliges messengers to attend the Lyon's two head-courts. In the case, indeed, of a complaint against any particular messenger, relevantly laid, and executed upon a charge of fifteen days, the party

complained on is bound, by the act 1587, to attend at the courts to be held upon the 6th of May, or 6th of November, and may be deprived by the sentence of the Lyon. But, in this case, there was no complaint against the suspenders; nor, at any rate, could an advertisement in the newspapers be held as a proper service of such complaint.

The claim for the annuities in use to be exacted from messengers, cannot be supported upon the acts of the Lyon-court, which, had they been consented to by the whole body of messengers at the time, could go no farther than to bind those who consented to them. And no argument can be drawn from the form of the bonds of cautionry, or of the injunctions which the Lyon delivers to messengers; for these, in so far as not supported by statute, are but so many usurpations of a power not founded in law; a power of imposing a tax, which, by the principles of the constitution, is confined to the Legislature itself.

And as to the compulsitor by deprivation, which the Lyon has exercised for enforcing payment of those annuities, it seems to have been reprobated by the Supreme Court. For, in the only instance where the question appears to have occurred, the execution of a messenger was sustained, though he had been deprived by the Lyon, it being for no malversation, but for a deficiency in the payments demanded by the Lyon; 11th July 1699, *Learmonth contra Gordon*, No. 6, p. 3096.

"The Lords found the decree of deprivation irregular and void; and suspended the letters simpliciter."

Reporter, KENNET.—Act. LOCKHART, COSMO GORDON.—Alt. CROSSBIE.

G. F.

Fac. Col. No. 31, p. 250.

No. 360. [7656] PROCURATOR-FISCAL of the Lyon-court v. WILLIAM MURRAY of Touchadam. June 24, 1778.

The Lyon-court having fined a person for having assumed arms without matriculation, and decerned him to forfeit the furniture which bore such arms; the Lords found that the Court was competent in such actions, but that its jurisdiction was not privative. And on the merits of the case, they found, that the defender having been in possession of a coat-armorial prior to statute 1592, such long possession presumed an antecedent right, and that the Lyon could do no more than oblige him to matriculate and pay the usual fee.

Mr. Murray was cited before the Lyon-court by the Procurator-fiscal, for having assumed ensigns-armorial without matriculation, as required by the acts 1592, c. 127, and 1672, c. 21. The precept concluded upon these acts for certain penalties, and for escheat of the goods and furniture on which the arms were represented.

The Lyon-depute having decerned in terms of the libel, Mr. Murray brought the cause into the Court of Session by advocacy; in the discussing of which, two preliminary points occurred, Whether the Lyon-court was competent to this question; and if competent, Whether it was likewise privative?

The Court, November 30, 1775, "repelled the objection to the competency of the Lyon-court, and also repelled the plea of its jurisdiction being privative."

[7657] The cause having been remitted to the Ordinary, his Lordship, after various procedure, found it proved, that the Murrays of Touchadam were in possession of a coat-armorial prior to the act of Parliament 1592; and that, since the 1660, they had been in use to bear the supporters, crest, and device, they now bear: "That such long possession infers an antecedent right, and excludes all challenge of defect of such antecedent right: That William Murray was not in *mala fide* to continue the use of the armorial bearings which his predecessors enjoyed; and that there is no sufficient warrant for the penal conclusions of the original summons; and, therefore, assoilzied Mr. Murray, reserving to the Procurator-fiscal to charge him to matriculate his armorial bearings in terms of the statute 1672, and to pay the fees exigible from a baron, and no more, as the said statute bears: And also, reserving to the officers of the said court to exact, further, a reasonable sum from Mr. Murray, in case he chooses to be furnished, not only with a blazoning, in terms of art, but

also with a painting in water colours, and other ornaments ; these being things which the Lyon is not bound, by law, to provide without a suitable remuneration."

The pursuers having reclaimed, December 20, 1776, the Court adhered to this interlocutor, excepting as to the fees exigible on matriculation, as to which " parties were allowed to be heard further."

The pursuers alleged, That, as to the fees, subsequent usage had derogated from the statute 1672, and had established higher fees. In support of which, eleven instances were condescended on, all within the last twenty years.

Answered ; The statute regulates the fees only where the right to the arms to be matriculated is prior to the 1672, as in the present case. But, in the instances adduced by the pursuer, new grants, either of arms or supporters, were obtained from the Lyon, and, therefore, they establish no usage contrary to the statute. These instances are likewise too few, and too recent, to ascertain the legal fees in any case.

The Court found, " That the Lord Lyon can exact no higher fees for matriculating Mr. Murray of Touchadam's arms than ten merks, being the fees exigible by the statute 1672 from a baron."

Act. SOLICITOR-GENERAL, JA. BOSWELL.—Alt. RAE.

Fol. Dic. v. 3, p. 360. Fac. Col. No. 22, p. 36.

No. 361. [7658] Earl of BOTHWELL v. L. CESSFORD. February 7, 1610.

A prelate having made an heritable bailie of his barony, or regality, is not thought to have done that privative ; but notwithstanding thereof, he may sit and judge himself whenever he pleases, but he may not appoint another bailie. Decided betwixt Francis Earl of Bothwell, and the Laird of Cessford bailie of the regality of Kelso.

Fol. Dic. v. 1. p. 509. Haddington, MS, No. 1788.

No. 350. [7709] ADAM BEGBIE, Deacon, and WILLIAM GIBSON, Boxmaster, to the Incorporation of Tailors of Potterrow and Bristo v. THOMAS BROWN, Tailor in Potterrow. January 26, 1776.

The barony of Portsburgh was sold in 1649 to the Town of Edinburgh. Found, that the jurisdiction of the Bailie of that barony was not taken away by the Jurisdiction Act, but fell under the exception, " That nothing in this act shall extend, or be construed so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the jurisdiction and community of any Royal Burgh in Scotland."

In 1594, a Seal of Cause was granted by John Towers, Baron of Innerleith, and Patrick Knox, one of the Bailies of the barony, erecting the tailors of that barony, of which the village of Portsburgh was a part, into a society, with certain immunities and privileges. It ordains, " That no person shall be allowed to work as a tailor within the bounds of the Potterrow, Easter and Wester Crofts of Bristo, except they be first presented to the Baron and his Bailies ; that their life and conversation may be tried, and their free goods, and armour for defence of the country, known, and be enrolled amongst the brethren of that craft in the Baron books, and to pay a certain composition into the box of the craft, as shall be agreed upon." The sum paid, in name of entry money, is not ascertained in the Seal of Cause ; but immemorial usage has fixed it at the sum of one hundred merks.

Portsburgh and Bristo made a part of the barony of Innerleith, of which the family of Towers were superiors, when the Seal of Cause was granted in the 1594. Afterward, the lands of Portsburgh and Bristo were disposed of by that family to Hepburn of Humble ; and from him the Town of Edinburgh pur-[7710]-chased

these lands, and were infeft, in virtue of a Crown charter, in the year 1649, proceeding upon the resignation of Towers, in favour of Mr. Hepburn. By the Town's charter, these lands, along with some others purchased by the Town, are erected into a barony, by *novodamus*, with a clause of exemption from the jurisdiction of the Sheriff of the county. And, by an after clause, the barony of Portsburgh is of new erected into a burgh of barony; and there is conferred upon the Magistrates the privilege, "*eligendi, creandi, faciendi, et continuendi, balivos, clericos, officarios, serjandos, et alios officarios necessarios infra dict. burgum baroniæ pro gubernatione ejusd. ac eligendi, mutandi, aut retinendi dictos balivos, clericos, et alios officarios annuatim in dictis ipsorum officiis, ac etiam faciendi leges et statuta, pro meliore gubernatione dicti burgi baroniæ, prout ipsis videbitur expediens.*" This charter of the Town of Edinburgh is recorded in the records of Exchequer; and, since the purchase of the Town of Edinburgh in the 1649, the districts of Portsburgh and Bristo form one jurisdiction, and are governed by two Bailies, who are appointed by the common Council of Edinburgh.

In 1774, an action was brought before the Bailie of the barony of Portsburgh, at the instance of the above-named persons, against Thomas Brown, tailor in Potterrow, libelling upon the foresaid Seal of Cause, and concluding, that, as Brown had refused to enter freeman of the incorporation, he should be obliged to take down his sign, desist from working within the barony, and should pay the sum of £5 Sterling, in name of damages, besides the expense of process; in which the Bailie pronounced an interlocutor, finding, that, as he had refused to consign the 100 merks, and to comply with the regulations of the society, he should desist from working as tailor within the barony, and pay 10s. of expenses.

This judgment having been suspended, with regard to the Seal of Cause, the suspender

Argued, That it cannot possibly afford the chargers any title to insist in the present action, in that there is nothing produced and founded upon, but an extract from the books of the Baron Court, signed by their clerk, which is not evidence in law, either of the tenor of the Seal of Cause, or even of its actual existence; for the Baron Bailie Courts are not considered as Courts of record; hence no extracts from their books can be held as probative in any degree whatever; and, of consequence, the title upon which the chargers found their action must fall to the ground.

But, farther, the suspender must beg leave to question Mr. Towers's title, as Baron of Inverleith, to erect any incorporation, with the exclusive privileges contended for by the chargers; as it is apprehended, that no society can be a legal incorporation, to such an extent or effect, without the authority of King or Parliament. And, in support of this objection, as well as to confute an argument used by the chargers, that, independently of their Seal of Cause, they have a *persona standi*, and a right to carry on the present action, as a private [7711] society, the suspender referred to the decision pronounced in this Court, 13th February 1761, *Crawford v. Mitchell, voce SOCIETY*.

In support of his second reason of suspension, viz. That the Baron Bailie of Portsburgh is not a Judge competent to try and determine in the present question, the suspender

Pleaded, That the power and jurisdiction of Baron Courts are, by the act the 20th of George II. abolishing heritable jurisdictions, clearly and expressly limited to questions where the debt and damages are under 40s. Sterling; excepting only from this limitation, actions for recovering and uplifting the Baron's rents.

And, as to the clause in the act above mentioned, which the pursuers had founded upon, viz. "That nothing in this act shall extend, or be construed, so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the jurisdiction and community of, any Royal Burgh in Scotland";

By the charter from the Crown, in favour of the Town of Edinburgh, no greater privilege is conferred on them than was on Hepburn of Humble, or Towers his author, original superiors of the land. The Magistrates of Edinburgh, therefore, as superiors or barons of these lands, are to be looked upon merely as individuals: As, therefore, the jurisdiction and privileges of Royal Burghs are not reserved to them by the act, as individuals, but as communities, the Magistrates of Edinburgh do not fall under the statute, as Barons of Portsburgh; nor can that barony be affected by the above clause, any more than it would have been, had the Town of Edinburgh's authors been

still superiors. The Town of Edinburgh, as a Royal Burgh, has all its privileges and jurisdictions reserved; but, when it stands in the light of a private baron, it must suffer, in that character, the restrictions laid on by the act of Parliament; the jurisdiction of its Baron Bailie must be confined to causes within 40s. or such as regard payment of its rents and profits.

Upon the first point, the chargers

Answered, That through all Scotland, and, particularly, within the baronies and Lordships belonging to the City of Edinburgh, numberless incorporations and societies have been instituted for the support of the police, and for the maintenance of the poor. The privileges of these societies, being of the greatest advantage to the country, have always been protected by Courts of law, especially when the privileges appear to have received the sanction of long and undisputed usage; being undoubtedly as lawful as they are expedient, especially when erected within regalities or baronies, whose superiors are considered, by the genius of our law, to be the proper guardians of police, and the protectors of good government.

As to the Seal of Cause, in this case, an extract of it is produced under the hand of the clerk of the Bailie Court.

[7712] A Baron Court, in some respects, is not considered as a Court of record. But, certainly, in matters which respect their own jurisdiction, and their own privileges, every order of Court may be preserved, and extracts of it by the clerk must be held as sufficient evidence.

Next, with regard to the title to prosecute, it will be observed, that this action is raised by the Deacon and Boxmaster of the society of tailors, "for themselves, and as representing the incorporation." There can be little doubt, that the Deacon or Boxmaster, as representing their society, are entitled to prosecute their rights and privileges, especially before the Judge of the territory. Were there any difficulty upon the general point, it is entirely removed in this case, by the manner in which the libel is laid, founded upon the undoubted interest of the Deacon and Boxmaster, who are themselves tailors, to prevent every encroachment upon the privileges of their society.

The next point to be considered is, whether the Bailie of the barony of Portsburgh enjoys the jurisdiction of determining the privileges of the societies within the bounds of the barony?

Jurisdiction is inseparably connected with property, Stair, b. 2, t. 4, § 9, and b. 2, t. 3, § 2; Bankton, b. 4, tit. 16; Erskine, b. 2, t. 3, § 46.

Again, this jurisdiction of the Bailie has been supported by usage; and there is not perhaps any country in which long usage or consuetude operates more powerfully than in Scotland; Dictionary of Decisions, *voce* CONSUETUDE.

The chargers have discovered no instance of any opposition having been made to the jurisdiction of the Bailie of Portsburgh, that respect the society of tailors. However, the chargers aver, that many such cases have occurred as the present one; but, upon a complaint made to the Bailie against any person who attempted to settle in the barony, without entering a member of the incorporation, or even upon information that such a complaint was intended, the persons thus transgressing upon the privileges of the incorporation, have always either entered members of it, or have desisted from carrying on the profession within the liberties of the barony. All the cases which the chargers can discover, to ascertain the extent of the Bailie's jurisdiction, respect the other societies, which are entirely in a similar situation, constituted by seals of cause. And the chargers instanced the following, viz. a petition and complaint against John Hastie, a painter, for having worked in Portsburgh and Potterrow in 1750. Another, of the society of barbers, against George Milne in Potterrow, for having exercised his profession, although an unfreeman, within the barony. And a third, of the incorporation of baxters against several persons, for putting up signs of bread upon their doors and windows; in all which, the respective corporations within the city were also parties, in virtue of an agreement between them and the incorporations in Portsburgh and Potterrow; and, in each of these cases, the Bailie had pronounced judgment against the delinquents.

But, did the smallest doubt upon this subject remain, it must be removed, by attending to the clauses in the town of Edinburgh's charter, in the 1649: [7713] "*Eximimus a privilegio et jurisdictione vicecomitis vicecomitatus nostri de Edinburgh. Et concedimus balivis et consulibus de Edinburgh, pro nunc et in perpetuum, officium*

vicecomitis, infra bondas terrarum supra specificatas." The lands here alluded to are the baronies of Portsburgh and Potterrow.

So much with regard to the jurisdiction of the town of Edinburgh, upon their general privileges as barons, and as conveyed to them by the Crown in the 1649.

If the Court are satisfied that the town ever enjoyed a jurisdiction sufficient to determine the present question, it will certainly appear equally clear, that it is preserved to them by the jurisdiction act 20th George II. It is declared, "That nothing in this act shall extend or be construed so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the incorporation or community of any royal burgh in Scotland," &c. By another clause, this reservation is extended to "corporations of any regality or barony, the magistrates of which are independent of the lord of regality or baron."

The chargers will not give themselves the trouble of defining the extent of such jurisdiction as belongs to royal boroughs, or boroughs of regality and barony, whose jurisdictions are preserved by the act of Parliament; yet, see Bankton, b. 3, tit. 10, § 47; Erskine, b. 1, tit. 4, § 21. All that the chargers contend is, that the baron-baillie of Portsburgh still enjoys a jurisdiction sufficient for vindicating the rights of the societies within that barony.

Observed on the Bench: The objection, that the principal seal of cause is not produced, comes too late. In fact, they have a very good seal of cause. It is the baron and bailie, sitting in judgment, who interpose their authority, and ordain their order or ordinance to be obeyed. Many such societies have been erected upon no better foundation, e.g. Kilmarnock, Paisley, &c., and it were dangerous to overturn them. There are even many burghs of barony where corporations have been created by long and established usage. In the case of the town of Kelso v. Duke of Roxburgh, all the seals of cause were lost, but they had had continued possession.—As to the second point, this is the very question that was disputed in the case from Gorbals (*vide* No. 97, p. 7381); nay, the present case is much stronger; for Portsburgh, in 1469, was erected by the Crown into a burgh of barony; which cleared a doubt expressed by some of the other judges, on the notion of this being merely a common barony.

The Lords "found the letters orderly proceeded."

Reporter, ALVA.—Act. G. CLERK.—Alt. H. ERSKINE.—Clerk, ROSS.

Fol. Dic. v. 3, p. 364. *Fac. Col.* No. 218, p. 170.

No. 4. [7721] Laird of RENTON v. LADY AITON. June 26, 1634.

A clause in a contract conceived in favours of a third party, albeit not of his knowledge, cannot be discharged by any of the parties contractors, without the consent of him in whose favours it is introduced, if the contract be registrated; for in that case, it is as good as it had been delivered to the said third party, and had become his evident.

Fol. Dic. v. 1, p. 511. *Spottiswood* (CONTRACTS), p. 72.

* * Durie reports this case :

June 25, 1634.—In a spuilzie of teinds founded upon a right made by John Stuart of Coldingham, and Francis Stuart L. Moriston, and Robert Douglas, to the pursuer of the same teinds; at the time of the making of which right, the pursuer gave a bond to the said persons, authors of his right, that he should never exact more for these teinds, now acclaimed from the Lady Aiton, but only £100 yearly; which bond is registered in the books of Council, and made public; and upon which bond, the Lady Aiton defender, propones this exception, that she could not be found to have committed spuilzie; which exception the Lords found relevant, and sustained it to elide the spuilzie; notwithstanding that the pursuer replied, That this bond containing the foressaid clause, could not defend her, the said clause being conceived in favours of a third party, who was neither present the time of the parties contracting

thereon, she not being a party, nor knowing any thing of the bargain, and doing nothing upon it, nor being accepted by her, nor by none in her name, and so behoved to be unprofitable to her, being *stipulatio alteri facta*, which is not [7722] profitable in law; likeas thereafter all the parties authors of the said disposition, and receiven of the bond, containing the said clause, had discharged the same, and all the whole heads thereof, to the pursuer, except the L. Moriston, whereby the same became extinct, as if it had never been made, seeing she was not contractor; which reply was repelled; for the Lords found, that seeing the said bond was registered, and so made public, the same could not thereafter validly be discharged without the consent, and express deed of that person in whose favours the clause was conceived; likeas the whole persons to whom the same was made, and who disposed the teinds to the pursuer had not at all discharged the same; for if it might have been validly discharged without consent of the third person (as it was not found) yet all their consents behoved to have been given thereto; and seeing Moriston's consent was not adhibited, who survived long after the discharge, and which is now impossible to be had, he being now deceased, therefore the discharge was not respected, to derogate to the said third person.

Act. STUART & NICOLSON.—Alt. ADVOCATUS & BELCHES.—Clerk, GIBSON.

Durie, p. 720.

No. 5.

IRVING v. FORBES. June 8, 1676.

Found in conformity with *Wood v. Moncur*, No. 1, p. 7719.

— Irving pursues the Laird of Tolquhon for payment of a bond granted by Tolquhon, his godsire, as principal, William Forbes, his father, who was then young Laird of Tolquhon, and another Forbes, as cautioners; he insisted first against the cautioner, who is alive, who alleged absolutor, because the pursuer had granted a bond in favours of Irving of Fedderet, wherein he had declared this cautioner free of this bond. It was answered, Imo, That the defender had no right by that clause, unless the bond had been delivered to him, or at least accepted by Fedderet; and it was offered to be proved by Fedderet's oath, and the witnesses insert, that this bond was never accepted by Fedderet, nor delivered to him, nor to any by his warrant. The pursuer replied, That this clause being in his favours, though a third party, it could only be taken away by his oath, for no man is obliged to prove the delivery or acceptance of a writ, if it be out of the subscriber's hand, unless the contrary be proved by his oath in whose favours the writ is.

The Lords found that this clause, though in a writ betwixt two other parties, was valid in favours of this third party, and that the not delivery or acceptance thereof, was only probable by his oath.

The pursuer did next insist against Tolquhon as representing his father, the other cautioner, who alleged that this bond bore not to be subscribed by his father, whose name was William Forbes; but this being only an extract of the [7723] bond registered in anno 1649, which bore *sic subscribitur* Patrick Forbes of Thainstoun, and offered to prove that there was one Patrick Forbes in Thainstoun at that time, the principal bond being lost with the registers. It was answered, That the pursuer's father was ordinarily designed of Thainstoun, and was so designed in the body of the bond, and his ordinary subscription was W. Forbes, which W. is very like a P., and which is very like another subscription produced. And for further adminiculation, produced a horning against young Tolquhon in his own lifetime, and offered to prove, that his money was arrested upon this bond, and a decret for making such forthcoming against him, and whereupon a part was paid.

The Lords ordained these writs to be produced, and the surviving cautioner to be examined *ex officio*, upon this point.

The pursuer insisted against Tolquhon, as vitious intromitter with his father's goods, who alleged absolutor from vitious intromission, because he was executor confirmed before intenting of this cause. The pursuer answered, That he was vitious

intromitter, in so far as he had fraudfully omitted things intromitted with by him and had not confirmed the same.

The Lords repelled the allegiance, and refused super-intromission, but by confirmation *ad omnia*, and by way of action, and that the *quot* might not be lost, according to their ordinary custom. See PROOF.

Fol. Dic. v. 1, p. 511. Stair, v. 2, p. 424.

No. 9. [7728] THOMAS TAIT v. THOMAS and MARGARET POLLOCKS. July 20, 1738.

A provision in a contract of marriage to the wife's children of a former marriage, was found not to import a *jus quæsitum tertio*, but only a destination of succession, alterable at pleasure by the husband and wife.

In the contract of marriage entered into betwixt Christian Morison and John Tait, he provided her "in and to the hail insight and household plenishing, and other moveable goods and gear, belonging to him, with power to her to use and possess the same during all the days of her lifetime, in case she survive, and remain unmarried." The contract further declares, "That, after her decease, it is to be divided in the following manner, viz. two-thirds thereof to Thomas and Margaret Pollock's children, procreated betwixt Christian Morison and Hugh Pollock, her second husband; and failing of them, or either of them, by decease, the deceaser's third to accresce and belong to the survivor; which failing, by both their deceases, to the said John Tait and Christian Morison, spouses, their nearest heirs and assignees whatsoever; and the other third of the said moveables, goods, and gear, to pertain to the said John Tait, his assignees, or to which of his children he should think fit to dispose the same before his decease," &c. And, by another clause, the liferent use of the household furniture is reserved to the longest liver of them two, with full power to them to meddle, intromit with, possess, use, and dispose thereof, at pleasure." Thereafter the said John Tait disposed to the said Christian Morison, her executors and assignees, all household plenishing, goods, gear, and effects, that should happen to pertain to him the time of his decease, with this quality or provision, That in case Thomas Tait, his second son, survived his said spouse, the one half of the plenishing should, after the decease of his spouse, accresce and belong to him, or the value thereof, in his option.

John Tait died first, whereupon Christian Morison confirmed the general disposition; and, after her decease, Thomas Tait brought a process, upon the [7729] above disposition, against Thomas and Margaret Pollock, for the half of the household plenishing.

For the defenders, it was pleaded, That, from the clauses above recited, it is plain, that two-thirds of the household plenishing are declared absolutely to belong to them *nominatim*; in so much, that the portion of the deceasing is ordained to accresce to the survivor; and, failing of him, only to John Tait and Christian Morison, their heirs and assignees; from which it is plain, John Tait did not intend to retain a power to alter, with respect to this provision in their favour; consequently, a *jus quæsitum* was thereby acquired to the defenders, which could not be taken from them by any gratuitous deed of John Tait's; more especially, as marriage-contracts are solemn deeds, and the articles therein mentioned are presumed to be agreed upon for onerous causes. It is true, that, in many contracts of marriage, the husband and wife are understood to be fiars, when the liferent is only provided to them, and the fee to the children *nascituri*. But the present case is quite different, as the defenders are *nominatim* put in the fee of the subject, by the settlement in the contract; neither can the words, "with full power to them to meddle, intromit with, possess, use, and dispose thereof at their pleasure," vary the argument, as that cause can never be pleaded so high as to give the husband a power to alter gratuitously, thereby to overturn the whole tenor of the contract; more especially as, from the words subsequent thereto, viz. "which liferent-provision above-mentioned," &c., it is plain, the power of disposal is solely applicable to the liferent competent to the husband

and wife, that clause being intended only to convey to the liferenters such a faculty, power, and use, over these goods, as was consistent with their liferent-right.

Answered for the pursuer; The contract contained not only the ordinary provisions in marriage-settlements, but, further, clauses which were fitter for a testament, in so far as the husband thereby nominates those whom he intended for his successors in his moveables. It is true, the nomination is not made in words commonly used in provisions of succession; instead of instituting heirs or executors, the terms in this deed are, "after the dissolution of the marriage, by both our deceases, shall be divided," &c. But, it is thought, it would be wresting what appears to have been the meaning of the parties to a strange degree, if these words were interpreted as constituting an unalterable right in the defenders to two-thirds of the pursuer's father's moveables. In short, the meaning of the clause is, That, upon ceasing of the liferent-right of the moveables, constitute in favours of the wife, in case of her survivance, the defenders should succeed to two-thirds thereof, and the pursuer to the other third, in case the said moveables should not be disposed of; so that it is plain, this was only a destination of succession, which is further evident from the words, "reserving to the parties power to dispose of the subjects at their pleasure." Neither can there be any doubt, but that, notwithstanding this declaration of the husband's intention, he could have sold or gifted the moveables, as that would have been no [7730] more than altering a simple destination. Besides, if it had been intended to have stripped the husband of the property, and to make him only a naked liferenter, some words would have been found importing that intention, which no where occur in the contract.

The Lords found, That the provision in the contract of marriage between John Tait and Christian Morison, providing two-thirds of their household plenishing in the events, and with the reserved powers therein mentioned, in favours of Thomas and Margaret Pollocks, children of the said Christian Morison, imports only a destination of succession; and that the same was alterable by the said John Tait, with consent of the said Christian Morison, at pleasure; and found the same accordingly altered by the disposition by the said John Tait, in favours of his said spouse, and accepted by her, whereby the half of said household plenishing is, in the event therein mentioned, granted to Thomas Tait, the pursuer; and therefore sustained process at his instance for the half.

C. Home, No. 98, p. 155.

No. 10. MARION WARNOCH *v.* MARGARET MURDOCH. January 8, 1759.

Found in conformity with *Bishop of St. Andrews v. Wylie*, No. 3, p. 7720.

James Glen, in his marriage-contract with Margaret Murdoch, 31st May 1751, provided her to a certain annuity after his death, payable at two terms in the year, to which was subjoined this clause: "But in case that Marion Warnoch, stepmother of the said James Glen, and widow of the deceased John Glen, merchant in Glasgow, his father, shall survive the said James Glen, and that the said Margaret Murdoch, his future spouse, be then also alive, then she and her annuity, in every event, shall be burdened with, and she, with consent foresaid, obliges herself to pay the sum of £12 Sterling yearly to the said Marion Warnoch, from the said annuity, at the terms before specified, for payment of the said Margaret Murdoch's annuity, and beginning at the same time, and that during the joint lives of the said Margaret Murdoch and Marion Warnoch allenary."

In December 1756, James Glen executed a settlement of his affairs, by which he divided his fortune amongst his children. This settlement contained the following clause: "But as to a gratuitous annuity of £12 Sterling yearly, mentioned in my contract of marriage, and intended to be given by me to Marion Warnoch, my stepmother, and with which I burdened my wife and her annuity, as specified in the said contract, I do hereby, for good reasons, revoke, recall, and make void the said provision of £12 Sterling yearly, in favour of the said Marion Warnoch, declaring that the said Margaret Murdoch, and her annuity and provisions, and my estate

and succession, shall be as free of the said £12 Sterling, as if the same had never been mentioned in the said contract."

[7731] James Glen died very soon after executing this settlement, and Margaret Murdoch, his wife, refused to make payment to Marion Warnoch, his stepmother, of the £12 of annuity, because it had been discharged by her husband's last settlement.

An action was brought against her by Marion Warnoch, upon this ground, That by the clause first recited in James Glen's contract of marriage, a right was established in favour of the pursuer, his stepmother, which it was not thereafter in his power, with the concurrence of his wife, to revoke, without the consent of his stepmother; for that when a right in favour of a third party is expressed in a contract between two persons, the right is effectual to that third party, though not present nor accepting, and it cannot be recalled; but that third party may compel either of the contractors to exhibit the contract, and thereafter may insist for performance. This is clearly set forth to be the law of Scotland by Lord Stair, b. 1, tit. 10, § 5, and it is supported by various decisions; 9th January 1627, Nimmo, No. 16, p. 7740; 25th June 1634, Renton, No. 4, p. 7721; 18th December 1633, Bishop of St. Andrews, No. 3, p. 7720.

Answered; The provision in favour of the pursuer was gratuitous; she was no party to the contract, and the stipulation was entirely between James Glen and his wife; it was submitted to by the wife, not upon account of Marion Warnoch, but upon account of her own husband; the stipulation was a voluntary eventual burden, created by him upon his wife's annuity; and no good reason can be figured why he might not again free his wife's annuity of that burden, when he found reason, or chose to do so; for he never could mean, that it should not be in his own power, if he saw cause, to relieve his wife of that burden. James Glen and his wife had it certainly in their power to have destroyed their contract of marriage by joint consent, and to have entered into a new contract, in which they were not obliged to insert this burden. Besides, no deed can be effectual without delivery; and, in this case, there was no delivery to Marion Warnoch, nor was the deed even put into the register, which is held to be a general delivery to all parties interested. If it is said, that the delivery of the contract of marriage by the wife to James Glen, must be held as a delivery to him, for the behoof of Marion Warnoch, the contract cannot, even upon this footing, have a stronger effect, than if he had taken a bond from his wife for payment of this annuity to his stepmother; in which case, he might certainly have given up or discharged that bond at his pleasure; his wife was bound, but he himself was not; and he was at liberty to discharge the obligation upon her.

The Lord Bankton Ordinary "found, That the defender must take her liferent, with the proper burdens, as there stipulated, and therefore repelled the defence, and decerned for payment of the £12 Sterling yearly."

"The Lords adhered."

Act. J. DALRYMPLE.—Alt. T. MILLER.—Clerk, PRINGLE.

W. J.

Fol. Dic. v. 3, p. 365. Fac. Col. No. 156, p. 278.

No. 11. [7732] The Lady CARNEGIE v. The Lord CRANBURN. January 30, 1663.

Property may be transferred without the knowledge of the disponent; and upon this footing recognition was sustained upon an infeftment granted to an infant out of the country, without necessity to allege there was any mandate to accept of the infeftment.

Lady Ann Hamilton, and the Lord Carnegie, her husband, as having obtained a gift of recognition from the King, of the barony of Innerwick, and being thereupon infeft, pursues the Lord Cranburn, to whom the same was disposed, by the Earl of Dirleton, grandfather to both, for declaring the recognition, and the donatrix' right, in so far as James Maxwell, late Earl of Dirleton, holding the said lands of his Majesty's ward and relief, had, without his Majesty's consent, alienated and disposed the same to James

Cecile, his oye, then second son to the Lord Cranburn, procreated betwixt him and the Earl of Dirleton's second daughter. It was alleged for the defender absolutor; because, where there was no infeftment, there could be no alienation nor recognition; and there could be no infeftment without the same were granted to the disponent, or his procurator, to the acceptor or his procurator; but here there was no acceptor nor procurator, because Cranburn being then a child, and in England, had granted no mandate to take this sasine, and therefore had raised reduction thereof, as done without his warrant; and as to the procuratory expedite in the Chancery, constituting an attorney to the said James Cecile, the expediting thereof was without his knowledge or warrant, and therefore the sasine being taken without his warrant, was null, and made no alienation nor recognition; as if any heiritor disposing ward lands, and giving a precept of sasine, if any third party should accidentally find, or steal away that precept, and take sasine, the same would be found null, as without warrant, and would infer no recognition. 2dly, Absolutor, because the disposition to the defender bears expressly, that Dirleton disposes, failing heirs-male of his body; so that it being conditional, and the sasine being *actus legitimus qui nec recipit diem nec conditionem*, the same is null; for if Dirleton had an heir-male of his own body, he would have excluded James Cecile, not by way of reversion or retrocession, there being none such in the disposition; therefore it behoved to be a suspensive condition. 3dly, Absolutor, Because though the sasine had been accepted warrantably, yet the acceptor was minor, and thereupon leased, and ought to be restored and the sasine annulled, and consequently the recognition. The pursuer answered to the first, *non relevat*, for albeit there had been no attorney out of the Chancery, the sasine would have been valid, because there needs no other procuratory for taking of sasine, but only the precept of sasine, which is an express mandate of the disponent, and the having thereof in the attorney's hand, is a [7733] sufficient evidence of the warrant or mandate to be attorney for the receiver, which proves sufficiently his warrant, neither was there ever any more required to a sasine in Scotland; and if more were required, all sasines would be null, it being ordinary to give sasines to infants, or absents out of the country; but the delivery of the precept by the disponent, to any person in name of the acceptor, is a sufficient mandate or attorney for the acceptor, especially here, where a grandfather gives infeftment to his oye, he might well give a warrant to an attorney, for him to accept. To the second, albeit the disposition bears, failing heirs-male of the disponent's body, yet the precept is directed to give present state and sasine without delay, whereby it is clear that the disponent's meaning was not, that this condition should be suspensive, to impede the infeftment; and therefore all it could operate is, to have the effect of a resolutive condition, that if any heir-male should be supervenient, he might upon that condition pursue James Cecile to renounce the right, or to declare it null; neither is a sasine *actus legitimus*, and though it were, and were incapable of a day or condition, yet that would not annul the act, but annul the condition or day, as *aditio hereditatis* is *actus legitimus*: yet if any man enter heir for a time, or under condition, he is heir simply, and the time and condition is void, but not the entry itself. To the third, albeit *regulariter* minors leased may be restored, yet that hath its exceptions, as a minor being denounced rebel, and his escheat fallen, or thereafter his liferent, or bearing in non-entry, either simply, or through a wrong or informal infeftment, he would never be restored against these casualties, so neither against the taking of sasine, in so far as may infer recognition. 2dly, There could be by the sasine no lesion at that time, Cranburn being then but his mother's second son, and not *alioqui successurus*, to the half of the estate, as now he is, neither is ever lesion interpreted by the prejudice of any part of a deed, unless there were lesion of the whole; as if lands were disposed to a minor, with the burden of debts, he could not reduce the burden of debts as to his lesion, unless thereby the whole disposition were to his lesion.

¶ The Lords repelled these three defences.—See MINOR—RECOGNITION.

No. 12. [7735] Colonel BORTHWICK v. THOMAS LAURIE, Merchant in Edinburgh. January 20, 1686.

The Lords sustained the delivery of a paper, though not to the party, but to another for his behoof, though he knew nothing of it, and so could not accept it.

Fol. Dic. v. 1, p. 511. Fountainhall, v. 1, p. 394.

No. 13. The Lord LINDORES v. JOHN STEWART of Innernytie. December 8, 1714.

The maker of a tailzie containing irritant clauses upon himself, and all the substitutes, has right to call for the deed as his proper evident, to be cancelled or not at his pleasure.

The deceased and present Lord Lindores made a tailzie of their estate in favours of certain heirs, reserving a faculty to this Lord Lindores, who was fiar, to alter, innovate, and dispose of the estate at his pleasure.

The said present Lord Lindores did, in anno 1706, grant a procuratory for resigning the foresaid estate in favours of himself and the heirs of his body; which failing, to John Stewart of Innernytie, and other heirs therein mentioned, under prohibitory and irritant clauses, as well upon my Lord, the granter of the procuratory, as upon the other heirs of tailzie.

Upon this bond no resignation followed, nor was it registered in the register of tailzies; but both the two tailzies were put in the hands of Oliphant of Carpeu, with a doquet on the paper wherein they were wrapped, written by my [7736] Lord's hand thus, "To the Laird of Carpeu to be kept for the use of all concerned."

My Lord Lindores pursues an exhibition of these tailzies against Carpeu, and the same being exhibited in the clerk's hands, compearance is made for Innernytie, the next heir of tailzie, failing heirs of my Lord's body, who alleged, that these tailzies being put in Carpeu's hand for the use of all concerned, he who was the presumptive heir had interest to crave that the tailzies might be registered, because the last tailzie did contain prohibitory and resolute clauses upon the pursuer himself, the granter of the procuratory, as well as other heirs; and if the tailzies were given up to him, he would cancel the same, and thereby evacuate the tailzie and order of succession; 2do, The said tailzies were deposited for the special use of the substitute heirs of tailzie.

It was answered, 1mo, to the deposition on which Innernytie founds his interest; he could not be admitted, because there was no deposition for the use of substitute heirs of tailzie, but only for the pursuer's own behoof, if he called for the same as he has done; and if he had neglected to call for them in his life, then there would have arisen an interest to the next heir of tailzie; but it can never be presumed that the custody was given to Carpeu exclusive of the right of the maker of the tailzie; 2do, The pursuer being the fiar and maker of the tailzie, upon which no resignation, registration, or infettment had followed, it continues yet as a mere destination ambulatory at the maker's pleasure, as has been frequently found, and especially in the case of Muirhead of Breadisholm * against his daughter-in-law, where Breadisholm having granted a disposition in favours of his eldest son, an infant, in fee without any onerous cause, which he afterwards cancelled, the Lords found, that he might lawfully do it, albeit infettment had followed upon it; and sicklike, 23d June 1713, Scot of Ralburn v. Scot, *voce* TAILZIE, a tailzie being granted without an onerous cause in favours of the maker of the tailzie in liferent, and his father in fee, and failing heirs of the father and son, to other heirs of entail, the Lords found the said tailzie, while it remained in the terms of a personal right not perfected by charter and sasine, was revokable and revoked by a posterior tailzie made by the maker of the said tailzie, with consent of his father the first member.

It was replied; *Unusquisque est rei suæ moderator et arbiter, et potest quam velit sibi*

* See General List of Names.

legem decere, and as by the first tailzie there was a faculty reserved to alter, so he might as he did by the second, lay a restriction upon himself as well as the other heirs of tailzie, and renounce that faculty whereby his power of alienating, or altering ceased; and *de facto* the tailzie contains a clause disabling him and all substitute heirs of tailzie to alter, whereby he becomes a limited fiar, and cannot contract debt, nor alter the order of succession, in prejudice of the substitute heirs of tailzie, to whom he is *jus quæsitum*; and though the tailzie was gratuitous, yet being made, it is every way as binding against the maker as if it were onerous. 2do, Innernytie's interest is the more clear by [7737] the deposition in Carpew's hands, to be kept by him for the use of all concerned.

"The Lords found, that the pursuer, who was fiar and maker of the tailzie, had right to call for delivery of the tailzie to him as his own proper evident, notwithstanding of the prohibitory and irritant clauses above mentioned."

Fol. Dic. v. 1, p. 512. Dalrymple, No. 123, p. 171.

No. 15. Sir JOHN BAIRD v. Creditors of Mr. HUGH MURRAY. January 4, 1744.

A sum of money was put into the hands of a party, with a declaration that it was to be paid to the nearest of kin of a certain person. It was found the person who deposited it, might have reclaimed it, so that the nearest of kin acquired no preferable right.

In the year 1737, Sir James Rothead made a settlement of his estate, heritable and moveable, upon certain persons, as trustees for behoof of his heirs therein named. Hugh Murray, the only accepting trustee, did, in December 1737, confirm the moveables; and, not having leisure to execute the office of executor, he granted a factory to George Gordon, writer in Edinburgh, to uplift the moveable debts, grant discharges, and to accompt to him for his intromissions. In September 1740, Mr. Murray and George Gordon instituted an accompt upon the subject of the factory, by which George Gordon came to be debtor to his constituent in the sum of £286 Sterling, for which George Gordon granted bill of even date with the fitted accompt, payable to Mr. Murray [7738] or order, and bearing value received; and, of the same date, got a full discharge from Mr. Murray of his factory, and all obligations arising therefrom. In March 1741, Mr. Murray being about to leave the town, and apprehending that a demand might be made upon him by the next-of-kin of Sir James Rothead for the balance in his hands, for which they had obtained a decree against him as Sir James's executor, he lodged in the hands of Andrew Chalmer, his first clerk, and ordinary doer, George Gordon's bill indorsed blank, with a further sum in money, to answer the said demand, and took from him a declaration in the following terms: "I Andrew Chalmer writer in Edinburgh, grant that Mr. Hugh Murray advocate, has indorsed to me George Gordon's bill to him for £286 Sterling, and given me in cash £123 Sterling, with which two sums I am to pay the sum he is decerned to pay to the nearest of kin of Sir James Rothead, and to report him their discharge." Sir James Rothead's next-of-kin not having made a demand, the money and bill remained with Mr. Chalmer till Mr. Murray died in the state of bankruptcy, when his creditors proceeded to diligence, took out a confirmation, and, among other moveables, gave up in inventory the bill and cash in the hands of Mr. Chalmer.

Sir James Rothead's next-of-kin appeared for their interest, and claimed preference before Mr. Murray's Creditors, upon this medium, that the bill and cash in the hands of Mr. Chalmer were subjects especially destinated by Mr. Murray for their payment.

"Found, That notwithstanding the money was lodged by Mr. Murray in the hands of Mr. Chalmer, under the declaration granted by him, it remained under the power of Mr. Murray, and might have been called for by him until actual application, and applied to what use he pleased; and therefore that the same remained *in bonis* of Mr. Murray, and that Sir James Rothead's next-of-kin have no preference."

Hugh Murray, executor nominated, having confirmed Sir James Rothead's moveables, granted a factory to George Gordon to levy the moveable debts. Mr. Murray and George Gordon instituted an accompt upon the subject of the factory, by which George Gordon came to be debtor to his constituent in the sum of £286 Sterling, for which George Gordon granted bill of even date with the fitted accompt, payable to Mr. Murray or order, and bearing value received; and, of the same date, got a full discharge from Murray of his factory. After Murray's death, the sum in this bill being confirmed by his Creditors, a competition arose betwixt them and Sir James Rothead's next-of-kin, to whom Mr. Murray never had accompted for his intromissions with Sir James's moveables. It was admitted for Murray's Creditors, that an executor, being but a factor or trustee, can have no ground of competing with the Creditors, or next-of-kin of the deceased, upon any subject which belonged to the deceased; and therefore, though an executor take a decree in his own name, or a bond of cor-[7739]-roboration in place of a decree, the next-of-kin are still preferable upon the subject *in medio*. But if an executor levy a sum due to the deceased, and grant a discharge, the money which he receives becomes his property; or, if in place of money, he take a private bond without relation to the executry, the case is the same. The discharge granted to the debtors of the deceased, binds the sum upon the executor; the money is understood to be in his pocket, and the next-of-kin have no concern what he makes of the money, whether he pay his own debts with it, or employ it upon a private loan. The present case is in effect the same; the bill granted by Gordon was Murray's property, and had Gordon proved insolvent, Murray alone would have suffered, and not the Representatives of Sir James Rothead. It was answered for the next-of-kin, That the transaction betwixt the executor and his factor, proves that the bill was the produce of the executry; and the plain consequence is, that the bill ought to be adjudged to them, and not to Murray or his Creditors. For, from the very nature of a trust, it is evident, that a trustee cannot compete with his constituent, either upon the *ipsa corpora* of the constituent's effects, or upon their produce; and it is a case adjudged, that if a trustee sell his constituent's goods, and take a bond for the price in his own name, the constituent will be preferable upon the bond before the trustee's creditors. Nor ought it to weigh that Murray run the hazard of his factor's bankruptcy; for this hazard he submitted to by naming a factor, which an executor is not entitled to do. If an executor take a bond of corroboration from a debtor of the deceased when payment is offered him in money, this circumstance will subject him to the hazard of the debtor's insolvency; and yet, unquestionably the next-of-kin will be preferable upon this bond before the creditors of the executor. Or if the executor dispose of the *ipsa corpora* of the moveables, and take a bond for the price instead of ready money, it is very consistent that the next-of-kin be preferred upon this bond, and the executor at the same time be liable to make it good.

"Found, That there is sufficient evidence that the sum contained in George Gordon's bill, was part of the proceeds of Sir James Rothead's executry; and therefore, that Sir James Rothead's next-of-kin are preferable for the sum in the said bill before the other creditors of Murray."—See SUBROGATUM.

Fol. Dic. v. 3, p. 365. Rem. Dec. v. 2, Nos. 50 & 51, p. 77.

No. 16. [7740] — v. NIMMO. January 9, 1627.

A purchaser of lands was taken bound to pay a part of the price to certain creditors of the seller. They were found entitled to use inhibition upon this right.

This day a supplication was given to the Lords by some persons, in whose favour some clauses were conceived and introduced by a contract betwixt Heron and Nimmo; in the which contract, Heron having sold some lands to Nimmo, Nimmo was obliged to pay the sums contained therein for the price of the land disposed to the said persons, who craved inhibition against the said Nimmo, upon the foresaid clause introduced in their favour; and it being doubted if they might crave the said inhibition, seeing

the said contract was not subscribed by them, neither were the parties contractors therein, nor in the inhibition craved by any of the contractors; the Lords found that the said persons, notwithstanding they were not contractors, might seek inhibition upon the clause foresaid, conceived in their favour, against the party obliged by the contract, to perform the same to them. John Dunlop was procurator for the supplicants, and caused raise and seek this inhibition.

Fol. Dic. v. 1, p. 512. Durie, p. 253.

No. 17. OGILVIE and GRANT *v.* KER. July 7, 1664.

A purchaser of lands was taken bound to pay a part of the price to a creditor of the seller. This was found a delegation in favour of the creditor, not a mandate which could be recalled.

There being a charge in the name of James Ogilvie and William Grant *contra* Mr. Andrew Ker, minister, on this ground, that by a minute of contract of alienation, Ogilvie had sold to Ker certain lands, and Ker was expressly bound by the minute to pay this Grant and others, in part of the price of the land, certain debts due by Ogilvie to them; Ker suspends, upon this reason, that he had satisfied Ogilvie, and obtained his discharge.

Grant answered, That by the foresaid clause contained in the minute, he had acquired right to the sum in satisfaction of his debt, which Ogilvie his debtor could not take away, without his consent, especially seeing the minute took effect; and the suspender, by his missive letters, after the date of this discharge wrote to the Laird of Pitmeddin, who was cautioner to Grant, that he would satisfy the debt. The suspender answered, That the clause in favour of Grant, who was no contractor, could not give him a right; 1mo, Because it was never a delivered evident to Grant; 2do, Because it was but a mandate, whereby Ogilvie the contractor did order a part of the sum to be paid to Grant, which Ogilvie might recal at his pleasure, as he might have annulled the bargain, and [7741] destroyed the writ; especially seeing nothing had yet followed; and as for the letters, they were not written to Grant but to a third party.

The Lords found, that seeing the bargain took effect, the clause in Grant's favour was not a simple mandate but a delegation, whereby Ogilvie constituted Ker his debtor, to be debtor to Grant his creditor, which needed no intimation, being contracted by, and so known to Ker himself; and therefore found Ogilvie's discharge ineffectual.

Fol. Dic. v. 1, p. 512. Stair, v. 1, p. 209.

No. 5. [7748] ELIZABETH DOUGLAS *v.* Laird of WEDDERBURN. July 19, 1664.

The maxim, *Ius superveniens auctori accrescit successori*, does not hold where there does not appear an onerous cause of the successor's right.

Elizabeth Douglas, as heir to her goodsire, and Sir Robert Sinclair of Lochermachus, her husband, pursue a spuilzie of teinds against the Laird of Wedderburn, who alleged absolvitor, because he had tack of the teinds of the said lands from the Earl of Home, and by virtue thereof, was *bona fide* possessor, and behoved to bruik till his tack were reduced; 2do, That he had right from the Earl of Home by the said tack; which Earl of Home, albeit his right which he had the time of the granting of the said tack was reduced, yet he has since presently in his person the right of the teinds of the lands from John Stewart of Coldingham, which being *ius superveniens auctori*, must accresce to the defender, and defend him in this pursuit. The pursuer answered to the first defence, that the defender's *bona fides* was interrupted long be-[7749]-fore the years libelled. 2do, Albeit there had been none, yet this

author, the Earl of Home's right being reduced in Parliament, his *bona fides* being *sine omni titulo*, is not sufficient; neither needed the tacksman to be called to the reduction, but his right fell in *consequentiam* with the granter of the tack's right. The second defence, it was answered, That the general maxim of *jus superveniens* has its own fallacies; for the reason of the maxim is, that when any thing is disposed for a cause onerous, equivalent to the value thereof, it is always understood, that the disponent disposes not only what right he hath already, but whatever right he shall happen to acquire, seeing he gets the full value; and therefore, *fictione juris*, whatever right thereafter comes in his person, though it be after the acquirer's right, yet it is holden as conveyed by the acquirer's right, without any new deed or solemnity; but where that reason is wanting, it holds not as first, if it appear that the cause of the disposition is not at the full value; then it is presumed, that the disponent only disposed such right as he presently had; or if the disponent deduce a particular right, as an apprising, or tacks, &c., and either disposes, but that right *per expressum*, or at least disposes not for all right he hath or may have, or does not dispose with absolute warrandice; in these cases, the author's right supervening, accresces not to the acquirer; but himself may make use thereof against the acquirer; much more any other having right from him. 2do, The maxim holds not, if the author's right be reduced before he acquire the new right, in which case, the first right being extinct, nothing can accresce thereto, but the author may acquire any other new right, and make use thereof. 3tio, The maxim hath no place, if the author do not acquire a new right to the land, which could be the foundation and ground of the tack granted; as if he acquired but the right of an annualrent, which could be no ground of the defender's tack, much more, if he acquire a right to the mails and duties of the lands, either upon sentence to make arrested goods forthcoming, or an assignation or disposition of the mails and duties made to the author, for satisfying of a debt to him by the disponent. This would be no right to the land that could accresce to validate a tack. The defender answered, 1mo, That his first defence was yet relevant; because, albeit his author's right were reduced, he not being called, his right would be a sufficient colourable title to give him the benefit of a possessory judgment, until his *bona fides* were interrupted by process, because his subaltern right is not extinct, till either by way of action or exception, it be declared extinct, as falling in consequence with his author's right reduced, seeing there is no mention thereof in the decret of reduction. 2do, Albeit diligence had been used, yet if the user thereof insisted not, but suffered the defender to possess *bona fide* seven years thereafter, it revives that benefit of a new possessory judgment.

The Lords, as to this point, found that the interruption of the *bona fides* by process, did still take the same away, unless it were prescribed; but found, [7750] that before any process, the defence should be relevant; and, therefore, sustained only process for the year since the citation.

As to the other defence *in jure*, the defender answered, That his defence stands yet relevant, notwithstanding all the fallacies alleged, which are without warrant in law, and without example with us, where this maxim hath ever been held unquestionable, that *jus auctoris accrescit successori*, unless the successor's right be expressly limited to a particular right, or to any right the author then had; but the defender need not dispute the equivalence of the cause, unless such express limitation were added, there is no ground to presume an exception upon the personal obligation of warrandice from fact and deed, which oftentimes is put in contracts fully onerous; but on the contrary, there is a several defence upon that very clause, that the Earl of Home, whatever right he should acquire, yet if he should make use of it against this defender, he comes against his own warrandice, whereby he is obliged, that he has done, nor shall do, no deed prejudicial to the defender's tack; neither is there any ground of exception; albeit the author's right was reduced before the new right acquired from that ground, that the new cannot accresce unto the old right, being extinct; because the maxim bears, that it accresces *successori*, *non jure successoris*; so that albeit the new right do not validate the old right, yet the new right becomes the defender's right *eo momento* that it became the author's right *per fictionem juris*, without deed or diligence, and cannot be taken away by any subsequent deed of that author, more than if before such a deed he had particularly established his successors therein; because the fiction of the law is equivalent to any such establishment; neither is there ground of exception, that the author's

right supervening, is but an annualrent, which cannot validate a tack ; because, if the author were making use of that annualrent to point the ground, the defender, upon his tack and warrandice, would exclude him, because he could not come against his own deed and obligation ; yea, albeit it were but a right to the mails and duties, *quocunque modo*. The Lords having considered the Earl of Home's now supervening right, and that it was but the right of an annualrent of £300 Sterling, with a clause, that in case of failure of payment, he might uplift the hail mails and duties till he was paid, and that the defender's tack included only personal warrandice ; they repelled the defence, and found, that such right could not accresce to the defender, to validate his tack ; wherein some of the Lords had respect to that point that the right was reduced before this new right ; but others, as it seems, on better grounds, laid no weight on that, if the clause onerous had been the full value, and equivalent, or if the tack had borne, for all right that I have, or shall acquire, which would accresce to the successor as oft as ever it was acquired, though all the prior rights had been reduced ; but in this case, the author not acquiring a new right to the land, but only to the mails and duties, which in effect is but personal, it could not accresce to the defender, more than if the author had been factor to a third party by the new right ; and albeit the clauses of personal warrandice might have personally excluded the Earl of Home himself, yet seeing that right could accresce to the defender, the Earl of Home having renounced, or assigned it to a third party ; the personal objection against the Earl of Home upon the personal clause of warrandice ceases ; neither did the pursuer insist upon the Earl of Home's right, but his own.

Fol. Dic. v. 1, p. 513. Stair, v. 1, p. 217.

No. 6. Viscount of ARBUTHNOT *v.* ALLARDYCE of that Ilk. December 2, 1698.

A patron who had a tack of the teinds of the parish, communicated it to an heiritor so far as concerned his lands. The property of the teinds conferred on the patron by act 1690, was found to accresce to the heiritor.

The mutual reductions and declarators betwixt the Viscount of Arbuthnot and Allardyce of that Ilk were advised. The Lairds of Arbuthnot were patrons of that church, which was a parsonage. As law presumed the teinds of benefices came from the patrons, and so gave them, by our acts of Parliament, right to the fruits of the benefice during the vacancy ; so it has permitted patrons without simony to paction with the intransigent minister for a local stipend, and get from him a tack of the teinds. The heiritors of Arbuthnot were in use to get tacks from time to time from the minister, of the whole teinds of the parish during their life, (for longer tacks except three years were esteemed by the common law a dilapidation). The lands of Allardyce lying in the same parish, and there being a good correspondence between these two families, there is a contract entered into betwixt the Lairds of Arbuthnot, elder and younger, on the one part, and Allardyce on the other, whereby Arbuthnot assigns him to the standing tacks and prorogations, in so far as concerned his teinds of Allardyce in 1628, and oblige themselves and their heirs never to obtain any tacks or rights of the teinds of Allardyce's lands, and if they do, they shall accresce to him. By the 23d act of Parliament 1690, Arbuthnot, as patron, gets right to the teinds of the parish, in place of his patronage ; and the minister of Arbuthnot, at the commission, obtains an augmentation of his stipend, which Arbuthnot, as patron, would allocate wholly upon Allardyce's tythes, conform to the power given patrons by the act 25th Parliament 1693. Allardyce reclaims, and intends a declarator on the contract, that Arbuthnot's right must accresce to him. The Viscount raises a reduction of the contract, on these grounds, 1mo, That it is null and defective, bearing Sir Robert Arbuthnots elder and younger to be contractors, and yet there is but one of them subscribing ; and so it is an incomplete deed. 2do, It is presumed only to be signed by the father, the liferenter, and so the right died with him. 3tio, The meaning of parties-contractors could be only to communicate conventional voluntary rights acquired by the Lairds of Arbuthnot by tacks, &c. but never a legal right introduced by a supervenient act of Parliament, which was *casus incogi-*

tatus et improvisus by the parties, and could be neither foreseen nor provided for; and in such cases *jus auctoris non accrescit successori*. Answered for Allardyce, That the contract was obliga-[7752]-tory and valid, though there was but one of the Lairds of Arbuthnot subscribing; and it must be presumed to be the son who was in fee, seeing *verba sunt interpretanda contra proferentem, et ea est interpretatio sumenda quae facit ut actus valeat potius quam pereat; et in re antiqua omnia praesumuntur solenniter acta*; and whether it was the fiar or liferenter that subscribed, *non refert*, for this Viscount represents both, and so is liable in warrandice. And as to the third, the obligation is so comprehensive, that it will extend to all rights coming *provisione legis*, as well as *hominis*; and even *quoad* this given to him as patron by the act of Parliament 1690, he had a *jus fundatum* before; and to evade his contract by this were *fraudem facere legi*; and not only tacks, but all rights he should acquire, are declared to accresce to Allardyce; and it cannot be denied, but the title my Lord Arbuthnot has now to the teinds of the parish by that act is a right, and so falls under the contract. The Lords repelled the reasons of reduction, and sustained Allardyce's declarator, and found this right now in Arbuthnot's person, by the late act 1690, accresced to him, and so decerned; but, in case the Viscount of Arbuthnot denied his representing these contractors, then the Lords assigned a term to Allardyce to prove the same. *Fol. Dic. v. 1, p. 513. Fountainhall, v. 2, p. 22.*

No. 7. GRAHAM and the other Trustees of Sir ALEXANDER WEDDERBURN, and other Creditors of TRAIL, Competing. December 5, 1746.

Debts were acquired by a party who had disposed lands with absolute warrandice to the purchaser, against all incumbrances. These debts were not found to accresce to the purchaser, as *jus superveniens*; but to the extent of the part of the price remaining due, the disponent was found preferable on these debts, and ranked accordingly, in competition with other creditors of the same purchaser.

Margaret Bonnar, after she had acquired right by disposition to the lands of Blebohole, having intermarried with Thomas Graham of Greigston, did, with consent of her husband, dispoise the lands to Thomas Trail, writer in Dundee; and, in respect she was not infert, the disposition contained an assignation to the procuratory of resignation contained in the disposition to her from her author, and the husband and wife became bound conjunctly and severally in absolute warrandice; and of the same date, Thomas Trail gave bond for the sum of £6283, bearing the same to be the price of the lands of Blebohole disposed to him of that date.

While about £2000 remained due of the price, Thomas Trail's affairs going into disorder, his creditors adjudged the lands of Blebohole; and Sir Alexander Wedderburn, one of the adjudgers, took out a charter, and infert himself upon the procuratory contained in the disposition to Margaret Bonnar.

Thomas Graham having, in order to put himself in condition to implement his obligation of warrandice, acquired two debts, which were secured by infeftments of annualrent on the lands of Blebohole, prior to Margaret Bonnar's own right; James Graham, his son, compeared in the ranking of the creditors of Thomas Trail, and craved to be preferred upon these two debts to the extent of the sum still remaining due by Thomas Trail of the price.

[7753] Objected for the creditors, That these debts having been acquired by Thomas Graham, who had concurred with his wife in disposing the lands to Thomas Trail, with absolute warrandice against all incumbrances, they accresced to Thomas Trail his successor as *jus superveniens auctori*; which the Lords "repelled, and found Graham preferable upon the debts to the extent of the sum remaining due of the price, and that he was to be ranked accordingly."

This judgment was equitable, that the accretion should only take place upon Trail's paying the sum in the bond, which bore it to be for the price of the land.

No. 13. [7759] TOWN of MUSSELBURGH v. SCOT. December 22, 1675.

A supposed superior granted infeftment to an appriser. He afterwards acquired the superiority. This did not validate the right of the appriser, who had paid no composition.

Adam Scot, his authors and predecessors being infeft in the heritable knaveship of the mills of Musselburgh, the town of Musselburgh having acquired right from the Duke of Lauderdale to the superiority of the knaveship, pursue a declarator of non-entry thereof against the said Adam, who alleged absolvitor, because he stands infeft by the Bailies of Musselburgh. It was replied, *Non relevat*, because that infeftment was granted only upon obedience upon an apprising led at the defender's instance, at that time when the town had not acquired the right of superiority. It was duplied for the defenders, That *jus superveniens auctoris accrescit successor*; and therefore the supervening right to the town, must accresce to the defender. It was triplied, That the maxim holds not in acts necessary, done for obedience. 2do, It holds not, except where there is absolute warrandice, or a cause onerous importing it. It was quadruplied, That here there was no necessary act, because there was no charge of horning, nor suspension.

[7760] The Lords found that the receiving of the defender was a necessary act of obedience upon the apprising, albeit there was no charge, and found that the supervenient right did not accresce to the defender, unless he had paid a year's rent of composition to the pursuers. *Fol. Dic. v. 1, p. 514. Stair, v. 2, p. 390.*

No. 15. [7762] STUART v. HUTCHISON. January 27, 1681.

Found in conformity with Forbes v. Innes, No. 12, p. 7759.

Umquhile David Dunbar being debtor to Hary Stuart in a sum of money, he granted a bond of corroboration, wherein he, with consent of Anna Hutchison his wife, obliged himself to infeft her in an annualrent, out of a tenement in the Canongate, whereupon he pursues a poinding of the ground. It was alleged for the said Anna Hutchison, that she stands infeft in this tenement in liferent before this pursuer was infeft, or at least had possession. It was answered, That her consent excludes her. It was replied for the defender, That this consent being adhibit *ex reverentia maritali*, and not ratified judicially with an oath, not to come in the contrary, it is null; 2do, This consent could only exclude or communicate any right the liferenter had in her person when she consented, but cannot reach to supervenient rights, which only accresce upon dispositions with absolute warrandice, but never unto a simple assent.

The Lords found that the *reverentia maritalis* was not relevant alone to annul the consent, unless threatening at least had been joined, and that the judicial ratification is not necessary, but adhibited *ad majorem cautelam*; but found if the consenter was not provided to her liferent of this tenement before her consent, that it would not prejudice her of her liferent.

July 7, 1681.—Henry Stuart pursues a poinding of the ground of a tenement in the Canongate, upon an infeftment of annualrent granted by umquhile David Dunbar to him. It was alleged for Anna Hutchison, relict of the said [7763] David, that she stands infeft in liferent in the tenement before the pursuer's father's infeftment; and therefore though he may apprise the property, he can have no right to the duties during her life. It was replied, That she had subscribed her husband's right of this annualrent as consenter. It was duplied, Her consent could only exclude her from any right then in her person, but her infeftment now founded on is posterior, and not founded upon any anterior obligation to infeft her in this tenement. The pursuer triplied, *Jus superveniens auctori accrescit successor*. The defender quad-

ruplied, That holds only where the author's right is with absolute warrandice, as hath been frequently decided.

The Lords found the consent could not exclude the defender to defend upon an infeftment posterior to the consent, and prior to the infeftment of annualrent, seeing there was no prior obligation to grant that infeftment to the wife, and that the consent imported not absolute warrandice, therefore could not accresce to the annualrenter. This cause was determined in the same terms before, upon the 27th day of January 1681; but the minutes being wanting, it was reported again, and the same way determined this day.

Fol. Dic. v. 1, p. 514. Stair, v. 2, pp. 846, 888.

No. 20. [7768] JOHN NEILSON v. MENZIES of Enoch. June 21, 1671.]

An author's infeftment was found to accresce to a tack granted with absolute warrandice, and not to a posterior disposition of the lands; though it was offered to be proved, that the infeftment was procured by the disponsee's means; and, consequently, was taken in order to validate the disposition.

John Neilson, as assignee constituted by John Crichton, pursues Menzies of Enoch for the rents of certain lands in Enoch, upon this ground, that there was a tack set by James Menzies of Enoch of the said lands, to the said John Crichton for 19 years, for payment of fourscore pounds Scots yearly of tack-duty: Thereafter, by a decreet-arbital betwixt Enoch and his eldest son Robert, he is decerned to denude himself of the said lands, in favour of Robert, reserving his own liferent: After which decreet, Robert grants a second tack to Crichton, relating and confirming the first 19 years tack, and setting the land of new again for five merks of tack-duty, instead of the fourscore pounds: After which tack, Robert disposes the land, irredeemably, to Birthwood; but, at that time, Robert was not infeft; but, upon the very same day that the [7769] disposition was granted to Birthwood, Robert Menzies is infeft, and Birthwood is also infeft: Birthwood's right, by progress, comes in the person of James Menzies, the defender Robert's brother. The pursuer insisted for the duties of the land, over and above the fourscore pounds, during the life of old James Menzies, and over and above the tack-duty of five merks after his death: For which the defender alleged absolvitor; because, he produces a decreet, at his instance, against Crichton the tacksman, decerning him to remove, because he was then resting several terms rent, and failed to pay the same, and to find caution to pay the same in time coming. The pursuer answered, That the said decreet was in absence, and was null; because, the defender libelled upon his own infeftment, and upon a tack set to Crichton the tacksman by himself, and there was no such tack produced by him, or could be produced; because the tack, albeit it bear to be set by James Menzies, yet it was only set by James Menzies his father, and not by himself.

The Lords found the decreet null by exception.

Whereupon the defender alleged, That the decreet, at least, was a colourable title, and he possessed by it *bona fide* till it was found null, *et bonæ fidei possessor facit fructus consumptos suos*. It was answered, That a title that needs reduction may be the ground for possession *bona fide*; but this is absolutely null by exception; 2dly, The obtainer of the decreet was *in pessima fide*; because, immediately after the obtaining it, it was suspended, and the tacksman was able to instruct that there were no duties resting at that time, and, though protestations were obtained, yet the suspension was never discussed against the tacksman.

The Lords repelled this defence also.

The defender further alleged, That albeit he would make no opposition against the first tack, yet the second tack could have no effect against him; because, before it was clothed with possession, Robert Menzies, setter thereof, was denuded in favour of Birthwood, from whom the defender has right; and it is unquestionable, that a tack, not attaining possession, is no real right, and that a singular successor, infeft

before possession on it, will exclude it ; 2dly, As the tack was not clothed with possession, so Robert, who set it, had no real right in his person when he set it, but only the decreet-arbitral. The pursuer answered to the first, That he opposed his new tack, which contained not only a ratification of the old tack, but a new tack *de presenti*, for five merks, and so was like a charter by a superior, with a *novodamus*, whereby the tacksman might ascribe his possession to any of the tacks he pleased ; and, if this tack had borne expressly a reservation of the father's liferent, for eighty pounds yearly, it would have been unquestionably a valid tack from the date, and payment to the father, by the reservation, would be by virtue of the new tack, as well as of the old : So likewise the tacksman might renounce the old tack, and retain the new ; or, if the new tack had been taken, without mention of the old, the same would have been clothed with possession, albeit it [7770] could not effectually exclude the payment of fourscore pounds to the father, during his life, as having a better right by the reservation. As to the second allegiance, albeit Robert, who set the tack, was not infeft when he set it ; yet Robert being thereafter infeft, his right accresced to the tacksman, in the same manner as if he had been infeft before, *fictione juris*. It was answered to the first, That the new tack did not bear a reservation of the old ; but the tacksman having two tacks in his person at once, although he might quit either of them, or declare to which of them he ascribed his possession. before the interest of any other party ; yet not having so done, he must be held to possess by the first, because he continued to pay the tack-duty of the first, and never paid the tack-duty of the second, till the setter was denuded. To this it was answered, That the payment to the liferenter, who had a better right, did not import the possessing by the first tack, and the tacksman needed not declare his option till he was put to it ; but law presumes that he possessed by that right, which was most convenient for him.

As to this point, the Lords found, that the tacksman might ascribe his possession to either of the tacks he pleased, both of them being set for a distinct tack-duty, and that *agibatur* by the second tack, that the father's liferent should be reserved.

As to the other point, the defender alleged, That the infeftment of Robert, who set the tack, could not accresce to the tacksman ; because, the same day Robert was infeft, he was denuded in favour of Birthwood, and he infeft ; so that it must be presumed, that he was only infeft to that effect, that Birthwood's right might be valid ; 2dly, It was offered to be proved, that Birthwood procured Robert's infeftment by his own means ; and so it cannot accresce to any other in his prejudice. It was answered, That whoever procured the infeftment of the common author, the fiction of law did draw it back to all the deeds done by that author, that might arise from that infeftment, which cannot be divided or altered, by the acting or declaration of either, or both parties.

Which the Lords found relevant, and found the infeftment did accresce to the tacksman in the first place, whose tack was prior, with absolute warrandice.—See TACK.

Fol. Dic. v. 1, p. 515. Stair, v. 1, p. 736.

No. 21. [7772] WILLIAM DUNCAN v. JAMES NICOLSON. January 11, 1699.

An adjudication led without a special charge, was not rendered effectual by the subsequent infeftment of the apparent heir.

Phesdo reported William Duncan, and James Nicolson, late Dean of Guild in Edinburgh. It was a competition, as creditors to John Aikenhead ; and it was objected, That Mr. William Walker's adjudication, to which the Dean of Guild had right, was null, wanting a special charge. Answered, A special charge being only a fiction, introduced by law, to supply the want of an infeftment, it was sufficient that Aikenhead, the apparent heir, was afterwards served heir and infeft, (*as de facto* he was), which must accresce to validate the said adjudication, and to supply the want of a special charge, seeing *jus superveniens auctori accrescit successoris*. Replied, Whatever this right of accrescing might do in the case of two voluntary dispositions, granted by an apparent heir, yet that does not hold in the case of a legal diligence by adjudication.

which being once null, can never be supplied, according to l. 29, *D. De reg. jur. Quod ab initio non valet, id tractu temporis convalescere non debet*; 2do, The serving and infetting the heir was done by Duncan, to complete his own security; and it were absurd, that his infetting Aikenhead, to validate and perfect the disposition he had got from him, should accresce to a third party, to be detorted to his prejudice; for, *actus agentium non operantur ultra eorum intentionem*, much less *contra eorum intentionem*. Duplied, Duncan's right was a gratuitous disposition *omnium bonorum*, and ought not to compete with a lawful creditor; and the rule, *quod ab initio vitiosum est*, has many exceptions, as l. 85, § 1, and l. 201, *D. De reg. jur.* • *Non est novum ut ea durent, licet ille casus extiterit a quo initium capere non potuerunt*; 2do, Seeing it is acknowledged, that the subsequent infettment would complete a prior voluntary right, why not also a legal one, there being no disparity, and diligences being more favourable than conventional rights. See Stair, 21st July 1671, *Neilson v. Menzies*, No. 20, p. 7768; and in his *Institutes*, tit. Dispositions. And the intention of law is more to be regarded here than the intention of parties. The Lords thought the case new; and ordained it to be debated in their own presence.

This subtle point being advised by the Lords, 7th February 1699, they found the adjudger, having omitted to charge the apparent heir to enter, he cannot, on his own neglect, plead the benefit of the subsequent service and infettment; and, therefore, preferred the disposition. Sundry of the Lords thought the service so far retrotracted, as to make the adjudication subsist for [7773] principal and annualrents, and only to cut off the accumulations. But this was not decided.

Fol. Dic. v. 1, p. 515. Fountainhall, v. 2, p. 33.

No. 23. Competition JOHN NEILSON, &c., with MURRAY of Broughton, &c., Creditors of JOHN GORDON of Kirkconnel. December 22, 1738.

If a common debtor grants several infettments on his estate before he be infett, and thereafter take infettment, his creditors must be ranked thereon according to the priority of the dates of their infettments.

In the ranking of the Creditors of Kirkconnel, Gordon, the common debtor, having granted several infettments before he was infett, the question occurred, Whether his infettment would bring them in all *pari passu*; or, if it would accresce to prefer the creditors according to the dates of their infettments?

For John Neilson, and those who had the first infettments upon the estate, it was argued, That, so soon as the common debtor was infett, the same behoved to accresce to them, each in their order, in the same way as if he had been infett before granting any of the precepts; to make out this, it was necessary to examine the nature of the *jus superveniens*, and what effect is given to it in law. One disposes an estate, of which he is not proprietor, and the purchaser stands infett; thereafter, the seller acquires a complete title to the subject; our law says, that there is no necessity for a second disposition; nor, indeed, seems there to be, from the nature of the thing; the purchaser has the consent of the proprietor formally interposed; the subject is delivered to him, and this is all that is necessary to transfer dominion. If, then, there is no necessity of a second disposition and infettment, after the common author has [7774] acquired the right himself, which cannot be disputed, otherwise there would be no such thing as *jus superveniens*; it follows, that the creditor first infett must be preferred; because, *quoad* the common author, who cannot plead the defect of his own right, the creditor's infettment is unexceptionable *a principio*. The common author, thereafter, can no more effectually deprive the first creditor of his possession, and deliver the subject to another, than if the property had been his before granting the first infettment; and the second creditor, who has nothing to plead, but upon supposition that the common author is proprietor, cannot object against the first creditor's right, derived from the same author. In a word, whether the common author's title, at the date of the infettments flowing from him, was unexceptionable or not, or if he had no title at all, is all the same thing with respect to rights derived

from him ; the creditor who gets the first infeftment, though he may be unsecure as to third parties, is absolutely secure with regard to his author, and all those deriving right from him.

The present question is a competition among creditors ; but let us suppose it were a competition among purchasers, who had each of them got an absolute disposition, with infeftment, to the same subject, from the common author, the same rules must govern that case ; for, if they were to be preferred *pari passu*, the subject behoved to be found a commonty, or common property, which would never go down. See l. 72, *Rei Vind.* Stair, b. 3, t. 2, § 2, 16th January 1663, Tenants of Kilchattan, No. 19, p. 7768.

For Murray of Broughton, &c., it was contended, That all the competing infeftments being null, until the common author was infeft, they could only be validate the moment of his infeftment, and could only be effectual from its date ; so that they must all come in *pari passu*, as if one infeftment had been taken for the whole, seeing the whole were void, in the same manner as if Gordon had no title to the estate ; it not being easy to conceive how his infeftment could operate *retro*, in favour of the first infeftment, all the intervening ones being so many mid-impediments to the retroactive virtue of his. By the operation of the law, a right supervening in the author's person accrues to his singular successor, to whom he had disposed with absolute warrandice, of which there is no doubt, when the question occurs betwixt the author and one singular successor ; but, where he had disposed the same subject to different persons, for onerous causes, he is equally liable to all of them to make it good ; and the absolute warrandice, competent to the first, being merely personal, cannot be more effectual toward constituting the real right, or accretion of the same, than that which is competent to the second ; the title of both is void, as a real right ; and, when considered as a personal one, inferring an obligation upon the author to make good the real right, both are upon a level. It is impossible to imagine that the common author, before he was vested, could be denuded ; or that a real right could be constituted, before he had any himself ; so that, to suppose the other creditors' infeftments good from their date, [7775] were *filius ante patrem* ; consequently, it seems absurd that any infeftment flowing from Gordon can be effectual, of a date prior to his own ; of course, they must all be preferred equally, as if granted of the very date of the common author's infeftment. See l. 11, § 2, *De pign. et hypoth. Voet. tit. Qui pot. in pign.* b. 3, t. 2, § 2.

The Lords found, that the creditors ought to be ranked according to the priority of the dates of their infeftments, notwithstanding that their author was not infeft.

C. Home, No. 111, p. 179.

No. 24.

PATERSON v. KELLY. December 10, 1742.

Where two infeftments proceeded from the same author, who himself was not infeft, the said author being thereafter infeft, his infeftment was found to accresce so as to validate the first infeftment ; notwithstanding it was argued, that the two infeftments having been validated *eodem momento*, they ought to be preferred *pari passu*.

Kilkerran, No. 1, p. 321.

* * C. Home reports the same case :

John Girdwood purchased some lands from David Aikman in July 1732, the disposition to which contained a procuratory and precept ; and in September thereafter, he, upon the narrative of being heritable proprietor, granted an heritable bond thereof to Kelly. In January 1733, Girdwood granted another heritable bond, upon the same narrative, to Robert Paterson, containing procuratory and precept ; upon which Paterson was infeft in November 1734, sasine recorded the 17th December thereafter. Anno 1735, Girdwood granted another heritable bond to Kelly, which contained procuratory and precept.

In April 1737, Kelly discovered that his debtor Girdwood was not infeft, whereupon he applied to him to do him justice, who accordingly delivered him his disposi-

tion to the said lands from Aikman ; whereupon he obtained himself (upon his two heritable bonds above mentioned) and author infekt in April 1737.

Robert Paterson having raised a process of mails and duties on his heritable bond, Kelly appeared and craved to be preferred upon his two heritable bonds to the pursuer, in respect the common author's infektment was attained by him, and at his expense, which therefore could only operate in his favours ; at least, that he should have a *pari passu* preference with the pursuer, in re-[7776]-gard that the infektments of both competitors were null until the common author was infekt, and, from that time only could their validity be dated.

The substance of the arguments for Kelly were, that no man can give an infektment who is not infekt himself, and that if the question were only with the author himself, the successor's infektment would be held good ; not that it is so intrinsically and in fact, but because no man is allowed to plead a defect in his own title. 2dly, Where an apparent heir grants procuratory or precept, or where a disponsee who is not infekt is the granter, their posterior infektment will accresce to validate the infektment taken by the purchaser. And supposing no mid impediment, the case will come out to be the same as if the author had been infekt before granting the procuratory and precept. The successor first infekt will have a good title to the subject, in competition with one deriving right from the author, after the author's own infektment. The reason is, that an infektment flowing from an author not infekt is null, and therefore the purchaser ought regularly to take a precept or procuratory from the author after he is infekt. But as it is a good practical rule, to avoid multiplying expense, where it can be done without prejudice to the security of the records, the second infektment has been remitted in our practice ; and the infektment already taken is considered as granted after the author's infektment ; or, in other words, the author's infektment is, *fictione juris*, drawn back to the date of the purchaser's infektment, in order to validate the same from its date. It is a consequence from this rule, that any right derived from the author, after his own infektment, will be ineffectual, in competition with the purchaser's infektment, though proceeding from the common author, before he himself was infekt. This purchaser's infektment, which is validated by the author's, though posterior, becomes a mid impediment after which the author can grant no new infektment to his prejudice.

Let us now view the interest of third parties, and what effect the *jus superveniens* may have in a competition with them. Suppose two infektments granted by an author not infekt, while matters stand in this shape, neither of the purchaser's infektments are good for any thing. It is equally clear, that upon the author's being infekt, both are validated, *ipso facto*, for the *jus superveniens* must operate equally in favours of both ; if it saves the one purchaser the trouble of a new procuratory, &c., it must save the other the same trouble ; consequently, both ought to come in *pari passu*. The fiction of law therefore, which makes the author's infektment of the same date with his competitors, is well founded in a question betwixt themselves ; but in a competition with third parties, there is no ground for bestowing so valuable a privilege upon the competitor first infekt. Lastly, suppose the case, that an apparent heir grants an heritable bond, and the creditor is infekt, thereafter, the apparent heir is charged to enter heir in special by another creditor, whereupon adjudication is led, and infektment follows, and last of all, the apparent heir makes up his title by service and infektment, no body can doubt the adjudger [7777] will be preferred, notwithstanding of the annualrenter's prior infektment. See 16th January 1663, Tenants of Kilchattan, No. 19, p. 7768 ; 21st June 1671, Neilson, No. 20, p. 7768 ; 28th February 1708, Alison, No. 22, p. 7773.

Answered for the pursuer, if the common author's infektment accresces at all to the prior rights granted by him, it must accresce according to their dates, were it otherwise, they must all remain null, as *a non habente*, and the infektments granted by the author, after he himself is infekt, must be preferable. If, indeed, any of the creditors obtains himself infekt by his own diligence, before the common author is infekt, his infektment must stand good, and be preferable to the prior infektment granted by the common author not infekt ; whose subsequent infektment cannot, in that case, draw back to validate the first infektment ; the intervening infektment of the other is a mid impediment ; for thereby the common author is effectually denuded, so far as concerned the infektment procured by the other party's diligence ; and this is a sufficient answer to the case of the apparent heir last put. See the competition amongst the Creditors of Kirkconnel, anno 1738, No. 23, p. 7773.

The Lords repelled the exception to the pursuer's infetment, and found the infetment, in favour of the common author, operates *retro* to the date of the infetment in favours of the pursuer; and therefore found him preferable to the competitor Mr. Kelly, according to the date of his infetment; but found the pursuer liable in a proportion of the expence debursed by the competitor, in procuring the common author infet, effeiring to the lands in question, in proportion to the other lands contained in the other infetment. *Fol. Dic. v. 3, p. 566. C. Home, No. 218, p. 359.*

No. 31. [7801] LOCKHART v. SIMPSON. February 27, 1637.

An assignation to a bond was executed by a person who had no right to it, but the creditor subscribed the assignation as consenter. The Lords found it was *jus tertii* to the debtor to plead that the cedent had no right, but they ordained the assignee to find caution to warrant the defender at all hands.

By contract of marriage betwixt umquhile Helen Johnston and Laurence Simpson, her son, taking burden for Margaret Simpson, daughter to the said Helen, and sister to the said Laurence, on the one part, and Archibald Hamilton on the other part, the said Helen and Laurence are bound to pay 2000 merks to the said Archibald in tocher good; to which sum, Jean Hamilton, only daughter of that marriage, having made Steven Lockhart assignee, with consent of the said Archibald, her father, which assignation is subscribed by her father, and consented to by him; whereupon, the assignee pursuing the [7802] heir of Laurence Simpson for payment, it was alleged, that the contract was null, being only subscribed for the mother and her daughter by one notary, against the tenor of the act 80th, Parliament 1579. This allegiance was repelled, because it was a contract of marriage, whereupon marriage had followed, and that it was subscribed by Laurence Simpson's own hand, whose son is convened. And it being further alleged, that this assignation ought not to be sustained, being made only by the daughter, with consent of the father, to whom the right of the sum did only justly belong, and who cannot be denuded of his right so established in his person, except he had been formally denuded by an assignation thereof, principally made by himself; so that this assignation, which is only a naked consent, cannot be found *habilis modus* to transmit the full right to the assignee, specially where the father is now dead; this allegiance was repelled, seeing no party having interest to propone this allegiance did oppose the same, and it was not competent to the debtor to propone it; but the Lords ordained the pursuer to find caution to warrant the defender at all hands who might pretend interest to the sum libelled. *Fol. Dic. v. 1, p. 518. Durie, p. 832.*

No. 40. [7812] FORBES of Waterton v. UDNEY of Auchterallan. December 3, 1701.

In mutual declarators of the right of a salmon fishing, the one party produced a right of the subject of a very old date, but not well connected for many of the intervening years, and the other produced a charter of a much later date. Found, that the latter had no interest to object the nullity or the want of mid-couples to the former, unless he derived right from his author.

The mutual declarators between Forbes of Watterton and Udney of Auchterallan, anent their rights of salmon fishing upon the water of Eythan, were this day debated and advised. Waterton's right was derived from the Master of Kaithness, and Ogilvie of Deskford, the present Earl of Findlater's predecessor, about the 1474, near 230 years ago, and down by progress to Bannerman of Waterton in 1606, and so to this pursuer. Auchterallan's right was a right granted by his Majesty in 1603, to Annand, then of Auchterallan, containing expressly cruives and salmon fishing, and a connected progress ever since. And he objected against Waterton's right,

1mo, That there is no sort of connection of their rights from the 1474, at which they begin, till 1567, for near 100 years; and from the 1567, till 1653, there is no real right produced, which is near the space of 90 years; and then an adjudication is obtained by Forbes of Waterton against the Earl of Findlater, on a renunciation and *cognitionis causa*, for implement of Ogilvie of Deskford's obligation to denude in favour of Waterton's authors; long before which adjudication, Auchterallan had a formal complete right by charter and sasine, viz. from the year 1603, and so is preferable. Answered for Waterton, Whatever defects his progress laboured under, the objecting thereof was no wise competent to [7813] Auchterallan, who could never quarrel Ogilvie's right, unless he competed on some right, legal or conventional, flowing from Ogilvie, or any of the succeeding intermediate authors intervening betwixt him and this present Laird of Waterton, which he did not pretend to. The Lords found Auchterallan had no interest to object this nullity and want of mid-couples to Waterton, and that it was *jus tertii* and incompetent for him to object and obtrude that defect, unless he derived right from Sir Walter Ogilvie, or any succeeding in his right. Then Auchterallan alleged, Ogilvie of Deskford's right was prescribed *non utendo*, before the adjudication in 1653, and so could not be of any use to Waterton. Answered, No prescription, because interrupted by Deskford's disposition to Bannerman in 1606, and charter and sasine thereon, and also by a gift of the non-entry duties in 1637, these fishings holding ward, and a declarator thereon in 1639. The Lords thought these documents were sufficient interruptions of the prescription, and that a disposition completed presumed that the party was in possession of the thing disposed, unless it were instructed, that another was then in possession; even as possession 40 years back presumes possession *retro ultra hominum memoriam*, unless the contrary be proven. 3tio, Auchterallan objected, that Ogilvie's old rights did not mention salmon fishing, but only *cum piscariis*, which only signifies the taking of small fishes by rod or wand; and Calvin, in his Lexicon, calls *piscaria* either the place where fishes are sold, or the custom, toll, and tribute paid for them; whereas Auchterallan's rights from the King, for near 100 years back, expressly bear *cum salmonum piscationibus, et lie cruivis*. And Craig, lib. 1, *feudor. cap. ult.* shews that salmon fishing is *inter regalia*, whereunto none have right *nisi specialis fuerit eorum in concessione mentio*. Answered for Waterton, That of old *piscaria* carried all kinds of fishings, as Craig in the very place cited acknowledges; and Spelman, in his *Glossarium*, calls *piscaria* either the *locus*, or *privilegium piscationis*. 2do, His sasines put it out of all doubt; for the symbols of tradition for the fishing bear boats, cruives, and nets, which are applicable to nothing but salmon fishing. The Lords repelled the objection, in respect of Waterton's answer. 4to, The Lords entered to consider the probation led by either party anent the possession; and it was contended for Auchterallan, that he had proven 40 years possession of the fishing by angle, spear, and wand, and that it was counted a part of his tenant's livelihood. And that the river fronting for near half a mile on Auchterallan's barony was always reputed to be his, and that any deeds of possession were sufficient for the hail species and kinds thereof. Answered, It was notour that rod and spear were never the way of fishing salmon; and it were absurd, that this should include net, coble, and cruives; and none are hindered to fish with a wand in public rivers, which would never give them a right thereto exclusive of others. The Lords found this not a sufficient possession for salmon fishing, and therefore found, as Waterton had the most ancient right, [7814] so he had the more pregnant possession, and preferred him, and assoilied from Auchterallan's declarator. See PRESCRIPTION. SALMON FISHING.

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Fol. Dic. v. 1, p. 520. Fountainhall, v. 2, p. 125.

No. 41. [7816] Lord BALLENDEN v. The Earl of ROXBURGH and His BROTHER.
February 3, 1702.

Found in conformity with Lord Ballanden v. Earl of Annandale, No. 38, p. 7811.

Rankeilor reported the Lord Ballenden v. the Earl of Roxburgh, and Mr. William Ker his brother. The late Lord Ballenden tailzied his estate, consisting of £112,000

Scots, in money, upon personal security, to John Ker, youngest son to the late Earl of Roxburgh, his nephew, with irritancies not to alter the succession, and in case of uplifting any of the sums, to re-employ the same, in the terms of the tailzie. The present Lord Ballenden having bought the lands of Whitehill from James Smith, and having 80,000 merks of his money lying in Lord Roxburgh's hands, he pursues him for payment. Alleged, He can do no deed to deteriorate or prejudice the succession, and therefore he cannot uplift, unless he employ the same of new again upon land, or other good heritable security, rendering the like rent or annualrent yearly that it did formerly, otherwise he may evacuate the whole estate and succession, by employing his money fancifully upon a house and yards, which afford no rent; and whatever others may cast out on a *pretium affectionis*, he cannot do it, but must keep up a solid stock for the use of the next heirs of tailzie, and content himself with the annualrent of the money for maintenance of himself and family. Answered, The Earl of Roxburgh being the debtor, he had no interest in the re-employing, it being *jus tertii* to him, who would be abundantly secure by the decret of the Lords and my Lord Ballenden's discharge, as was found in former processes he pursued against the Lord Drumcairn, and the Earl of Annandale; * whom the Lords found not concerned in the re-employment, which my Lord Ballenden was to do upon his peril.—The Lords repelled the Earl of Roxburgh's defence, and found he had no interest in the re-employment, neither would they name any of their own number at whose sight it should be again employed, the tailzie requiring no such thing. 2do. Alleged for the Earl of Roxburgh, and Mr. William Ker, his brother, that he, as the next branch and member of the tailzie, had raised a declarator that my Lord Ballenden had contravened the irritancies and incurred the forfeiture, by uplifting sundry considerable sums formerly, which he had never re-employed, but spent and consumed, and so has lost and amitted both the dignity and title, and likewise the property of what remained, and the same was devolved to him as next heir; and upon which process Mr. William had laid on arrestment of their sums in the Earl's hands, and so the Earl was not *in tuto* to pay, till the same was either loosed or discussed. Answered; This declarator cannot be received *hoc ordine incidenter*; and though it were, it could never be sustained at Mr. William's instance, who is not the next immediate heir of tailzie, but my Lord Ballenden's own sons are before him, who are not complaining nor pursuing any contravention. Replied; He is tutor and administrator to his son, who is but a minor, and so will never pursue any such action against his father; and therefore law [7817] cannot be destitute of a remedy in such a case, where one is dilapidating the estate. Ballenden is certainly debtor in the obligation to re-employ the sums he uplifts; this must have a *correlatum* of a creditor where the *jus exigendi et cogendi* is lodged; now, if the next heir of tailzie will not, nor dare quarrel the palpable violations of the tailzie, the right of exaction must necessarily go to the remoter; not that the fourth or fifth branch should be admitted; but if the nearest be negligent, then he who succeeds him may quarrel it, and so it was sustained in the case of the heirs of tailzie of Home of Ayton v. the Earl of Home, and the Lady Tarras v. Hepburn, see TAILZIE.—The Lords considered this was an anomalous tailzie of fungibles and a moveable subject, which cannot always continue in the same state, but of necessity must be sometimes lifted and changed, either when debtors turn weak, or refuse to keep the money any longer in their hands; and that the declarator could not be regarded in this debate, whether the re-employment my Lord Ballenden was making, was profitable or damageable to the subsequent heirs of tailzie; therefore they repelled the declarator *hoc ordine*, and found the arrestment could not hinder my Lord Ballenden's uplifting, reserving Mr. William Ker's declarator, as accords, where these two questions would naturally fall in; 1mo, If a remoter heir could pursue such an action? 2do. If the employment must be equivalent in rent and value to what it yielded before, at least in some proportion, that the inequality be not great? Otherwise, by purchasing beautiful gardens and houses, the tailzie may be materially frustrated and eluded, and the fund exhausted on things unprofitable.

No. 75. [7849] FRANCIS FRASER v. DAVID MIDDLETON. February 26, 1794.

Found in conformity with *Livingston v. Warrock*, No. 73, p. 7847.

The late Mr. Fraser of Findrack, in his son Francis's contract of marriage, disposed to him, and the children of the marriage, the estate of Findrack, which he had long possessed in apparenacy, reserving to himself the possession and liferent-use of one half of it, and a power of burdening it with certain provisions to his widow and other children. The son, on the other hand, became bound to relieve him of a certain proportion of his debts; and his bride assigned her tocher of 7000 merks to her future husband. Francis, in 1772, took infetment upon the precept in the contract.

His father, in 1785, granted a lease, for 57 years, of the farm on which he resided, part of which was in his natural possession, to David Middleton. The [7850] money-rent stipulated was 200 merks Scots, during the lifetime of the granter, and £100 Scots after his death. The granter also reserved to himself the liferent-use of the house in which he lived, with the offices belonging to it, and some ground adjoining. Middleton immediately entered into possession of the rest of the farm.

Upon the death of the father in 1791, Francis Fraser brought a reduction of this lease, as *ultra vires* of the granter, and *in fraudem* of the contract.

The defender refused to satisfy the production; contending, that the pursuer's disposition and infetment, flowing from an heir-apparent, did not give him a title to pursue in the action; but the Court (7th March 1793) "sustained the pursuer's title, as sufficient *in hoc statu*, to force production of the deed under reduction."

The reasons of reduction then came to be discussed, when the defender

Pleaded; An heir-apparent cannot convey a real right to others. If he has been three years in possession, his onerous deeds are only so far effectual against the succeeding heir, in terms of the act 1695, as to give a personal claim against him. All his deeds come in *pari passu*. A creditor infet on an heritable bond, has no preference to mere personal creditors. Even although, therefore, the defender had not had possession upon his lease, and the disposition in favour of the pursuer were onerous, their claims would only have been upon an equal footing.

But the defender's lease having been followed by possession, it has become a real right, in terms of the act 1449, c. 18, the benefit of this statute being equally competent to the lessee of an heir-apparent, three years in possession, as of an heir who has made up titles.

2do, Although old Mr. Fraser's title had been complete, the granting of the contract in question, which, at least in so far as it regards that half of the estate of which he retained possession, is to be considered rather as a family-settlement, than as an onerous deed, could not so far alter the nature of his possession, as to make his subsequent onerous deeds ineffectual; 3d March 1784, *Stewart v. Vans Agnew*, *voce* TAILZIE.

Answered; A tenant cannot challenge his landlord's title to remove him, when he himself has no other title of possession than that which he has derived from him; because he cannot do so, without acknowledging that his own title to possess is defective.

For the same reason, he cannot make such objection in a question with his heir or singular successor. Hence, it is a settled point, that a mere sasine in the property, without regard to its warrant, is, in such circumstances, a sufficient title to prosecute a removing; *Stair*, b. 2, tit. 9, § 41. In the present case, both parties derive right from the same person; and therefore they must set out with supposing his right to be unexceptionable. The only question then is, Which has the best right from him? Now, the pursuer's sasine must have [7851] as strong effects as the defender's possession; and, being prior in date, must be preferred.

The act 1695 applies only where the succeeding heir makes up titles to a more remote ancestor, or adjudges on his own bond; 12th February 1736, *Lady Rattar v. The Apparent Heir of Rattar*, *voce* PASSIVE TITLE. The pursuer has no occasion to do either. His disposition and infetment are already a complete title in all questions with persons deriving right from his father, and afford a sufficient ground of prescription against third parties.

Even where the act applies, the creditors of an heir-apparent must, in questions

among themselves, consider him as infert. His deeds can be challenged only by the succeeding heir, and of that right the act 1695 deprives him. It never could be meant, that a donee, with infertment flowing from an heir-apparent, should be in no better situation than one claiming on a mere personal debt long afterwards contracted.

The object of the act 1449 was to protect tenants against the posterior deeds of the landlord, but not to render valid a lease obtained from a person, who, before its date, had divested himself of the power of granting it.

2do, It may be true, that a person cannot by any deed, *intra familiam*, retain the fee in his own person, and yet prevent his onerous deeds from affecting it; but he may divest himself of the fee altogether. Contracts like the present are very common, and they are strictly onerous, as upon the faith of them the marriage is contracted.

Replied; When a person does not represent his author, he may challenge the existence of any powers in him which are not necessary to support his own right. To support the lease in question, it is sufficient that the granter was three years in possession.

The Lord Ordinary "found, that as both the pursuer and defender derive their right from the same common author, it is not competent for the defender to object the want of title in the person of the common author, by way of defence against the pursuer; and in respect that the common author was divested of his right to the fee of the estate by the disposition contained in the pursuer's contract of marriage, and infertment had followed in the pursuer's person long before the date of the lease under reduction, found, that the same cannot be effectual against the pursuer after the death of the granter thereof; and therefore reduced, decerned, and declared, in terms of the libel."

At advising a reclaiming petition and answers, it was

Observed on the Bench: The act 1695 does not apply to this case. The pursuer has not made up titles to the estate passing by his father, and he has no occasion to do so, as he has already a title good against every person who does not shew a preferable right to that of his father. As both parties found upon the right of their common author, both must hold it to be complete. The [7852] pursuer has the preferable right from him. If the tack had not been derived from old Frazer, it would have been incumbent on the pursuer to have produced a complete progress, but in the present circumstances the production of his sasine is sufficient.

The Lords, by a great majority, "adhered." See LIFERENTER.

Lord Ordinary, JUSTICE-CLERK.—Act. CHA. HAY.—Alt. MACONCHIE, HUTCHISON.
Clerk, HOME.

D. D.

Fac. Col. No. 110, p. 242.

No. 25. [7873] Creditors of JOHN BURNET v. JAMES MURRAY, Receiver General of the Customs. July 7, 1754.

The Crown ranked *pari passu* with other adjudging creditors, in a ranking and sale of a bankrupt's estate.

James Murray, Receiver General of the Customs, led an adjudication of the real estate belonging to John Burnet, merchant in Aberdeen, for a debt due by him to the Crown upon duties of tobacco. Burnet's other creditors led adjudications within year and day; and insisted, in the ranking, for a *pari passu* preference, upon the act 1661, Charles II. parl. 1, cap. 62.

Argued for the Crown; That by the law of England, whether the common law or the statutes, the Crown, before judgment obtained, was preferable in a competition with other creditors, upon the real as well as personal estates of its [7874] debtors. See Coke, 1 Inst. 30, b. 130, A & B, and 131, A & B; the reason given is, *quia thesaurus Regis est fundamentum belli et firmamentum pacis*. See also the act 33d Henry VIII., cap. 39, §§ 2 & 25, where this is enacted in express words. That, by the 6th article of the Treaty of Union, it is "provided, That all parts of the United King-

dom shall be liable to the same duties on import and export." And, by the 18th article, "That the laws, concerning regulation of trade, custom, and such excises to which Scotland is to be liable, shall be the same in Scotland as in England." And, by the 19th article, "That there be a Court of Exchequer in Scotland for deciding questions concerning the revenues of Customs and Excises there, having the same power and authority, in such cases, as the Court of Exchequer in England." That, by the act 6th Ann. cap. 26, for establishing the Court of Exchequer in Scotland, it is enacted, "That all obligations for debts to the Crown shall have the same force and effect as in the Court of Exchequer in England, according to the true intent and meaning of 33d Henry VIII. cap. 39, or any other law, &c. ; or by virtue of the prerogative royal ; and that her Majesty be preferred in all suits in the said Court of Exchequer in Scotland, according to the said statute 33d Henry VIII., and according to the practice of the Court of Exchequer in England ; and as well the bodies as the lands and tenement-debts, credits, and specialities, goods, chattles, and personal estate of all debtors, or accountants to the Crown, or their debtors in Scotland, shall be subject and liable, by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of such debts, duties, or revenues to the Crown ; and in such and the same manner and form, to all intents and purposes, as in the Court of Exchequer in England." Hence, it is evident, that in Scotland the Crown must be preferable to all other creditors, as well in the debtor's real as his personal estate, without any respect to priority of diligence. Nor does it alter the case, that, in the act last mentioned, there is a proviso, "That no debts to the Crown shall affect or subject any real estate in Scotland further, or otherwise, or in any other manner or form, than such real estate may, and ought to be, subject and liable by the laws of Scotland." For that this proviso means no more but that a personal obligation granted to his Majesty for the duties of customs and Excise, does not in terms of the 33d Henry VIII. create a real lien upon the debtor's real estates in Scotland, for this were to make them liable further ; nor are they liable to be attached by extent, or other English forms of diligence, for this were to make them liable otherwise than in the law of Scotland ; but yet, as soon as the real estate is affected, at the Crown's instance, according to the forms of the law of Scotland, then the prerogative of the Crown ought to take place, and give the same preference in Scotland as it does in England.

Answered for the Creditors, 1mo, That, by the law of Scotland, before the Union, the King was entitled to no preference upon real land estates, for revenue debts, but according to his diligence ; "That, by the treaty of Union, all [7875] the laws in Scotland, not inconsistent with any of the particular articles, are saved and preserved."

That the preference given to the Crown over the estates belonging to its debtors was only given by the said act, 6th Annæ, cap. 26, when pleaded before the Court by that act established, the Court of Exchequer ; that, supposing the case were even before the Court of Exchequer, the preference, in the act above mentioned, never could affect a real estate. For, 2do, This was carefully provided for by the proviso above mentioned ; where it is declared, not only that such debts shall not affect the real estates further, or otherwise, and in no other manner nor form, than by the laws of Scotland ; "but also that the laws of Scotland shall, in all such cases, hold place and be observed." Neither does the statute leave the matter to rest even there ; for, in another clause, it expressly provides, "That the validity or invalidity, and preference of the title of the Crown to any honours, manors, lands, tenements, or hereditaments, or to casualties belonging to the Crown, shall continue to be tried and decided in the Court of Session, as was used, and, of right, ought to have been, by the law and practice of Scotland, at the time of the Union, and not otherwise." This puts an end to all question ; and it is well it does so ; for, were the Crown's plea good, the whole faith and security of our records would be at an end ; the whole security of entails would be also at an end ; for, by the 33d Henry VIII., §§ 26 and 27, a simple personal obligation to the King, charges land to whomsoever it comes, whether by descent or purchase. Even entails are subjected, in like manner, to the Crown's debts. See Wood's Inst. book 1, cap. 2, p. 20.

"The Lords found, that, before the Union, the King, by the laws of Scotland, was entitled to no preference, for revenue debts, upon the real land estates of his subjects, but only according to his diligence ; and found, that, by the act 6th Annæ, the laws of Scotland are saved, and declared to hold place and be observed ; and there-

fore found his Majesty preferable only *pari passu* with the adjudgers, within year and day of his adjudication ; and prefer him and them, *pari passu*, accordingly."

Act. LOCKHART, AND. PRINGLE.—Alt. ADVOCATUS, R. CRAIGIE.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 368. *Fac. Col.* No. 112, p. 166.

. This case was appealed :

The House of Lords " Ordered that the interlocutor complained of be affirmed."

No. 29. [7891] ROBERTSON *v.* JARDINE. July 6, 1802.

The prerogative process of the Crown preferable to the landlord's hypothec, as long as the tenant's effects remain unsold, though after sequestration and a warrant to sell.

By statute 33d Henry VIII. c. 39, § 74, it is enacted, " That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the said suit and process shall be preferred before the suit of any person or persons : And that our Sovereign Lord, his heirs, and successors, shall have first execution against any defendant or defendants of and for his said debt, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt, at the suit of our Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." This act was extended to Scotland by the articles of Union, and 6th Anne, c. 26.

John Gibb and Janet Walker his mother, tenants on the estate of Grange, having fallen considerably in arrear for the rent of crop 1799, an application was made by the landlord to the Sheriff of Stirlingshire, praying for a sequestration of their effects in common form, and for a warrant to sell the same, to discharge the arrears of rent. The Sheriff (16th February 1801) granted warrant of sequestration ; in consequence of which, their whole effects were laid under sequestration on the 20th day of February 1801. This proceeding was reported to the Sheriff-court (27th February 1801), when the Sheriff granted warrant to sell as much of the sequestrated effects, by public roup, after due advertisement, as would pay the bygone rent, with the expense of sale.

In consequence of the discovery of a still used by Gibb, an information in the name of Mr. Robertson, the Collector of Excise in the district, to the Justices of the Peace of the county of Stirling, was exhibited against him on the 3rd of March, and he, upon citation, appeared that same day before the Justices, at a meeting held by them at Falkirk, being fifteen days posterior to the Sheriff's interlocutor granting warrant to sequester, and four days after granting warrant to roup, but before the day appointed for the roup itself. At this meeting, the Justices pronounced a decree, finding Gibb and his mother jointly and severally liable in a fine of £150 Sterling. The proper officers of Excise, accompanied by a messenger at arms, proceeded (10th March 1801) to recover the penalties awarded, by attaching the goods and chattels of the delinquents in the usual manner ; but they were prevented from carrying the attachment into execution, upon the 11th day of March 1801 (the day appointed for the roup under the Sheriff's warrant, but the sequestrated effects remaining unsold) by the intimation of a sist pronounced upon a bill of suspension, which had been presented by the landlord on the 10th.

The question with regard to the preference of the Crown or landlord in these circumstances, was reported from the Bill-chamber on memorials, when Henry Jardine, writer to the signet, factor for the landlord,

[7892] Pleaded ; It is not disputed, that, in consequence of the reversal of Ogilvie *v.* Wingate, No. 27, p. 7884, the Crown's right under the prerogative process, in terms of 33d Henry VIII., § 74, is preferable to that of the landlord, in virtue of his hypothec. But the present competition betwixt the landlord and the Crown must be deter-

mined in a different manner, as there the competition arose betwixt the prerogative process and the naked hypothec of the landlord, before any judgment or interlocutor by the Sheriff ; whereas, in the present case, the landlord competes with the Crown, after a judgment obtained from the Sheriff ; for the interlocutors of the 16th and 27th of February 1801, sequestrating the tenant's stocking, and granting warrant for sale, are of the nature of a judgment in favour of the landlord ; and being prior to the decree of the Justices of 3rd March 1801, imposing the penalty above-mentioned, in virtue of which the attachment of the Crown proceeded, a preference is thereby created to the landlord over the Crown, in terms of the statute of the 33d Henry VIII. § 74, declaring, that the King's process shall have first execution, or be preferred before the suit of any other person or persons, provided always, that such process be taken and commenced before the judgment given for the said other person or persons. In England, the tenant's goods are impounded by the landlord's authority merely, without the intervention of any judge, Blackst. Com. b. 3, c. 1, § 5 ; b. 2, c. 3, § 10. Though they are of the nature of a pledge, yet no lien is imposed upon them till the judgment of a judge intervene ; King v. Cotton, Parker's Reports, p. 112 ; 4, Termly Reports, 402, and 2, Blackst. Hilary, Geo. III. 1251, 1294 ; till then it is simply a distress. The clause in the statute of Henry VIII. applies in general to any judgment or final sentence that is adapted to any species of action raised on the part of the subject, and is not limited to a judgment of any particular kind or form. Now, the warrant for sale granted by the Sheriff, following upon the landlord's sequestration, is the concluding step of the process ; because, according to the general practice, when a sale has taken place under the authority of the Sheriff, for the rent due to the landlord, no further application is necessary ; the clerk of the roup is in use immediately to pay over the proceeds of the sale, in so far as these may be requisite for payment of the hypothec rent, and the expenses. The warrant of sale, therefore, is a virtual adjudication by a judge of the proceeds of the sale to the landlord ; and is such a judgment under the intent and meaning of the statute, as creates a preference in favour of the landlord, sufficient to exclude the King's process.

Answered ; The warrant of the Sheriff appointing a sale to take place on a particular day, cannot be converted into an actual sale and transfer of a tenant's effects in favour of the landlord ; it is only an interlocutory order or decree pronounced by the competent court in favour of a subject ; and, although previous to the suit of the Crown, it can in no shape constitute or create a preference to the former over the prerogative process of the latter. On the contrary, by the term judgment, under the statute of Henry VIII. is truly meant an *exe-[7893]-cution*, whereby the property of the King's debtor is actually taken out of him and vested in another, until which period his property is liable to the King's execution or distress, even though such goods and chattels are *in custodia legis*, by some antecedent act of a subject creditor. And hence, a judgment, according to a fair interpretation of the statute of Henry VIII. comprehends an execution, whereby the property of the goods is altered, and transferred from the debtor into the person of the subject-creditor, whose preference operated, and took effect, in consequence of his judgment or execution being prior to the test or date of the Crown's writ or process ; King v. Aldersey ; and Stracy v. Hulse, in Douglas, p. 395 ; King v. Cotton. The landlord's right of hypothec in the present instance, or the proceedings by sequestration held before the Sheriff for rendering the same effectual, did not go the length of altering or transferring the property of the sequestrated goods and effects of the tenant, so as to bar the prerogative process of the Crown. This appears by attending to the detail of the proceedings carried on before the Sheriff for rendering the landlord's right of hypothec effectual ; for the proceedings before that Court are not at an end by the warrant to sell ; but after the sale has been made by the clerk, and when the whole produce of it has been recovered by him, another application must be made by the landlord, narrating the proceedings, and praying the judge to direct the clerk to make payment to him of such sums of money as would extinguish the arrears of rent falling under the hypothec, together with the expenses incurred in carrying the process of sequestration into effect ; and the desire of this petition being granted by the Sheriff, the landlord becomes entitled in this manner to receive payment of the arrears of rent incurred, but not sooner. Sequestration does not take the goods out of the tenant's hands ; Dickson v. Watson, 6th February 1779, No. 270,

p. 1246; it may be defeated before sale by payment of the arrears, and the landlord's creditors may arrest it in the tenant's hands. The superior too may defeat it by a claim for the feu-duties, and an heritable creditor of the landlord may carry it off by a decree of mails and duties. In short, till actual sale, the tenant is not divested of the property, and, till then, there is no such judgment as can defeat the Crown's right.

The Court, before deciding the question, recommended to the parties to take the opinion of English counsel, for an explanation of the meaning of the term judgment, and ordered an inquiry into the practice of the Sheriff-courts in questions of sequestration.

It appeared to be the law of England, that as long as the property in the goods remains in the King's debtor, the extent will prevail over the process and execution at the suit of the subject; and that this is the case till the delivery of the writ of *feri facias* to the Sheriff, so that the extent, if tested, even after signing the judgment, but before delivery of the writ of execution, will be preferable.

[7894] The reports from the different Sheriff-clerks were almost unanimous in not considering the procedure relative to sequestration closed with the warrant to sell, which contains an order for the auctioneer to lodge the proceeds of the sale, with a report of the proceedings, in the hands of the clerk of court; but that, after this has been done, the landlord must make up a statement of the debt due to him, and of the proceeds of the roup, with the expense of sale and sequestration, and the court then authorises the clerk to pay the sum consigned to the landlord in extinction of the debt, and the balance, if there be any, to the tenant.

Counsel were also heard in presence.

The Court, with one dissentient voice (6th July 1802), "preferred the Crown," as both the warrant to sequester, and the warrant to sell, were only ministerial acts, interlocutory sentences, and not final so as to authorise an execution; which is the sort of judgment the statute requires, and which first divests the property out of the King's debtor; although it was pleaded, that the distress in England, and the landlord's hypothec were different, in as much as the landlord, in virtue of his distress, had no previous connection with the tenant's goods, which could be attached by him only in the same way as by any other creditor; but that the hypothec is a tacit pledge for the rent, and the warrant to sell might, without impropriety, be considered as analogous to the writ of *feri facias* delivered to the Sheriff, so as to close the business at that period.

Lord Ordinary, MEADOWBANK.—For the Crown, CROWN LAWYERS.—Agent, R. DUNDAS, W.S.—For the Landlord, H. ERSKINE, ROBERTSON, RAE, SIR P. MURRAY.—Agent, H. JARDINE, W.S.—Clerk, PRINGLE.

F.

Fac. Col. No. 53, p. 108.

No. 8.

[7897] COLT v. SIMPSON. June 23, 1610.

Improbations cannot be pursued by way of action without concurrence of the Advocate.

Fol. Dic. v. 1, p. 526. *Haddington, MS.* No. 1914.

No. 18.

[7907] HEW DARBY v. JAMES LOVE. February 10, 1796.

The trustee for the creditors of a bankrupt is not entitled to bring a charge of fraudulent bankruptcy against him without the concurrence of his Majesty's Advocate.

Hew Darby, trustee on the sequestrated estate of James Love, and himself claiming as a creditor, presented a petition and complaint, in which he accused Love of fraudulent bankruptcy, and craved that he might be punished accordingly; 1621. c. 18; 1696, c. 5; 33d Geo. III. c. 74, §§ 27, 28.

[7908] The facts charged were alleged to have happened during the dependence of the sequestration.

This complaint being brought without concurrence of His Majesty's Advocate, the defender, *inter alia*, objected to its competency on that account, 10th August 1765, Syme, *voce* SUMMARY APPLICATION ; 1777, Blacklaw. See APPENDIX.

The pursuer, on the other hand, stated, that it was the practice of the Court to exercise their criminal jurisdiction incidentally, without that concurrence, where the crime occurs in the course of actions depending before them, Acts of Sederunt, 13th June 1561, Stevinston ; 8th January 1736, Blackadder ; 14th June 1782, Brown. That the sequestration in the present case must be considered as a depending action ; and that the concurrence of his Majesty's Advocate was not necessary to complaints of fraudulent bankruptcy, even where there was not a previous dependence, Acts of Sederunt, July 26, 1748, Mackenzie and others ; 4th February 1757, Wauchope.

Observed by the Bench, It is usual for the Court to punish incidentally perjury or prevarication committed in the course of a process depending before them, these crimes being of the nature of a contempt of Court. When any other matter of criminal charge, such as fraudulent bankruptcy, comes under their observation in the course of a civil action, it is the duty of the Court to take notice of it ; but the proper mode of proceeding is, to recommend to his Majesty's Advocate to inquire into the matter, and, as he shall see cause, give his instance or concurrence to a prosecution brought in proper form. And a formal complaint at the instance of an individual, without concurrence of his Majesty's Advocate for the public interest, is, in such cases, wholly incompetent.

Upon advising the complaint, answers, replies, and duplies (27th June 1795), "the Lords dismissed the complaint" ; and, upon advising a reclaiming petition, answers, &c., "adhered."

Act. GREENSHIELDS.—Alt. TAIT.—Clerk, COLQUHOUN.

Fac. Col. No. 202, p. 483.

No. 4. [7914] PARISH OF INVERKEITHING v. Lady ROSYTH. February 15, 1642.

Heritors of the landward part of a parish of a royal burgh obliged to contribute to the purchase of a bell for the church, in the same proportion as for repairing the church.

The Parishioners of Inverkeithing and stent-masters, having charged the Lady Rosyth to pay her proportion of the stent, imposed upon the parishioners of Inverkeithing, both to burgh and landward, for furnishing of bells to the kirk ; and she suspending upon this reason, that albeit there be an act of Parliament for beiting and repairing of the kirk and kirkyard dykes, yet there is no warrant to stent the parishioners for buying of a bell, especially a bell within a burgh-royal, which only is incumbent to be done by the burgesses and indwellers within the burgh, and not by those dwelling in landward, their bells being in use at all times, to serve for their own burgesses, and for their own use at prayers morning and evening, and for their other meetings about their town business ; and this suspender, nor the heritor did never consent to this stent, but did expressly oppose the same ; attour, she alleged, That the titular and those who had right to the teinds, should bear the burden of this stent, or the third part of the burden, as in reparation of the kirk. Notwithstanding of all which reasons, the stent roll, and letters raised thereon, were sustained and allowed.

Durie, p. 893.

No. 8. [7916] HERITORS of the Parish of Faulkland v. the MINISTER and KIRK SESSION thereof. February 20, 1739.

The disposal of the area of the church was found to be in the heritors, and not in the minister and kirk session.

Fol. Dic. v. 1, p. 527. *Kilkerran* (KIRK), No. 1, p. 323.

No. 11. [7918] Lieutenant-General SINCLAIR, and other HERITORS of the Parish of Kinghorn v. The MAGISTRATES and TOWN COUNCIL of that Burgh. February 6, 1761.

Area of a church, how to be divided between a burgh and a landward parish. In what proportion are they to pay the expenses of repairing the church and manse.

The parish of Kinghorn is partly landward, and consists partly of a burgh of that name. By the ancient usage of the parish, when the church and minister's manse fell into disrepair, the expenses necessary on that occasion were divided into two equal parts, one of which was paid by the town, and the other by the landward parish.

In 1759, the church and manse being both in disrepair, a meeting of the Heritors and Magistrates was called; and it appearing, from an estimate given in, that the expense of repairs would amount to £102, 18s. 10d. Sterling, the Magistrates and Town Council were appointed to make payment of one half of that sum, conform to use and wont, and the other half to be paid by the heritors, according to their respective valued rents within the parish.

The Magistrates brought a suspension of this decree, complaining that it was unequal and unreasonable to impose one half of the burden of these repairs upon the town, and lay only the other half upon the landward parish, which was extensive and opulent, and insisting, that the proper rule for settling the proportion of repairs to be paid by the town as well as the heritors of the country parish, was their respective valued rents. On the other hand, it was maintained by the heritors, that the town had been in the immemorial use of paying one half of these reparations; and that they had no reason to complain, as they possessed a much larger share of the church-area; at the same time, the heritors were indifferent in what proportion the division of repairs was made, provided the area of the church was divided in the same proportion. And in order to have this matter settled, a process was brought at the instance of the Heritors against the Magistrates and community of Kinghorn, for having the church area divided amongst them according to their several interests.

"The Lord Ordinary found the defenders liable in a share of repairing the manse, office-houses, and kirk of Kinghorn with the heritors of the landward part of the parish, in proportion to the amount of the cess paid out of the burgh of Kinghorn, and that out of the landward part of the parish; and that the defenders are entitled only to the possession of a share of the area of the kirk effeiring to that proportion."

[7919] Pleaded in a reclaiming bill for the defenders; 1mo, The established and general rule by which repairs are always proportioned, is according to the valued rent of the parish, and not according to the proportion of the cess payable out of it. The cess payable by any town to the royal burghs is not according to any valued rent, and variable according to the circumstances; more than one half of the cess paid by the burgh of Kinghorn is levied from the different trades and employments within the town; and this part of the cess which is paid by the trades, and which is neither imposed on their lands in the parish, nor their houses and burgh-acres, is by no law subjected to such public burdens. Suppose a gentleman should have a thriving and populous village upon his estate, this will not vary the rule, and he will only be obliged to pay such repairs in proportion to his valued rent.

2do, It will be attended with very great hardship upon the inhabitants of this burgh, if they are only found entitled to a share of the church-area in proportion to the share which, by the former part of the interlocutor, they are to pay of the repairs.

Rather than submit to this inconvenience, they would agree to pay for the repairs of the church in proportion to the area they at present possess, notwithstanding the disparity between their valued rent and that of the landward parish. At the same time they apprehend that this cannot in reason extend to the manse, which, by the universal practice, is supported by the proportion of the valued rent. The different societies and individual inhabitants of the burgh have, by long possession, acquired a right of property in their lofts and seats, which cannot be taken from them; and it would occasion much confusion, if a new division were to take place.

Answered for the pursuers; The burden of repairing the kirk and manse must lie upon the heritors in the same proportion in which they are entitled to a share of the area; and this proportion ought to be ascertained according to the extent of the interest which every heritor has in the parish. As the property of the church is common to all the heritors, it cannot belong to them in any other proportion than that which corresponds to their property within the parish; 20th February 1739, Heritors of the parish of Faulkland *contra* The Kirk-session, No. 8, p. 7916. The only question therefore is, how the extent of their property or interest in the parish is to be ascertained? The undoubted rule of dividing such burdens among landward heritors, is the valued rent, which has been agreed on as much more expedient than entering upon proofs of real rent, improvements thereof, and deductions from the same; and as this is the rule among the landward heritors themselves, so, when a burgh happens to be situated in a parish, the nearest estimation that can be taken to correspond to the general rule, is to compare the extent of the cess annually payable by the burgh, with that which is paid yearly out of the remaining lands in the parish, and to divide the burden of repairs in the same proportion. No other rule can be taken to answer the intention of the law. Neither has any distinction ever been made in this respect between the church and the [7920] manse; the one as well as the other must be repaired and upheld by the heritors, and the method of levying the repairs has at all times been the same with regard to both.

In the next place, whatever rule shall be adopted with regard to proportioning the repairs between the town and country parish, the division of the area must necessarily correspond to the same rule; for it is an essential principle which no law can dispense with, that the burden must be allocated among the several parties in the same proportion that the property of the subject thereby affected is to be divided among them: "*Quem sequitur commodum, eum debet sequi et incommodum.*" No possession for any length of time can entitle a party to a share in the area of a church who has no property in the parish; and as little can any possession entitle an heritor to a greater share of the church than corresponds to the lands he has in the parish. This would be to establish a prescriptive right without a title, nay, even contrary to the title of the party, which must, from the nature of the thing, be bounded by the property he has in the parish.

N.B. What the Lords chiefly regarded in the question about dividing the area, was the immemorial possession. And with respect to the other point of the repairs it was at last agreed on by both parties, that the burgh should continue to pay the one half and the heritors the other.

"The Lords found, that the community of the burgh were entitled to retain possession of that proportion of the area of the kirk of Kinghorn presently possessed by them; and that the heritors of the landward parish were also entitled to retain possession of that proportion of the area of said kirk presently possessed by them, without prejudice to the heritors of the landward parish dividing the said proportion of the kirk ascertained to belong to them in common, and to the community of the burgh, dividing the proportion of said area ascertained to continue with the community. And of consent found, that as the community of the burgh of Kinghorn had been in use to pay one half of the repairs of the kirk, manse, and office-houses; therefore that they were liable in the one half of the present repairs, and also in the half of all repairs on said kirk, manse, and office-houses, in time coming."

Act. FERGUSON.—Alt. GARDEN.—Clerk, GIBSON.

No. 12. JOHN DRUMMOND of Logiealmond v. The HERITORS of the Parishes of Monzie, Monedie, Crieff, and Others. February 2, 1773.

"The Lords find, that the heritors of the lands annexed *quoad sacra* are liable in their proportion of upholding the fabric of the kirks to which they are [7921] annexed, and in no other parochial burdens : Find, that they are not liable to contribute for upholding the fabric of the parish-kirks from which they are disjoined ; but that they remain liable in all other parochial burdens in these parishes ; and remit to the Ordinary to proceed accordingly."

Act. D. GRÆME, W. M'KENZIE.—Alt. ILAY CAMPBELL.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 369. *Fac. Col.* No. 54, p. 138.

No. 13. JOHN Duke of ARGYLE, and other Heritors of the Parish of Campbletown v. CHARLES ROWAT, and other Inhabitants of that Borough. February 1, 1775.

A parochial church, partly landward and partly burgage, must be repaired and rebuilt at the expense of the heritors and burgh.

The town of Campbletown, and some part of the country about it, originally consisted of four parishes, which were afterwards united into one, now called the parish of Campbletown ; and the place of worship came to be fixed within the town, where a church was built, in which the Gaelic language, as being the only one then understood in the parish, was used. It soon, however, appeared, that this church was not sufficient for containing all the parishioners ; and the English language having come in use, it became necessary to have another place of worship, and a minister who could preach in the English language. This accordingly took place ; and it was afterwards found expedient to make the Highland and Lowland congregation a collegiate church : and both the ministers serving the cure within the parish are presented by the Duke of Argyle, as patron.

Some time ago, the New or Lowland church becoming ruinous, a visitation was appointed by the Presbytery, in common form, who were proceeding to oblige the heritors of the parish to repair or rebuild it, in the same way as they had decreed against them a few years ago to build a manse for the accommodation of this same minister of the Lowland congregation. The heritors, however, thought it necessary to have the matter explained, whether they were to have the whole of this burden laid upon them, and at the same time, not to have the benefit of the area of the church, more than two-thirds of which is at present possessed by certain seat-holders, who claim the same as their property.

Accordingly, the Heritors presented a petition to the Sheriff, setting forth, That, though the two kirks of Campbletown had been built for a considerable time past, yet that they were promiscuously occupied by the heritors and tenants within the parish, and the inhabitants within the borough ; and, therefore, praying the Sheriff to grant warrant to such persons as he should think proper, to measure the area of the church, and afterwards divide the same. And this petition having been intimated at the market-cross of Campbletown and [7922] church doors, to all concerned, answers were put in to it, in name of Charles Rowat, surgeon in Campbletown, and some others of the inhabitants, for themselves, and in behalf of all the alleged proprietors of seats in the Lowland church ; and in these answers it was contended, That, as this Lowland church was allenarly built and proportioned among such of the inhabitants of the town and country as did not understand the Gaelic language, and never was meant as a parish church, the pursuers had no right to demand a division of the area, since they had neither built the kirk, nor contributed for that purpose. And the Sheriff-substitute having pronounced an interlocutor, finding, "That the said church was built by the voluntary contribution of well disposed people, with the approbation

of the Dutchess of Argyle, who was manager for the then Duke, her son ; and that the seats in the said church were enjoyed by the present possessors without interruption, their predecessors or authors, beyond the years of prescription ; in respect whereof, refused the desire of the petition, with regard to the Lowland church." The Heritors brought a suspension of this judgment, and, at the same time, a process of declarator before this Court, concluding, 1mo, That it should be found and declared, that the pursuers are entitled to have the area of the Lowland church divided, and shares thereof allotted them respectively, in proportion to their valued rents in the parish, or according to such other rule as the Court should think just and reasonable ; or otherwise ; 2do, That they, their heirs and successors, should be free in all time coming, of the burden of repairing the church, &c., and that the defenders should be bound to uphold the said church, and also the manse for the Lowland minister, and kirkyard dykes, and perform all other burdens whatsoever respecting the said church ; and that, in the event of its being so found, the defenders should be liable in repetition to the pursuers of the expenses of building a manse for the minister of said Lowland church, amounting to the sum of £300 Sterling.

The Lord Ordinary having found that the seats belonged to the occupiers and assoilzied from the declarator, upon the idea that this was no parish church, the matter was laid before the Court in a reclaiming petition ; on advising which, with answers, upon the 18th January 1774, the Lords pronounced the following interlocutor :

" Find that the Lowland church of Campbletown, is a parochial church, and is subject to division, conform to the rules of law, and remit to the Lord Ordinary to proceed accordingly, and specially to hear parties on their alleged rights of property to the seats within mentioned."

The cause having returned to the Lord Ordinary, who, after hearing parties, pronounced an interlocutor unfavourable for the defenders, they reclaimed to the Court, and insisted, That both in virtue of their right of property, and as parishioners, they are entitled to a share of the area of the Lowland church of Campbletown.

[7923] Answered ; It is a fact no less remarkable than true, that almost the whole of these defenders have long ago deserted the established church, and built a kirk of relief for themselves, in the heart of the borough, Mr. Rowat being at their head ; so that a more emulous and captious plea cannot well be figured than what they are here maintaining against the magistrates and community of the borough, and against the whole heritors who adhere to the legal form of worship.

That the heritors have no view to exclude any one inhabitant of the parish from having his due proportion of one or other of the two parochial churches ; on the contrary, what they contend for is, that both the one and the other of these churches shall be considered as parochial churches, and shall be rebuilt as such, and divided according to the known rule established by law, and practised in all other parishes, which rules are formed upon the very plan of giving access to all the parishioners to attend divine worship in the church ; whereas, on the other hand, the plan of the defenders is to appropriate this Lowland church to themselves as private property, or at least the greatest part of it, so as to exclude the bulk of the parish ; when, at the same time, they will not rebuild it upon that plan, but insist that the heritors should be at the whole of the expense, whereby they would lay the burden on the heritors, and take all the benefit to themselves. This circumstance of the fabric being ruinous, and that a new one must be built, they have chose to keep altogether out of view. They have again and again been called on to say, whether, in case the area was adjudged to be their private property, they would be at the expense of re-building and maintaining this private property of theirs, and relieve the heritors thereof now and in all time coming, and what security they would find that this would be the case. To this civil question they have all along declined giving any answer. If they meant nothing more than to have the seats which they pretend a right to in the present church set apart to them as their private property, and if they were not to claim the same interest in the new church which is to be built, it would be scarce worth while to dispute the matter with them, because it is doubted if the present church will last out the process ; and, therefore, it is immaterial who possesses the area of the present church, which is now shut up, and stands condemned as totally ruinous ; unless in the view that, by adjudging it to the defenders, this would give them a handle to say, that they must also have the area of the new church. For this reason, and as the judgment of the Court has now finally ascertained the church in

question to be a parochial church, it is thought to be a necessary consequence that the division must be made according to the rules used in parochial churches.

In the present case, there is both a borough and landward parish; but the respondents, the heritors of the landward part, have no dispute with the borough. They are willing that the borough should have their share of the area of the church in a just proportion with the landward part of the parish; and a proportion of the expense of rebuilding the church will in like manner be laid [7924] upon the borough. And so the Lord Ordinary's last interlocutor imports, agreeably to the decision in the case of Kinghorn, and to the known rule in such cases.

"The Lords find, That the Lowland church of Campbletown, being a parochial church, ought to be repaired and rebuilt at the expense of the heritors and borough; and, as the defenders are not heritors, find they are not entitled to any part of the area, except such share of that part falling to the borough as may effair to them, in proportion with the other inhabitants.

Act. ILAY CAMPBELL.—Alt. CHA. HAY.—Clerk, TAIT.

Fac. Col. No. 154, p. 19.

No. 15. The FEUERS and HEADS of FAMILIES in the Town of Crieff *v.* The HERITORS of the Parish of Crieff. November 20, 1781.

A church having become ruinous, the question occurred, at whose expense must it be rebuilt. Two-thirds of the parishioners resided in a burgh, the remainder in the landward part of the parish. The Court found that the expense of building as much of the church as should be necessary for accommodating the landward parish, should be defrayed by the heritors according to their respective valued rents, and divided among them in the same proportion; and that the expense of the remaining part should be defrayed by the feuers and proprietors of houses, in proportion to their real rents, and divided amongst them in the same proportion.

The parish church of Crieff being insufficient for accommodating the whole parish and having likewise become ruinous, the question occurred, by whom, and in what proportions, the expense of building a new one was to be defrayed.

The old church was capable of containing 500 persons; and no discovery could be made, by whom it had been either originally erected, or afterwards repaired. The Presbytery of Auchterarder, within whose bounds it is situated, reported, that the new church ought to be sufficient to contain 1200 hearers, and that the examinable persons in the parish amounted to 1980. Of these, [7925] 597 belonged to the landward part of the parish, the rest resided in the town of Crieff; being either inhabitants of the old burgh of regality of that name, or of an adjacent village, built on grounds feued by the neighbouring heritors.

The question was brought before the Court on informations; and appearing to be attended with considerable difficulty, became the subject of a hearing in presence, when it was

Pleaded for the inhabitants and feuers; Landed property first presents itself as the subject of those public burdens which are of a permanent nature. Hence, when tithes, which are a proportion of the produce of lands, were first allotted to the maintenance of the Christian church, a fourth part was dedicated to the building and reparation of churches; Burn's Ecclesiastical History, vol. 1, p. 247. This fund from the misapplication of tithes, soon became inadequate to the charge; and long before our separation from the Romish communion, parsons, or others having right to tithes, were liable only in a third of this expense, the remainder devolving on the parishioners, according to their substance; Lord Hailes's Mem. can. 6. And although the import of these expressions might at first seem to affect the inhabitants at large, practice, which is the best interpreter of laws, has, agreeably to the original nature of this imposition, confined it to heritable proprietors. It was accordingly levied, not by personal taxation, but by assessments upon land; Spottiswoode, *vide* Kirkmen. See APPENDIX.

By an act of Privy Council in 1563,* ratified in Parliament in 1572, the regulations which had been in force before the Reformation, were renewed; Sir George Mackenzie's Observations. Hence, when, by acts 1690, c. 23, and 1693, c. 25, the ministers of the church of Scotland became stipendiary, and were, of course, relieved of that part of this burden to which they were formerly subjected as titulars of the tithes, the practice did not transfer it to the people of the parish, but to the heritors alone; Bankton, b. 2, tit. 8, § 82. From that period, they have been uniformly exposed to this expense, by assessment; first, according to the real rents of their landed estates, and after the general valuation, according to the valued rent. Thus the payment of cess points out, with precision, not only the persons subject to this expense, but also the proportions by which it is levied.

Such being the general rule in this matter, it is next to be considered, what are the exceptions, and whether there is room for any in the present instance? One exception, and the only one which has occurred, takes place where a parish is partly landward, and partly made up of a royal burgh. As the statutes have made no provision for this case, so it would appear, that, at first, royal burghs, in their corporate capacities, were subjected, like other heritors, according to the public burdens or cess which they paid; and that the alteration in this respect has been owing not to the law, nor to the intervention of courts of [7926] law, but to the conduct of the office-bearers in those communities. The magistrates, and heads of corporations, have thought proper to erect seats for themselves separately from the rest of the congregation. In doing so, they have appropriated that part of the church to which custom has affixed a degree of eminence and dignity. On these accounts, they have been in use to subject themselves to a larger proportion of the expense than would fall upon them by the valued rent. Hence, in the case of the Town of Kinghorn, No. 11, p. 7918, the Court, "in respect of the practice," found that town liable in the half of the expense of building the church, although its valued rent was very inconsiderable. At all events, the reasons for excepting royal burghs from the ordinary rule do not exist in the parish of Crieff. A royal burgh, as an aggregate body, may acquire a right, and it is subject to legal compulsatories in the persons of its magistrates; whereas a multitude of feuers, or the inhabitants of a village, collectively considered, are incapable of either. The first may be viewed as a permanent establishment, whereas the same casualties which draw the last together at one period, may disperse them at another.

Farther; A decision agreeable to the plea of the heritors, would be attended with great inconveniency, or great injustice. The present inhabitants of the village of Crieff, from the vicissitudes incident to people of their rank, must soon give place to others. If they acquire a property in the church corresponding to their contribution in building, the new-comers must be excluded altogether. If, again, the right of the original contributors ceases with their residence, the new-comers will enjoy seats in the church at the expense of the former inhabitants. It is obvious, too, that the same reasons which are urged for a departure from the general rule in this case, will occur even in a parish entirely landward, it being next to impossible that the progress of population on every estate in the parish should be exactly uniform.

Neither will the landholders in the end be losers from the necessity of enlarging the church. The same causes which gave rise to it, by exciting industry, and improvements in agriculture, must augment the value and profits of their estates; and as they acquire a property in the area of the church proportioned to their several disbursements in building it, by letting out what they have no occasion for to those who have not enough, they will soon be enabled to indemnify themselves.

Answered for the heritors; It is quite unnecessary to go back to the history of the Christian church, in the consideration of a question which is precisely defined by the law of this country. In conformity to the general maxim, "*Quod cujus est emolumentum, apud eum onus esse debet*," the burden now under consideration has been imposed on the parishioners, according to their substance. In parishes entirely landward, indeed, this Court has taxed landholders with the whole, according to their valued rents. There the precarious situation of the other parishioners rendered a deviation from the general rule in some degree necessary. Besides, in such a case, every heritor paying for his tenants, on this [7927] account draws a higher rent for

* To be found in Lord Kames's Abridgement of Scottish Statutes.

his land ; and the recourse to the valued rent, which is a fixed, and, in general, a pretty equal standard, by saving the trouble of a proof, is beneficial to all parties. But these reasons are nowise applicable to the case of a royal burgh, a considerable market town, or populous village, where an obligation to accommodate the parishioners with churches would render land itself a burden on the holders. Accordingly, the custom there is, either to assess the landward part of the parish for the expense of a church necessary for their own occasions, and to impose the remainder upon the town, or that the last should build an ayle, or church of relief, for themselves. All these several modes have been adopted in the royal burgh of Selkirk, in the village of Saltcoats, and burgh of Paisley. Hence, too, the decision in the case of the Town of Kinghorn, in which the judgment indeed bears, that the Court went upon the practice as to building, and upon consent as to repairing ; but that practice affords conclusive evidence of the general idea, that burghs do not contribute to this expense according to the valued rent ; and the consent would not have been given, had there existed a probability of a more favourable judgment.

The scheme suggested, of the heritors letting the seats, is liable to many objections. There is no court of law who could give effect to it, by obliging the heritors to let, or the parishioners to hire, seats in the parish church. The benefit of a national church would thus become the subject of an unseemly traffic, and the bulk of the people, instead of enjoying, at a moderate expense, the right of attending the public worship of God, must pay, for a precarious liberty of doing so, whatever the heritors chose to exact.

The difficulties and injustice said to arise from subjecting the feuers and inhabitants of the town of Crieff to any part of this burden, are purely ideal. The real rents of their respective properties, whether feu-holdings or tenements of houses, can be readily ascertained. According to these, the proprietors will be liable in the expense of building, and in the same proportion they and their successors will acquire a share in the area of the church after it is built.

The Lords found, "That in the circumstances of this case, the valued rent could not be the rule of affixing or apportioning the expense of building the whole church ; but that the expense of building as much of the said church as should be necessary for accommodating the landward parish, should be defrayed by the heritors according to their respective valued rents, and divided among them in the same proportion ; and that the expense of the remaining part should be defrayed by the feuers and proprietors of houses, in proportion to their real rents, and divided amongst them in the same proportion."

Reporter, LORD COVINGTON.—For the Feuers and Inhabitants, HENRY ERSKINE, ROBERTSON.—For the Heritors, ILAY CAMPBELL, RO. DUNDAS.—Clerk, ORME.

Fol. Dic. v. 3, p. 370. *Fac. Col.* No. 4, p. 6.

No. 16. [7928] JOHN CATHCART and Others v. JAMES WEIR and Others.
November 24, 1785.

A regular and proper division of the area of a church presumed from long possession.

The old parish church of Greenock was built in the end of the last century, some years after the erection of that town into a burgh of barony. The parish consisted likewise of a landward district, a part of which belonged to Sir John Schaw ; and of the remainder another person was superior ; between whom and the former, in consequence of a written contract, a division of the area of the church took place. Sir John's share was then, and has been ever since, occupied by the country tenants and town feuers of his estate, in distinct portions, on which their respective seats were fitted up. But if any regular subdivision was made among them, the evidence of it, as not now existing, must have been lost.

Such had been the situation of this church for more than double the years of the long prescription, when a recent set of feuers, in an action brought by them,

contended for a new division of the area, according to their respective proportions of valued rent, alleging, That hitherto the area had not been regularly or legally subdivided.

The cause was reported by the Lord Ordinary, when

The Court were of opinion, That there was, from the long possession, sufficient presumptive proof of a regular and proper division ; and therefore

The Lords assolizied the defenders.

Reporter, LORD BRAXFIELD.—Act. MURRAY.—Alt. M. ROSS.—Clerk, HOME.

S.

Fac. Col. No. 240, p. 370.

No. 17. The MINISTER of the Parish of Tingwall v. The HERITORS. June 22, 1787.

The Court found that where it is necessary to build a new church, its dimensions must be such as will contain two-thirds of the examinable persons in the parish, not under twelve years of age.

The Presbytery of Zetland having directed a new church of certain dimensions to be built in the parish of Tingwall, the Heritors brought those proceedings under the review of the Court of Session, by a bill of suspension.

The Lord Ordinary pronounced this interlocutor :

“Finds, That when it becomes necessary to build a new church, the heritors of the parish are bound to provide one sufficient for the accommodation of the parishioners capable of attending public worship ; and that this is a burden under which they acquired and hold their estates : Finds it admitted, That the parish of Tingwall does at present contain 209 families : Finds, That there are in it 847 persons capable of attending divine worship : Finds, That the church, as proposed by the heritors, is not of dimensions more than sufficient to accommodate 426 persons ; and that the church, as proposed by the Presbytery, is of [7929] dimensions sufficient to accommodate 585 persons : Finds, That a church of the former dimensions would be too small, and that the latter would not be too large, for the decent and convenient attending on divine worship in the parish of Tingwall.”

Against this judgment, the heritors preferred a reclaiming petition, in which they also insisted, that the form of the church proposed by the Presbytery was liable to considerable objections. After advising this petition, with answers given in, in behalf of the minister,

The Court were in general of opinion, That the plan of the building might be concerted among the heritors themselves, without the intervention of the Presbytery. whose only province it was, to see that the church was of a proper size for accommodating those who attended public worship.

The extent of the accommodation requisite for the number of parishioners was fixed in this manner ; those were deemed examinable persons who were twelve years old, and the church was to be built in such a way as to be capable of containing two-thirds of the parishioners falling under this description. This was laid down as a general rule to be observed in all time coming.

The Lords found, “That the heritors of the parish of Tingwall are obliged to build a church capable of containing two-thirds of the examinable persons in the parish, not under twelve years of age, and remitted to the Lord Ordinary to proceed accordingly.”

Lord Ordinary, HENDERLAND.—Act. W. ROBERTSON.—Alt. CHA. HAY.—Clerk. HOME.

C.

Fol. Dic. v. 3, p. 369. *Fac. Col.* No. 335, p. 515.

No. 18. JOHN URE, and other Heritors within the Royalty of the Burgh of Forfar v. PATRICK CARNEGIE, and Others, Heritors of the Landward District of the Parish of Forfar. May 16, 1793.

The area of a new church in a parish where there is both a royal burgh and a landward district, falls to be divided between them in proportion to their population.

The parish of Forfar is composed partly of the royal burgh of that name, and partly of a landward district. The number of examinable persons within the burgh, and lands holding of it, amounts to 2965; the country district contains 765.

The old parish church having become ruinous, a new one was built, and an action was brought by some of the burgh heritors, in order to ascertain the manner in which its area should be divided.

The pursuers contended, that the church should be divided between the burgh and the landward district, in proportion to their respective population. The country heritors, on the other hand, insisted, that the area should be divided [7930] equally between the burgh and themselves, and that their half should be subdivided in proportion to their valuation.

It was understood, that the expense of building the church was to be defrayed according to the extent of area which each party should ultimately obtain.

The leading arguments on both sides were the same in substance with those stated in the report of the case of Crieff, 20th November 1781, No. 15, p. 7924, and need not be here repeated.

The defenders likewise founded on a decree-arbitral in 1759, relative to the building a schoolmaster's house, and repairing the church, whereby it was declared, that in future the expense necessary for these purposes should be equally defrayed by the burgh and landward district; and it was contended, that this afforded evidence of the practice in bearing public burdens, and that therefore the benefit arising from them should be divided in the same proportions.

The Lord Ordinary reported the cause on informations.

One of the Judges, influenced by the practice of the parish, in paying parochial assessments in other cases, thought the area should be divided equally. The rest of the Court, however, were clear, that where a considerable town makes part of a parish, from the very nature of the thing, the division must proceed on the ratio of population. They considered this point as fixed by the decision in the case of Crieff above-mentioned, and in those of Campbletown, No. 13, p. 7921, and St. Andrews, 25th May 1791. See APPENDIX.

It was accordingly found, "That the area of the church in question must be divided betwixt the heritors in the landward part of the parish and the burgh of Forfar, in a proportion effeiring to the number of the parishioners in each, and that the expense of the building must be defrayed by the burgh of Forfar, and the landward part of the parish, in proportion to their respective shares of the area."

Lord Ordinary, HENDERLAND.—Act. M. ROSS, JO. MILLAR, JUN.—Alt. CRAIGIE.

R. D.

Fol. Dic. v. 3, p. 371. Fac. Col. No. 52, p. 107.

No. 19. ROBERT SKIRVING and GEORGE YOUNG v. ROBERT VERNOR. June 21, 1796.

Suitable accommodation in that part of the area of the parish church which belongs to the landlord, is held to be included in a lease of lands.

Robert Vernor, in 1763, obtained a lease of a farm belonging to the Earl of Wemyss, in the parish of Inveresk. His Lordship's factor, at the same time, wrote a letter to him, mentioning, that as he had agreed to repair and keep in good order his Lordship's property in the church during the lease, he was in return to be allowed to possess or sublet the whole of it.

[7931] Vernor's lease expired, and was renewed in 1783; and he continued to possess and let out the Earl's seats in the church as formerly, but without any express authority from his landlord. In 1794, however, Robert Skirving and George Young, who hold large farms in the parish under the Earl, of leases commencing in 1792, which give them right to the lands, "with all liberties and freedoms belonging thereto," presented, with consent of their landlord, a petition to the Sheriff, praying that the area in the church belonging to the Earl might be divided among his tenants, according to the rents paid by each.

A plan was accordingly made out, and the Sheriff ordered the division to take place in terms of it.

In an advocacy, Vernor, *inter alia*, disputed the title of the pursuers to insist in the division, as their leases gave them no express right to seats in the church; contending, that the area of the church is the property of the heritors, who may sublet it at their pleasure, and that, accordingly, the Earl of Wemyss had exerted that right, by his grant to the defender, which must be considered as renewed with his lease of the lands.

The pursuers

Answered; The right of an heritor in the area of the church is not personal to himself, but is inseparable from the possession of the lands, and common to himself, his family, and tenants; the pursuers, therefore, would have been entitled to make their present claim, although their leases had not expressly given all the freedoms and liberties connected with the lands, and even in opposition to the Earl of Wemyss; but the clause in the lease, and the consent of his Lordship, make their case the more favourable. Besides, Vernor's grant of the seats has not been renewed along with his lease of the lands.

The Lord Ordinary reported the cause on memorials.

The Lords remitted "to the Sheriff, to find, that the Earl of Wemyss's tenants in the parish of Inveresk are entitled to be accommodated with suitable seats in the parish church of Inveresk, and to make a fair and equitable division of his Lordship's area in that church accordingly; and found Messrs. Skirving and Young entitled to their expenses."

Lord Reporter, METHVEN.—Act. CULLEN.—Alt. CORBET.—Clerk, SINCLAIR.

D. D.

Fac. Col. No. 224, p. 524.

No. 2. [5] The Earl of MARCHMONT and Others v. The Earl of HOME and Others.
December 17, 1776.

Division of a kirk. Area, after being seated, how to be divided. See No. 14, p. 7924.

The parish church of Eccles having become ruinous, it was found necessary to build a new one.

Several estimates were given in, but the heritors differing among themselves, it was sometime before any one was adopted. At last, however, the church was finished; but the disagreement of the heritors having prevented an amicable division of the area when seated, a summons of division of the kirk was raised before the Sheriff of Berwickshire, by Lord Marchmont and some other heritors.

Some procedure took place before the Sheriff, this judicial division being opposed by the Earl of Home and other heritors, who were averse to the measures of Lord Marchmont and his friends. At last, the following interlocutor was pronounced: "The Sheriff having considered the libel, defences for the Earl of Home and others, answers thereto by the Earl of Marchmont and others, with the minutes of the heritors present, for dividing the seats of the said church in April and May last, repels the objection to the competency of the court: Finds it fully instructed by the minutes of procedure, that the division of the church then alleged to have been made was an improper mode of division, against the consent of some of the most considerable heritors of the parish, and not finished; that the same is not good nor binding upon those who entered their dissent, or were absent from the meetings: Finds, that each heritor's share must be allocated and set apart by itself, and that the heritors have

choice of place one after another, according to the valuation of their several estates in the parish : Appoints a division of the said church amongst the heritors accordingly ; and that the same may be properly done or ascertained, nominates and appoints Alexander Low, land-surveyor and measurer, to measure the area of the said church, and proportion the same among the several heritors according to their respective valuations, setting apart each heritor's share by itself, to be verified by him upon oath, and decerns accordingly."

This judgment was brought before Lord Gardenstone by a bill of advocation, who, after hearing parties, remitted the cause simpliciter.

In a petition to the Court, it was pleaded for the Earl of Home and the other heritors joining with him, in substance, that the heritors, according to their valuation, might be entitled to have their choice of the principal seats, for the accommodation of themselves and families ; but when they have made that choice, that the other heritors should be entitled to their choice in their proper course, and that what seats were necessary for their tenants should not be included in their choice, till after each heritor, down to the lowest, had [6] chosen, when afterwards, in the same order, they might chuse for their tenants. In this way alone could the area be divided, so as not to allow the principal heritors, by chusing for themselves and their tenants at once, to exclude from any possibility of accommodation in the church those heritors who had inferior valuations. And it was added, that any measure or rule of division, by which the parish church of Eccles would be turned almost entirely into private property, and by which a great number of the inhabitants would not have it in their power to have access to the church, was not only in itself a measure contrary to reason and justice, but opposite to the consideration in which a parish church should be held, which ought rather to be considered as *publici juris*, than private property, and as something of the nature of a *res sacra*. Churches are not now founded by private endowments, nor built and repaired by a stent on the whole parishioners, as had been the case in former times. But still it is as absurd for heritors, in consequence of their being at the expense of building a church, to claim a right of absolute property in it, as it would be for the titular of the teinds, or patron, or heritors having right to their teinds, to insist, that because the burden of the stipend fell upon them, they should have the whole labour of the minister to themselves.

It was answered for the Earl of Marchmont and the heritors agreeing with him, that a place of worship, in so far as respects the use of it, may not improperly be termed *res sacra* ; and that so far as concerns the appropriation of it for the use of a whole parish, it may properly enough have the denomination of *juris publici*. However, in every other respect, as being the subject of division and separate possession, the divided parts can be considered only as private property following the land to which they are allocated upon the division. Unless it be pretended that the kirk is to remain a common, and that the person who comes first is to be first served, provided he live within the parish,—this must be the inevitable consequence. Justice and good sense naturally dictate the rule of division adopted. Those who receive the largest share of the area are those who have spent the largest share of their fortune in the creation of that area.

It is therefore evident, that the heritors possessed of the highest valuation have right to the greatest share in the division of a church. And from this it follows, that they are entitled in their order to a first and single choice. The notion of different choices in different places of the church, is absurd and imaginary. By the first and single choice, every heritor sees at once the extent of area which falls to his allotment, and according to that allotment he is enabled to make a proportional division among the occupiers and inhabitants of his own estate. The matter would be otherwise perfectly inextricable, and besides, this rule of division has been the immemorial practice.

The Court pronounced the following interlocutor : " The Lords having advised this petition, with the answers, they adhere to the Lord Ordinary's interlocutor, with this variation, that each heritor, in proportion to his valued [7] rent, may have a seat in the church for himself and family, distinct from the share of the area to be allotted to their tenants ; but that in dividing the whole area of the church, the area of each heritor's seat must be taken *in computo* in making up his share of the whole area corresponding to his valued rent ; and, with this variation, they refuse the desire of the petition."

Both parties differing about the precise meaning of this interlocutor, petitions were given in on both sides, and some further procedure took place. The Earl of Home craved that the interlocutor might be so explained, as to give all the heritors a preference to the principal and most commodious seats in the first instance, leaving the tenants and other inhabitants upon the estates of the principal heritors to be provided for by a second choice. The Earl of Marchmont craved that it might be found, in express terms, that the heritors were entitled to make choice in their turn according to their valuations, not only of family seats, but of their whole allotments, whether lying together or distinct, as should be most convenient.

The Court adhered to their interlocutor ; but they so explained it from the Bench, that every heritor should be first provided in a family seat, according to his valuation, and afterward by a second choice, and according to the same rule, should make his election of as much more as made up his share, conform to his valuation.

Lord Ordinary, GARDENSTONE.—For the Earl of Marchmont, DEAN OF FACULTY DUNDAS, PAT. MURRAY.—For the Earl of Home, CROSBIE.

J. W.

No. 28. [7950] The Bishop of DUMBLAIN v. KINLOCH. July 11, 1676.

A party held an annualrent right over lands, which were afterwards resigned to the King, and by the King mortified to a bishoprick. The bishops were suppressed, and afterwards re-established. While suppressed, the debt was paid to the King, who gave a grant of redemption. The grant of redemption was sustained, though without the consent of the Officers of State.

In anno 1596, the Earl of Bothwell having borrowed, from one Thomas Craig, advocate, 7000 merks, did, for security thereof, infest him in ten chalders of victual out of his lands of Halls and Truprain, redeemable upon payment of 7000 merks, by a clause of reversion in the contract, obliging himself to a reversion, being infest. This annualrent was acquired by John Murray, thereafter Earl of Annandale, and by him resigned to King James VI. who, in anno 1620, mortifies the same to the Bishop of Dumblain, as Dean of the Chapel Royal, who possessed the same till the expulsion of Bishops in anno 1638. The Earl of Bothwell being forfeit, the right of these lands, out of which the annualrent was payable, came by progress, in the person of Sir George Seaton, who, in anno 1651, paid the 7000 merks to the King, and obtained from his Majesty a grant of redemption at Stirling, immediately before he went to Woster ; yet the King having given an assignation to his chaplains, they continued to possess ; and, after the restitution of Bishops, Bishop Leighton did possess ; and now Bishop Ramsay succeeding, charges Francis, who has succeeded to Sir George Seaton in the lands, out of which this annualrent is payable, who suspends, on this reason, that his author had redeemed the annualrent from the King in anno 1651, when the Bishops were suppress, and the King had the only title. It was answered for the charger, Imo, That this annualrent being [7951] mortified by King James to the Bishop of Dumblain, as Dean of the Chapel Royal, and thereby become a part of his benefice, he was *decennalis et triennalis possessor, qui per regulam cancellarii non tenetur docere de titulo ; sed possessio habetur pro titulo*, which, upon good ground, was received by all Christian nations, churchmen being but administrators and usufructuaries of their benefices, their mortifications and evidents were subject easily to be lost ; and, therefore, as prescription, with any colourable title, and forty years' possession, makes a full right in temporal lands ; so thirteen years' possession doth the like in benefices. 2do, By an act of sederunt, it is declared, " That twenty years' possession before the Reformation, or thirty years of kirk-lands after the Reformation, should be holden as a right " ; and this annualrent has been possessed as a part of the benefice above fifty years. 3tio, By the act restoring Bishops, they are restored to all they had in anno 1637, and so to the right and possession of this annualrent ; and, as a redemption made by a donatar of forfeiture would be void, if the forfeiture were rescinded, and the forfeit person restored *per modum justitiæ*, so much more the Bishops being restored *per modum justitiæ*, they returned to their

right and possession, and the suspender can have only access to the King for repetition of his money. 4to, Though this annualrent were redeemable, as it is not, yet it was not lawfully redeemed, because there was no order of redemption or declarator; and this grant of redemption was without consent of the Officers of State, and was not registrate. It was replied for the suspender, to the 1st, That the rule of the Chancellery is not in vigour amongst the Protestant nations, otherwise the act of sederunt would not have pitched upon twenty or thirty years as a title; but though it were, it is but a presumptive title, which, though it be sufficient, both active and passive in *possessorio*, yea though in *petitorio* in reduction, improbation, or declarator, it might hinder certification; yet, where the mortification does appear, and is produced by the suspender, *presumptio cedit veritati*; and it is evident that the mortification relateth Mr. Thomas Craig's right, as acquired by the King and mortified. Likewise Mr. Thomas Craig's right is produced, which bears a clause of reversion in its bosom, which is all one as if Mr. Thomas Craig's right had been deduced verbatim in the mortification; so that the mortification had comprehended a reversion, which therefore might be founded on, and made use of, though the kirk had possessed 100 years. For reversions in *gremio juris* prescribe not. And as to the act of sederunt, it can be no more but the like presumptive title, and relates particularly to the time of Reformation, when the Popish clergy, being become desperate, did dilapidate their benefices, and suppress their rights. Neither can the act restoring Bishops import any thing as to the point in question; for it is undeniable, that Sir George Seaton, having a right to the reversion, might have redeemed this annualrent at any time he pleased, by payment, or consignment of 7000 merks. And at the time Bishops were suppress, he could pay or consign to none but to the King; and seeing the King accepted the money, he needed not use any order by premonition and [7952] consignment, neither needed he declare the order; and yet, *ex abundante*, the defender raised a declarator against the late Bishop of Dumblain, and has renewed it against this Bishop, for declaring, "that, by the payment made to the King, the right of annualrent was redeemed and extinct." And though the redemption had been granted by a donatar of forfeiture, it would be effectual against the forfeit person, though restored by way of justice, as being payment made *bona fide* to a party in title for the time, and the restored person would have only recourse against the donatar who received the money. Neither doth it import any thing that the Officers of State do not consent, because this annualrent was no part of the annexed property or patrimony of the kingdom, but of the private patrimony of the King, in *quo jure utitur communi*; nor doth the want of registration operate, which, as it is clear by the act, so it is only in favours of acquirers; but it cannot be said the Bishop acquired from the King since the redemption, neither can the charger plead a possessory judgment, either by the common law, because annualrents have not the benefit, or by the special privilege of churchmen, seeing redemption has been obtained, which evacuated the right, and left neither real nor presumptive title, without which no possessory judgment can defend, much less can it affect the right of another by an annualrent, which is extinct, as being redeemed. It was duplied for the charger, That if the possession of churchmen make only a presumptive title, it will evacuate all the benefices of the church; for it were easy for the heirs of the mortifier to infest themselves upon their right, and to declare the same against the beneficed person, and though it be true where the mortification is extant, and any intrinsic restriction or qualification thereof may be founded on, yet, in this mortification, there is no mention of a reversion, albeit it bears, "that the right mortified was Mr. Thomas Craig's right," whereof the reversion might have been discharged thereafter; or when the King had the right of reversion by the forfeiture, he might have reserved it from the donatar in favours of the Bishop.

The Lords found, that seeing the mortification bore expressly Mr. Thomas Craig's right to be the right mortified, and that Mr. Thomas Craig's right had a reversion *ingremio*; they found it intrinsic to the mortification, and that thereby the right was redeemable, and that it was redeemed; and that, after the redemption, there was no place for the privilege of any possessory judgment.

Stair, v. 2, p. 444.

No. 1. [8019] BASS v. YOUNG. July 25, 1609.

The grass of a kirk yard cannot be assigned by the plat to the minister of the parochin, because it is common to the parochin, and may be set by them for a duty to be applied *ad pios usus*. *Fol. Dic. v. 1, p. 532. Haddington, MS. No. 1633.*

No. 1. [1 App.] The MAGISTRATES and TOWN COUNCIL of GREENOCK, Pursuers v. JOHN SHAW STEWART of Greenock, Esq., Defender. July 4, 1777.

Additional burying ground necessary for a parish, partly landward, and partly composed of the inhabitants of a populous Burgh of Barony, must be furnished by the heritors having ground proper for that purpose: And they are to be indemnified by the other heritors, and by the community, in proportion to the examinable persons within the parish. See No. 2, p. 8019.

The town of Greenock is a burgh of Barony holding of the defender, the ground upon which it is built having originally been a part of the estate of Greenock, feued off in parcels at different times to the inhabitants, by the defender's predecessors.

The old parish of Greenock is chiefly composed of the town, but includes also some adjoining lands in the country, belonging in property to the defender, and to another heritor, Crawford of Crawfordsburn. The defender's valuation amounting to £2062, 8s. 8d. Scots; Crawfordsburn's to £223, 6s. 8d. Scots; these two sums together make £2285, 15s. 4d. Scots, the total valuation of the parish.

The town of Greenock has for a considerable time past been gradually extending itself and increasing in population. Hence, sometime ago it became necessary for them to subdivide the parish, and to have another church, the old one being insufficient to contain the inhabitants; and for this and some other public works they, in the 24th George II. obtained an act of Parliament laying a duty of two pennies upon the pint of ale brewed or vended in the place. And as the old church was inadequate to the parish, so, as early as the 1721, it had also become necessary to add considerably to the old churchyard; and the ground for that purpose was gifted to the town by the late Sir John Shaw. The churchyard, however, even with this addition, was still somewhat less than an acre, and by degrees this also became rather too scrimp for the inhabitants.

[2] Upon an application being made to Mr. Shaw Stewart, he signified his willingness that a proper addition should be made to the burying ground, and that a part of his property be allotted for that purpose, upon certain terms: But these not being agreeable, an action was instituted in name of the Magistrates and Council of Greenock, as representing the community, setting forth that their present churchyard contained only three roods seven falls and nineteen ells of ground, which was insufficient for the purpose; and therefore concluding against the defender, as proprietor of all the ground adjacent to the said churchyard, to set off what was sufficient for burying the inhabitants of the town and parish of Greenock, "and the said ground so set off, ought and should be adjudged to be part of the common burial place of the said town and parish of Greenock, and the management thereof vested in the kirk session of the old and new parishes of Greenock."

The summons also contained a conclusion in these words: "And in case the said John Shaw Stewart shall be found entitled to any recompence from the other heritors and feuers, in the said old and new parishes of Greenock, then, Archibald Crawford of Crawfordsburn, William Donald, feuer at Glen, &c. (naming a variety of other feuers in and about the town of Greenock), ought to be decerned to pay the said John Shaw Stewart their respective proportions of the said recompence."

The Lord Ordinary, after some procedure before him and a proof led by both parties, pronounced an interlocutor importing, lmo, That the providing burying ground is a burden which nature, law, and reason, lays upon the heritors of every parish; that the ground most commodious for the purpose falls to be appropriated;

and that the value of the ground ought to be paid to the proprietor by the several heritors of the parish conform to their valued rent, he himself bearing his own proportion ; 2do, That it is proper the ground to be set apart by way of addition shall be contiguous and adjoining to the present churchyard, and that it is proper it should be of a dry soil ; and, 3tio, Finding that the ground pointed out by the pursuers for that addition, is more proper than that proposed by the defender, and appointing the same to be set off and walled decently with all convenient speed.

The defender reclaimed, 1st, As to the situation of the ground ; alledging, that the demand made by the pursuers to have a piece of ground called the kirk town-yards was unreasonable and unjust, and the allocation of it would greatly hurt his property ; and that their objection to the ground he proposed on account of wetness could be easily removed by draining ; neither was it necessary or expedient that the additional churchyard should be contiguous to the old one ; and that it would be more for the benefit of the living, if it were laid off at some distance from the town ; 2dly, As to the value to be given for the ground ; and 3dly, At whose expense it ought to be furnished, and which, he contended, ought in part to be defrayed by the community, as well as the landward heritors.

[3] The Court considered this to be a case altogether new, to which the common rules would not apply, and therefore it behoved them to settle it upon equitable principles.

"The Lords found, that the additional burying ground necessary for the parish in question must be furnished by the heritors thereof having ground proper for that purpose : But found that the heritors who furnish the same must be indemnified by the other heritors, and by the community of the town of Greenock, in proportion to the examinable persons within the parish, residing upon their estates, and within the community, respectively : And ordained the defender Mr. Shaw Stewart to give in a condescendence of the ground he proposes to furnish, both as to quantity, situation, and price demanded by him."

Against this decision a reclaiming petition was presented, to which answers were given in ; but before advising, the dispute was settled, in consequence of Mr. Shaw Stewart's accepting an offer of the new kirk session, to feu a piece of ground from him for the purpose, and to take the risk of indemnifying themselves, by disposing of it in small quantities among the inhabitants.

Act. C. BROWN.—Alt. ILAY CAMPBELL.—Clerk, CAMPBELL.

J. W.

No. 2. [8023] JOHN SEYTOUN v. THOMAS BALLINGALL. December 2, 1532. "

Pure men, sick as taskeris, hyndis, or cottaris, beand chargit to find lawborrowis to ony man, ilk ane of thame may be ressavit to be lawborrowis for utheris. Item, Na pupil nor persoun beand within the age of xij zeiris, may be compellit to find lawborrowis.

Fol. Dic. v. 1, p. 533. Balfour (LAWBORROWIS), No. 1, p. 518.

No. 7. [8024] STRANGS v. SANDILANDS. November 1591.

Contravention of lawburrows was sustained, although no damage was done but only the party had stopped a high way where carts with corn used to pass.

The Laird of Balcaskie and Florence Strang, pursued Mr. Andrew Sandilands father's brother to the Laird of St. Monance, to hear and see that he had contravened an act of lawborrows acted in the books of Secret Council, into the which the said Mr. Andrew was obliged not to trouble or molest the pur-[8025]-suers in body or goods, otherwise than by order of law. It was answered by the defender, That he ought not to answer to the summons of contravention, because the contravention was alleged to be done into the stopping of a gate through the lands of Abercromby ;

and, true it was, that there was action of molestation depending betwixt the Laird of Balcaskie and the said Florence Strang and the indwellers in Pittenweems against the Laird of Abercromby, anent the right of the said gate and passage, and that being prejudicial, therefore cognition ought first to be taken in the molestation, quia utraque actio versabatur circa eandem rem et idem subjectum. Answered, That this action of contravention was *facti* only, that no person should trouble another by way of deed, and the molestation was *tam facti quam juris*, and so the one could not be prejudicial to the other. The Lords found, that the action of molestation was prejudicial, and cognition ought first to be taken thereintill before the defender answer to the contravention.

December 1591.—In the aforesaid action of contravention, pursued by Florence and David Strangs *v.* Mr. Andrew Sandilands, the deed of contravention was libelled to be done in the stopping of a high passage, so that the pursuers might not lead their corns from the lands of Abercromby. It was alleged that the libel was not relevant to infer any pain of contravention, because there was no damage or any interest libelled or qualified, nam pœna dicitur a puniendo, et nullus punitur nisi delictum aut noxam commiserit, et ubi nullum est damnum ibi nullum est delictum; and so there could be no pain sought of contravention, except it had been expressly libelled, that the pursuer had been damnified or interested in so meikle. To this was answered, That the pursuer had founded his libel upon the act of lawburrows that was insert in the books of Secret Council, and in so far as the said pain was insert in the act it was pœna judicialis et legalis et a iudice decreta, et ubi ejusmodi decernitur pœna, non inspicitur damnum sive interesse, sed si iudici obtemperatum sit aut non; and so the pursuer was not obliged to qualify any interest or damage, but if he was molested by way of deed or any otherwise without order of law. The Lords repelled the allegiance, and found that the pursuer needed not to qualify damage or interest.

In the same action and cause, it was alleged, That albeit the libel might be found relevant, not libelling *damnum sive interesse*, yet the deed of the molestation was so small, that it neither in law nor equity could infer so great a pain, viz. for stopping a cartful of corn, quia pœnæ inferendæ sunt habita consideratione rerum et personarum; et omnibus pœnis proportio geometrica et non arithmetica consideratur, de qua vide Aristot. L. 5. The Lords found, that before the probation, they could not modify the pain, because the one half pertained to the King's Majesty and his Treasurer.

Fol. Dic. v. 1, p. 533. Colvil, MS. pp. 462, 463.

No. 8. [8026] AULD TOWN of ABERDEEN *v.* NEW TOWN. June 1549.

The Auld Town of Aberdeen got charges against the Provost, Bailies, Council, merchants and craftsmen of the New Town of Aberdeen, for finding of lawburrows to them under several pains respectively: And in like manner the Laird of Ferne got charges against the Provost, Bailies, and Council of Ruther-[8027]-glen, for finding lawburrows to them, in June 1595, and the year preceding, one Crichton *v.* Sanquhar.

Fol. Dic. v. 1, p. 533. Haddington, MS. No. 409.

No. 9. Earl of CASSILLIS *v.* KNOCKDOLOAN. July 24, 1501.

In an action betwixt the Earl of Cassillis and the Laird of Knockdoloan, an horning for not finding of lawburrows was found null, because the raiser of the charge had not made faith before the charge was given.

Fol. Dic. v. 1, p. 532. Haddington, MS. No. 656.

No. 11. SHAW v. WILKIESON. February 1604.

Pasturing of cattle does not infer contravention, unless herding be also libelled.

The Laird of Shaw pursued James Wilkieson for contravention of lawburrows, through casting of feal and divots upon his proper lands, and pasturing his guide thereupon :—The Lords found not the summons relevant for pasturing nakedly, while the pursuer eiked his summons with the words herded and kept the same upon his proper lands, which was found relevant.—It was further alleged, That he did no wrong in casting divots, because he being infest in the miln and miln-land, land of —, and thereby having pasturage and commonty through the hail lands of the said town, he did no wrong to cast feal and divot upon the ground thereof.—It was answered, That no such privilege nor use of pasturage and commonty could give him liberty to cast divots upon the pursuer's proper said lands ; albeit, because he offered him to prove that he did cast them upon his proper arable land, which he tilled and sowed diverse years before the said fact, and which was presently tilled, ready to sow. In respect of the which reply, the Lords rejected the allegiance.

Fol. Dic. v. 1, p. 533. Haddington, MS. No. 707.

No. 12. [8028] CONSTABLE OF DUNDEE v. FLESCHOUR. June 21, 1605.

The Constable of Dundee younger having found caution of lawburrows to David Flescheour in Dundee, the said David pursued him for contravention, in so far as after the act and charge of lawburrows, he came to the said David, standing upon the side of High Street with Mr. Andrew Lamb, and the said young Constable being accompanied with ten or twelve of his accomplices, took the hat off his head, crushed it under his feet, and tramped upon it ; and menacing the said David, said, that if he, or the others of this town, took not off their hats to him, he should nail it with a whinger to his head.—It was alleged, That the summons was not relevant, because the defender was only acted and obliged, that the pursuer should be harmless and skaithless in his body and goods ; and true it was, that he had neither harmed his body, or done skaith to his goods.—It was replied, That the defender was bound that the pursuer should be untroubled or molested, directly or indirectly, otherwise than by order of law ; and the defender had troubled, wronged, and dishonoured him, both in his person and goods.—Notwithstanding whereof the Lords found the summons irrelevant, and assolizied from the same.

Fol. Dic. v. 1, p. 533. Haddington, MS. No. 838.

No. 14. [8029] M'KIE v. M'KIE. February 27, 1607.

Drawing a sword to invade a man, though no harm followed, was found sufficient to infer contravention.

In an action pursued by M'Kie v. M'Kie for the contravention of an act of the burrow court of Wigton, wherein the said M'Kie obliged himself and his cautioner, that the other should be harmless, &c., under the pain of £500, because, after the said act, he had drawn a sword, and pursued and invaded the other M'Kie ; it was excepted, That this fact could infer no contravention nor penalty, because it was *modo conatus sine damno aut effectu*.—It was answered, That the invasion was relevant without any farther qualification. In respect of the which summons and reply, the Lords repelled the exception. The Advocate compeared thereafter, and according to his desire was admitted for his Highness, and alleged, That the half of the penalty could not appertain to the Provost and Bailies of Wigton, but to the King ; because that all acts of caution found for keeping the King's peace, under pecuniary pains, in

cases of contravention, make the half of the pain to fall to the King's Majesty, unless the act bear the express contrary, which is not in this case.—It was answered, That albeit the King had right to the half of the penalties resulting from the contravention of lawburrows, found in the register of Session or Privy Council, yet penalties of troubleance within burgh pertain to the Magistrates of the same. Notwithstanding whereof the Lords found, That the King's Majesty and his Treasurer had right to half of the penalties foresaid. *Fol. Dic. v. 1, p. 534. Haddington, MS. No. 1338.*

No. 16. [8030] BRUCE v. LAIRD OF CLACKMANAN. December 21, 1609.

In a contravention pursued by Bruce of Greenyards v. Clackmanan, the libel was found relevant, because that Clackmanan struck the pursuer with his neif upon the breast, and drew his whinger and struck at him therewith, albeit there was no hurt done.

January 13, 1610.—In a contravention pursued by Bruce of Greenyards v. Clackmanan, for two invasions of him for his slaughter, one in 1604 by Clackmanan's self, and another in 1609 by Clackmanan's servant Donaldson; it being urged for Clackmanan, That ane only pain of lawburrows should be granted, the Lords repelled the allegiance, in respect of the long distance of time betwixt the two facts, and that they were both personal invasions.

Fol. Dic. v. 1, p. 534. Haddington, MS. Nos. 1709 & 1734.

No. 17. LORD THIRLESTANE v. PATRICK HEPBURN OF NEWMILLS. July 14, 1612.

He who charges a man with lawburrows for fear of his oppression in his goods, lands, and possessions, not making faith before the charge, may supply it, making faith when the matter is brought in question by suspension.

Fol. Dic. v. 1, p. 332. Haddington, MS. No. 2478.

No. 18. [8031] MUIRHEAD v. LAIRD OF BARSINOK. July 6, 1616.

In an action pursued by George Muirhead v. the Laird of Barsinok, the Lords found the deeds of contravention relevant, which were libelled upon Barsinok, violent entering into the possession of the lands after George was put in, notwithstanding it should happen him to reduce the decret of removing.

Fol. Dic. v. 1, p. 534. Kerse, MS. fol. 232.

No. 19. ANDERSON v. GALBRAITH. December 5, 1616.

In an action pursued by George Anderson v. John Galbraith, the Lords would not sustain a contravention of herding and pasturing, except he would condescend that the goods were violently held on after they were called off.

Fol. Dic. v. 1, p. 533. Kerse, MS. fol. 232.

No. 27. [8033] ANDERSON *v.* BLACKWOOD. February 3, 1629.

It was found no contravention to let in water upon a coal-pit. The party might prosecute for damages.

In an action of contravention pursued by George Anderson *v.* Thomas Blackwood, the pursuer libelled, that he having a going coal in Patrick, and the defender having a wasted coal-heugh upon the croft and rising of the pursuer's coal, out of which the pursuer had drawn all the waste water which could hurt his coal, the defender, out of malice that the pursuer should have a coal going, his own being wasted, let in the water of Kelvin in his own wasted heugh, which presently drowned the pursuer's going coal, to the pursuer's great loss, and prejudice of the country. The Lords would not sustain this libel to infer a contravention, but ordained him to pursue for damage and interest, if he had any; for they thought there was no violent deed libelled; and it might have been likewise that his coal was wasted as well as the defenders, so that he could not sustain great prejudice by the defender's deed; in which case, it had been hard to have condemned him in 1000 merks for the pain of contravention.

Fol. Dic. v. 1, p. 534. Spottiswood (CONTRAVENTION), p. 74.

No. 29. [8034] HEPBURN *v.* TENANTS of Douglas. January 27, 1630.

Hepburn, relict of the parson of Oldhamstocks, having used letters of lawburrows against the Tenants of Douglas, pursues them for intromitting with the teind sheaves, crop 1629, as a deed of contravention; and at the reasoning of the cause, the pursuer is content to restrict her summons to wrongous intromission, which the defenders alleged could not be, because the action of lawburrows and wrongous intromission were of diverse natures; for the one, the cautioner was obliged, and not the other; and in the one, the half of the pain pertained to the King, which fell not out in the other. The Lords would not sustain the action to be restricted or converted.

Auchinleck, MS. p. 31.

No. 30. Laird of WHITTINGHAM *v.* The LADY. December 13, 1631.

A liferentrix plowed land that was found to be no part of her jointure, and after it was sown by the proprietor, she caused it to be sown again. This was found to infer contravention, though violence was not alleged.

The L. Whittingham being provided to the fee of the lands of Whittingham, after the decease of the Laird, his author, pursues the Lady, relict of his said author, for contravention, she being charged and bound to him in lawburrows, upon this deed, that after her husband's decease, she had tilled a part of the lands wherein he was infett, as said is. And she alleging, that that was no deed whereupon contravention could be inferred, seeing there was no violence qualified to have been committed by her, and the tilling of that land, wherein her husband died possessor, and was in possession ever before, could not cause her to incur the pain of breach of lawburrows, specially seeing she was infett in conjunct fee, in the lands libelled, which lay in *confinio* with that piece thereof which is alleged to have been tilled by her, and alleged pertaining to the pursuer; so that there being no declarator, nor trial taken, whether this land pertained to the pursuer, or was comprehended in her infettment, before that was declared she could not be found to have contravened by doing the deed foresaid. And the pursuer replying, that the tilling of the pursuer's ground was enough to infer contravention, where-[8035]-to she had no right, albeit there was no violence otherwise done by her, specially seeing after she had tilled, the pursuer

having sowed the land so tilled up by her, she did thereafter sow the land over again ; and where she excepts upon her infeftment of conjunct fee, the same cannot furnish her a right to the lands libelled, because her infeftment cannot extend to the same, seeing the contract of marriage, which is the warrant of her infeftment, provides her to be infeft in the lands at that time set in Aikerdale : And true it is, that this piece of these lands, for tilling whereof this contravention is craved, was not then set out in acres, but was laboured by the Lairds of Whittingham at that time and since with their own goods, and in mansing, and another part thereof was then set out in acres, which she possesses, as her conjunct fee, and cannot claim the other part of these lands ; specially seeing in this same contract of marriage her husband is obliged to make her conjunct fee lands worth 18 chalders victual ; and the same are worth, and were then worth that yearly duty, by and besides this piece of land now controverted : The defender duplying, that her contract of marriage must extend to all these lands libelled, albeit the words thereof bear her to be appointed " to be infeft in the said lands," with this adjection, viz. " presently set out in acres," for this is no taxative clause, to restrict her right to that part thereof, which was then so set out in acres, and to exclude her from the rest, if any was in mansing, unset out in acres ; seeing she is appointed to be infeft in these lands indefinitely and totally, and is not restricted to any part thereof, by any limiting word, which would have been set down expressly, if it had been so intended by some word to import the same, " as allenarly, or in so far as it was set out in acres," and the words adjoined are only demonstrative, and not restrictive, as the pursuer would mean ; and further, to remove all doubt, she offers to prove, that all lands, and particularly this parcel libelled, was set out in acres the time of the said contract ; and so she being to maintain her infeftment and contract of marriage, ought to be preferred in probation ; and she desires the Lords, in respect there is no violence, and that her infeftment is now drawn in question, to grant commission to some of their number to visit this ground, and to take such competent trial, as the verity may be known and reported to the Lords before this cause be decided : The Lords refused the visitation, and found, that they would presently decide this cause, and they repelled the exception and duply, in respect of the reply, which they admitted to the pursuer's probation ; for they sustained the deed of contravention, albeit there was no violence libelled, and found these words of the contract, viz. " presently set out in acres," not to be demonstrative, but to be taxative, and to restrict her security to so much of these lands as were set out in acres, and not to any further ; and where the Lady duplied, that all was then set out in acres, the Lords preferred the pursuer, replying, that a part thereof was then in the master's hands laboured in mansing.

Act. STUART & CRAIG.—Alt. NICOLSON & MOWAT.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 534. *Durie*, p. 607.

No. 31. [8036] GRANT v. GRANT. January 28, 1632.

It was not contravention that the defender had taken horses from the pursuer's tenant, as the tenant might prosecute for spuilzie.

A contravention being pursued by him to whom caution of lawburrows was found against the party who was bound, and found the caution upon this deed of the breach of lawburrows, viz. because the defender had taken from the pursuer's tenant (who occupied his lands set to him by the pursuer for a yearly duty, to be paid therefor), two horses ; the Lords found not this deed committed against the tenant, to be such a fact, whereupon breach of lawburrows and contravention might be sought at the instance of the tenant's master, seeing neither was there any special charge executed by the tenant, nor any caution found specially to that tenant, neither was the tenant pursuer of this action of contravention, to whom the wrong was alleged done, but only the master of the ground ; for the tenant had his own action unprejudged by this pursuit, or any thing following thereupon against the party, for spuilzie or

wrongous intromission with his horses ; and it was not qualified that the fact done to the tenant had any relation to the master to whom the lawburrows was found, or that the said wrong was done, in regard of the master, or for that quarrel ; but if it had been true, as it was also denied by the defender, yet it might have been done upon some other respect, and for some private question betwixt the defender and that tenant, wherein the master could have no interest ; so that the pursuer not qualifying how that deed libelled did more particularly concern himself, than by that respect (viz. because it was done to his tenant), the Lords found, that they would not grant contravention therefor, specially seeing the tenant's self complained not ; neither was it respected, that the pursuer replied upon the tenor of the act, which bore, That the pursuer, his men, tenants, and servants, should be harmless in their bodies, lands, goods, and gear, &c. ; seeing that was only the common stile of Court in such acts, and the tenants, as said is, complained not.

Act. BURNET.—Alt. GIBSON.—Clerk, HAY.

Fol. Dic. v. 1, p. 534. Durie. p. 615.

* * Auchinleck reports this case.

If a master pursue contravention against him who found him lawburrows, alleging that the defender had spuilzied some goods from the pursuer's tenants, the Lords found not this a deed of contravention to infer against the breach of the lawburrows, seeing the summons was not at the instance of the tenant spuilzied, and the tenant had his civil action for the spuilzie reserved to him to be decided civilly ; for there cannot be two pains for one cause.

Auchinleck, MS. p. 32.

No. 35. [8040] LINDSAY v. DENNISTON. February 9, 1633.

Found in conformity with Grant v. Grant, No. 31, p. 8036.

Lindsay of Bomull pursues Denniston of Dalquharn upon contravention, for coming to the pursuer's land of Bomull, and entering in the house of one who was then actual tenant to the pursuer, dwelling upon the said lands of Bomull, and then taking out of the said tenant's house a cow, and breaking up of the tenant's chest, and taking out thereof, and away with him, three bolls oats, pertaining to the said tenant, which the pursuer libelled to be deeds of breach of lawburrows, seeing thereby the defender was bound, that the pursuer, his men, tenants, and servants, should be harmless at his hands, in their lands, bodies, goods, &c. The Lords found no process upon this contravention, upon this fact libelled, for taking away of the tenant's goods, albeit being within the house of the tenant, upon the pursuer's heritage, seeing the tenant was not pursuer, nor the action at his instance.

Fol. Dic. v. 1, p. 534. Durie, p. 670.

No. 39. [8042] JAMES SELLARS v. NINIAN ANDERSON. July 3, 1778.

After application for letters of lawburrows, and oath that he dreads bodily harm, the person who applies is not bound to specify the facts on which his application proceeded.

James Sellars and his brother and sister were all apprehended on letters of lawburrows, obtained from the Sheriff, by Ninian Anderson, and were liberated soon after, on finding the usual caution. They afterwards brought an action of damages against Anderson, on this ground, that the application for the lawburrows was calumnious and without cause.

In this action, the pursuers insisted, that the defender should specially condescend on, and prove the grounds and causes of his dreading harm. The defender gave in a condescendence ; but, at the same time, contended, that he was not obliged to assign any causes why he dreaded the harm mentioned in his oath, still less to establish them by proof.

Pleaded for the pursuers ; The manner in which lawburrows are obtained, without citation of the accused, or enquiry into the causes of the application, gives room to the committing of much injustice. From the nature of this proceeding, there is no check on a groundless application, nor any means of avoiding the oppressive consequence of imprisonment till caution is found. The laws of other countries are attentive to prevent this injury. Those of England, in granting surety of the peace, require a citation of the party, and an oath specifying sufficient causes of dreading harm ; Blackstone, b. 4, c. 18. In other nations, precautions of a like nature are required ; *Christen. Comment. in leg. Meeklin. t. 4, art. 5.* Anciently in Scotland, though citation was not necessary, it would seem that the complainer was bound to prove some cause of his fear, by his oath or otherwise ; A. 1429, c. 129. Stair, b. 4, t. 48.

But although, in practice now, the complainer is not obliged to specify the causes of his fear, or prove them when the application is made ; yet both ought to be required of him, when called in an action for a groundless application. It is impossible for the pursuer to prove the negative, that the defender had no cause of fear, except by proving that such as he shall specify are without foundation. If, therefore, he is not obliged to condescend, all evidence that the application was groundless is necessarily shut out.

This cannot be the meaning of the law, which allows this diligence to be granted in a summary manner, but does not therefore authorise wanton and groundless applications. In the present action, the defender must assign and prove a rational cause of fear, otherwise damages must be given according to the established rule, that a person injured is entitled to reparation of what he suffers from the rashness and folly of another, as well as from bad design. In the similar case of an application on a *meditatio fugæ*, the creditor may be afterwards called on to support his oath, and must prove sufficient reasons to justify his application, otherwise he will be liable in damages ; Erskine, b. 1, t. 2, § 21.

Answered for the defender ; The law of Scotland requires nothing more to entitle any person to letters of lawburrows, but that he is in dread of harm ; A. 1449, c. 13. They are given to quiet the minds of those under such apprehensions ; and the only effect of them is to oblige the person against whom they are directed to find caution not to injure the obtainer of the letters, which, at any rate, the law would restrain him from doing.

As the dread of harm is entirely a matter of feeling in a person's own mind, it is capable of no proof but by the oath of the person himself. When he depones that he is under such dread, he has proved all that the law judges to be necessary for justifying his application ; and, consequently, though it were that the fear he depones to did not proceed from a sufficient cause, he is not liable afterwards in damages on that account. He is not, therefore, in defence against an action of this kind, obliged to specify, or prove the causes of his fear.

The principle on which lawburrows are granted, does not apply to the case of a *meditatio fugæ*. The effect of the caution likewise required in that case, is to restrain the debtor from what he would be otherwise entitled to do.

The Court were of opinion, That the oath required by the Judge, from the person applying for lawburrows, being only that he is under dread of harm, no action of damages lies merely on account of his not having a good cause for his fear. Malice, or any undue motive in making the application, are relevant grounds for an action of damages. The judgment was, " finding that the petitioner, after application for letters of lawburrows, and his oath taken, is not bound further to justify the facts upon which his application proceeded."

Act. CULLEN.—Alt. CRAIG.

Fol. Dic. v. 3, p. 373. Fac. Col. No. 27, p. 44.

No. 4. [8048] Doctor MONRO *v.* Sir WILLIAM SCOT's Executors. July 6, 1630.

A legacy *ad pios usus*, suffers a proportional deduction, if the funds be not sufficient for all the legacies, unless the legacy *ad pios usus* has been paid in the testator's own lifetime.

The Executors suspending against all the legatarys, that the free gear confirmed would not be so meikle as will pay all their legacies ; and so the legatarys disputing amongst themselves, and Doctor Monro, as doer for the Kirk, alleging, That a legacy of 5000 merks, left for building of a kirk in the Elie, should be totally paid, albeit the rest of the legacies should suffer defalcation, because the same was left *ad pios usus*, which ought to have the preference to all other legacies ; the Lords found, that there ought no preference to be [8049] given to any of these legacies before others, where the free gear was not sufficient to pay all the legacies, and that all should suffer a proportionable deduction ; for all the preference which in law a legacy, *ad pios usus*, had before other legacies, was only where the defunct's gear was sufficient to pay all, "eo casu Falcidia detrahebatur de cæteris legatis, et non de legato ad pias causas, sed quando legata excedunt vires hæreditatis, tum Falcidia detrahitur, tam de legatis ad pias causas quam aliis." And, upon the 15th of July, they found, that a *legatum ad pias causas* being *solutum*, and delivered to the legatar in name of the kirk, and so being perfected by the testator in his own lifetime, should not suffer defalcation with the other legacies, albeit the free gear would not pay all the legacies. And that it was delivered by the defunct himself in his lifetime, was found probable by witnesses.

Act. NICOLSON.—Alt. STUART & LERMONTH.—Clerk, SCOT.

Fol. Dic. v. 1, p. 535. Durie, p. 526.

No. 8. [8052] SPREUL *v.* MILLER. July 21, 1665.

Barbara Miller having left two legacies, and named William Wilson her executor and universal legatar, he nominates his wife, and one Giffin, his executors. Spruel having right to the two legacies, pursues the relict, and executors of Wilson, who was executor to Barbara Miller, for payment of the legacies. He alleges absolutor, because the first testament was not executed ; 2dly, The special legacies must be abated proportionally with the general legacies.

The Lords repelled both the defences, and found the general legacy not to come in *pari passu* with the special ; and found, that the executor of the executor was liable, unless he could allege, that the first executor had done diligence, and had not recovered, or was exhausted.

Fol. Dic. v. 1, p. 535. Stair, v. 1, p. 300.

* * Newbyth reports this case :

Umquhile Barbara Miller, widow in Glasgow, by her latter will and testament, left in legacy to Janet and Helen Millers, her nieces, 500 merks betwixt [8063] them, and nominates John Wilson her only executor and universal legatar ; and the said John names William Govan, and Barbara Miller his relict, executors to him ; both their nominations being confirmed, umquhile Barbara Miller her inventory extends to £1156, who died in anno 1644, and the inventory of John Wilson's testament extends to £933, 11s. 8d., who died in anno 1645 ; the said Janet Miller being on life, assigns her right of the legacy to Andrew Spruel ; and the said Andrew, as executor surrogated to Helen Miller, upon both their titles, pursues William Govan, Barbara Miller, and Henry Murray her husband, for his interest, as executors confirmed to umquhile John Wilson, whilk umquhile John Wilson was executor confirmed to the said Barbara, who left the said legacies. It is alleged there can be no process against the defenders for payment of the said legacies, because John Wilson being executor, and deceased before recovery of the goods, the benefit of executry pertains to the nearest of kin of

the said umquhile Barbara Miller, which they may do by a dative *quoad non executi*. To which it was replied, That as the said John Wilson was executor, so he is universal legatar, and thereby the nearest of kin is excluded ; and the pursuer representing the defunct who left the legacy, being executor to the said John Miller, which John Wilson was executor to the said Barbara who left the said legacies, they are liable in payment thereof, for they are *heredes heredis*. 2do, It is alleged the defender cannot be liable, but effeiring to what is received, and the defenders ought to have defalcation *pro rata bonorum*. To which it was duplied, That the defender having confirmed the said testament, the inventory thereof far exceeds the said legacies, he ought to postpone his allegiance upon full and exact diligence, and of not recovery after full diligence, and to be special therein. 3tio, A special legatar ought to have preference to a general legatar. 4to, It is alleged, that there being two executors nominate to the said John Wilson, the defender can only be liable effeiring to the said legacies. To which it was answered, That the pursuer has converted both the executors of the said John Wilson, viz. William Govan, and the said Barbara Miller his relict, who were executors to the said John Wilson, and were both on life, and the inventory far exceeding the two legacies, the defender ought to pay the same ; and the pursuer is content to find caution, in case any debts arise to impair and diminish the legacies ; and albeit he had convened but one executor, the total legacy being far within the half of the inventory, which is the practice received ; because the one executor libels *in solidum*, where he claims only his proportion of the inventory, for he may pursue his other executor for relief ; except the defender would allege, that the hail inventory, after lawful diligence, were not able to equal the payment of the hail legacy and expenses.—The Lords found, that the executors of the executor had good right to pursue for the legacy contained in the first executor's confirmed testament ; and that the first executor being also universal legatar, the legacy was transmissible in the person of the next executor, albeit the testament was not execute, and so fell not under *quoad non executi*.

Newbyth, MS. p. 39.

No. 13. [8056] MITCHEL v. LITTLEJOHNS. December 14, 1676.

A bond of provision, granted upon deathbed, obliging the defunct, his heirs, &c., though it could only take place in the dead's part, was yet found preferable to a legacy, though the legacy bore an obligation upon the heirs and executors to pay the same, for a legacy is only a succession, and cannot therefore compete with a *jus crediti*.

Fol. Dio. v. 1, p. 535. Stair. Dirleton.

No. 15. [8059] CRANSTON v. BROWN. December 2, 1674.

Legatum rei alienæ is effectual, if the testator knew it was not his own. The executor must pay the value. Otherwise, if he supposed the thing his own.

Mr. Robert Cranstoun, minister, having legated to the said Robert Cranstoun the sum of five hundred merks, for security whereof he had an infetment ; the legatar did pursue John Brown the executor for payment thereof for to transmit the right of the infetment by serving himself heir, or making of a disposition. It was alleged, That the sum legated being an heritable sum, could not fall under testament, and so the testator *fecit quod non potuit*. It was replied, That albeit the sum legated was heritable, yet it ought to affect the moveables, which were opulent, seeing it was *speciale legatum*, and the defunct declaring his full intention that the same should be effectual having left his apparent heir his executor, he is far more liable than if he were in the case where he had made a legacy of that which belonged to another than himself, *quo casu* the executor *tenetur luere vel valorem præstare*, as was decided Drummond v. Drummond, No. 10, p. 2261, in the case where an heritable bond was disposed. 2do, It is offered to be proved, that the executor had homologated the

legacy by the delivering of the evidents of the heritable infestment. The Lords, after much reasoning, did repel the defence; which seems to be hard, seeing if this be granted it would give power, by testament, to dispoise of heritable rights, which is not *habilis modus* by our law; and the privilege of *speciale legatum* is only to give the legatary privilege above common legacies. *Gosford, MS. No. 716, p. 433.*

* * Stair also reports this case :

December 2, 1674.—Mr. Robert Cranston, by his testament, nominates Elizabeth Cranston his sister, and John Brown her son, his executors and universal legatary, and leaves to Robert Cranston 500 merks due to him by an heritable bond, upon which there was infestment; who thereupon pursues Brown the executor, being likewise heir, to make good this legacy out of the execu-[8060]-try, to denude himself thereof as heir. The defender alleged absolutor, because this being an heritable sum, the legacy thereof was void and ineffectual, and all that he could be obliged to do, was to give an assignation as executor, with warrandice from his own deed; for legacies being donations, have no further warrandice; which assignation would have no effect, nor would the debtor be obliged thereupon to pay, because the defender as executor hath no right to the sum, and as heir is not liable for any legacy. The pursuer answered, That law hath such respect to fulfil the will of defuncts, that when they legate that which is not in their power to legate, and is so known to them, it is understood to be their will, that the executor should purchase the thing legated for the legatary; but if the testator knew not the right of another, he legates any thing as he has it *cum periculo*; and here this testator did legate that which he could not legate, being heritable, and is presumed to know it was so, and mentions the sum as due to his father, and could not be ignorant of the infestment of getting annualrent, so that albeit it be *legatum rei suae*, yet seeing he could not legate effectually, it is equivalent as if it had been *legatum rei alienae scienter legatus*, the reason of the law from the presumed will of the defunct being one in both;

Which the Lords found relevant. See *QUOD POTUIT NON FECIT*.

Stair, v. 2, p. 287.

No. 19. [8062] WILLIAM GRAY, Son to ADAM GRAY, Feuier in Dunse, and ADAM for himself, and as Administrator-in-law to his Son v. WILLIAM COCKBURN of Caldra. December 27, 1711.

An executor cannot charge for payment of a special legacy, but only the legatee.

William Nisbet, flesher in Dunse, having named William Cockburn to be his executor, to pay his debts and legacies, to put on a through-stone upon his grave, and to finish the building of a tenement in Dunse out of the first and readiest of the executry; and having left several legacies, particularly a special legacy of £457, with annualrent thereof, contained in his father's bond granted to the testator; William Gray and Adam his father complained to the Lords of William Cockburn, for his unwarrantable charging Adam Gray, as administrator-in-law to William Gray, with horning, denouncing and registering him at the horn for the said debt, as due to him *qua* executor to William Nisbet; albeit the debt was specially bequeathed and assigned to William Gray in the very body of the testament, the charger's title.

Answered for the charger; If the legatary had no right till the testament be executed, and the debts and deeds preferable to the legacy were paid and performed, the executor had *jus exigendi*, that he might either pay it to the legatary, or be accountable to him for the same out of the free gear, *actione ex testamento*, Laird of Balnamoon *contra* Laird of Balcomy, No. 25, p. 3844; Forrester *contra* Clerk. No. 36, p. 2194; and he the executor must be discharged with respect to this legacy; so that there is no ground of complaint against Caldra, for his using *jure communi*. It is true, by the Roman law, *legatarius* might recover *legatum speciei, rei vindicatione*; but *legatum nominis* could only be recovered *condictione certi*, at the instance of the heir, against whom the legatary had action competent to him, *ex testamento*.

The Lords found the charge of horning unwarrantable, and ordained the horning and executions thereof to be put in the clerk's hands, that the same might be cancelled and razed at the signet.

Forbes, p. 563.

No. 21. [8063] Mr. FRANCIS WAUCHOP of Kackmure, Advocate v. WILLIAM WILSON, Merchant in Edinburgh. July 3, 1724.

When a special legacy is appointed to be paid out of a particular fund, the executors are not liable if the subject should perish.

William Wilson, the defender's grandfather, in his latter will and testament, anno 1659, named his infant sons his executors and universal legatary; and appointed his wife, and some other friends, tutors to the children.

In this testament, he left 20 merks yearly to his sister Margaret, during her lifetime, and likewise a very considerable legacy to his wife, which he expressly burdened with the payment of all his debts, and of the annual legacy to his sister; and the wife subscribed the testament with the husband.

Anno 1661, the tutors confirmed the testament; and the merchant goods, and others bequeathed to the wife, were given up in inventory.

Mr. Wauchop having acquired right to Margaret's legacy, insisted against Mr. Wilson, as representing his father and uncle, the executors, upon the passive titles, for payment of the annual legacy, due for many years; and contended, That an executor was obliged to execute the testament, by paying the debts and legacies, so far as the inventory does extend; and, in this case, the testament was confirmed in name of the children, and the goods, and others specially legate to the wife, were given up in inventory; and, therefore, the defender ought to be liable in payment of this legacy, which was a burden upon the wife's; 2do, That legacies, especially to near relations, were so favourable, that, should a testator legate a *res aliena*, the executors would be obliged to purchase it for the behoof of the legatar; 3tio, That, in this testament, the relict was burdened with the payment of his debts as well as legacies; and, as the creditors would have action against the executors, and not be left to make out their payment from the relict, so must the pursuer, whose claim was equally a burden on the executry; and, as to them both, the obligation upon the relict was no more than an accessory security.

It was argued for the defender, That, when a special legacy is appointed to be paid out of a particular fund, the executors cannot be liable, if the subjects should perish; because, the legatar ought to have secured himself, before the fund of his payment was dilapidated; and though, in the present case, the executors had confirmed the relict's legacy (which was occasioned from the custom at that time, that the Commissaries would not admit of a partial confirmation), yet she continued in possession of the goods, and for some years regularly paid the legacy pursued for, which appeared from a discharge in process.

As to the argument from a *legatum rei alienæ*, and from the relict's being burdened with the payment of debts, it was answered, That the first could not be regarded, unless the pursuer could allege, that the testator had not left [8064] as much to his relict as would have paid this and the other legacies; nor could the second, because debts became a burden *ex lege*, and the debtor's whole effects are subject to the payment of them; whereas, legacies are only *ex voluntate testatoris*, and the rules prescribed by him are precisely to be observed, and they payable out of such funds as he had allotted for them.

The Lords having considered the discharge produced, granted by the pursuer's author to the relict, assoilzied the defender.

Act. IPSE.—Alt. Jo. HORN.

Edgar, p. 67.

No. 22. Competition, MARGARET HAMILTON with Mr. WILLIAM GRANT, Advocate.
February 6, 1736.

A legacy of a bond of corroboration found to have been derogated from by a posterior legacy of another bond, which made part of the first.

The deceased Mr. George Meldrum was creditor to Duncan of Straithmartin by a bond, dated 11th December 1702, for the sum of £520 Scots ; and, on the 24th of June 1704, Straithmartin granted an heritable bond of corroboration for this, and other sums he was then due to Meldrum, extending to £1250 Scots. Meldrum, in the settlement of his effects, disposed to Justice Meldrum, his nephew, the sum of £1250 Scots, in the following terms : " Item, to the said Justice Meldrum, the sum of £1250 money foresaid, annualrents thereof, bygone and to come, liquidate expenses, and termly failzies, contained in an heritable bond, granted by Alexander Duncan of Straithmartin to me, dated 24th June 1704, and in my sasine following thereon."

After which, follow three or four legacies to other persons ; and then the following one is subjoined ; " Item, to William Grant, second son to Sir Francis Grant of Cullen, my nephew, £520 Scots principal, annualrents thereof, bygone and in time coming ; and £150 of penalty, contained in another bond, granted by the said Alexander Duncan of Straithmartin to me, dated 11th December 1702."

As the heritable bond of corroboration for the £1250 happened to be made up in part of the £520 Scots bond, a competition ensued betwixt Margaret Hamilton, as coming in the right of the deceased Justice Meldrum, her husband, and Mr. Grant.

For Margaret Hamilton it was pleaded, That the whole sum of £1250, contained in the heritable bond of corroboration, was, by the testator, specially made over to her husband, without any restriction ; therefore, the subsequent legacy to Mr. Grant, of another bond of £520, could have no effect, since none such appears, other than that of the same date and sum, which is corroborated by the heritable bond assigned to Justice Meldrum. Further, it was plain, from the words of the legacy to Mr. Grant, that the testator believed he had a bond due to him by Straithmartin, other than that which in part [8065] composed the £1250 ; as the adjection of the word another shows that he supposed the one of which he was then speaking to be a quite different debt from any of those contained in the heritable bond : So that the legacy to Mr. Grant carried in it the implied condition of a debt being due to the testator by Straithmartin, other than the £1250, the non-existence of which must void the legacy, conform to l. 75, § 1 and 2, *De Leg.*, nor does it make any difference, that Straithmartin was truly owing £520 Scots, by a moveable bond, of the date described in the settlement ; seeing, in the preceding part thereof, it was bequeathed to her husband, as, part of the £1250 ; from which there is no reason to presume an intention to make any derogation.

On the other hand, it was argued for Mr. Grant, That the assignation in his favour was as express and particular as any other in the settlement ; a proof that it was intended to leave this bond to him, which was then in the testator's hands, as well as the corroborative bond ; therefore, he ought to be preferred to the general assignation of an accessory corroborative security, containing several other sums in favour of Justice Meldrum ; as it must, in so far, be understood to be restricted by the subsequent special legacy of one of these sums to him, agreeable to the doctrine laid down in l. 2, *pr. D. De Trit. vin. vol. ol. legat.* and l. 99, § *ult. De Legat.* 3.

Besides, it is a rule, that, where the accessories are legated to one, and the principal subjects to another, the first must vanish in competition with the last ; as is plain from § 17, *Inst. De Legatis*. The application whereof to the present question must have the greater force, when it is considered, that his legacy is posterior in order to Justice Meldrum's ; which, as it might have been annulled or restricted by a subsequent writing, so there appears no reason why the donor could not do it in the same deed.

As to the argument drawn from the adjection of the word another, it was answered, Imo, That it must be supposed to refer to the bond mentioned in the immediate preceding clause, which was another bond due to the testator, though by a different debtor.

2do, *Esso* it referred to Straithmartin's, it is no evidence the testator believed that this £520 Scots bond was not corroborated by the heritable one. And, abstracting from the general presumption, that every man knows the state of his own effects, it is plain, from the particular recital of debts and sums in the settlement, that he knew the one was corroborated by the other; consistent with which he might properly call it another bond, as they were two separate deeds; and, if he knew it, the second bequeathment can bear no other meaning but a restriction in part of the former.

The Lords preferred Mr. William Grant to the bond of £520 Scots, principal, &c., and upon the heritable bond of corroboration, in so far as relates thereto.

C. Home, No. 11, p. 31.

No. 23. [8066] Legatars of JOHN CALDWALL, Merchant in Barbadoes v. THOMAS CALDWALL. June 24, 1736.

A legacy of £20 Sterling for a suit of mourning, found preferable to other legacies of sums of money, to the extent of the probable cost of the mournings.

These legators brought a process, for payment of part of their legacies, against Mr. William Caldwell, merchant in Leith, and which, after his decease, was transferred against the said Thomas, his executor, as having some of the said John Caldwell's effects in his hands.

The defence offered was, That there being £20 Sterling left to each of the executors for mournings, the defender, who was one of them, was preferable for that sum.

Answered, That the legacy of £20 to the defender was only a general legacy, as well as those left to the pursuers; therefore, all of them must come in *pari passu* upon the executry. Neither can the purpose for which it was to be applied vary the rule; seeing it is only mournings to such as are in the defunct's family, and not to strangers, that have a preference as part of the funeral expenses.

Replied, That, where there are special legacies left to certain persons, and sums of money to others, if the executry prove deficient, the special legacies suffer no deduction. Now, this was truly a legacy of a suit of clothes, which the defunct appointed to be taken off by each of his executors after his death; so that it is the same in effect, as if he had legated a suit of clothes, of £20 value to each of them; and when such appointments as these are made by the defunct himself, they become part of the funeral charges, which, by the nature of the thing, must be immediately laid out (as was the case here), at least before any gratuitous legacy can be paid.

The Lords found the defender preferable for the mournings bequeathed, which they modified to £10 Sterling, and *pari passu* as to the remainder.

C. Home, No. 25, p. 49.

No. 25. [8072] Mrs. JEAN WHITEFOORD, &c. v. CHARLES AYTON and his SPOUSE. November 3, 1742.

A missive of the following tenor, "I give you my watch, chain, and seal, which you shall enjoy after my death," was found sufficient to constitute a legacy or *donatio mortis causa*.

Anno 1734, Doctor Hamilton, intending to make Mrs. Whitefoord a present of his watch, chain, and seal, executed this intention, by writing a letter to her in the following words: "I give you my watch, chain, and seal, which you shall enjoy after my death."

The Doctor lived about two years after the date of the letter, and having fallen sick and died in the house of Charles Ayton, Mrs. Whitefoord brought an action against Ayton, for delivering up the watch, &c., to her; and having referred the having thereof to his oath, he deponed, "That, when he attended the Doctor, anno 1736, at the

goat-whey, he delivered the watch to the deponent, desiring him to keep the same for the use of the deponent's son."

To this the pursuer objected, That nothing had been referred to the defender's oath, but simply the having the watch; *ergo*, the quality which he had added, *scil.* "that it was given to him for the use of his son, was extrinsic, and ought not to avail him." Whereupon the defender offered to prove the particulars, mentioned in his oath, by witnesses.

Answered for the pursuer, That supposing the fact true (which is very improbable), it is not relevant; Imo, Because, the letter imported an absolute and irrevocable donation *inter vivos*. The gift was simple, only the term of delivery was suspended till the death of the giver. The adding the death of the giver to a donation or promise, does not *per se* constitute a *mortis causa* donation, unless a clause of return, or power of revocation, were expressly reserved by the giver. See § 1, *Inst. De donat.* l. 42, D. *De mortis causa donat.* and Voet. § 4, *ad tit. D. De donat.* 5th December 1672, Galloway, No. 57, p. 4959.

It is, therefore, of no importance to prove the particulars in the defender's oath; for, upon the supposition, that the prior donation in favours of the pursuer was absolute and irrevocable, as it did infer warrandice from fact and deed, so it was not thereafter in the granter's power to do any gratuitous deed in prejudice thereof. But supposing, for once, that the letter should only be interpreted a legacy, or donation, *mortis causa*, yet, even in that view, it is believed, the delivery to the defender, as narrated in the oath, must be constructed in the same manner, since the one seems to be done as much *intuitu mortis* as the other; if so, the question comes to this precise point, How far a special legacy, being once constituted by writ in favours of the pursuer, could thereafter be taken away by a nuncupative legacy of the same subject to the defender? As to which it is plain, that as our law is extremely jealous of all kinds of proof by witnesses, so it is a rule, that the testimonies of witnesses are not admitted to prove in cases where writ may, and uses to be adhibited. [8073] And if this holds in the general, it ought *a fortiori* to obtain, that a proof by witnesses ought not to be sustained, so as to take away a right or obligation which is once constituted by writ; since, in this case, the general rule is aided by the common principle of law, *unumquodque eodem modo*, &c. See the 18th February 1631, Houston, *voce* PROOF. Lastly, it was observed, That the watch was worth about £30 Sterling in value; and so could not be carried by a nuncupative testament, as such are not effectual beyond £100 Scots.

Replied, All the quotations from the civil law, adduced for the pursuer, relate to the case of donations completed by delivery, which does not apply to the case in hand, where the property and possession still remained with the Doctor; consequently, there was nothing to hinder him to dispose of it otherwise during his life, as he really did. Upon this principle, he could not be liable in warrandice on the missive; or supposing he was, yet those that got the bulk of his effects would be liable in the same; but it is very plain from the common principles of law, that the first delivery must be effectual to convey the property; and the quotation from Voet shows this to be the case, with an exception as to deeds granted by the Prince. In the next place, supposing the missive imported no more than a legacy, or *donatio mortis causa*, which is plainly the case, then it was absolutely in the Doctor's power to adhere to it or not, to give away the subject, or to leave it among his effects, to be forthcoming to the legatee or not. Could not the Doctor have gifted his watch to a stranger? and could he not have gifted it, even *mortis causa* to any person, by giving it out of hand? Indeed, if he had made only a verbal legacy in relation thereto, subsequent to the legacy by writ, there might be a doubt in the case; because verbal legacies cannot be proved by witnesses beyond £100 Scots; but in every case, the delivery of the *ipsa corpora* of moveables, may be proved by witnesses, and the intent for which the delivery is made, or title whereon, may be proved by witnesses, though the thing be of never so great value; as in all bargains about moveables, because the law supposes there is no danger of mistake in such a case.

The Lords found the defunct's letter does constitute a *donatio mortis causa*, in favours of the pursuer, and that a proof by witnesses is not competent, in this case, to take away the effect of a donation constituted by writ, and create a new legacy of the same.

C. Home, No. 206, p. 342.

No. 31. [8080] ARCHIBALD ARBUTHNOT, ROBERT GORDON, and MARGARET GORDON
v. ELISABETH ARBUTHNOT. February 13, 1756.

A legacy was left, after others, in these words, "And the remaining £600, residue of the said £1600, I bequeath to A.B." A deficiency having happened of the total fund, this was found a special legacy, and the legatee entitled to draw proportionally with the others.

In July 1750, Robert Arbuthnot, in his marriage-contract with Mary Arbuthnot, became bound to secure £900 Sterling of his own, and £700 of his wife's, with half of the conquest to the wife in liferent, and to the children of the marriage in fee, declaring, That whatever he should be worth at the dissolution of the marriage over £1600 should be esteemed conquest; in case one daughter only should exist of the marriage, the fee of the £1600 was declared restricted to £800.

Of this marriage there was one daughter, Elizabeth.

[8081] In February 1752, the father, then residing in England, executed a will, in which he "ratified his contract of marriage, and bequeathed to his wife £200 over her provisions by that contract, and bequeathed all the residue of his estate to his daughter Elizabeth, subject nevertheless to his contract of marriage.

"In case his daughter Elizabeth should die in the lifetime of her mother before majority or marriage, then he bequeathed to his wife all his plate and furniture, and also bequeathed to her the residue of his estate; subject nevertheless, after her decease, to the payment out of the said sum of £1600 of several legacies in favour of Robert Arbuthnot, Robert and Margaret Gordon, amounting to £1000, and the remaining £600, residue of the said sum of £1600, he gave and bequeathed to such person as his wife should appoint; and failing such appointment, to her nearest in kin." The wife and other friends he named executors.

At the time of making this will, 10,000 merks of the £1600 was heritably secured in Scotland; and therefore could not be conveyed by testament.

Soon after the testator died, and the wife, as executrix named, intromitted with all his effects, both in Scotland and England, except the heritable bond.

Elizabeth the daughter died in July 1753; and Mary the wife having returned to Scotland, also died in March 1754, having made a settlement in favour of Elizabeth Arbuthnot her sister.

An action was brought by the legatees against Elizabeth, who produced an account; by which it appeared, that the total fund, exclusive of the heritable bond, amounted to £1052 Sterling.

Pleaded for Elizabeth; That she was entitled, in right of her sister, first, To retain £200 as a *præcipuum*, to which Mary the wife became entitled immediately upon the death of the testator, leaving a daughter; and as this £200 was given to the wife, in preference to the daughter of the marriage, much more was it meant to be given to her in preference to the legatees. Secondly, That she ought to be ranked on the balance for £600 equally with the other legatees.

Answered for the legatees; The defunct's last will contains two separate settlements of his whole estate in two several events. If his daughter Elizabeth should survive her mother, or should live till majority or marriage, he then gave to his wife £200, and all the rest to his daughter: But if his daughter should predecease his wife before majority or marriage, he then settled his whole fortune in a different manner; he gave £1000 of legacies to the pursuers; and the residue, which he believed would amount to £600, he gave to his wife.

In the event, therefore, of the daughter's dying under age, it was not intended that Mary should have £200 as well as £600, since the testator's effects, at the time of making the will, amounted only to £1600, and were not sufficient to pay £800 to her and £1000 to the other legatees.

[8082] Neither could she claim to be ranked equally with the other legatees for £600; because that sum was not left to her as a special legacy, but was conceived in terms of a residuary legacy; and although the testator had expressed what he imagined would be the amount of the residuary legacy, yet, as the form of words in which the legacy was conceived would certainly have entitled Mary to any surplus, if the funds had exceeded £1600, the same form of words must also be held to import a

residuary legacy, so as to burden her with the loss arising from the deficiency of the funds. In support of this l. 75, § 2, *D. De legatis*, lmo, was quoted.

Replied, The testator evidently intended by the will to favour his wife more than the other legatees. He bequeathed to her indeed £600 after the other legacies, and in form of a residuary legacy, not with any intention to subject her alone to the burden of any deficiency, but because he believed no deficiency would happen; and thought it therefore immaterial in what form the legacy was conceived. The words annexed to her legacy of £600 ought in this case to be considered in the same light as a *falsa demonstratio* in the civil law, and not as a *falsa causa*.

"The Lords found, That in the event which had happened, the wife had no right to the sum of £200 as a *præcipuum*; but that she had right to the sum of £600 as a special legacy equal with the other legatees."

Act. JOHNSTONE.—Alt. D. DALRYMPLE, LOCKHART.—Clerk, JUSTICE.

J. D.

Fol. Dic. v. 3, p. 377. *Fac. Col.* No. 188, p. 379.

No. 32. JANET MITCHELL, Relict of James Kay of Edinbelly v. THOMAS WRIGHT of Easter Glen. November 21, 1759.

A donation *mortis causa*, of a sum of money exceeding £100 Scots, is effectual without writ, and may be proved by a quality of the party's oath.

John Wright, by a settlement made three years before his death, conveyed to Jean Kay, his spouse, all debts and effects that should belong to him at his decease.

Jean Kay survived her husband a short time; and by her testament appointed her mother Janet Mitchell her executor; who was afterwards confirmed executrix dative *qua* creditor to the said John Wright, in implement of his general disposition to his wife.

Upon this title Janet Mitchell brought an action before the Sheriff of Stirling against John Wright, the father of the said deceased John Wright, for payment of 1000 merks, said to have been put into his hands by young John a few days before his death.

The libel being referred to the defender's oath, he deponed, "That four or five days prior to the death of John Wright, the deponent's second son, the said defunct being then on his deathbed, gave to the deponent 1000 merks [8083] Scots, to be delivered to Margaret and Mary Wrights, the deponent's daughters, equally betwixt them, by way of gift; and which the deponent accordingly delivered to them about six months after the defunct's death; and which sum was delivered to the defunct by Jean Kay, then the defunct's spouse; that if the defunct had lived any considerable time after, he would have returned the money to him, as the defunct desired the deponent not to deliver it till after his death."

Upon advising this oath, the Sheriff "found, That the defender's son, by his nuncupative testament, could only, by law, leave £100 Scots, to each of his sisters, and restricted the sum left to them accordingly; and found the defender liable for the balance."

John Wright obtained a suspension; and afterwards dying, the process was carried on by Janet Mitchell against his son and representative Thomas Wright.

Pleaded for the charger, That it appears from John Wright's oath, he was desired by his son not to deliver the money to his sisters till after his death; and that if his son had lived any considerable time after, he would have returned it to him; which proves that the property of the money was not transferred during the lifetime of John Wright the son: That therefore it can be considered in no other light than that of a legacy, or donation *mortis causa*; and as writing, by the law of Scotland, is essential to the constitution of a legacy of a greater extent than £100 Scots, this verbal legacy to each of the sisters cannot be sustained beyond that sum.

Pleaded for the suspender, lmo, This was not properly a legacy, but rather a gift or donation *inter vivos*, as the money was given away by the donor in his own

lifetime, and the father or sisters were under no legal obligation to return it. 2do, Supposing it to have been a legacy, yet it must subsist without writ, though beyond £100; for although a nuncupative legacy of a sum beyond that amount cannot be sustained, *propter lubricam fidem testium*; yet it is thought, a legacy of a specific debt or subject to a greater extent may be constituted and proved otherwise than by writ, Dirlerton and Stewart, *voce* LEGACIES. And further, in this case, the proof does not rest upon the bare emission of words, but is established and made effectual by delivery of the money. 3tio, The quality of John Wright's oath, that the money was given him to be delivered to his daughters, is intrinsic. The only mean of proof for establishing the charger's claim, was his oath for instructing that the money was put into his hands; so it cannot be divided, but must also prove the ends and purposes for which the money was deposited.

Answered for the charger, The quality of the oath can have no greater effect, than if the father had been *ab ante* custodier of the money, or debtor to his son for any other cause; and it would be dangerous, if every custodier or debtor had it in his power to give away the defunct's effects to a third party, to the greatest extent, by swearing to a verbal order or legacy. Again, [8084] the mere act of delivery imports no transmission, without legal evidence of the will or intention of the testator; and that cannot be legally expressed or proved but by writing. Supposing, therefore, the fact were true, that the defunct gave his father such an order, to deliver the money to his sisters; yet that destination being only appointed to take effect after his death, was truly a legacy, to the constitution of which, of whatever kind, beyond the value of £100 Scots, writing is required, not only as the mean of proof, but as an essential solemnity, equally as in the nomination of an executor, the appointment of tutors and curators, or the conveyance of heritage; Schaw *contra* Lewis, No. 47, p. 4494; Bankton, b. 3, t. 8, par. 6.

Replied, There can be no danger in admitting such a quality as an intrinsic part of the oath, when the debt can only be constituted against the party by his oath. If the party has no regard to an oath, he might as easily swear away the debt altogether, and of which there would be a much greater risk, than of his swearing falsely in favour of a third party.

Observed on the Bench, 1mo, This is not a legacy, but a gift or donation *mortis causa*, which differs from a legacy, in so far as it is done *de præsenti*, though the effect of it is suspended till the donor's death. Upon this distinction, it is now understood (though it was not so anciently), that a man may effectually convey his heritage in his testament, reserving his liferent, and a power to alter, providing he uses the *verba de præsenti*, such as "give, grant, or dispose," and not "legate or bequeath." The rule as to writ being essential to legacies, therefore, does not apply to this case, in respect of the delivery of the money, which was the same as if it had been made to the sisters themselves, and was a deed *inter vivos*, though only *mortis causa*. 2do, The quality of the oath is intrinsic. It is laid in the libel, that a certain sum belonged to the defunct at his death, and was put in the defender's possession; the mean of proof is the defender's oath, and his oath does not prove, that the money belonged to the defunct at the time of his death.

"The Lords sustained the reasons of suspension, and suspended the letters simpliciter."

Act. MILLER.—Alt. MACQUEEN.—Reporter, STRICHEN.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 378. *Fac. Col.* No. 200, p. 357.

No. 35. [8087] JOHN ROBERTSON, and other Executors of JAMES MACCOMIE, Merchant in Aberdeen *v.* ISOBEL and RACHEL STRACHANS. July 29, 1760.

If an executor confirmed received sufficiency of funds for payment of both debts and legacies, the legatees are not liable in repetition to the creditors upon his insolvency.

William Strachan, senior, Merchant in Aberdeen, in 1745, granted bond to the executors of James Maccomie for £1000 Scots.

Strachan died in 1747; when it appeared, that he had, as early as the 1735, made a testament, by which he appointed his wife Rachel Baxter to be his sole executrix; "and, after payment of his debts, he legated to his two sons, William and James, two-third parts of his hail effects; and to his two daughters, Isobel and Rachel, the other third part thereof."

Rachel Baxter having predeceased her husband, no confirmation was expedite on the testament; but William, the eldest son, was confirmed executor *qua* nearest in kin to his father. In the inventory, the debts contracted by the defunct, in a copartnery with his son, the executor, were deducted; but Maccomie's debt was not; and the sum confirmed amounted to £700 Sterling, besides some heritage, which was collated by William.

Isobel Strachan had, before her father's death, received at her marriage 3000 merks; and William, the executor, afterwards paid her £100 Sterling in full of her share. To Rachel he granted bond, in 1749, for £240, as her proportion; which he afterwards paid in September 1754. To his brother James he also paid, or granted security, for his share.

After all these payments, there remained a sufficient fund in his hands, both to answer the defunct's debts, and the proportion provided to himself.

William Strachan likewise made sundry partial payments of the debt due to Maccomie's Executors; whereby it was reduced, in the 1754, to a balance of £383, 6s. 8d. Scots.

Towards the end of September 1754, William Strachan's affairs went into disorder, and he became bankrupt.

Maccomie's Executors thereupon brought an action, not only against the cautioners in William's confirmation, as executor to his father, but also against James, Isobel, and Rachel Strachans, as representing their father, on the passive titles, or as having intromitted with his effects, for payment of the balance of the said debt; but James Strachan died during the dependence.

Pleaded for the pursuer; 1mo, William Strachan was not confirmed executor upon his father's testament, but as next of kin; and the defenders stood in equal degree with him, and drew their shares as such. He was only their trustee, and therefore all should be liable as if they had been conjoined in the office. 2do, One to whom a certain share, such as a third or fourth of the defunct's effects, is bequeathed, is termed a *legatarius partiaris*, and is liable *in valorem* for the testator's debts; and supposing the testament to have been here followed as the rule, the defunct therein expressly provided, that his children should [8088] only be paid their shares after his debts were cleared; which made those debts a burden on their shares. And, 3tio. Legacies of all kinds are only due *deductis debitis*, in so much, that if an executor has made payment *bona fide* to the legatees, and creditors of the defunct afterwards claim, an action of repetition lies against the legatees proportionally; Stair, b. 3, t. 8, § 70.

Pleaded for the defenders; 1mo, The predecease of the executor nominate did not invalidate the testament, but any of the legatees might have confirmed upon it; and although the eldest son confirmed as next of kin, yet the testament was the rule observed in settling the children's proportions of the funds. The person who is confirmed as executor, whether as nominate, or as nearest of kin, comes to have the sole administration, as representing the defunct, and is alone liable to the defunct's creditors. 2do, A legacy, indeed, is not due unless there be a sufficient fund for the payment of it, after deducting the defunct's debts; but if there be a sufficient fund, as there was in this case, and the legacy is accordingly paid, the subsequent insolvency of the executor, without clearing the defunct's debts, although he was left sufficient for doing it, cannot subject the legatee, even though he should be one of the defunct's children; because such legatee does not take by succession or intromission, but by gift, and the defunct had the absolute disposal of the free effects, after deducting his debts. This testament did not burden the legatees with the payment of debts, but only declared their legacies to be a proportion of the free surplus, after deducting debts, and they receive no more. And, 3tio, Legatees receiving their money in this way think themselves *in bona fide* to use it, and have no action to oblige the executor to apply the funds retained for payment of the debts; and it would be very hard if the creditors, by neglecting to claim payment from the executor while solvent, should have it in their power to subject the legatees, at a great distance of time, to make

good the debts out of the money they had thus *bona fide* received, and perhaps consumed.

The Lords assoilzied Isobel and Rachel Strachans.

Act. D. RAE.—Alt. JOHNSTONE.—Clerk, PRINGLE.

D. R.

Fol. Dic. v. 3, p. 374. Fac. Col. No. 241, p. 440.

No. 36. MARION WRIGHT and her Husband v. MARGARET and MARY WRIGHTS.
February 11, 1761.

Legacy cannot be constituted in the form of a bill.

John Wright of Easter-glins died in 1751, leaving issue, Thomas Wright, who succeeded him in his land-estate, and Margaret and Mary Wrights, who succeeded to the executry.

Thomas Wright the son had a natural daughter named Marion, who, at the age of ten, had been taken into John Wright's family; and a year before his death, when she was about 16 years old, received from him a bill drawn in her [8089] favour for 1000 merks Scots, payable the first term of Martinmas after his decease.

In a process at Marion's instance against her father the heir, and against Margaret and Mary Wrights the executors of John, before the Sheriff of Stirling, for payment of this bill, the Sheriff having, before answer, ordained the pursuer to condescend on the value for which the bond was granted; Marion condescended, "That she had served John Wright as his housekeeper for seven years and upwards, and that the bill had been granted in payment of her wages for said service." At the same time she acknowledged, that there had been no particular stipulation for wages. The Sheriff sustained the bill as a good ground of debt, and decerned for payment.

Pleaded for Margaret and Mary Wrights, in a suspension of this decree; From the charger's own condescendence, it is plain, that no value was given for this bill; she was but ten years old when she went to live in Mr. Wright's house, and she was only seventeen when he died, so that her services when in his family were of very little value; he did not keep a servant less upon her account; and, at any rate, her aliment, during that time, was a sufficient recompense for her supposed services. The bill therefore must be considered as a mere donation or legacy; which is further evident from this, that it was taken payable at the first term after the grantor's death, which might not have happened for 20 or 30 years from the date. A writing of this kind is null and improbativ by the law of Scotland, being destitute of those solemnities required by the Act 1681. It is true, that bills are an exception from the statute, and have many extraordinary privileges; but then they must be confined to their own proper sphere of facilitating commerce; when converted to other uses, they have no privilege, and are altogether improbativ, as not clothed with the legal solemnities. The constituting a donation or legacy, is a transaction in which trade is no way concerned; and therefore a bill granted in that view, and for that purpose, is a null deed; so it has been found in a variety of cases, 13th February 1724, Hutton *contra* Huttons, No. 19, p. 8062; Home, 9th November 1722, Fulton and Clerk *contra* Blair, No. 16, p. 1412; 3rd December 1736, Weir *contra* Parkhill, No. 17, p. 1413.

Answered for Marion Wright; There is no doubt of Mr. Wright's intention to bestow this liberality upon her; and the intention was highly reasonable; she attended and nursed him during the last years of his life, as it became a dutiful child towards an aged and declining parent. Had she not been in her grandfather's house, she might have been in other service, and earning a stock for herself. It will therefore be hard if she is allowed nothing in name of wages from her grandfather, when it evidently appears to have been his intention that she should have them. The bill cannot be considered as gratuitous. The onerous cause was seven years service and attendance upon her grandfather. In the case Fulton and Clerk *contra* Blair, it was acknowledged, that no value was paid for the bills; and the decision seems to imply, that if any onerosity had [8090] been condescended on, the bills would have been

sustained ; besides, there does not appear any solid reason why a man may not make a present by bill ; and if it bears value, why it should not be binding as effectually as if value had been given. The onerous cause is the will of the acceptor, which says, he shall be owing such a sum to the drawer. In the case of *Barber contra Hair*, 8th February 1753, No. 311, p. 6097, the Court sustained blank indorsations to bills by a husband to his wife upon deathbed. Indorsations are new draughts upon the acceptor in favour of the indorsee, and are of the same nature with bills ; yet these indorsations were sustained, though acknowledged to be on deathbed, and gratuitous.

Replied for the suspenders ; The case of *Barber v. Hair* does not apply. The only question there was, Whether a gratuitous indorsee was entitled to take the debt ! This was no constitution of a new debt, but only a transmission of a debt formerly created ; and although value is absolutely necessary to the constitution of a bill, yet where once constituted, there is no doubt that it may be properly transmitted by indorsation without any value paid by the indorsee. Such indorsations are every day practised, and are indeed necessary in the course of trade, as bills are often put into the hands of trustees in order to recover payment.

Suggested on the Bench ; That though the writing founded on was not a proper bill, it might be sustained as evidence of a legacy, along with other circumstances ; but the plurality were of opinion, that it was totally null.

The Lords found, that the bill in question appearing to be of the nature of legacy, was not a sufficient ground of action, and would not be astricted by collateral evidence.

For the Charger, WALTER STEWART.—For the Suspenders, MACQUEEN.—Clerk, KILPATRICK.

J. C.

Fol. Dic. v. 3, p. 374. Fac. Col. No. 20, p. 37.

No. 39. [8098] *POLLOCK v. GILMOUR*. February 27, 1777.

Barclay, a writer, made out, at Gilmour's desire, a memorandum of his proposed settlements, which being approved of by Gilmour, were given to another writer to frame, and were accordingly executed regularly by the testator. In one of these settlements, the testator conveys an heritable bond for 5000 merks, to Janet Pollock his widow, "with and under the special burden, that the said Janet Pollock and her foresaids shall be burdened with the payment of the sum of 2000 merks Scots, at the first term of Whitsunday or Martinmas next after the testator's death." But no mention is made to whom this sum is to be paid. From the memorandum of the settlements, however, it appeared, that this was an omission of the person who drew the deed, as there [8099] was clear evidence from that memorandum, that this legacy of 2000 merks was meant to be paid to James Gilmour, the testator's brother, who on the widow's refusing to pay this legacy, sued her in an action for that end, and craved a proof for establishing that the memorandum of the settlements was taken by Barclay from the testator's mouth, and was the only rule for drawing them up. The defender urged the incompetency of proving by parole evidence any legacy above £100 Scots. The Lords allowed the proof. *See APPENDIX.* *Fol. Dic. v. 3, p. 379.*

No. 45. [8107] *ANDREW DOWIE v. ALEXANDER MILLIE*. February 2, 1786.

Found in conformity with *Wright v. Wright*, No. 36, p. 8088.

The father of Alexander Millie accepted a bill of exchange drawn by Andrew Dowie, his son-in-law ; who, in an action for payment, judicially acknowledged, that the purpose of the deceased in this transaction was to create a testamentary bequest in favour of his daughter.

The question being, Whether a deed of that nature could be so executed ? it was contended in behalf of the pursuer, That since the statute of 1772, shortening the endurance of these documents, there was not such danger to be apprehended from extending their use as in former times ; 2d December 1782, Adam *contra* Johnston, No. 18, p. 1416, *voce* BILL of EXCHANGE.

The Lords, however, found, " That the bill in question was a *donatio mortis causa*, and that a donation constituted in the form of a bill is not a valid deed by the law of Scotland."

Lord Ordinary, HAILES. — Act. DURHAM. — Alt. NAIRN. — Clerk, COLQUHOUN.

C.

Fol. Dic. v. 3, p. 375. *Fac. Col.* No. 254, p. 309.

No. 46. [8108] GRAHAM *v.* DENNISTON and Others. June 22, 1792.

William Graham, by a clause in his testament, leaves " to his brother, sisters, uncle, cousins, a free discharge of everything they may owe him at his death." By letter found in the repositories of the defunct, Walter Colquhoun his cousin, then in the West Indies, acknowledges to have received payment of certain bills belonging to the testator, for which he holds himself accountable, and desires the testator to draw on him for the amount. The question occurred, Whether this was a debt which fell under the *legatum liberationis* in the testament ? The argument against this plea was, That the property of these bills was in the testator, and that Walter Colquhoun held them only as trustee for his account. On the other hand, the bequest seemed to include every claim, from whatever contract it arose. The Court thought the case extremely doubtful, but inclined to the former of these opinions, and found that the amount of the bills did not fall under the *legatum liberationis*.

Fol. Dic. v. 3, p. 398.

No. 47. JANET and JOHANNA SEMPILLS *v.* HUGH Lord SEMPILL. November 15, 1792.

A legacy payable at the majority of the legatee lapses by his death before that period.

This found to hold even where the executors of the testator were empowered to pay it sooner, if they should think fit.

Hugh Dunlop conveyed to Hugh now Lord Sempill, his heirs and substitutes, the lands of Bishoptoun and others, by a settlement, burdening him and the lands conveyed with payment of £1000 to George Sempill his second son, and £500 to Patrick his third brother, &c. ; " and these at and against the next legal term after their attaining to their respective ages of 21 years complete."

George and Patrick survived the testator, but died in minority.

Janet and Johanna Sempills, two of their nearest of kin, brought an action against Lord Sempill, concluding for payment of two-fourths of the sums above mentioned, and

Pleaded ; That legacies vest *a morte testatoris*, is a general presumption of law, which there is nothing in the present case to overturn. The legacies are not made payable, if the legatees arrive at the age of 21, nor are there any other words employed which shew the testator's intention that they should be conditional. They are simply and unconditionally constituted as burdens on the heir ; and the reference to the age of the legatees which is annexed to the term of payment, and in a posterior clause of the sentence, can only have the effect *morandæ solutionis*. The testator thus separated the constitution of the obligation, from the time at which the heir should be obliged to perform it ; two circumstances quite independent of each other, and which he may have had good reasons for distinguishing, l. 213, *De verb. sign.* Had he, without making this distinction, merely said, " I leave to George and Patrick Sempills [8109] at and against the next term after their arriving at the age of 21

years, to the former a thousand, to the latter five hundred pounds," he would then have shewn it to be his intention that the legacies should vest and be exigible at the same time.

The maxim of the Roman law, *Dies incertus pro conditione habetur*, applies only when it is uncertain, if the day will ever arrive, e.g. the marriage of the legatee. But there is no such uncertainty in the present case. If the day on which the legatees would in fact have reached the age of majority had been specified as the term of payment, but without referring to that circumstance, the legacies would have vested. And it is not easy to see why that reference should make any difference. The legatees may indeed die before the term of payment, but still a definite point of time is established, the existence of which is certain; 9th December 1783, *Burnets v. Sir William Forbes*, No. 44, p. 8105; l. 5, *C. Quando dies leg.*; l. 26, § 1, *D. ad eund. tit.*; l. 46, *D. ad Sen. Cont. Treb.* Voet, b. 36, tit. 2, § 2, *et seq.*; *Mantica de conject. ultim. volunt. lib.* 11, tit. 23, p. 27, *et seq.*; Blackstone, b. 2, c. 32, § 6; Burrow's Reports, v. 1, p. 226; Bankton, b. 3, tit. 8, § 42.

Answered; The interpretation of testaments must be regulated by the will of the testator, and not by critical discussions upon the meaning of the words employed.

In the present case, it is not disputed, that had the legacies been payable if the legatees should arrive at the age of 21, or if they had been thus expressed; I leave to George and Patrick Sempills, at the next term after they arrive at the age of 21, to the former £1000, to the latter £500, the legacies would have lapsed by their death before that period; and the expression used in this case is surely too similar to warrant an opposite judgment.

Besides the general rule of law is, *Dies incertus pro conditione habetur*. A legacy, payable at the marriage of the legatee, will not vest, if the legatee die unmarried; because then the existence of the only event upon which it was declared payable, becomes impossible. For the same reason, a legacy payable when the legatee attains a certain age, should fall by his predecease.

The case of *Burnets contra Sir William Forbes*, stands single in support of the pursuer's doctrine, and its authority is much weakened by the decision 19th November 1788, *Omev v. Maclarty*, No. 9, p. 6340.

The Roman law cannot prevail, in opposition to sound principle. At the same time, it is by no means clear that it supports the pursuers' doctrine, as the passages quoted seem rather to apply to certain exceptions from the general rule, which our law would likewise admit. Thus, as in the case, l. 26, § 1, *D. Quando dies legati, &c.*, if the legatee were to draw interest before the term of payment, it might reasonably be supposed that an immediate right was vested in him, though even this circumstance was disregarded in the case of *Omev*. Or if, as in l. 46, *D. ad Sen. Cons. Treb.* the legacy were vested in a trustee, for behoof of the legatee (the *hæres fiduciarius* may be so considered), as the [8110] subject is then taken out of the hands of the heir, it may be presumed that the testator meant to prefer the heirs of the legatee to the trustee, who was not at all connected with him.

The Lord Ordinary reported the cause on informations.

A great majority of the Court thought the defence well founded. It was observed, that all subtleties ought to be laid aside, in order to get at the real intention of the testator; that legacies and bonds of provision are precisely in the same situation. In both there is a material distinction between the case where the term of payment is fixed to a day which must certainly arrive, and where it is fixed to one which may never occur; between a legacy payable twenty years' hence, and one payable on the legatee's arriving at the age corresponding to that period. The former vests *a morte testatoris*, the latter according to the maxim, *dies incertus, &c.*, lapses by the death of the legatee before the term of payment.

But that even this distinction must be disregarded, wherever there is reason to believe that it is contrary to the will of the testator; and that the cases adduced from the civil law, except l. 5, *C. Quando dies leg.* which is too shortly stated to admit of an accurate judgment being formed with regard to it, seem to have been determined on this principle.

The Court assoilized the defender.

A reclaiming petition was refused without answers, on the 4th December 1792.

Upon another conclusion of the summons, besides the same general question, a speciality occurred, on the effect of which the Court were much divided. It was

brought by the pursuers, as nearest of kin to their brother George, against Lord Sempill, as residuary legatee of his uncle Colonel Sempill, in whose will, after legacies of £1000 each had been left to the pursuers and Lady Forbes their sister, payable on the day of their marriage, or attaining twenty-one years of age, it is immediately added, "Item, I give and bequeath to my nephew George Sempill £1000, to be paid him at any time my executors think proper, before his marriage, or attaining to twenty-one years."

George, as already mentioned, died in minority. He was never married, and the executors had paid him no part of the money.

A majority of the Court were of opinion, from comparing the terms of the bequest to George Sempill, with those of the legacies to the pursuers, that the testator intended the former should be conditional only, and therefore that it lapsed by his death. Colonel Sempill (it was observed) thought his nieces could have no occasion for their legacies till their majority or marriage. That, however, as the command of money might be beneficial to his nephew at an earlier period, for instance, to buy him a commission in the army, a discretionary power was given to his executors. But he had no intention that his nephew should have it in his power to squander it, or dispose of it by testament.

[8111] Other Judges thought that this was stretching the maxim, *die sincerius, &c.*, beyond its proper limits. There was here no condition annexed, and therefore *quod sine die debetur presenti die debetur*. The legacy vested *a morte testatoris*, but the executors might withhold payment till the majority or marriage of the legatee; that the testator meant to leave it to his executors to determine, whether the legacy should vest or not, or, in other words, to transfer to them his power of making a will, was surely not to be presumed.

The Court "assoilzied the defender."

A reclaiming petition was followed, with answers; but the Lords "adhered." *

Lord Reporter, MONBODDO.—Act. DEAN OF FACULTY, JOHN BURNET.—Alt. WIGHT.
—Clerk, HOME.

D. D.

Fol. Dic. v. 3, p. 377. Fac. Col. No. 2, p. 5.

No. 48. DAVID FLEMING v. CHRISTIAN MARTIN. June 6, 1798.

A woman having executed a testament, with dispositive words, by which she conveyed the whole effects which should belong to her at her death to a sister, without mentioning her heirs, although she had children at the time; and their mother having died before the testatrix, a surviving sister was found entitled to exclude them from the succession.

Margaret Martin executed "a latter will and testament," by which she gives and disposes, leaves and bequeaths, the "whole goods and gear," &c., which should belong to her at her death, to her sister Helen, without mentioning her heirs, though she was a widow, with children grown up at the time. Helen, by the deed, was nominated executrix, and burdened with payment of Margaret's debts, and an annuity to Christian, an unmarried sister. It also contained a power of revocation.

Helen died a few days before Margaret, who left no heritable property.

Christian was confirmed executrix to Margaret; upon which David Fleming, one of two children left by Helen, founding on the will, brought an action against Christian, for half of his aunt's succession; and

Pleaded; As the deed contained dispositive words, which would have been sufficient to convey heritage; 17th June 1785, Robertson v. Robertson, voce TESTAMENT; 21st November 1759, Mitchell v. Wright, No. 32, p. 8082; the right under it was transmissible to heirs.

* The second judgment of the Court upon this last point was pronounced on the 29th January 1793; it is stated here for the sake of connection.

And although the deed were considered to be strictly testamentary, as it must have been Margaret's intention that Helen's children should succeed to her, the omission of the term "heirs," must be held as a mere inaccuracy, and the claim supported on the same principle, that children dying before their father, transmit the provision made by him on them to their children, although heirs be not mentioned; 26th June 1789, *Wood v. Aitchison*, *voce* PROVISION TO HEIRS AND CHILDREN; 21st January 1767, *Binning v. Binning*, *IBIDEM*; and even where the grandfather has substituted others to his immediate descendants; *Home*, 21st November 1738, *Magistrates of Montrose v. Robert*-[8112]-son, No. 50, p. 6398; 19th November 1788, *Omey v. Maclarty*, No. 91, p. 6340.

Answered; The deed is purely testamentary. The terms "give and dispose," are used by the writer as synonymous with "leave and bequeath." As, therefore, Helen's heirs are not mentioned, and as an aunt is not under that natural obligation to provide for a nephew, which a parent is to provide for his grandchildren, Margaret must be presumed to have meant, that the ordinary rule, *quod morte legatarii perit legatum*, should take place. Even where heirs are mentioned, it is a question of intention, whether a legacy does not fall by the death of the legatee before the testator; 22d November 1752, *Belsches v. Murray*, *voce* PRESUMPTION; 10th March 1769, *Russel v. Russel*, No. 36, p. 6372; 13th December 1769, *Scots v. Carfrae*, No. 37, p. 8090.

The Lord Ordinary reported the cause on informations.

One Judge was for the pursuer, from the dispositive words employed in the deed; and a doubt was expressed as to the intention of the testatrix. But the Court, in general, were against the claim, on the grounds stated for the defender.

The Lords sustained the defence; and afterwards (22d June 1798), refused a reclaiming petition for Fleming.

Lord Ordinary, CULLEN.—ACT. HUTCHISON.—Alt. MONTGOMERY.—Clerk, *MENIES*.

D. D.

Fac. Col. No. 80, p. 186.

No. 3. [5] *GRAHAM v. HOPE*. February 17, 1807.

Provision or legacy to a person, his heirs and assignees, must vest in the legatee before it can be transmitted by his will.

The Honourable Charles Hope Weir of Craigiehall, in 1785, executed a settlement, in which he bequeathed "to Colonel Henry Hope, my third son, and Mrs. Sarah Jones, his spouse, in joint fee and liferent, but for the liferent use only of the said Mrs. Sarah Jones, in case she shall survive her husband, and to the said Colonel Henry Hope, his heirs and assignees, in fee, the sum of £2000 Sterling." The purpose of this settlement was, to distribute among his children that share of the executry of the Marquis of Annandale, to which he and his sisters were to succeed on the death of the Marquis, who was a lunatic, and far advanced in years.

[6] By Colonel Henry Hope's settlement, which was executed in America in 1779, in the English form, he disposed of his effects in the following manner: "That is to say, all and singular such pay, ready money, securities for money, goods, chattels, and personal estate whatsoever, that I now am, or at the time of my decease, I shall or may be possessed of, or in any manner entitled unto; and also all and singular such messuages, lands, tenements, hereditaments and real estate whatsoever, and wheresoever, that I now am, or at the time of my decease, I shall or may be seized or possessed of, or in any manner entitled unto, either in possession, reversion, remainder or expectancy, or otherwise howsoever, I give, devise and bequeath the same, and every part and parcel thereof, unto my dear wife Sarah, her heirs, executors, administrators and assigns, to and for her and their own proper use and benefit for ever, in case she shall be living at my decease; but in case my said dear wife shall happen to depart this life before, then I give, devise and bequeath the same, and every part and parcel thereof, unto such child or children as may hereafter be born

unto me of her body (if any such shall be born unto me), as shall be living at my decease, and his, her, or their heirs, executors, administrators and assigns, for ever, and to and for his, her, or their own proper use and benefit, and to be equally shared and divided between them, if more than one, share and share alike ; and if but one, then to such one child only, and his or her heirs, executors, administrators and assigns for ever ; and in case no child shall be born unto me, and shall happen to die before my said wife, so that no child shall be living at my decease, then I give, devise, and bequeath all and singular my real and personal estate, aforesaid, and every part and parcel thereof, unto my dear brother Charles Hope, Esq., a Captain in his Majesty's Royal Navy, his heirs, executors, administrators and assigns, for ever."

Henry Hope predeceased his father, who, however, made no alteration in his settlement after his son's death ; and Mrs. Sarah Jones having proved the will, introduced with the whole of her deceased husband's effects. She was succeeded by her sister Mrs. Field, as her executrix, who received from Mr. Hope Weir's trustees a separate legacy of £500, which had been left to Henry Hope, his heirs and assignees. After her death, she was succeeded by her daughter, the wife of the Reverend James Graham, of the county of Tyrone.

After the death of the Marquis of Annandale, William Hope Weir, the eldest son and representative of the Honourable Charles Hope Weir, brought a process of multipointing, to have it ascertained who was the heir or assignee of his brother Henry Hope, and cited Mrs. Graham and Charles Hope, the General's brother, as defenders.

The case was reported by the Lord Ordinary ; and the Court (28th June 1805) pronounced the following interlocutor : " Find, that the provision in question did not lapse by the predecease of the late General Henry Hope to his father the testator : Find, that Mrs. Sarah Jones, the widow of the late General Henry Hope, had right to that sum, in virtue of her husband's settlement in her favour ; therefore, prefers Mrs. Ann Graham, as his representative, thereto ; and decern in the preference, and against the raiser of the multipointing accordingly."

The residuary legatees of the Honourable Charles Hope acquiesced in this interlocutor ; but a petition against it having been presented by Charles Hope, the Lords, upon advising it, with answers (6th March 1806), " alter the interlocutor reclaimed against, and find, That the legacy in question was not carried by the will of the late General Henry Hope ; therefore prefer the petitioner thereto, and decern in the preference, and against the raiser of the multipointing accordingly."

Against this judgment Mrs. Graham presented a petition, and

Pleaded : A legacy taken to heirs and executors, does not lapse by the death of the legatee before the testator ; Ersk. b. 3, tit. 9, § 9. The testamentary deed of Charles Hope Weir, conveyed this legacy to his son Henry, " his heirs and assignees," and thereby destined this sum to whatever person or persons his son should name as his heir and executor in any settlement executed by him. It is only on the failure of heirs nominate, that heirs-at-law are admitted to succession ; and therefore, as Colonel Hope appointed his widow to be his executor, she or those coming in her right, must be entitled to this legacy, more especially as Mr. Hope Weir survived his son for a considerable time, and though he was acquainted with the nature of his settlements, executed no revocation of the legacy.

Answered : This legacy never belonged to Henry Hope, consequently it could never be assigned by him either to his wife or to any other person he might name his executor. The expression, heirs and assignees, does not alter the case, so as to put it in the power of the original legatee to assign during the life of the testator, and thereby to establish a right to the legacy, though he should die before the testator. To give the legatee the power of disposal, it is necessary that he should have succeeded to the subject ; Ersk. b. 3, tit. 9, § 9. Had the original legatee survived the testator, the person named by him as executor would certainly have been preferred to the heir-at-law ; but as he had nothing more than a *spes legati*, neither his creditors could attach it for his debts, nor could he convey it by his will ; Patison v. Patison, June 4, 1741, No. 24, p. 8070 ; Inglis v. Miller, July 16, 1760, No. 33, p. 8084 ; Boston v. Horsburgh, February 13, 1781, No. 41, p. 8099 ; Earl of Moray v. Stuart, Decemehr 15, 1782, No. 43, p. 8103 ; Duncan v. Campbell, November 8, 1791 (not reported).

The Court was a good deal divided in opinion, but adhered to the last interlocutor.

Observed on the Bench : The term assignees, could only mean, that the legatee

might assign the legacy when it became vested in his person ; it could not give him the power of assigning, while the right was not vested in himself. [8] This legacy, therefore, must either be considered as lapsed altogether, or it must devolve on the heirs-at-law of the original legatee. No principle is more clearly established, than that a will can only convey property which is vested in the testator at the time of his death.

Lord Ordinary, CULLEN.—Act. LORD ADVOCATE ERSKINE, MONYPENNY, TYTLER—
Agents, HOTCHKIS & TYTLER, W.S.—Alt. CONNELL, CAMPBELL.—Agent,
D. WEMYSS, W.S.—Clerk, PRINGLE.

J.

Fac. Col. No. 270, p. 607.

No. 31. ¶ [8128] Lady EDNAM v. The HEIR thereof. June 26, 1628.

Summons of pointing the ground sustained, though executed before the first term of the annuity was due, it concluding only payment to be made at the term.

In a pointing of the ground, the Lady Ednam being infeft by her husband in an annualrent of 3000 merks out of Ednam, pursues the apparent Heir of her husband, granter of her right, and the Tenants of the ground, for payment of the Whitsunday's term 1628, and in time coming ; and the tenants compearing, and alleging, That their goods could not be pointed for this term of Whitsunday libelled ; because, the summons being raised in March 1628, and the husband having deceased only some few days before, in that same month, the relict could not intent any summons against the tenants, which might distress them, or their goods, before the terms of payment of their duties and farms, while their occupation, were by past ; and, therefore, this summons being raised before Whitsunday, which was the first term craved, and they not being debtors, neither of that term, nor of the Martinmas thereafter, while Yule and Candlemas were past ; therefore, they contended, That this pursuit moved for the said term, and executed before that term was past, and before the terms of payment were come, at which, and whereby they would be only debtors of their duties, could not be sustained. The Lords repelled [8129] the allegiance, and sustained the process, for that term of Whitsunday, which was not come, as said is ; and albeit the summons was executed before the term, seeing thereby payment was craved to be made after the term was past only. The Lords found, that this action was *declaratoria juris*, and not principally for present execution.

Act. NICOLSON.—Alt. KINROSS.—Clerk, HAY.

July 11, 1628.—In a pointing of the ground, Lady Ednam v. the Laird Ednam, the Lady being infeft, conform to her contract of marriage, by her husband in an annualrent of 3000 merks, to be uplifted out thereof ; the Lords found, that she had competent action against the tenants, for pointing of any of the tenants' goods which they had on the ground, which was affected with that annualrent ; and that the said goods were in law subject and liable to the payment of the annualrent, of all years and terms preceding before the pointing, notwithstanding that, at that time, they should be owing no farm nor duty to their master, heritor of the land ; and albeit the terms of payment of the duties, viz. Yule and Candlemas, were not come, nor yet the legal terms, viz. Whitsunday and Martinmas ; for the Lords found, that, if the terms were come contained in the infeftment of the annualrent, appointed for payment thereof, albeit the term of paying of this duty to his master were not at that time come ; yet the annualrenter might point *omnia in vecta et illata* within the ground, as well any strangers' goods and gear, as the goods of the tenants, labourers of the ground ; to the which payment the said tenants' goods were subject, albeit the duties paid to their master yearly should not extend to the half of that for which their goods should be pointed ; and this was found, notwithstanding of the 36th Act, 5th Parliament, James III. which provides, That the goods of the labourers of the ground shall not be pointable for their master's debt, for a greater quantity than the year's

duty payable to their master ; which act the Lords found did extend only where pouding was deduced against the tenants' goods for a moveable debt, as sums of money owing by the master to the creditor, and did not extend to annualrents claimed by infestment, which they found affected the ground, and all the goods being thereon, to whomsoever they pertained, and for all bygones owing to the poudner, albeit the tenant were not debtor to the master, and before his terms were come, if the terms of paying the annualrent were past.—See **POINDING**.

act. HOPE & NICOLSON.—Alt. AITON & MOWAT.—Clerk, HAY.

Fol. Dic. v. 1, p. 538. Durie, pp. 377, 387.

No. 58. [8150] Competition, Mrs. MARGARET LYON with the CREDITORS of Easter-Ogle. January 24, 1724.

A father, after granting a bond of provision to his daughter, became bankrupt. The Court found that an adjudication in security might proceed upon this bond, though it was not payable till ten years afterwards.

By contract of marriage betwixt the deceased William Lyon, younger of Easter-Ogle, and his wife, anno 1710, the land estate was provided to the heir-male of the marriage, and in failure thereof, to other heirs-male ; after which followed the clause, subject of the present debate : “ And if it shall happen, that there shall be only daughters, and no heir-male of the said marriage ; then, and in that case, the said William Lyon, younger, binds, and obliges him and his foresaids, thankfully to content, pay, and deliver to the daughter or daughters to be procreated of the said marriage, failing of an heir-male, as said is, the particular provisions and portions, in manner, and upon the conditions after specified, viz. if there shall happen only one daughter, to pay to her the sum of 9000 merks ; if two daughters, 10,000 merks, &c.” Which provisions are payable at their respective marriages, if the same happen in their father's lifetime ; and if not married in his lifetime, at their respective ages of eighteen years complete, or the first term of Whitsunday or Martinmas after his death, either of them falling out ; and execution is ordained to pass for implement of the contract, in name of persons therein specified ; and there is a power of division of the above tochers reserved to the father. There having existed no heir-male of this marriage ; but the father being married a second time, and his affairs like to go into disorder, an adjudication was led against him at the instance of Mrs. Margaret Lyon, who is now the only daughter of the first marriage, with concurrence of the friends at whose sight execution was ordained to pass, for security of the sum contracted to be paid to her, the day of payment not being yet come ; after which there arose a competition and ranking of the said William Lyon's creditors, wherein Mrs. Margaret compeared, and competed upon her interest.

Preference was pleaded for the Creditors upon this medium, That this daughter of the marriage is truly to be considered as an heir of provision, and as such liable to her father's creditors *in valorem*, after discussing the heir of line and other representatives of the debtor. Nor can it have influence in the case, that the provision here is conceived in form of an obligation to pay a definite sum ; for the right of whatever heir of provision is built upon an obligation either to dispoise or pay, or provide and secure, the form and style of the writ does not alter its nature ; and since the obligations in such cases are still conceived in favours of persons *nascituri*, who in no sense can be creditors, they have always been interpreted to resolve in a provision of succession, which indeed the father cannot gratuitously disappoint, but yet must give place to his onerous creditors. To apply this to the case in hand, it cannot make a great alteration, whether these provisions become due after the father's death, or at a certain period of the children's age ; which is in itself uncertain, and may eventually fall out before or after the father's death. The [8151] provision in either case is in the nature of the thing the same, viz. a settlement for children who exist only *in spe* at the time of the contract. To confirm this, no one doubts that the provision of

lands to the heirs-male of a marriage by contract, is, in the intention of parties, as valid and solemn a stipulation, as the provision of sums of money to daughters or younger children; every body agrees, nevertheless, that the onerous deeds and debts of the father are preferable to the provision made to the heir-male, and a burden upon it: Wherefore then should not the case be the same in regard to provisions of particular sums to younger children, since the intention of parties is the same in either case? And the necessity of the thing gives the father a full right of administration over the estate out of which the provision is made to the eldest son, as well as to the younger children. It is true enough, that in one sense, younger children are considered in our law as creditors for the sums provided, and so frequently is the eldest also; but though they are creditors to one effect, viz. that the father is disabled from doing any gratuitous deed in their prejudice, it does not from thence follow, that they are creditors in all respects, and have equal privileges with extraneous creditors for onerous causes; since in reality the right savours more of the nature of succession, than of *jus crediti*, which naturally supposes a plenary right of administration in the father. Hence, in the question June 1697, betwixt the Children and Creditors of Napier (See PROVISION TO HEIRS AND CHILDREN), the Lords, upon report, found, "That the obligation in favours of the children of the deceased Mr. Robert Napier, in the contract of marriage, having been to an uncertain day, and conditional, the children, or their assignees, adjudgers upon the said contract, could not be heard to compete with the extraneous creditors, unless they proved that the father was solvent the time of his decease." And afterwards, upon a reclaiming bill, and hearing in presence, informations, and list of all the decisions which could be gathered prior to that time, the Lords found, "That provisions in contracts of marriage *liberis nascituris*, payable after the father's death, and the children's attaining to such ages less or more, and according as the children should exist more or fewer; albeit all these conditions shall come to be fulfilled, and diligence should be used thereupon by the children, the children cannot be heard to compete, and come in *pari passu* with the onerous creditors"; which was very consistent with another pronounced 24th January 1677, betwixt Graham and Rome, *voce* PROVISION TO HEIRS AND CHILDREN.

On the other hand, it was pleaded for Mrs. Margaret Lyon, If it is possible in a contract of marriage to contrive obligations by the husband in favours of younger children to be procreate of the marriage, whereby these children would become just and lawful creditors to their father, so as to compete with his other posterior creditors. it is certainly done in this case; for scarcely can obligations be contrived more express: Where obligations are conceived in form of provisions in favours of heirs of a marriage, there indeed the provisions are always affectable by the father's creditors, at whatever time the debts are contracted; the word heirs importing of itself a representation, subjecting *in valorem*; which, by the way, is the foundation of the decision Graham *contra* Rome. But the present contract of marriage is conceived in quite another form, and the parties here have carefully and anxiously distinguished betwixt the provisions in favours of those who were intended to be heirs, and the obligations in favours of the daughter and younger children: For besides the conveyance of the land estate, there is a separate clause of provision of 5000 merks in favours of the heir-male of the marriage, which deserves to be considered; there William Lyon younger, "obliges himself to ware and employ that sum upon land or annualrent, and to provide the same to himself in liferent, and to the heirs-male to be procreate of the marriage in fee"; which sum, therefore, would undoubtedly been affectable by his creditors. But the obligations in favours of the daughters and younger children are expressed in the strongest manner, to make them, not heirs of provision, but proper and true creditors; for there he does not oblige himself to ware and employ, but to content, pay and deliver to them their several sums, and at the several terms of payment therein mentioned. To strengthen this, let it be noticed, this daughter is not so much as apparent heir, there being a son alive of a second marriage; and her provision might have fallen due even during her father's life, when therefore he would not have had an heir: And if she outlive the term of payment, her provision upon her death, will fall to her nearest of kin and be affectable by her creditors, even though her father were alive: All which are incompatible with the nature of a right of succession; for if the children were to be accounted heirs of provision, the succession could not devolve upon them, but by the death of him to

whom they were heirs ; and should they de cease before him, the subject could never descend to their representatives as such, or be affected by their creditors ; but either the provision would be wholly evacuated, or devolve upon the next heir of the fiar. It is no solid difficulty, that the obligations are conceived *liberis nascituris* : The question comes just to this, whether an obligation to a person not yet existing, but to be procreate, can be valid and effectual ? or if it be void and null ? for if the obligation is good for any thing, it must, upon the existence of the person in whose favours it is conceived, be effectual to compete with other creditors, according to the diligence done upon it ; and in that view, it is presumed it cannot well be made a question. Had this obligation been granted in favours of children to be procreate by any other person than the granter, who can doubt of the validity thereof ? what difference does it make in law, that it is in favours of the granter's own children, since these children were not by the obligation to represent him, or to be heirs of provision ; there can therefore remain no doubt, but this obligation in the contract of marriage was binding and valid from the beginning ; and that the daughter who was born very soon thereafter, and before contracting [8153] any of the competing debts, was thereby from the time of her birth, a just and lawful creditor for the sums payable to her by the contract, as much as if a bond of provision had at that time been granted to her *nominatim*, and duly delivered ; and consequently there does not appear any ground in law, whereupon these obligations can be reduced by subsequent creditors, or they preferred to her, otherwise than according to the priority of their respective diligences. It remains but to notice some decisions, to show this plea is not without precedent : Sir Alexander Hamilton of Hags, in his first contract of marriage, bound himself to provide the sum of 24,000 merks to the daughters of the marriage, payable at their respective ages of sixteen years : The Lords, 21st February 1690, " Found by the conception of the foresaid contract of marriage, the daughters are not heirs of provision, nor is the provision thereby conceived in their favours a simple destination of succession ; but found by the contract, the daughters are formally stated creditors to their father ; and therefore repelled the grounds of preference proponed for the posterior creditors, and preferred the children according to their diligence, the same having been raised in the childrens own name, against the father, in his lifetime, after the elapsing of their respective terms of payment." Another decision is as follows : Sir Robert Preston, in his contract of marriage with his second wife, obliged himself to pay 20,000 merks to the heirs and bairns of the marriage, at their age of fifteen years, and to infest them in lands for security, &c. In a competition of these children with their father's onerous creditors, the Lords, 15th July 1691, " Found, that the children of Preston, by their father and mother's contract of marriage, were only heir designative, and not heir substitute, but real and formal creditors for sums therein contained." *

" The Lords found the Creditors not preferable, but that the daughter must come in *pari passu* with them, according to their several diligences."

Fol. Dic. v. 1, p. 540. Rem. Dec. v. 1, No. 45, p. 89.

No. 3. [8163] JAMES KENNEDY v. His FATHER'S RELICT. July 15, 1622.

James Kennedy executor dative to Robert, his father, pursues his relict for the goods and gear confirmed. She excepts she has retention of the half, because the defunct had no bairns extant the time of his de cease, but this pursuer, who is heir, and cannot be both heir and have a bairn's part, and be counted a bairn, to make the testament divide in three, in prejudice of the relict. Simile, if there were more bairns nor the heir, and all forisfamiolate but he, the testament would divide in two only. *Ergo*, the like where there is no bairns at all by the heir. Replied, the heir is excluded

* These two cases will be found *voce* PROVISION TO HEIRS AND CHILDREN.

by another, but when there is no other, he is a bairn *et facit partem in testamento*. The Lords repel the allegiance, in respect of the libel and reply.

Reporter, REIDHOUSE.—Act. AYTON & FLETCHER.—Alt. NICOLSONS, SEN. & JUN.—Clerk, HAY.

Fol. Dic. v. 1, p. 543. Nicolson, MS. No. 41, p. 22.

No. 4. CHAPMAN *v.* GIBSON and FINGASK, her Spouse. June 17, 1631.

The husband's children of a former marriage come in with the wife's executors to make a tripartite division.

The deceased Thomas Gibson having begotten a daughter, the only bairn of his first marriage, after whose decease, he having married Marjory Murray, his second wife, who dying also before her husband; Chapman, her executor, pursues the bairn of the said first marriage and her spouse, to make payment of the equal half of the goods, which the said umquhile Thomas Gibson had [8164] the time of the said Marjory her decease; wherein the Lords found, that the said relict, nor her executors, had no right to the half of the said goods, but only to the third part, seeing there was one bairn living the time of the relict's decease, whereby her husband's gear could not fall in a twofold division, but in a threefold division. Neither was it respected, as the pursuer replied, that this bairn was not a bairn of the second marriage; and also he alleged, that she is that person that is heir, and hath gotten a great inheritance, so that she cannot claim any part of the moveables, being heir by her heirship. This was not respected, for it was found nevertheless, that the testament ought to have a threefold division; and albeit she be heir now since her father's decease, yet her father being then living when Marjory Murray, the second wife, died, she could not be then respected as heir, but as a bairn; for heir she could not be, her father being in life; and seeing there are no more bairns but she, she ought to have a bairn's part also; though it were proper to other bairns, if any had been, to have excluded the heir, as is not in this case. And it being also alleged, that by contract of marriage betwixt the said Thomas Gibson and his second spouse, it was provided, that the husband's goods should pertain to him and his executors, and the wife's to her and her executors, and none of them should seek or have right to any of others gear, but to their own allenarly; this contract being alleged not to be obligatory to prejudice the defunct, nor her executors, in her part of the husband's goods, because he alleged it to be a contract *contra bonos mores, et contra leges, et consuetudinem patriæ*, and against the right and division of goods, observed ever in this kingdom betwixt man and wife; this allegiance against the contract was repelled, and the contract found good and lawful, and the allegiance thereon sustained.

Act. —.—Alt. CRAIG.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 543. Durie, p. 591.

No. 5. HENDERSONS *v.* SANDERS, Minister. July 18, 1634.

Found in conformity with Chapman *v.* Gibson, No. 4, *supra*.

One Henderson's Bairns pursuing their mother's second husband, which mother was executrix to her first husband, their father, likeas her second husband was executor to his wife, their mother, for payment to them of their bairn's part of the gear, and of their part of the money pertaining to them, falling by their father's decease, together with the annualrent of the said money continually since the father's decease, and since the time of their mother's intromission therewith; and also for payment of the equal

half of the goods and gear contained in their mother's testament, whereto they had right as bairns, and nearest of kin to their mother; this pursuit being moved before the Commissary of Murray, and sentence given thereupon against the defender, viz. the bairn's goodfather, the second husband of their mother, as [8165] executor to her, he compearing; which decret being suspended by him, upon this reason, viz. That he, nor yet his umquhile spouse, could not be subject to annualrents, they being only executors, who by the law are not subject to pay annualrents, specially before sentence, for any terms before they were decerned; and there being nine or ten years betwixt the first husband's decease and the time of the sentence, and also two or three years betwixt their mother's decease and the said decret, no reason can make either her, if she were living, or him, liable in annualrent, seeing executors cannot be subject, but at most from the time of the sentence; and the chargers opposing, that they having meddled with the monies, and employed the same to their use, and they being but minors all this time, they are excusable not to have pursued more timely for their monies; and the suspenders, and their mother's intromission therewith, ought not to be profitable to them to their prejudice; and they opposed the decret given against them in *foro contradictorio*; the Lords, in respect of the sentence given *parte comparente*, found the letters orderly proceeded, albeit most of the Lords were of different judgments, some thinking that executors are not subject to pay annualrent, specially before sentence; and others were of a contrary judgment in this case, where the bairns were minors, and the mother and father-in-law had intromitted with the money; but because of the sentence standing *parte comparente*, decret was given as said is. Item, where the decret decerned the father-in-law to pay the half of the gear to the bairns, as having right to that half by their mother's decease, the Lords found, that the bairns could not claim the half, because the mother's testament, by whose decease they sought the same, could give them only right to a third of the goods and gear which belonged to her husband conveyed; for although there were no bairns procreated betwixt the said second husband and her, yet the said husband had bairns living of a prior marriage, who behoved to be reputed to have their own interests, and a third part of their father's goods; and consequently they found the wife's testament should not been confirmed as it was, by a two-fold division, giving the wife the one half, and the husband the other, but that there ought to have been a division in three parts, viz. the wife one third, the husband another third, and the third third to the husband's bairns; so by this decision, the wife and the husband, albeit having no bairns betwixt them, yet where the husband has bairns of another marriage, the wife dying transmits right only to her nearest of kin, to the third part of their gear allanarly; and the bairns of the husband, although not gotten of that marriage, have right to a third *fictione juris*. For their father living, they cannot have right to any bairns' part of gear, so long as he lives; but it was reputed as a right in their person, to exclude the wife from any right further than a third, seeing the whole gear being *de jure in bonis mariti*, and he *dominus*, it was not thought reasonable to give the wife the half, thereby to exclude the bairns, and to give them no [8166] right to their father's gear; and albeit this was considered by the Lords, yet it could not be effectual to give the bairns any right thereto, so long as the father lived; and albeit also the chargers alleged, that seeing the father is living, the bairns could not have right, and that the husband is truly reputed in law to be *dominus omnium bonorum*, as the party alleged, therefore, with the more reason, and in law, should his wife have the half of all which he had the time of his decease; which allegation was repelled, and the wife's part restricted to a third, as said is.

Act. JA. GIBSON.—Alt. —.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 543. *Durie*, p. 728.

No. 6. JUSTICE v. HIS FATHER'S DISPONEES. November 10, 1737.

A man who had only one son who succeeded to him in his land estate, and no other children, made a disposition of his moveables *mortis causa* to certain trustees for the behoof of his grandchildren, which, after his death, being quarrelled by his son, as in

prejudice of his legitim, the Lords "found the pursuer entitled to a legitim, and reduced the disposition in so far as it was prejudicial thereto."

The heir is no less entitled to a legitim than the other children, though, if he insist on it, he must collate; and if he was not *de jure* entitled to it, he could no more claim a share of the moveables upon collating, than the younger children can claim the heritage upon collating. It is also *triti juris*, that though there be but one child who is heir, and a relict, the testament is tripartite as well as where there are more children; but if the heir were not *de jure* entitled to a legitim, it should be only bipartite. But why then should not he have been obliged to collate the heritage with the disponees? For this reason, that the right to demand collation is a privilege personal and peculiar to the executor at law, and to no other.

Fol. Dic. v. 1, p. 543. Kilkerran, No. 1, p. 332.

No. 8.

[8167] MARTIN v. AGNEW. February 22, 1749.

Legitim not due to the heir without collating, where all the other children have accepted provisions in satisfaction.

Andrew Agnew, late of Scheuchan, died widower, leaving two sons, Robert the eldest, now of Scheuchan, and James; and Robert having confirmed executor dative *qua* nearest of kin, and intromitted with the whole moveables, a process was brought against him at the instance of Gilbert Martin, as assignee by James the younger son, to account for his intromissions.

It was pleaded for Robert, That James had in his father's lifetime accepted of a provision in satisfaction of his legitim and bairn's part of gear, and that therefore his claim was to be restricted to the dead's part; and that he could have no part of the legitim, which, by his forisfiliation, did wholly belong to the defender.

But it being answered for the pursuer, That the defender being heir, could have no claim to any part of the executry, unless he would collate; the Ordinary "repelled the defence, in respect of the answer"; and the Lords once and again "adhered," notwithstanding the reply for the defender, that collation can only be sought from the heir by those who have a right in the subject which the heir claims, as where he claims to concur in the dead's part with the nearest of kin, or in the legitim with the other children who have title to a legitim; but where the children have renounced their legitim, they can no more require the heir, claiming his legitim, to collate, than the relict, or the executors, or legataries named by the defunct, can do. The reason is all the same, that they have no interest in the legitim, the subject which the heir claims.

It was admitted on all hands to be an established point, that where the heir is the only child, he is entitled to the legitim in a question with the relict, or with the disponees, to whom the father may have conveyed his moveables, as in Justice's case. No. 6, p. 8166. And the Lords, who differed from the judgment here given, could see no reason why the heir should not have the same title to it, where all the other children had renounced; as children who have renounced their legitim, are, with respect to the legitim, to be considered as not in being. And further, where there is a relict and no heritage, and all the children have renounced their legitim or bairn's part of gear, the division is bipartite between the relict and dead's part; and so it must be, because there is no person in being entitled to a legitim. But as [8168] that cannot be said, where besides the younger children who have renounced, there is also an heir, who, *ex concessis*, is *proprio jure* entitled to the legitim when the only child, they could not see a reason why he should be excluded from it by the other children, where themselves had no interest in it; or why, by and through them, the relict's interest should be extended from a third to a half. The case was also figured, that the father, after having forisfiliated all his younger children, should bequeath his whole moveables to a stranger, no challenge would lie against this deed to the younger children, in respect they had renounced their legitim; but would the heir therefore be barred from claiming his legitim from the stranger disponee? This was thought not pleadable.

But all this notwithstanding, the plurality found as above, putting the whole upon this one proposition, That wherever an heir claims any part of the moveables, he is bound to collate ; and that where he is the only child, he is just in the case as if he had collated ; but with which the minority were not satisfied, for the reason above given from the nature of collation.

There was an argument pleaded by the procurators for the pursuer, from the import of the younger children's renunciation, as what had no operation in favour of the heir, but only enabled the father to test upon the whole ; or, in other words, that thereby the legitim accresced to the dead's part. But as no notice was taken of this by the Lords, and that it is a construction altogether imaginary, such renunciation being truly an extinction of the right renounced, as if it had never existed, it is enough to have just mentioned it.

Fol. Dic. v. 3, p. 383. Kilkerran (LEGITIM), No. 4, p. 334.

No. 9. [8170] ISOBEL JERVEY v. JOHN and THOMAS WATT. January 7, 1762.

Executors of a posthumous child entitled to that child's legitim, though not confirmed, notwithstanding a general disposition by the father to his wife. The wife having in her contract of marriage accepted certain provisions in full of all terce of lands, or third or half of moveables, the child's legitim found in this case to amount to one half of the moveables.

Isobel Jervey, in her marriage contract with William Watt, accepted a certain annuity "in full of all terce of lands, or third or half of moveables, which might fall to her by the decease of her husband."

Upon the 4th of May 1754, William Watt, the husband, executed a general disposition of his whole effects in favour of his wife, and named her his executrix, reserving power to alter at any time in his life, and dispensing with the not delivery.

William Watt died upon the 22d of January 1755 ; and, about six weeks thereafter, his wife was delivered of a daughter.

This child having lived only a few months, John and Thomas Watts, brothers of William, brought an action against his relict, to account for the whole of her husband's estate ; in which they insisted, that the settlement in her favour could have no effect, because of the *conditio si sine liberis*. But, in this plea, they were overruled by the judgment of the Court.

They next insisted, that as nearest of kin to their defunct niece, they were entitled to the half of the moveables as her legitim.

This demand occasioned two questions, 1mo, Whether any legitim could be claimed by them ? and, 2do, What the extent of such legitim should be ?

Pleaded for the relict upon the first point, Although it has been found that a father cannot, by a testamentary deed, disappoint his children of their legitim, no testament has hitherto been set aside, *quoad* the legitim, at the instance of the extraneous heirs of such children. The interest of a child, and of the heir and successor of such child, appear to be very different. A father is, by the law of nature, bound to aliment his children ; they are therefore understood to have an interest in his effects after his death, which it is not in his power to disappoint. But as this duty respects only the children themselves, their right cannot descend to their heirs, so as to prevent him from disposing of his goods by testament.

By the Roman law, from which the doctrine of the legitim is derived, the *querela inofficiosi testamenti* was only competent to children and parents, and did not descend to the heirs of the children in the case of their surviving the testator, but dying *ante motam querelam* ; L. 15, D. De inofficioso testam.

When the present testament was made, William Watt had no children. The child which his wife afterwards brought forth was not then begot ; he might therefore lawfully dispose of all his moveables at that time. It is true, that the after existence of the child might entitle her to quarrel the deed, either in whole or in part, according to circumstances ; but, as she did not live to do so, there seems to be no foundation,

either in law or practice, for extending the power of challenge to the pursuers, or any other extraneous heirs. If it be competent to them, it must also descend to relations at the distance of [8171] ten or twenty degrees; nay, even to the *ultimus hæres*. And it appears not a little absurd to suppose, that a father should not have it in his power to settle his moveables, so as to prevent a donatar of *ultimus hæres* from taking them; nor is it of any moment that children transmit their legitim without confirmation, as that is no more than a piece of form. The case of succession *ab intestato*, is very different from the present, where a father has disposed of his effects by a will, and settled his succession.

Answered for the pursuers, Nothing is better established in the law of Scotland, than that the legitim vests in children *ipso jure*; and this, of itself, is sufficient to answer all the arguments urged upon the part of the defender. If the child had been confirmed, the legitim would have transmitted to her nearest of kin; because, by confirmation, it would have been fully vested in her person; and as it is a fixed point, that it vests equally without confirmation, it must equally transmit in the one case as in the other. This point is also settled by several decisions recited in the Dictionary, by which it has been constantly found, that children surviving their father transmit their legitim to their nearest of kin, though they die without establishing it in their own person by confirmation. And in the case of Christie, 13th July 1681, § 6, *k. t.* where, after the death of a father who had named his daughter Jean his executrix, and substituted another in the case of her decease, a posthumous son, James, was born, the Court, in a question betwixt James (who was confirmed executor to his sister upon her death), and the substitute, found, that the substitution could only reach to the dead's part, and that the bairn's part belonged to James, as nearest of kin, and executor to Jean. From which it appears, that a father cannot so much as appoint a substitute to his children in the legitim, in bar of the nearest of kin.

Nor is it of any consequence, that by the Roman law, the *querela inofficiosi* did not transmit to heirs, unless moved by the child, parent, or brother, to whom it was competent. It was considered as an *actio injuriarum*, *l. 8, D. De quer. inoff.* and it was an established point with them, that *actio injuriarum hæredi non datur*. But in this country, in which there is not the same abhorrence at the *rescindatio testamenti*, the demanding the legitim is by no means considered as an *actio injuriarum*; and therefore it has been established, that, though the child die without making a demand, or without any *aditio hæreditatis* or confirmation, the legitim will nevertheless transmit to its nearest of kin.

Pleaded for the relict upon the second point, Supposing a legitim due, it can only extend to a third of the moveables; for, although her acceptance of a special provision might have barred her from claiming any share of her husband's moveables, *ab intestato*, the case is very different here, where she claims upon an universal disposition, granted before the existence, or even conception of the child. The contract of marriage being a paction betwixt the husband and wife, they had the sole interest in the mutual stipulations in favour [8172] of each other. The renunciation of the wife's legal provision was made in favour of her husband; he therefore was at liberty to pass from it, and to put her in the same situation as if no such stipulation had been made; and, although the disposition mentions nothing with regard to impairing the legitim, or altering the wife's conventional provisions, it must be held as equivalent to an express discharge of her renunciation, as the greater certainly includes the less. Being a disposition of his whole effects, he must be understood to have given to his wife whatever was in his power to give; and that he could have restored her against any stipulation made in his own favour, cannot be disputed.

Answered for the pursuers, The legitim is a portion of goods over which the father has no power of disposal. It necessarily accrues to the children, *ipso facto*, upon his death; and as, where there is no relict, or where she has renounced her *jus relicte*, the half of the father's moveables falls to them; so, from the nature of the thing, no testamentary deed, or *mortis causa* donation, which takes not effect till after death, can exclude or diminish their share. So indeed, it was solemnly determined in the case of Henderson, February 1728, § 6, *k. t.* Although, therefore, William Watt had expressly taken away or diminished his child's legitim by his deed, which was only to take place after his death, it could not have been effectual for that purpose; and far less can the legitim, in this case, be disappointed or impaired by an implied or presumed intention. The only will that can be presumed for him, is, that he meant

to grant to his wife what was in his power to give her, viz. the dead's part ; but that he had no intention to encroach upon the legitim, which was not under his power. The universal disposition cannot therefore be held as equivalent to a discharge of the wife's conventional rights, and as restoring her to her legal provisions.

"The Lords found, that the legitim was due, and that the pursuers were entitled to a bipartite division of William Watt's moveables." See *Jervey v. Watt*, *voce IMPLIED CONDITION*, No. 52, p. 6401.

Act. WAL. STEWART.—Alt. JAMES DUNDAS.

A. W.

Fol. Dic. v. 3, p. 382. *Fac. Col.* No. 73, p. 164.

No. 10. JAMES SKINNER v. WILLIAM-ANN SKINNER. December 20, 1775.

A son who had received a sum in his father's lifetime, found obliged to collate it.

In an action brought at the instance of the younger son, against the elder, to account for his intromissions with the effects of their deceased father, who died intestate and a widower, and consequently his succession fell to be divided in two parts, legitim and dead's part, the pursuer insisted, That the defender is bound, before he can claim any share of legitim in this case, to collate the sum of £100 Sterling, advanced him by his father, as well as the sums which have [8173] already been paid, or may hereafter be paid in virtue of a bond of annuity granted by the father to the defender's wife.

The first of these subjects of collation was vouched by a bond granted by the father, dated 4th October 1770, and proceeding upon the following narrative: "Whereas Alexander Smith, late master of his Majesty's ship the 'Favourite,' my son-in-law, has, at my request, advanced and lent to me the sum of £100 Sterling, presently requisite to be applied for extricating the affairs of William-Ann Skinner, my eldest lawful son, who intends to go soon abroad in the service of the East India Company; and as the said Alexander Smith has agreed not to demand either the said principal sum, or interest, till after my death, and to accept of my obligation underwritten, for payment of the same, in these terms: Therefore, &c." Which bond appeared to have been paid and discharged since Mr. Skinner's death.

The other subject of collation was a bond of annuity for £15 a-year, of the same date above-mentioned, executed by the deceased Mr. Skinner, in favour of the wife of the defender, to subsist while he remains abroad, or, in case of his predecease, while she remains a widow: And it proceeds on the following narrative: "Whereas William-Ann Skinner, my eldest lawful son, intends soon to go abroad, and enter into the service of the Honourable East India Company, whereby he will be obliged for some time to live separately from his wife and family; and that I have resolved to contribute somewhat for their better subsistence and aliment during my said son's absence, or in the event of his decease," &c.

The Lord Ordinary repelled the plea of collation insisted on by the pursuer, who reclaimed, premising, that to one now under the pressure of poverty, the question of collation becomes of considerable moment in adjusting the proportion which he is entitled to draw of the small remains of his father's succession; and, upon the point of law,

Pleaded; By the equitable rule of collation, every child claiming an interest in the legitim, is bound to bring in, and collate, whatever provisions may have been executed by the father in his favour during lifetime. In order to exclude collation, there must be a clear indication of the will of the deceased to that purpose; but it cannot, in this case, be pretended, that there is any express declaration of Mr. Skinner's will, that the defender should have either of the above provisions, without their being subject to collation.

With respect to the £100, which, it has been urged by the defender, was a free gift from his father, for the purpose of enabling him to go out to India, and cannot therefore

be considered as a proper subject of collation ; in the first place, the situation of Mr. Skinner's affairs when this £100 was borrowed by him from his son-in-law, and advanced to the defender, merits particular attention. It appears, that all that he had in the world, did not exceed a few hundred pounds, and the sum that was advanced to the defender must therefore be considered as large and exorbitant, compared with the funds of which his father was possessed.

[8174] 2dly, Let the situation in which the defender then was, be next considered. He was long past the period of education ; nor was this sum advanced on his first outset in life ; on the contrary, he had been for many years in the army, was married, and had a family ; so that the sum advanced to him in these circumstances can never be considered in any other light than as an advance of money to him by way of provision, which he therefore was undoubtedly bound to collate with the pursuer in adjusting their respective proportions of the legitim. For it is laid down, that every advance of money by a father to a child, where there are not circumstances sufficient to show a contrary purpose in the father, must suffer collation ; *vide* Erskine, b. 3, tit. 9, § 24.

2do, The bond of annuity of £15 a-year to the defender's wife, must be looked upon as equivalent to a provision in favour of the defender himself. It is a provision to his wife and family, for whom he was and is bound to provide ; and he, therefore, clearly derives an annual benefit from it, being relieved to that extent of the expense he otherwise would be put to. It now appears, that this annuity does more than exhaust the annual produce of the free residue of Mr. Skinner's effects, after paying his debts, and, among others, the £100 before mentioned. And it were extremely hard, that, when the funds are burdened in this manner, by means of provisions in favour of the defender and his family, the pursuer should not at least be entitled to insist for his collating the benefit which he has thence derived, or may hereafter derive.

Answered ; Admitting the general rule of collation laid down by the pursuer, it will by no means follow, from thence, that there is any room for collation in the present case. The collation even of large provisions may be excluded by the father himself, if it appears to be his will to do so, and that, without distinguishing whether such will be clearly expressed, or is only to be gathered by implication ; Erskine, b. 3, tit. 9, § 25.

But if (as there laid down) in the case of a provision to children, which, in its own nature, implies the idea of forisfamiliation, and something set apart for them, as separate and distinct from the family of their father, it is allowable for the father to qualify that provision, so as to enable them to draw their share of the legitim over and above the provision actually made for them ; and if even such qualification will be presumed, from facts and circumstances, distinct from the express will of the father, it follows, *a fortiori*, that, in the case of a sum gifted and delivered over for present use, abstracting from the idea of a provision, or of forisfamiliation, such sum can never be supposed to come *in computo* of the legitim ; nor can the person receiving it be obliged to collate, so as to increase the amount of the funds from which the legitim is to be drawn.

Such, however, is the case with regard to the £100 in question.

The late Mr. Skinner certainly had it not in view, when he advanced this £100 for the purposes of the defender, to diminish any right the defender his eldest son had to his executry upon his death ; for, as the pursuer had not been heard of for several years, his father concluded that he was dead ; and, as his [8175] daughters were forisfamiliated at their marriages, he must have taken it for granted that the defender would enjoy every thing he should leave behind him at the time of his death.

And far less can the defender be bound to any such collation, on account of the annuity which was settled on his wife ; for, how much soever a child may be obliged to account for provisions made directly to himself, it is impossible he can be made to account for provisions made to third parties, however nearly they may be connected with him, or however dependent they may be upon him. The defender's father was at liberty to dispose of his effects by deeds, *inter vivos*, as he should think proper. He might have granted bonds to the defender's children, to the full extent of what he was worth ; nor could such bonds have been quarrelled by the pursuer, in order to let him into a legitim. And it was surely equally competent to Mr. Skinner to do an act of kindness to the defender's wife, by settling a small annuity upon her during her husband's absence, or her widowhood. There are therefore here no *termini habiles* for collation.

Observed on the Bench ; £100, in this instance, was a large sum, and which could not be considered as of the same nature with advances made by a father on account of his son's education, which are exempted from collation.

The Court found, " That the defender must collate the principal sum of £100 in question, but not the interests ; and, as to the annuity, remitted to the Lord Ordinary to hear parties farther on that point."

Act. J. SCOTT.—Alt. WIGHT.—Clerk, PRINGLE.

Fol. Dic. v. 3, p. 383. *Fac. Col.* No. 210, p. 158.

No. 19. [8179] Mrs. KATHARINE M'GILL v. The Countess of OXFORD.
February 17, 1671.

A bond of provision being granted to a child in satisfaction of legitim, the bairns part goes wholly to the other children, and no part to the heir or executor, who are burdened with payment of the bond.

The deceased Viscount of Oxford having named his son executor and universal legatar, he gives a bond of provision to umquhile Mrs. Mary, one of his daughters, in satisfaction of her portion natural and bairns part ; there are yet three children beside the heir, and the said Mrs. Mary did survive her father, and in the count and reckoning of his executry, the three surviving children claimed half of the moveables as the bairns part. It was alleged for the Viscount, the universal legatar, That a fourth part of the bairns part behoved to belong to him, which would have belonged to Mrs. Mary ; because the bond granted by the defunct being in satisfaction of Mary's bairns part, her bairns part must come in place of it, and not accresce to the rest of the bairns, but must belong to him as executor and universal legatar ; especially this bond being granted on deathbed, is only effectual as a legacy, whereby the defunct did burden his own dead's part, which can be no otherways understood than thus, that he would make up Mary's portion to £10,000, her bairns part being in the first end thereof ; and it cannot be thought his meaning to exhaust his dead's part further, or to gift any thing to the rest of the bairns by the accrescence of Mary's part. It was answered, That such bonds of provision are most ordinary, bearing it to be in satisfaction of their bairns part, which has ever been so interpreted, that the portion of the bairn so satisfied accresceth to the rest of the bairns ; and it was never heard, that the heir or executor burdened [8180] with such bonds of provision, did thereupon recur to seek that share of the bairns part which was satisfied by the bond of provision ; neither is there any odds whether the provision were by legacy or bond, for the reason of recourse being, because the heir or executor is burdened to satisfy that bairn, and so in either case doth claim the share of that bairn ; neither was it ever so understood, that fathers granting such bonds of provision did not thereby leave entire the bairns part to the remanent bairns.

The Lords found, that Mrs. Mary's share of her bairn's part did accresce to the rest of the bairns, and did not belong to the executor, either as a part, or in place of any part, of the £10,000, but the same did solely burden the dead's part.

Fol. Dic. v. 1, p. 544. *Stair*, v. 1, p. 723.

No. 23. [8181] JANET, JEAN, and WILHELMINA NISBETS v. NISBET of Dirleton, their Brother. January 18, 1726.

The wife accepting a voluntary instead of her legal provision, the moveables receive a bipartite division betwixt the legitim and dead's part, equally as she were removed by death. Provisions to children, unless so expressed, are not imputed in their legitim, but they can draw both separately.

The deceased William Nisbet of Dirleton, in his contract of marriage with Mrs. Jean Bennet, his second lady, provided her " To a liferent-annuity of twenty-six

chalders ten bolls victual, which she accepted in full satisfaction of terce of lands, third of moveables, or others, which she might claim by law, in and through her said husband's decease." In the same contract, "he obliges himself, his heirs and successors, to make payment to the daughters of the marriage, if three or more, the sum of 60,000 merks"; and the term of payment is after the said William Nisbet's decease, at their respective ages of eighteen years complete, with annualrent, &c.

After the death of their father, Janet, Jean, and Wilhelmina Nisbets brought an action against the present Dirleton, as executor nominate, to account to them for the half of the defunct's free moveables, as their legitim. Amongst other [8182] defences, it was pleaded, That the legitim could in no event be more than the third of the free gear, seeing the defunct has left a relict as well as children.

In fortification of the libel, it was contended, Though there both be a relict and children existing after the father's decease, if either the relict or children have accepted of a provision in satisfaction of their legal claim, the division of the free moveables falls to be bipartite, equally as where children only, or a wife only is left. The reason is, that the wife, children, and executors of the husband, having each a right *pro indiviso* in the defunct's moveables, as this necessarily falls to make a tripartite division when they all concur, the same reason points out a bipartite division when but two concur; and it has no influence, that the not concurring happens through the death of the third party, or any other reason; because, from the nature of the thing, each has a right to the whole subject, unless he is restricted by the actual concurrence of the two other parties. To enforce this, let it be considered, were it even possible, that the husband could acquire his wife's third, so as to add only to the dead's part, making it two parts, and the legitim one; yet, 1mo, The wife's acceptance in satisfaction is not a conveyance, but a renunciation; which, in as much as the wife's right is not a *ius crediti* against the husband (whereby a renunciation might be pleaded as a consolidation of her share with his) but a right of division, which would need a conveyance, the consequence is inevitable, that her renunciation can have no other effect, but to increase the capital of the testament to be the subject of a bipartite division betwixt the legitim and the dead's part. But, 2do, Supposing the wife's renunciation had been in form of a conveyance, it would have come to the same, from this consideration, that all acquisitions of moveables by the husband go to the common fund of executry, and are at his death subject to the common rules of division above explained. Nor can there be any difference, whether the provision accepted in satisfaction, and upon account of which the renunciation is made, was out of the executry, or any other subject, for the case here is the same as where a land-estate is given to younger children, which they accept in satisfaction of their interest in the moveables, whose renunciation would have the individual same effect as if they had got so much for their share out of the executry. In the next place, As the pursuers are well founded in the nature of the thing, they want not sufficient authority beside to influence a decision in their favours. In the instructions given to the Commissaries anno 1666, which they are ordered to observe in the confirmation of all testaments, the rules of division are laid down to the same purpose; thereby it is appointed, that if the defunct was single, and had no bairns *in familia*, the whole free gear should pay *quot*; that if he left both wife and bairns *in familia*, the testament should divide in three parts, and the third part only pay *quot*; that if he left a wife, and no bairns, the testament should be divided in two, and the half of the free gear pay *quot*; and that the same division should be observed, though he left bairns behind him, if they were all forisfiliate. Now, though the case of children *in familia*, and [8183] a wife who has renounced her share, is not here expressly mentioned, it may readily be gathered from analogy; for, since children non-existing and forisfiliate are put upon the same footing in these instructions, there cannot possibly be a solid reason given, why the determination should be different, whether the wife be dead, or if she has accepted a conventional instead of her legal provision; which will be evident from this consideration, let the children's right be supposed either a right of division, which the pursuers contend it is, or only of credit, still the renunciation of the wife can never operate more in the husband's favours, than the like renunciation from the children. But not to dwell upon authorities by way of analogy, where they are to be had expressly upon the point, see act 19th Parl. 1669, where it is statuted, "That the Commissaries admit of no divisions in testament, in favours and upon account of the relict, where, by her contract of marriage or otherwise, she is secluded from all

part of her husband's moveables." Now, as this was consequential to the instructions of the Commissaries 1666, so it was in exact conformity to the analogy of our law and practice ; for it being admitted, that where the law secluded the relict from any share in particular moveable subjects, as the act 1661 does with respect to bonds bearing annualrent, the division was bipartite as to these subjects betwixt the dead's part and children's part ; there was the same reason for the like division, where the wife's interest was, in virtue of her own paction and agreement, excluded by her own marriage settlement.

The answer for Dirleton was as follows ; Where a husband gives his wife a provision in satisfaction, the greatest part whereof is commonly out of his heritable estate, the rational meaning is, that the husband has purchased his wife's claim, for a valuable consideration, to the effect he may have the more ample disposal of his goods ; for no man is presumed to tie down his own hands. As this must be presumed Dirleton's intention in his contract of marriage, the method he chose was very proper for that end ; for, let it be considered, that the wife's renunciation or acceptance of the provisions in the contract in satisfaction, was not an extinction of her legal claim ; her right in the communion still was subsisting at her husband's death ; and she was entitled to draw her share in opposition to the children, though not in opposition to the husband's executors, who had a personal objection against her, arising from her contract of marriage, wherein she had renounced her right in the moveables, not indeed absolutely, but in favours of her husband ; and the husband's executors take the wife's share, not as a conveyance from her, but in the defunct's right, just as they take the whole when none concur. Whence it is, that this being a personal paction betwixt the husband and wife, the children cannot found upon it, and can draw no more than if such a paction had never been made. And as a further evidence, that a renunciation in such a case does and must operate only in favours of the husband, it cannot be doubted, but, notwithstanding such a clause in satisfaction agreed to by the wife, the husband may discharge it, and declare that she shall come in for her third ; which he could not do if there was [8184] a *jus quæsitum* to the children ; nor could the discharge restore her, if there was any absolute extinction of her right. It cannot have influence, that the renunciation was in the contract before the marriage, and before the wife had any interest in the communion of moveables ; whence it might be argued, that by her contract she had debarred herself from ever having any interest ; for, as it was not the design to increase the common fund for the children's behoof, so the personal paction in favours only of the husband was no absolute exclusion of her legal interest, more than if the contract had been after the marriage, and after her *jus quæsitum* in the moveables. It is said, " That the children's renunciation does increase the common fund of moveables in favours of the wife, and that there is the same reason the wife's renunciation should benefit the children." But it is doubted, whether it be law or be reasonable, when all the children renounce their legitim, that the wife must have half of the executry. It is not established in practice, or expressly said by any of our lawyers ; and before this be established, it would be necessary to give an example, where the wife is preferred to the half of the executry upon the children's renunciation, notwithstanding a testament by the defunct disposing of the moveables otherwise ; and indeed there seems to be no good reason for it, since the father can, notwithstanding such renunciation, admit the children, if he pleases, to be bairns in the house ; which shews that the renunciation is in his favours. Thus, then, upon the whole, there are three persons to whom the law has given a division in the moveables ; and if any of them, by a deed, have barred themselves from the benefit of that division, the person in whose favours the deed was made can alone have benefit thereby. To come now to the authorities adduced for the pursuers ; it cannot be admitted, that either the instructions or act of Parliament determine anything about the extent of the respective interests in the communion of moveables ; they are calculated without any other view, but for ascertaining the extent of the *quot*, which was the bishop's share. And of this there is good evidence from Lord Stair, who, though well acquainted with these instructions, published by himself, with the act of Parliament, and with the method of division that was practised by the Commissaries, yet he, in his Institutions, states this point as dubious and undetermined, namely, Whether the children's renunciation of their legitim would give any benefit to the wife, or entitle her to any more than a third of the free moveables, l. 3, t. 8, § 46.

Replied for the pursuers, There is no more presumption, when a husband provides his wife out of other funds, that he intends to exclude the children from any benefit of her third of moveables, than when he sells land, that the children should be excluded from any share in the price; the cases are precisely equal. In a word, if this presumption take place, the children and relict also will be understood as excluded from every acquisition of moveables made by the husband. But there is no such presumption; the husband does not tie down his hands, by encreasing the common fund of executry, as administrator, [8185] or rather in some respects as *dominus*, having an ample power of disposal during his life. And, in the present case, there is no presumption that Dirleton intended to exclude his children from his lady's share of the moveables, since this he could do at any time, if he should be so minded, by bestowing it upon land, or by restoring his lady to her legal right in the moveables, which he could do, though her renunciation was absolute, the children having no title to object, amongst other reasons, for this particularly, that they are thereby in no worse condition than if the renunciation had not been made. And this will serve to remove the difficulty drawn from the husband's power of discharging the renunciation, as if, in consistency with that, the renunciation could not be absolute, but only in his favour. To go to another point, the defender, in his answers, is obliged to maintain, that the act above cited, was introduced only to ascertain the bishop's *quot*. But even that will be found a sufficient concession for the pursuers, because these are convertible terms, "Whatever is dead's part pays *quot*, and *quot* is payable out of nothing but what is dead's part." If, therefore, there is an indisputable rule from the law for establishing the *quot*, that points out the dead's part, and that of consequence ascertains the other proportions of the executry. Thus, wherever *quot* is paid for the half, it is certain the other half must belong to the bairns part, or to the relict; if the bairns have no claim, through their non-existence or forisfiliation, the relict has it; and where the relict has no claim, cut off by her paction or death, the bairns must have it. And this clearly excludes the notion, that the dead's part may be two-thirds, and the bairns part one-third; for if this could obtain, the act of Parliament must have enjoined, that in case of the wife's renunciation, the testament should be tripartite, whereof two shares to the dead's part, in his own right and that of his wife, for which *quot* should be paid, and the other third bairns part. But the quite contrary is established; the husband's moveables in that case are to admit of a bipartite division, wherein the wife's share, because of her renunciation, is not at all to be considered.

"The Lords found, The defunct's moveable estate admits only of a bipartite division, betwixt the children and the dead's part, by equal portions."

Another defence pleaded for Dirleton, against his sisters' claim of legitim, was, That they cannot draw both the legitim and the 60,000 merks provided to them in their mother's contract of marriage; but the provision in the contract must be imputed *pro tanto* towards the satisfaction of the legitim; which was endeavoured to be made out from the reason of introducing the legitim, viz. that children might not be unprovided. The law, for this end, has thought fit to settle a provision, and determine the extent of it; but where the father has given the child a sufficiency. and reasonable provision, the intent of the law is so far fulfilled, since the child has a proportion of his father's effects, equal to what the law intended him to draw. The legitim, therefore, being only a subsidiary claim given by the law, in defect of other competent provisions, there is no place for it, where the children have already got more than the legitim; [8186] and if the provisions are less, being in its nature subsidiary, it can only come in to supply what is wanting of a competency; that is, in other words, the provisions must impute in the legitim *pro tanto*. Thus, then, the legitim, from its original design, is no more but a certain share of the moveables, including former provisions; and, therefore, unless the father's *animus* do appear, that the former provisions shall not impute, the rule of law is that they do impute. This will not have the less weight that it is agreeable to the Roman law, whence our legitim is evidently derived. See l. 29, C. *Inoffic. Testam.* 2do, This is founded in the maxim, *debitor non præsimitur donare*, the father is debtor in the legitim, and what he gives must be understood in satisfaction *pro tanto* of that debt.

To the first it was answered, That the legitim is not a subsidiary claim; "it is that direct interest the children have in the communion of moveables, established to them by law and custom, abstractedly from any consideration, whether they are

otherwise provided or not." For thus far the law thought proper to make them absolutely secure, leaving them to their parents for what additions should be thought proper. The pursuers, therefore, are well founded in their action. As creditors in virtue of their mother's contract, they can draw their payment out of the common fund of the executry; and of what is left, after satisfying that and other just debts, they come in as children to draw the half, which is their legal provision. These two claims are perfectly consistent, and there is no more reason for imputing the one into the other, than if existing in different persons; and therefore in no case will a provision exclude the legitim, unless where the parent has expressly so determined. This reason is greatly confirmed from analogy of the wife's provision; for before the act 1681, c. 10, a provision to a wife in a contract of marriage, would not have imputed in her legal provision; and to this hour, an obligation in a contract of marriage, to pay a wife a sum of money, will not impute in her third of moveables; the pursuers cannot see, why a separate provision in their favour, should impute into their legal provision, more than in the case of the wife. To the second it was answered, That the father is not debtor in the legitim, and therefore the maxim applies not. The legitim is a right of division, like the wife's third; it transmits without confirmation, and can be validly assigned the moment the father dies, while at the same time the other third, which is dead's part, is neither assignable, nor transmits without confirmation. But, 2do, Granting, for argument's sake, the legitim to be a debt, still it is no such debt to which the maxim can be applied. Indeed, where one is under a strict determined obligation, which the creditor has at any time in his power to enforce by legal execution, there every dubious deed will be interpreted as in order to dissolve the obligation; but every one sees that this has no relation to the case in hand. A father, whatever may be said of his being debtor in the legitim, is certainly under no strict obligation upon that account. He has, notwithstanding, the full and almost unaccountable administration and disposal of the moveables during [8187] his life; and the children must be satisfied with their share as he leaves it. This case, therefore, differs in every circumstance. 3tio, Were this maxim applicable, there is a stronger presumption on the other side, that would take away its whole force, viz. the presumption of paternal affection, which has the effect, that bonds of provision to children are not even imputed in former bonds; see Stair, l. 1, t. 8, § 2, *med.* far less in the legitim.

"The Lords found the provisions of the defunct's contract of marriage in favour of his children, the pursuers, must come off the hail head of the executry, as a debt; and that what remains after payment of these provisions, and payment of the defunct's other moveable debts, the children come to have right to the equal half thereof, as their legitim."

Fol. Dic. v. 1, p. 545. *Rem. Dec.* v. 1, No. 66, p. 127.

No. 24. MARION HENDERSON v. DAVID HENDERSON. June 1728.

Claud Henderson had a son and three daughters; the eldest, in her contract of marriage, accepted a provision in satisfaction; the son obtained a general disposition from his father of all his effects, with the burden of certain provisions to the two youngest daughters. After the father's decease, the second daughter ratified the disposition to her brother, accepted of her provision, and renounced any claim she had of legitim; the youngest neglected her provision, and took herself to her claim of legitim. The Lords found, That the eldest daughter being forisfamiliarated before the father's decease, the brother could claim no share nor interest in the legitim upon her account, and that the second daughter not being forisfamiliarated the time of the father's decease, had right to a share of the legitim, and did, by her ratification and renunciation, communicate her share to her brother. See APPENDIX.

Fol. Dic. v. 1, p. 544.

No. 29. [8193] REBECCA HOG v. THOMAS HOG. June 7, 1791.

One or more of the children *in familia* having renounced the legitim, their shares fall to those who have not renounced.

The father of Thomas and Rebecca Hog had six children, three sons, of whom Thomas was the eldest, and two daughters, beside Rebecca. On the younger sons and the daughters he made provisions; and from all of them, except Rebecca, having given the securities in his lifetime, he received discharges, and renunciations of their legitim. Rebecca had offended him by her marriage; and though he intended to make her portion equal to that of her sisters, who had married with his approbation, he did not chuse to advance it to her, or settle it irrevocably during his life; by which means she had not the occasion of renouncing her legitim, as all the rest had done.

On the death of the father, two of the other children being predeceased, it came to be a question between Rebecca, and Thomas his heir, who was also his general dispositive, whether she, who alone had not renounced her legitim, and who now repudiated the provision destined for her by her father, was entitled, unquestionably contrary to his intention, to claim a full half of his moveables under that denomination, or only one third of such half, while the shares of the other two surviving children accresced by their renunciation to Thomas, in the room of his father. In an action at the instance of Rebecca, to enforce her claim to the half of the moveables, she

Pleaded, The present question relates to the effect of the renunciation of legitim by a part of the children entitled to it, whether the father is to be considered as having purchased their shares, so as proportionally to increase the dead's part, or to give him, as coming into their place by implied assignment, the absolute power of disposal of them; or if the portions of the renouncers, still remaining in the same situation as the rest of the legitim, will fall to the child or children who have not so renounced.

The legitim resembles a right of property. Though a husband, from his power of administration, may waste the goods in communion, in the same way as any other part of his fortune, and so impair or annihilate the subject of the legitim; yet he cannot, by a testamentary deed, or even by a deed *inter vivos*, if calculated for that end, disappoint his children of their shares, which they take, not as in right of succession, but *proprio jure*.

When a father, in giving portions to his children, obtains a renunciation of the legitim, it is plainly nothing but a transaction, by which they receive their shares, or what is held as equivalent, by anticipation, the fund for division as at [8194] the father's death being thus proportionally diminished. If, therefore, the father's dispositive were then entitled to claim the shares of the children who had renounced, the consequence would be, that having been already advanced by the father, they would be doubly paid. For in such a case there could be no room for collation; the law not requiring collation by a dispositive.

Nay, were the effect of this renunciation, or of a virtual assignation to the father, of the shares renounced, such as to separate the renouncers proportions from the rest of the legitim, they would still be comprehended among his moveables, and suffer the division belonging to that aggregate fund.

The effect of renunciation of legitim is therefore the same as that of the death of the renouncer; so that if the children renounce, the whole goods in communion become dead's part, or fall also under the *jus relictæ*; and if only some of the children be thus forisfamiliaried, the whole legitim must be drawn by such as remain *in familia*. In the same manner, when a wife renounces her *jus relictæ*, this, instead of encreasing solely the powers of the husband, renders the subject of it liable to the legal division between father and children.

Accordingly, in the instructions framed in 1666, for the guidance of the Commissaries in the confirmation of testaments, the dead's part is always held as either a half or a third of the free gear, no idea, it is plain, being entertained of increasing the dead's part by transacting with the children; for then it would hardly have passed unnoticed by those dignitaries of the church, who were both the framers of the instructions, and the very persons to whom the *quot* was payable. It is also clearly there laid down, that in the case of all the children being forisfamiliaried, the division should be bipartite; whereas, were the father to stand in their place, it would be rather tripartite, as he would be entitled to two-thirds.

All the other authorities of our law equally coincide in establishing the same doctrine ; and some, by implication or analogy, as Nisbet *contra* Nisbet, 18th January 1726, No. 23, p. 8181 ; Kilkerran, Falconer, 22d February 1749, Martin *contra* Agnew, No. 8, p. 8167 ; Fac. Col. 7th January 1762, Jervy *contra* Watt, No. 9, p. 8170 : And some of them more directly, as Stair, b. 3, tit. 8, § 46 ; Bankton, b. 3, tit. 8, § 15 ; Erskine, b. 3, tit. 9, § 23 ; Stair, 17th February 1671, M'Gill *contra* Viscount of Oxenford, No. 19, p. 8179 ; June 1728, Henderson *contra* Henderson, No. 24, p. 8187 ; 29th July 1768, Sinclair *contra* Sinclair, No. 26, p. 8188.

Answered, The legal division of the defunct's moveable estate may be properly denoted by saying, that the wife receives a half, if there be no claim for legitim, and the children a half when the *jus relictæ* is not claimed. When, therefore, a wife relinquishes her *jus relictæ*, or when the whole of the children renounce the legitim, the legal division is necessarily bipartite, the claim of *jus relictæ* in the one case, and of legitim in the other, being extinguished. But if the right of legitim has been renounced by only a part of the children, that claim still subsists, and by consequence produces a tripartite division. Those, [8195] however, who have not renounced, can only have a title to their respective shares ; and when these are obtained, they suffer no loss from the disposal of the shares of those who have renounced.

The case is the same as if a father, for value given by him, were to stipulate with one of his children, that he should apply in a certain manner his portion of the legitim, or that he should allow a nominee of the father's to draw it in his stead ; a bargain, to which it is plain neither the relict nor the rest of the children could make any legal objection. It is, besides, obviously equitable, that a father who gives for his child's renunciation a value which is absolutely his own, so that he may employ it in any other way he chuses, should reap the benefit of his purchase, which indeed is also a casual benefit, dependent on the child's surviving.

The idea of a share's being thus twice drawn, as if collation were then excluded, is erroneous ; because a dispositive, as well as a child, would be bound to collate ; and, at any rate, the hardship would be no greater than if the father had exerted his power in another way, by declaring, that notwithstanding the payment of a provision, the child should remain *in familia*.

With respect to the authorities quoted by the claimant, the cases of Nisbet and of Jervy respect the renunciation of the *jus relictæ*, which it is admitted does not convey the right to the husband.

In those of M'Gill, of Sinclair, and of Martin, the natural presumption was, that the father willed the shares of the renouncers to accresce to the rest of the children ; and every case of this kind is a *quæstio voluntatis*. The case of Henderson, where a renouncer's share was found to accresce to the children not renouncing, contrary to the father's will, therefore is, and that alone, favourable to the claimant's plea.

The right of children to conquest is extremely similar to the legitim ; and the idea, if a just one, of renunciation having the same effect as the death of the renouncer, should apply not less to conquest than to legitim. But in regard to the former, it has been repeatedly found, that a renouncer's share did not accresce to those who had not renounced, but became at the father's disposal ; Allardice *contra* Smart, 1720, see APPENDIX ; Sinclair *contra* Sinclair, 1768, No. 26, p. 8188 ; Dirleton, *voce* EXECUTORY.

The Lord Ordinary pronounced an interlocutor, in substance as follows.

" Finds, that when a father takes a discharge and renunciation of the legitim from one of his children, no *jus quæsitum* arises to the other children therefrom, the transaction being *res inter alios acta* as to them ; so that the father has absolute power over such discharge and renunciation, and may cancel or burn it when he inclines : Finds, that the same power must be competent to his heir or universal dispositive, who has right to it from him ; or, without destroying the deed, he may wave the exception which it affords him against the renouncer, and admit him to the legitim, to which the other children have not a title to object, but only to insist for collation, if that has not been dis-[8196]-charged by the express or implied will of the father : Finds, that there is nothing in law or reason to disable the child from assigning, in the father's lifetime, his eventual right to the legitim, either to the father or to any other person ; and that if any other person claims upon such assignation, he must collate what the child has received in the father's lifetime ; but that if the father's heir or dispositive claims upon such assignation, he will not be obliged to collate, because the father can

discharge the obligation to collate ; and such discharge is implied from his having taken the assignation to himself : Finds, that a discharge and renunciation granted by a child ought to have the same effect as if an express assignation had been granted ; the meaning of the parties being clear, and the omission of the assignation being probably owing to its being deemed unnecessary, and to the seeming impropriety of granting an assignation to a man who can never himself use it in his lifetime : Finds, that it has been twice adjudged by this Court, and by the House of Lords, that such discharge and renunciation as to conquest will operate in favour of the father and his heir, and not in favour of the child or children not renouncing : And though it is admitted in one of these two cases, that the contrary would hold as to the legitim, finds, that no solid reason is assigned for making the distinction : On these grounds, finds, that the renunciation of the other children cannot avail the pursuer, but must operate in favour of their father, who obtained it, and his heir, the defender."

Afterwards the Lord Ordinary took the cause to report on memorials, and the Court pronounced the following judgment :

" Finds, that the renunciations of the claim of legitim by the other younger children of the deceased Mr. Hog, operated in favour of the pursuer, Mrs. Rebecca Hog, and have the same effect as the natural death of the renouncers would have had ; and as she is the only younger child who did not renounce, find her entitled to the whole legitim, being one half of the free personal estate belonging to her father at the time of his decease."

The defender reclaimed ; but the Court, on advising his petition, with answers, adhered to their interlocutor.

Reporter, LORD DREGHORN.—Act. LORD ADVOCATE, SOLICITOR-GENERAL, WIGHT, J. CLERK.—Alt. DEAN OF FACULTY, G. FERGUSON, M. ROSS.—Clerk, SINCLAIR.

S.

Fol. Dic. v. 3, p. 384. Fac. Col. No. 186, p. 381.

No. 30.

[8197] CHRISTIE v. CHRISTIE. July 13, 1681.

Pupillaris substitutio hath no place in the Scotch Law.

The deceased Mr. James Christie, by his testament, did nominate Jean Christie, his daughter, his executrix and universal legatrix ; and, failing of her by decease, David Christie, to whom he left also a legacy of 3000 merks ; and dying shortly after the testament, the said Jean being an infant, was confirmed executrix, and did obtain sentences for the defunct's moveables, and shortly after died in her infancy. Mr. James Christie's relict brought forth a son about nine months after his death, who was served executor to Jean Christie his sister. The said David Christie pursues James to make payment to him of all the executry of Mr. James Christie, as being substitute to Jean Christie in the office of executry and universal legacy, in case of her decease. The defender alleged, Imo, That Jean being institute heir *in mobilibus*, and having entered by confirmation, the substitution to David evanished, seeing Jean failed not to be heir. It was answered, That the clause of substitution bearing, failing Jean by decease, imports a tailzied succession *in mobilibus*, whereby Jean was constituted fiar, and David heir substitute ; so that Jean might have disposed thereof at her pleasure ; and if she or her tutor had taken bonds for the defunct's executry, to herself and her heirs whatsoever, it would have excluded David the substitute ; but that not being done, but only decreets obtained, decerning the debtors to pay the sum to Jean, as executrix, James her brother doth not succeed to her therein, but David the substitute by her father. " The Lords found, that the substitution imported a tailzied succession, which not being altered, David was preferable to James, nearest of kin to Jean." The defender further alleged, That, albeit the substitution in the universal legacy did prefer David, yet that could extend no further than the dead's part of the testator's moveables, being the half ; for Jean being the only bairn, and the relict excluded by her contract of marriage, the one-half of Mr. James his executry did belong to Jean, as the only bairn, which no deed of her father

on deathbed, or by testament, could prejudice. It was answered, That the testator having appointed Jean his universal legatar, and only intromitter with his goods and gear, she could not accept [8196] the universal legacy upon other terms than it was granted, which did import the communication of her own bairns part; and this is in effect *substitutio pupillaris*, whereby the father hath substituted to his daughter, not only in his own dead's part, but in her bairns part, which is a just power attributed to fathers by the Roman law, to substitute heirs to their children, not only in their heritage, flowing from the father, but into all their other rights. "The Lords found, the substitution could only reach to the dead's part, and that the bairns part belonged to James, as nearest of kin, and executor to Jean, and that pupilar substitution hath no place with us, neither did the father make the universal legacy with express condition, that the substitute should have both dead's part and Jean's bairns part." The defender further alleged, That this substitution of David Christie to Jean Christie, who was the testator's only child at that time, being a donation of mere gratuity to a stranger of no relation, is excluded by the superveniency of James, whom the testator knew not to have been conceived, which if he had known, he would never have given a stranger the substitution of his whole moveables, which is *universum jus in mobilibus*; and, therefore, as all donations are revoked by ingratitude, or superveniency of children, when the donation is universal, so this donation must be revoked by the superveniency of James, who was not a month conceived when his father died.

This point being new, the Lords appointed to hear it in their own presence.—See SUBSTITUTE and CONDITIONAL INSTITUTE.

Fol. Dic. v. 1, p. 546. Stair, v. 2, p. 889.

No. 32. [8199] Lady BALMAIN v. GRAHAM. January 18, 1721.

A disposition by a husband to his wife of the stocking that should be upon his mains the time of his decease, being quarrelled by his children, as in prejudice of their legitim, being of a testamentary nature, revocable, as not having been a delivered evident; it was answered, That the form of the disposition is *per modum actus inter vivos*, whereby a present right is conveyed, though suspended till the grantor's death, and being done *in liege pousie*, it cannot be reached by the law of deathbed, and there lies no other bar to the father's power of alienation; 2do, This is a rational deed, an additional provision to a wife, and not of that nature as to admit of a construction that it was intended to disappoint the children of their legitim. The Lords found the goods disposed belonged to the Lady *tanquam præcipuum*. See APPENDIX.

Fol. Dic. v. 1, p. 545.

No. 35. [8208] JOHN ALLAN v. MARGARET CALLENDER. June 16, 1762.

A person's insolvency is not a sufficient reason for his father to dispose of his whole effects, and thereby exclude him from his legitim.

James Allen, merchant in Edinburgh, having two children, Euphan who was married and forisfamiliaried, and John who was married but not forisfamiliaried, made his ultimate settlement, disposing to his wife Margaret Callender his house and shop, to be sold, and the price to be settled upon his son John in liferent, and John's children in fee; and settling also his moveables upon John and his children, to be distributed among them as the said Margaret Callender should think proper, according to the circumstances of him and his family.

The son John challenged this deed as *ultra vires*, by depriving him of his legitim, over which the father has no power. Answered, That John at the time of the settlement and at his father's death being bankrupt, the settlement was the most rational

that could be contrived even for his own interest, because it secured a fund for his family which otherwise must have been swallowed up by his creditors ; and at the same time John himself was not overlooked, for his mother was empowered, if she saw cause, to settle all upon him ; and which she certainly would do were a free man to take the benefit of it.

In support of this answer it was urged for the defender, That the legitim being established by law as a provision to children, it cannot in the nature of things be due in any case where a child cannot hold or take benefit by it. For this reason a father can never be blameable for disappointing a son attainted of high treason of his legitim. What if a child be cognosed an idiot ? What if a young man has attempted to murder his father ? These particulars prove that there are many reasons to justify a man for withholding the legitim from his son ; and bankruptcy is as strong a justification as any of them.

Replied for the pursuer ; That the inference from the cases mentioned to bankruptcy is not fair. A bankrupt has always hopes of emerging out of his difficulties, to which his legitim may greatly contribute ; and therefore to deprive a bankrupt of his legitim is not less hard than to deprive one who is not a bankrupt. Put the case, which holds true as to John Allan, that the legitim will pay all the bankrupt's debts, and set him down a free man. This, instead of being a reason for depriving him of his birthright, is one reason more for securing him in it. And if bankruptcy afford not, in this case, a reason for withholding the legitim, it cannot in any other case of bankruptcy ; for judges must act by general rules.

The Judges accordingly reduced the deed, as far as it deprived the pursuer of his legitim.

Fol. Dic. v. 3, p. 382. Sel. Dec. No. 197, p. 262.

No. 37.

[8215] MILLIE v. MILLIE. June 7, 1803.

The claim of legitim not affected by a general disposition of a father to his eldest son, upon which no actual delivery ensued, although the disposition was declared irrevocable.

In the year 1791, David Millie, manufacturer in Pathead, by a general disposition, conveyed his estate, heritable and moveable, to his only son, under the burden of an annuity of £100 per annum, which he reserved to himself ; and by a deed of the same date, he provided a small annuity to each of his daughters. This disposition was declared to be irrevocable, and was recorded.

The father and son had been for many years engaged in a copartnery for carrying on business. But the effects of this copartnery were never regularly delivered over by an inventory to the son, although notification was made to some of their correspondents, that the affairs of the company were to be wholly managed by him after the date of this general conveyance. Nor did the annuity reserved to the father appear to have been regularly drawn. In 1793, a submission was entered into between Millie and his Son, upon the one part, and Elizabeth, his daughter, on the other, narrating, that no settlement had been made upon her, nor any discharge granted by her to the claims competent to her out of the estate and effects of her father. But after some procedure, the submission was given up by the arbiters, without pronouncing any final decision.

Millie senior died in 1795, possessed of a considerable fortune ; and his daughter soon after brought an action against her brother, concluding to have the disposition in his favour set aside, on the head of imbecility and circumvention, and for payment of £10,000 as her legitim. She brought likewise an action for payment of her share of her mother's executry ; but some circumstances prevented her from following out her claims, and the defender was assoilzied from the conclusion of both processes.

Elizabeth Millie, however, raised a new action against her brother, concluding for payment of her legitim ; and the plea of *res judicata* being repelled, she

Pleaded, The general disposition executed by her father, was intended for the sole purpose of defeating the legitim, which the law provides for younger children. A father may virtually defeat this claim, by converting his moveable into heritable

property, or by divesting himself of his moveable effects altogether. But he cannot defeat the provisions of law by a simulate conveyance. The [8216] conveyance in this case, though conceived in the form of a deed *inter vivos*, was not in reality intended to take effect till after Millie's death, and can be considered in no other light than as a fraudulent device between a father and a son, by a deed of testamentary nature, to defeat the claim of legitim (which the law can never sustain); *Allan v. Callender*, 17th June 1762, No. 35, p. 8208. The claim of the widow to the *jus relictæ* is founded upon the same principles with this claim of the younger children; *Erskine*, b. 3, tit. 9, § 16; and the *jus relictæ* cannot be defeated by a deed *mortis causa*, *Sorlies v. Robertson*, 5th December 1771, No. 147, p. 5947.

With respect to the special circumstances of the case, independent of the general presumption of a simulate conveyance by such a gratuitous alienation, it was urged, that the deed in 1791 was not a *bona fide* conveyance, because no actual delivery or transfer of the copartnership and other effects had ever taken place in consequence of it, nor was the partnership truly dissolved; that the settlement of an annuity upon the father was quite fictitious, for no regular account had ever taken place; and that the submission entered into afterwards, to which the father was a party, explicitly recognised the pursuer's eventual claim of legitim, which could have no place if her father had conceived himself to have been really divested of all his moveable estate.

Answered, *Nemo agit dolose qui jure suo utitur*. The right of legitim is not a right of property, nor does it even bestow a *jus crediti* in favour of children. It is merely a right of succession in the moveable estate of which the father may die possessed; and as he is by law entitled to alienate this estate, it is of no consequence to inquire, what may have been his intentions in making the alienation. The law has sufficiently secured the claim of legitim, by sustaining it against deathbed or testamentary deeds; but it does not allow children to challenge every transaction of their father, executed in *liege poustie*, with respect to his moveable estate, by which their claims may be affected, *Bankton*, b. 3, tit. 8, par. 26. If, therefore, a father is the unlimited proprietor of his moveable estate, and can dispose of it by deeds *inter vivos* to a stranger, he cannot be said to act fraudulently when he conveys it by such a deed to his son. Accordingly, it has been found, that an irrevocable conveyance to an eldest son of moveable property, even when the father reserves the liferent, is sufficient to defeat the legitim of the younger children; *Agnew v. Agnew*, 28th February 1775, No. 36, p. 8210.

And with regard to the particular circumstances of the conveyance in 1791, it was answered, That the pursuer had been unable to point out any act of possession on the part of her father subsequent to the deed; that the nature of the effects conveyed rendered any inventory unnecessary, when his son had been for many years in partnership with him; and that the object of the submission could never be to ascertain what was due to the pursuer as legitim, because that must be regulated entirely by the amount of the moveable estate at the father's death, which could not be previously ascertained.

[8217] The Lord Ordinary found "the pursuer's claim for a proportion of her deceased father's effects, being founded upon the obligation laid upon parents, both by the law of nature and positive institution, to provide for their children, cannot be defeated but by a *bona fide* alienation and transfer of property during the lifetime of the parent; and, upon the whole circumstances of the case, that the voluntary and gratuitous disposition by David Millie senior, in favour of his son, the defender, cannot be held as a *bona fide* alienation and transfer of his property, but a collusive transaction, devised for the purpose of defeating the claim of legitim competent to the pursuer: Therefore repels the defences founded on this deed; sustains the claim; and appoints the pursuer to lodge a state of the amount of the personal funds belonging to her father at the time of his death."

A petition was presented to the Court against this interlocutor; which, upon being advised with answers, was refused (16th February 1803). And afterwards, upon considering a reclaiming petition with answers, the Court adhered.

Lord Ordinary, BALMUTO.—Act. CAMPBELL, JUN., BOYLE.—Agent, D. LISTER.—
Alt. ROBERTSON.—Agent, JOHN TAWSE.—Clerk, PRINGLE.

No. 2. [3] REBECCA HOG and Others v. THOMAS HOG. May 14, 1800.

The legitim may be disappointed by the gratuitous deeds of the father *inter vivos*.

In the process, No. 29, p. 8193, brought by Rebecca Hog, her husband Mr. Lashley for his interest, and the assignees of Alexander Hog, against their brother Thomas Hog, as their father Roger Hog's general disponee, to account for the legitim, the pursuers, *inter alia*, claimed to have included in Roger Hog's personal succession 120 shares of the stock of the Bank of Scotland, which he had transferred to the defender *inter vivos*, the greater part of it only a few months before his death, and in order to defeat the claim of legitim, which, he had become apprehensive, would be made against his general disponee.

The pursuers contended, That this had been done *in fraudem* of the claim of legitim; Ersk. b. 3, tit. 9, § 16, and that the stock was held in trust for Roger Hog during his life.

The defender hardly disputed the object of the transference; but maintained, that it was absolute in his favour, and therefore sufficient to exclude the claim; 28th February 1775, Agnew v. Agnew, No. 36, p. 8210.

To ascertain the fact, the defender, and others acquainted with Roger Hog's affairs, were examined as havers; the books of the Bank and of the deceased were inspected; and other written evidence was produced.

The Lord Ordinary found, "That the 120 shares of the stock of the Bank of Scotland, transferred to and vested in the defender by the late Roger Hog of Newliston, anterior to the death of the said Roger Hog, are not subject to the pursuer's claim of legitim."

[4] Upon advising a petition, with answers, it was

Observed on the Bench; The proof establishes, that the stock was absolutely transferred to the defender *inter vivos*. A father, in *liege poustie*, has complete power of administration over his effects. He may change moveable into heritable securities. It is not relevant to inquire into his motives. The case of Agnew is decisive against the claim. The passage in Mr. Erskine, b. 3, t. 9, § 16, is loosely expressed.

The Lords, with some hesitation on the part of one Judge only "adhered."

Lord Ordinary, ARMADALE.—Act. JO. CLERK, GILLIES, *et alii*.—Alt. CONNELL, *et alii*.
—Clerk, SINCLAIR.

D. D.

Fac. Col. No. 183, p. 394.

* * On appeal, the House of Lords (16th July 1804) "declared, That such shares of the stock of the Bank of Scotland, standing in the name of the respondent Thomas Hog, at the death of the said Roger Hog, as shall appear to have been transferred to the said Thomas Hog, under any agreement or understanding that he would invest the same in land after the death of the said Roger Hog; and also such shares, the dividend whereof shall appear, notwithstanding the transfer of same, to have been, after such transfer, ordinarily received for the account of and applied for the use of the said Roger Hog, ought to be considered as subject to the pursuer's claim of legitim; and it is therefore ordered and adjudged, That all such parts of the interlocutors complained of in the said appeal, as are inconsistent with these declarations, be, and the same are hereby reversed, and in so far as they are agreeable thereto, the same be, and are hereby affirmed; And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to ascertain whether any, and which of the shares in the Bank of Scotland, agreeably to the declarations aforesaid, are subject to the pursuer's claim of legitim," &c.

No. 3. [8235] GORDON v. The Earl of QUENSBERRY. June 15, 1680.

A requisition at a market-cross found null, not being by letters of supplement from the Lords.

Gordon being infert in the lands of Middlebee, pursues reduction of an apprising, led at the instance of Craig of Stewarton, as assignee to a decree of terce-duty of the

said lands due to Mary Maxwell, relict of Robert Maxwell of Middlebee, and upon several heritable bonds due by the said Robert, to the which apprising the Earl of Queensberry had right. The first reason of reduction was, that the decret for the terce-duty was null, bearing only "that the relict was kened to a terce, and that the duties of the lands were intromitted with by Maxwell during his life, after the tercer's husband's death": but it did not bear, that the time of her husband's death was proven, or the durance of the intromitter's life; and that it would appear so by the testimony of the witnesses extant in process, the decret being in anno 1677. It was answered, That the Lords having found by a decret *in foro* that Maxwell intromitted, and that the terce-duties intromitted with, extended to the sums decerned, and did necessarily infer, that probatation was both led at the entry of the intromission and the ish thereof; and that it is a principle that no decret of the Lords *in foro* can be quarrelled, upon pretence that the testimonies did not prove what the Lords found proven, for testimonies not being publishable in the first or second instance, the sentence is ultimate and unquarrellable, and the Lords do frequently refuse revising of testimonies, even before extracting of the decret, much less after so long time, when it cannot appear whether all the testimonies be extant, for no signature of process bears the number of the witnesses;—the Lords repelled this reason, and sustained the decret, and would not call for the testimonies of the witnesses. Another reason insisted on was, that the apprising in question proceeded also upon heritable bonds, bearing requisition; and that the requisition made was null, being made to a pupil, and not to his tutors or curators, either personally, or at the market-cross, by letters of supplement; and albeit the instrument of requisition did bear, "that it was made at the cross to tutors and curators," yet that was null and unwarrantable without letters of supplement from the Lords, by which only intimations at a cross are effectual. It was answered, 1mo, The defender opposes the decret *in foro*, wherein this allegiance was competent and omitted; 2do, There is produced a decret of registration which supplies the requisition. It was replied to the 1st, That the persons against whom the decreets were obtained being minors, and undefended by tutor or curator, the omission of an advocate cannot exclude the minor to make use of the reasons omitted; to the 2d, The decret of registration can never supply the requisition, seeing it grants but such execution against the heir, as might have been against his predecessor, subscriber of the bonds, against whom there could be no process until requisition had been used, so neither could they against his heir.

[8236] The Lords found the decret of registration did not supply the requisition, and that the requisition at the market-cross was null, not being by letters of supplement from the Lords, and found the omission of this allegiance could not exclude the minor in his reduction. See MINOR. *Fol. Dic.* v. 1, p. 547. *Stair*, v. 2, p. 770.

No. 4. [8240] The Lady LAMINGTON v. Her SON. February 14, 1682.

The Lady Lamington pursued her son the Laird for the third of the coal of Penston and Hoprig, as due to her by reason of terce, whereunto she was served out of these lands. The Lords found, That terce was due only of the lands above ground, and that the Lady tercer had no right to the profits of coal, or any thing under ground, but in so far as was needful for her own use, and she could not break the ground to work coal and sell it to others, nor could participate of any profit gotten thereby, but only should have as much as might serve herself.

Fol. Dic. v. 1, p. 548. *Spottiswood* (TERCE), p. 336.

* * Kerse reports this case :

Found no terce of coal-heughs *nisi ad usum proprium*. *Kerse*, MS. fol. 90.

* * This case is also reported by Durie :

In an action by the Lady Lamington v. the Laird, for payment of the terce of the coal of certain lands, to the terce of which lands she was lawfully served and

kenned, and thereby claimed the third of the profit of the said coal, which was win within the said lands ; the Lords found, that the Lady tencer [8241] had no right to the profits of any coals win within the lands, by virtue of her right of terce, but only to so much as might serve for her own use, and not to any more of any part of the commodity made by the heritor thereof, and therefore assoilzied from that purwit, except as said is *pro tanto*, so far as concerned her use for her own fire.

Act. NICOLSON *et* BELSHES.—Alt. HOPE *et* STUART.—Clerk, GIBSON.

Durie, p. 345.

No. 5. CAMPBELL *v.* STIRLING. February 16, 1666.

A liferenter being infeft in lands *cum molendinis*, found to have right to a mill buik thereon after the infeftment, but to the multures of the liferent lands only.

Laird of Ottar having infeft his wife in conjunct-fee or liferent, in certain lands *cum molendinis*, did thereafter build a mill thereupon, and the question arising betwixt the liferenter and the heir, who should have right to the mill ? The liferenter alleged, *ædificium solo cedit*. The heir alleged, That a mill is *distinctum tenementum*, that cannot pass without infeftment, and the clause in the *tenendo cum molendinis* is not sufficient not being in the dispositive clause, nor any mill built then, and he offered to make up all the liferenter's damage by building on her ground.

[8242] The Lords found that the benefit of the mill belonged to the liferenter as to the multures of all that was ground without the thirlage ; but found it not to extend to lands of the defunct's which he had thirled to the mill. *Stair*, v. 1, p. 358.

No. 7. The Lady PRESTON *v.* The Laird of PRESTON. July 13, 1677.

A liferenter found to have no right to the coal in her liferent lands. See No. 4.

The deceased Lord Preston, by his contract with — Bothwel his second wife, having provided her to an annualrent of 1200 merks out of his lands, and for security thereof, obliged him to infeft her in the lands, declaring it to be in her option, to take her to the annualrent, or to possess the lands themselves, she chuses the possession of the lands, and insists for the benefit of a going coal-pit in the lands at the time of the contract, and now as being part and pertinent of the lands, and thereby carried, though not expressed, as vassals being infeft in lands, though the superior remains infeft *in directo dominio*, yet he hath thereby no right to coals in the lands, but the vassal hath right thereto, as part and pertinent, which must also hold between the liferenter infeft in the lands in liferent and the fiar. It was answered for the fiar, That there was no parity in these cases ; because liferents, however conceived, are [8243] but *ususfructus*, and are not extended to green woods or coals. It was replied. That liferents have been extended unto coals sufficient for the liferenter's use, or woods to the reparation of houses. It was duplied, That whatever might be pretended in liferent by conjunct-fee, whereby the liferenters may receive vassals, and where the fiar hath been in use to raise coal for his own fire, and to make use of wood for his own and his tenants use, that the conjunct fiar might continue the same custom, yet this is but a simple liferent, and the coal before the infeftment was accustomed to be farmed, and sold to the country, or if there had been *sylva cædua* accustomed to be hained and sold to the country, the liferenter can pretend no right.

The Lords found the liferenter to have no right to this coal which was a going coal sold to the country before the contract, much less, if it had been a coal begun to be win after the contract. *Fol. Dic.* v. 1, p. 548. *Stair*, v. 2, p. 540.

No. 8. [8244] Sir JAMES STANFIELD v. WILSON of Spango, and the Earl of QUEENSBERRY. July 16, 1680.

Wherever references are made to the Lords from other courts, they use summarily to call them in presence without order of the roll. The Lords found the Countess Dowager of Carnwath, being infeft *cum silvis* in liferent, that it gave her interest to interrupt the heritor and his tacksman from cutting *in ipso initio*, till a portion should be set apart for her liferent use, and ordained a speedy cognition of the wood to be taken, and a part to be laid aside for the liferentrix's use, for repairing the houses, &c. ; the report to be made within eight days, that Sir James's lead-works might not be out for want of timber. Yet Craig, page 189, thinks a liferenter cannot hinder an heritor to sell and dispose of his wood and coals, and cites decisions for it. See APPENDIX.

Fol. Dic. v. 1, p. 548. Fountainhall, MS.

No. 9. Earl of DUNFERMLINE v. The Earl of CALLANDER. March 28, 1683.

A conjunct fiar cannot cut wood for sale, though he may for necessary use.

In the process pursued at the instance of the Earl of Dunfermline, as having right from his father, who was heir served and retoured to his grandmother, intended against this Earl of Callander, as representing his uncle, who was obliged to provide the half of the conquest during the marriage betwixt the Lady and him, to her and her heirs, in case there should be no heirs of the marriage surviving; the Lords found the obligation to provide the half of the conquest to his Lady and her heirs did state him only to be in the case of a conjunct fiar, and so could not cut the woods for selling, except for necessary use.

Fol. Dic. v. 1, p. 536. P. Falconer, No. 64, p. 142.

* * Harcarse reports this case :

My Lord Callendar, who had a conjunct-fee of the conquest lands, having sold the woods of Callendar, it was found, that the half of the price thereof did fall to the Lady's heirs, who had right to the fee of the half of the conquest; albeit it was contended, That though a liferenter by constitution have but *usum*, yet conjunct fiars and liferenters by reservation have *usumfructum*; and that Craig is of opinion they may sell woods, and *de consuetudine* parents after resignation of the fee of lands to themselves and their wives in conjunct-fee, and to the heirs in fee by way of destination, use to dispose of the woods that come to be cut during their lives. But it would be a different case if resignation were made to any nomination.



Harcarse (LIFERENTS), No. 672, p. 191.

No. 10. [8245] Lady BORTHWICK, Supplicant. July 3, 1696.

A liferentrix, when the estate was going to be sold, craved power to cut as much wood as would repair the houses.—Refused.

The Lords having advised the probation of the roup of the Lordship of Borthwick, in the process of sale, pursued by the creditors, and found the estate bankrupt; the Lady gave in a bill, craving the sale might not prejudice her jointure, which was so declared; 2do, she alleged, That She ought to have the faculty and power of cutting as much of the timber and woods growing on her liferented lands, as would repair and uphold the houses on the ground. To which it was answered, That her infeftment not bearing the woods, but alienably the lands, and it not being a *sylva cadua*, which uses to be cut by hagg, and for profit, she ought to have no such liberty, else

the fiar's planting might be destroyed by liferenters, who, by the acts of Parliament, are obliged to preserve the planting and policy about houses; and *ususfructus* is always understood *salva rei substantia*. Some of the Lords argued, that she might use it as her husband did before, *et tanquam bonus et frugi paterfamilias* without wasting, only for the necessary use of the ground, even as a relict will get as many coals out of a going heugh, in her liferent lands, as may serve the use of her family; and Craig tells it was so decided, both in the case of woods and coal-heughs, lib. 2, *Feudor.* tit. 8. The Lords, considering this planting was valued to £2500 Scots, and if the Lady were permitted, under the pretence of reparations, to dispose of it, it would not only diminish the price, but discourage buyers, and that she had no specific infetment on the wood, and that her husband's right was a *jus pinguius domini* more than what a conjunct fiar could claim; therefore found she had no right to cut any part of the woods, though to the use of the ground, but she and the tenants ought to uphold them upon their own expenses. This seems to debord from the ancient decisions; but then lands were not sold by roup, to which this privilege of widows might be a great discouragement and let.

Fol. Dic. v. 1, p. 548. *Fountainhall*, v. 1, p. 726.

No. 14. [8250] GIDEON GRAY v. ARCHIBALD SETON. February 24, 1789.

A liferenter can sell no wood except coppice, not even although planted by himself.

The late Mrs. Seton being heiress of the estate of Touch, disposed in her marriage articles these lands, with the woods, fishings, &c., "to herself and to her husband in conjunct fee and liferent, for her husband's liferent use allenary," &c.

After Mrs Seton's death, her husband became insolvent. His estate, including his liferent right in the lands of Touch, was brought to sale; and, among other things, the Court authorised a sale of some coppice wood on this estate, none of which had been cut for 30 years. Afterwards, Gideon Gray, factor on the estate then sequestrated, applied to the Court of Session, for authority to expose to sale certain other woods on the lands of Touch, which he divided into three different classes; 1st, What was formerly coppice wood, but had been allowed by the liferenter to grow up into large trees; 2dly, Old planting which was on the estate before the liferenter's right commenced, and was already fit for cutting; and, 3dly, The trees planted by the liferenter himself, so far as they were fit for immediate use.

Archibald Seton, the only surviving son of the marriage, and after his mother's death, the fiar of the lands of Touch, opposed this measure; and

Pleaded, Our law has established a clear and distinct boundary between the rights of fiar and of liferenter; the former, if not restrained by special agreement, enjoying the uncontrouled privilege of using his property in any manner he pleases; while the latter is only entitled to reap the annual produce of the lands, without performing any act which may render them of less value in any one year than they were before. Particularly, with regard to growing timber, great care has been taken to restrain liferenters from doing anything which may deprive the lands of that shelter, which, in this country, is so essential to them. Unless in the case of a coppice wood, which has formerly been in use to be cut annually in different hags, so as to yield a constant yearly rent, a liferenter is not at liberty to cut, for sale, woods of any description whatever. And this, whether the trees have been planted by himself or by others. *Erskine*, b. 2, tit. 9, §§ 56, 57, 58; 13th July 1677, *Lady Preston*, No. 7, p. 8242; June 1727, *Heirs of Roseburn*, see APPENDIX.

Answered, The authorities above referred to, should seem to be applicable only to the case of widows having their jointures secured on their husband's lands, and cannot be extended to the present one. As, during the marriage, the husband here might have cut down the whole trees on the estate; no good reason can be assigned, why, after its dissolution, and while his right seems to be equally broad as formerly, he, and *a fortiori* his creditors, should not be allowed at least to proceed in the same way as a proprietor of the estate acting *tanquam bonus paterfamilias*, might have done.

There seems to be a considerable degree of expediency in such a construction of the liferenter's right. [8251] Without it, persons so situated would be apt, while the marriage subsisted, to exercise their powers in a manner very prejudicial to the estate. And, with regard to that part of the woods which has been planted by the liferenter himself, it would be manifestly unjust, if he were not thus allowed, without any injury to the lands themselves, to avail himself of the fruits of his own industry. So far from being conducive to the advantage of the proprietor, this would, in general, prove a real loss to him, while the improvement of the country at large would be greatly hindered by it; Bankton, b. 2, tit. 6, § 6.

After advising the petition for Gideon Gray, with answers for Mr. Seton, which were followed with replies, the Court were of opinion, that a liferenter had no right to sell any part of the woods growing on the liferented lands, unless in the particular case of a coppice, which had been in use to be cut in a certain yearly progression, so as to yield a constant annual income to the possessors; and that the warrant of sale, so far as it allowed this, ought to be recalled. Mr. Gray therefore having agreed to pass from any objection in point of form, the following interlocutor was pronounced:

"The Lords find, That none of the woods or plantations condescended on, fall under the liferent of Mr. Hugh Seton; and therefore appoint such of the said woods or plantations as are contained in the act of roup, to be struck out of the sale; and refuse the desire of the petition."

Act. ABERCROMBY.—Alt. DEAN OF FACULTY.—Clerk, HOME.

C.

Fol. Dic. v. 3, p. 386. *Fac. Col.* No. 64, p. 116.

No. 15.

CLARK v. WEMYSS. December 13, 1596.

In an action betwixt one Clark in Dysart and Wemyss, anent the entry of a tenant, infest as heir to his father in certain acres of Dysart, by the Master of Sinclair, as fiar of the barony of Dysart, the Lords found, That the sasine given by the Master of Sinclair was null, because my Lord his father's liferent was reserved of the said barony, whereby the entry of the tenants pertained to him; and albeit oft times the resigners used to resign expressly the entry of free tenants, yet the general reservation of the liferent, *cum tenentibus, tenendriis, &c.*, is sufficient to make right to the liferenter to enter tenants. *Fol. Dic.* v. 1, p. 548. *Haddington, MS.* No. 605.

No. 16. [8252] Lady CRAWFORDJOHN v. Laird of GLASPEN. January 11, 1611.

A man, denuded of the fee of a barony, with reservation of his own liferent, may resume and enter the heirs of his vassals, which will be lawful and sufficient to them; but he may not resume strangers, nor change the vassals and free tenants, neither may he thereafter set any tacks or rentals that may last longer than his lifetime.

Fol. Dic. v. 1, p. 549. *Haddington, MS.* No. 2080.

No. 25. [8262] KATHARINE KINROSS v. Laird of HUNTHILL. December 10, 1661.

A bond being payable to a husband and wife in conjunct fee, and to their heirs, &c., the wife, though only liferenter, was found to have power to uplift the stock; but, before extract, she was ordained to give bond for re-employment of the same, to herself in liferent, and to her husband's heir in fee.

Katharine Kinross having charged the Laird of Hunthill for payment of a bond granted to her first husband, and the longest liver of them two, and their heirs, which

failing his heirs ; he suspends on this reason, that she is but liferenter, and the defunct being infeft in fee, she would not renounce, but the heir.

Which the Lords sustained, and found the letters only orderly proceeded for the annualrent.

July 25, 1622.—The Laird of Hunthill being obliged by bond to pay a sum to umquhile Mr. Beverly, and the said Katharine his spouse, the longest liver of them two in conjunct fee, and the heirs betwixt them, which failing, his heirs, or any person he should design, whereupon they were infeft in an annualrent ; the said Katharine having charged for payment of the sum, Hunthill suspended, alleging, That she was but liferenter, and he could never be *in tuto* till the fiar were called. The Lords, formerly found the letters orderly proceeded for the annualrent, but superceded to give answer for the stock, till some to represent Beverly the fiar was called, who now being called and not compearing, [8263] the debtor alleged he could not be liable to give up the stock to the charger, being only liferenter, neither would her discharge, or renunciation of the wadset liberate him and his estate, but only a renunciation of the heir ; neither did the charge at the liferenter's instance, take away the annualrent, and make the principal sum moveable, unless it had been at the fiar's instance. The charger answered, That she being conjunct fiar, was not a naked liferenter, albeit it resolved in a liferent ; and therefore she craved that it should be declared by the Lords, that she had power to uplift the stock, and to re-employ it as formerly, and that her discharge and renunciation should be declared to be sufficient to liberate the debtor and his lands, which being so found by the Lords, the debtor's apparent heir being called, would be an irreducible and sufficient ground of liberation.

The Lords declared as aforesaid, but before extract, ordained the conjunct fiar to give bond for re-employment of the sum to herself in liferent, and to Beverly's heirs in fee ; which bond they ordained to be presently registered, and kept by the clerk, in respect none appeared for the heir.

Fol. Dic. v. 1, p. 549. Stair, v. 1, pp. 67, 136.

No. 27.

[8264] JORDAN *v.* HOMES. June 30, 1680.

Where a sum is taken payable to a woman in liferent and her son in fee, the Lords found the money payable to the liferentrix, but that she could not lift it without citing of the fiar to see it re-employed, or caution found ; but granted a diligence to cite him in that same process ; and found it not enough that the grandfather offered to consent to the uplifting of it by her.

Fol. Dic. v. 1, p. 549. Fountainhall, MS.

No. 34. [8271] Young Laird of CADDEL *v.* DOUGLAS. January 23, 1635.

The Lords extended the act which requires liferenters to find caution to uphold houses, to a person who had infeft his son in his lands, and had taken from him a liferent tack of the house, mains, &c. ; and further, they extended it even to the King's donatar, who had taken a gift of the liferent tacksman's escheat, and had assigned that gift to a creditor of the liferent tacksman.

The young Laird of Caddell having got, from his father, infeftment of all his lands, by contract sets to his father the mains of Caddell, with the house, and manor place thereof, for all the days of his father's lifetime. Francis Douglas, brother-in-law to the old Laird, takes the gift of his escheat, and makes Stephen Boyd assignee to the said gift, for debts owing by the old Laird to Stephen Boyd. The young Laird of Caddell fiar, intents summons against Francis Dou-[8272]-glas, donatar to his father's

escheat, and Stephen Boyd, assignee constituted to the said liferent, to hear and see themselves decerned to repair the said manor place of Caddell, and make it in as good estate as it was the time of their intromission therewith, conform to the act of Parliament, Ja. IV. Parl. 3, cap. 25th. It was alleged, Imo, That this act of Parliament was only conceived against liferenters and conjunct-fiar, who bruiked by infeftment; but the old Laird of Caddell was only but tacksman, who could not be drawn under the said act of Parliament more than any other tacksman, who, by this tack, cannot be holden to uphold his house set to them, especially houses of this kind, the upholding whereof will sometimes exceed the duty of the tack, except in the location they had been specially obliged thereto. To which it was answered, That the exception ought to be repelled, in respect of the quality of the tack set to the defenders, which bears but a small duty, or none at all, and so his case is equivalent as if, in the fee granted by the father to the son, the father's liferent of the house and mains had been reserved. 2do, It was alleged for the donatar and assignee, That acts of Parliament are *stricti juris*, and this act cannot be extended to donations of liferents, in prejudice of the King, who cannot be compelled to uphold the rebel's house, no more than to pay the rebel's debts; but, however, the rebel may be pursued upon the act, yet the King and his donatar are free, except it had borne the same *per expressum*. To which it was answered, That the allegiance ought to be repelled, in respect of the act bearing liferenters, without exception; and the reason of the act being for maintenance of the policy, no liferenter whatsoever ought to be exeemed therefrom, except they had been exeemed expressly.—The Lords repelled both the exceptions, and sustained the summons against all the defenders, for repairing the house to that estate wherein it was the time of their intromission with the same respective; and to find caution, and to uphold the same in time coming; and ordained commission to be given to the Sheriff to try the estate of the house the time of their intromission with the same, and how much it is deteriorated since.

Fol. Dic. v. 1, p. 550. Auchinleck, MS. p. 123.

No. 37. [8275] CUNNINGHAM v. CUNNINGHAM. December 18, 1733.

In a process against the representatives of a liferentrix, founded upon the statute and common law, she having suffered the mansion-house, during her possession, to go into disrepair, the question occurred, if it was necessary for the pursuer, in order to estimate the damages, to bring a distinct proof, by two witnesses, of the condition of the houses at the Lady's entry, which was now become impracticable by the lapse of time; or if it was sufficient to bring a proof, as far back as the memory of man could go, which must presume *retro*, unless the defender would prove reparations *ab ante* bestowed by the liferenter. The Lords found, that the pursuer must prove the condition of the mansion-house, both at the time of the entry of the liferentrix, and the time of her death. See APPENDIX. *Fol. Dic. v. 1, p. 550.*

No. 39. [8278] DAVID SCOT v. PHOEBE FORBES. March 5, 1755.

A liferentrix, on entering to possession, finding the house liferented ruinous, it was questioned, whether she or the fiar was obliged to repair it. Found, that neither of them was bound to repair it; but that, upon the liferentrix repairing it, her heirs, at the end of the liferent, would have a claim for the whole expense laid out.

The deceased John Scot, the pursuer's brother, disposed in liferent to Phoebe Forbes his second wife (as an additional provision to those in her contract of marriage) "the mansion-house of Hedderwick, gardens of the same, with that park called Clayland, consisting of about ten acres; which liferent right he binds and obliges him and his heirs to be good, valid, and sufficient to her against all mortals."

The roof of the mansion-house was entirely ruinous; and the question was,

whether John Scot the heir, or Phoebe Forbes the liferenter, should be at the expense of repairing it ?

The Lords, on the 28th of January 1755, found, " That the roof of the main body of the house of Hedderwick must be sufficiently repaired at the joint expense of Mr. Scot of Hedderwick, and Mrs. Phoebe Forbes the widow ; and that he is obliged to contribute two-thirds of the expense of said reparation, and she the one-third thereof ; and that the materials of the present roof, and produce thereof, must be applied towards said repair ; and that the said repair shall not exceed the sum of £60 Sterling, over and above the materials of the present roof ; and ordained the said repair to be made by the said Mr. Scot, at the sight [8279] of a tradesman to be named by the said Mrs. Phoebe Forbes, betwixt and the first day of August next to come ; and failing thereof, allowed the said Mrs. Phoebe Forbes to make the said repairs at the sight of a person to be named by the said Mr. Scot, if he thinks fit to name any such ; and failing such nomination, the same to be made at the sight of the Sheriff of Forfar, or his substitute ; and the said repairs being made, found, that the said Mrs. Phoebe Forbes is obliged to find caution in terms of the act of Parliament ; and decerned and found moderate expenses due to the said Mrs. Phoebe Forbes, and ordained her to give in an account thereof."

Both parties reclaimed ; and it was pleaded for the heir, That it was optional for him to desert the house, and therefore he could not be bound to repair it. A liferent right is only a servitude, and binds the fiar to no more than *nuda patientia* ; so the fiar cannot be bound to repair. The civil law bound the liferenter to repair, and to find surety called the *cautio usufructuaria*, to leave the subjects in as good condition as he found them. *Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum cædes per arbitrium cogi, Celsus scribit*, l. 7, § 2, *D. De usu fructu*. The act 1491, James IV. p. 3, cap. 25, which is ratified by act 1535, James V. p. 4, cap. 15, bound the liferenter " not to waste and destroy the subjects, but to hold them in sicklike kind as they are in at the time he gets and receives the same, he taking his reasonable sustentation or using in needful things without destruction or wasting thereof."

Pleaded for the liferenter ; That as the disponent bound himself and his heirs to give her the liferent of a house, so he must have meant that house was to be made habitable. That indeed after it was made habitable, it was not unreasonable she should bear the *minores impensæ* for keeping it wind and water tight, and should find caution for that effect ; but never could it be expected, that she should lay out the *maiores impensæ* of repairing a ruinous roof, far less of putting on a new one. This is expressly the doctrine of the civil law in the place above-mentioned, where, to what is recited, it is added, *Hactenus tamen ut usufructuarius sarta lecta habeat, modica refectio ad eum pertineat*. And although it is there also said, *si qua tamen vetustate corruissent, neutrum cogi reficere*, this was agreeable to the particular doctrine of the civil law ; by which it was held, if the liferent of a house was given in legacy, and the house fell, the liferent determined ; for the liferent of a house did not include the liferent of the area. But this is not held to be the law of Scotland. The acts 1491 and 1535 relate only to the not abusing or wasting liferented subjects, by altering the form of buildings, plowing pasture grounds, or felling woods.

In this case the Court seemed to agree, that none of the parties were bound to put a new roof upon the house ; so the question came to be, In case the liferenter should repair, how far she could have repetition from the heir ? Upon this the Court was almost equally divided ; some were of opinion, that, if the liferenter should repair the roof, she and her heirs would at the end of the life-[8280]-rent have no further claim from the heir than *in quantum esset lucratus*. Others said, this was entailing a lawsuit.

Upon the first of March 1755, the Lords found, " That neither Mr. Scot, nor Mrs. Phoebe Forbes, are obliged to repair the roof of the house in question ; but that she is entitled to repair the same, and that the said reparation, if made, ought to be at the sight of the Sheriff of Forfar, or his Substitute, at whose sight also the account of expenses of said reparation is to be made up ; and found, that, at the issue of the liferent, Mr. Scot is liable to repay to the heirs of the liferentrix the whole expenses of the said reparation, conform to the accounts to be made up ; but, as to the expenses of process, adhered to the former interlocutor."

And, upon a reclaiming petition by Mr. Scot, praying for an explication of some things in this interlocutor.

“ Found, that the expense of repairs must not exceed eighty pounds Sterling ; and that the liferentrix must find caution immediately with respect to the gardens and inclosures, as also with regard to the house, after the repairs are made, in the words of the act of Parliament, and modify the account of expenses given in to £24, 10s. Sterling, and decern ; and also decern for the expenses of extracting the decret.”

Act. LOCKHART.—Alt. WEDDERBURN.—Clerk, KIRKPATRICK.

Fol. Dic. v. 3, p. 386. Fac. Col. No. 148, p. 220.

No. 40. Major THOMAS COCHRAN, and Others, Trustees appointed by the deceased CHARLES COCHRAN, Esq. of Culross *v.* Major-General JAMES COCHRAN. August 7, 1755.

A person getting the liferent of a house, and of the furniture thereof, must use the furniture in that house only.

Charles Cochran of Culross, by a disposition, to take effect after his death, vested his estate, heritable and moveable, in certain trustees for uses ; and, by the same deed, he gave the liferent of the house of Culross, and household furniture, gardens, and inclosures, to his brother Major-General James Cochran ; who, after the death of Charles, attained the possession of these subjects.

The Trustees brought an action against the General, for having it found, 1st, That he could only use the household furniture in the house of Culross. 2dly, That some very fine table-linen, of Dutch damask, cut and shaped in 1663, but never sewed, nor used, did not fall under the liferent grant of household furniture ; and, therefore, that the General ought instantly to restore them to the Trustees.

It was pleaded for the defender, against the first conclusion of the libel ; That, as he had got right to the liferent of the furniture in the house of Culross, [8281] without any restriction as to the place where he was to use the furniture, he might use it where he pleased, and could be no further restrained than the nature of all liferents restrains the liferenter, viz. to the use *salva rei substantia* ; and although the furniture is in the deed described to be the furniture in the house of Culross, yet that was only demonstrative of what furniture was given, but not taxative, so as to confine the defender to use the furniture only in the house of Culross. Liferent rights of furniture are very common, and are often granted in favour of wives in their contracts of marriage, or by other deeds ; and yet it was never pretended that the liferenters could only use that furniture in the house by which it happened to be described in the deed, and that they could not transport the bed and table-linen, or other furniture, to any house in town or country, where they might happen to reside ; were liferent rights to be constructed as the pursuers would have them, they would often be of very little use to the liferenters.

Against the second conclusion of the libel, it was pleaded ; 1st, That table-linen are undoubtedly household furniture, and therefore it was not necessary to inquire what was the proprietor's intention ; such inquiry is only necessary, when it is doubtful whether the thing falls under the description of household furniture or not. l. 32, § 2, *D. De auro, argento, &c., legat. Argento, pоторio, vel escario legato, in his quæ dubium est cujus generis sint, consuetudinem patrisfamilias spectandam ; non etiam in his quæ certum est ejus generis non esse.* 2dly, That the intention of the proprietor to make the damask household furniture sufficiently appeared from his cutting it into table-napkins and table-cloths ; and therefore they fell under the liferent-grant of the furniture.

It was answered for the pursuers, in support of the first conclusion of the libel ; That where the liferent of a house, and of the furniture in that house, is granted to one, it is implied in the grant, that the liferenter is only to use the furniture when he resides in that house ; and were it otherwise, the right of the fiar would be of very little value ; for furniture is usually adapted to the place where it is put up, but if moved from place to place, must be very soon destroyed.

In support of the second conclusion of the libel, it was answered ; That it depends much upon the will of the proprietor, whether a thing is to be reckoned household furniture or not, as it is observed by Voet. *ad tit. D. De supellect. legat.* No. 3. And as the table-linen were never used, nor so much as sewed, so as to be fit for using, they cannot be considered as household furniture, as appears from the definition thereof, L. 7, § 1, *D. De supellect. legat. Instrumentum quoddam patriis familiæ rerum ad quotidianum usum paratum.*

The Lords found, that the defender could not carry away any of the household furniture out of the house of Culross, or use it any where else but in that house ; and found, as to the linen cut, but not sewed, and which were kept for so many years backwards in the family for a curiosity, without being made use [8282] of as furniture, that the defender had no right to use them any other way than as they had been formerly used.

Reporter, SHEWALTON.—Act. AND. PRINGLE *et* SIR JOHN STEWART.—Alt. RO. BRUCE.—Clerk, GIBSON.

Fol. Dic. v. 3, p. 386. *Fac. Col.* No. 162. p. 242.

No. 14. ROLLO *v.* IRVING and Others. December 1, 1801.

An extraordinary dividend or bonus given by a bank belongs to the liferenter of the stock.

In June 1794, Alexander Houston executed a deed, by which he vested his heritable and moveable estate in the hands of trustees. His conveyance included, among other subjects, 144 shares of the stock of the Bank of Scotland. It provided a life-rent to Mrs. Houstoun, in these terms : “ That my whole heritable and moveable means and estate, generally and particularly herein disposed in trust, shall be, and are hereby burdened with the life-rent-right to Mrs. Margaret Rollo alias Houstoun, my spouse, during all the days of her life, in case she shall survive me ; immediately on my decease, to get the shares of the Bank of Scotland, presently standing in my name, transferred in her own name in life-rent ; and to appoint factors from time to time to receive the dividends then due, or becoming due thereon, and the rents, annual rents, and profits arising from my other means and effects, both heritable and moveable, hereby disposed in trust, without the consent or interference of my trustees,” &c. Upon the death of Mr. Houstoun in 1798, the bank-stock was accordingly transferred to the widow in life-rent, and his trustees in fee ; and she received from time to time the ordinary dividends.

Previous to Mr. Houstoun’s death, an addition had been made to the capital of the bank, and he had subscribed for a number of shares of the additional stock, which were to be paid by instalments ; he directed his trustees to pay these instalments, by selling stock in the 3 per cents., of which he had a considerable sum. But it was judged more expedient, both by the trustees and the life-rentrix, to allow the calls for the bank-stock to run in arrear, as the Bank were in use of accommodating proprietors in this way, upon their paying interest, to be deducted from their dividends.

At a general meeting of the proprietors of the Bank, on the 26th March 1799, it was ordered, “ That an extraordinary dividend or bonus be given to the proprietors holding stock, upon the 1st June next, by transferring to them part of the Bank’s interest in the 5 per cents., 1797, at the rate of £5 of the 5 per cents. for each share of the Bank of Scotland’s stock ; or, in the option of the proprietor, that the Bank shall, in lieu thereof, pay to him the selling price of the said 5 per cents., as per Lloyd’s list, the first transfer day after the 1st of June, at the Bank’s office in Edinburgh : and that a sum equal to the bonus to be ascertained as above, falling to such proprietors as are in arrear [8183] to the Bank, on their stock account, shall be applied towards the extinction of the arrear due by such proprietor, and that at the same time that the bonus is given and executed.”

In consequence of this resolution, a doubt arose whether Mrs. Houstoun, the liferentrix, or Mr. Houstoun's Trustees, who were the fiars, were entitled to this extraordinary dividend; and for the purpose of determining the point, Mrs. Houstoun brought an action against the Trustees, concluding, "That they should be decerned and ordained to make payment to the pursuer of the foressaid extraordinary dividend, which has been retained by the Bank of Scotland, and applied for the use of the said Trustees."

At the request of the parties, the Lord Ordinary took the cause to report. The pursuer

Pleaded; 1st, The power of fixing the amount of the dividends of bank-stock, is, by act of Parliament, exclusively vested in a general meeting of the proprietors. The amount of these dividends is different each year, according to the situation of the Bank, but the proprietor must take his dividend, such as it is fixed by the meeting, whatever be its amount. As the liferentrix therefore is obliged to put up with a small dividend, she is entitled to draw a large one when it occurs, during the period of her liferent. 2dly, As Mrs. Houstoun, by the terms of her liferent, is entitled to receive "the dividends and profits," she has a right to every emolument arising from the fund. This bonus is not a dividend of stock, but an extraordinary dividend of profit; and if she be in any year entitled to draw any thing, however inconsiderable, more than the profits of that year, she cannot, by any principle of law, be prevented from drawing these profits, to whatever sum they may amount. 3dly, It is not competent, nor is it perhaps possible, to ascertain how far these accumulated profits have arisen since Mr. Houstoun's death. The only period which can be ascertained, is when they became due; and as the pursuer's executors, after her decease, could not have any claim upon the trustees for such part of an extraordinary dividend as might be alleged to have arisen from profits during her liferent, neither can the trustees have any claim upon her for such as may be alleged to have arisen from profits before its commencement.

Answered; "*Fructus ordinarios solum percipit usufructuarius.*" Mrs. Houstoun can have no title to the bonus; 1st, From the nature of her right. A liferenter is only entitled to the ordinary fruits of the subject; the liferenter of a superiority draws the annual duties payable by the vassal, but unless the liferent be constituted by reservation, has no right to the composition at the entry of singular successors; and the same doctrine holds in other subjects; Ersk. b. 2, t. 9, § 58. 2dly, From the nature of the bonus. The Bank, besides paying the yearly dividends, is in the use of retaining part of its profits, which is accumulated into a fund, and forms a sort of additional capital. Over this additional capital, the proprietors have no power, except in so far as is granted to them by the occasional division of part of it among them as a bonus. It cannot be [8184] maintained, that if the Bank were to come to the resolution of dividing their whole stock by way of a bonus, that the liferenter would be entitled to it; nor, upon the same principle, can she be entitled to any part of it, except in so far as it may produce increased annual dividends. The Bank have no power, by any resolution of theirs, to alter the rights of third parties, or to give to liferenters, under the name of a bonus, part of that stock which belongs to the fiar. 3dly, From the terms of the minute of the Bank, it was ordered to be paid to the "proprietors holding stock"; and it was provided, that a sum equal to the bonus falling to such proprietors as are in arrear on their stock, shall be applied towards the extinction of such arrear. The Trustees of Mr. Houstoun are in this situation, and therefore the bonus remains in the hands of the Bank, as so much additional capital. The defenders farther referred to the usual practice of the Royal Bank of Scotland, in the application of their extraordinary dividends; and to the English case, *Brander v. Brander*, 22d July 1799; Vesey's Reports, v. 4, p. 800.

The Lords (29th June 1801) sustained the defences, to the extent of such part of the extraordinary dividend in question as may have arisen from the undivided profits of the stock during Mr. Houstoun's life, and remit to the Lord Ordinary to proceed accordingly.

Each party reclaimed against this interlocutor, both upon the merits of the case, and upon the impossibility of extricating matters according to the principle upon which it proceeded. And the Lords having advised the mutual petitions, with answers, with one dissenting voice, "recalled their former interlocutor, and found Mrs. Houstoun entitled to the dividend."

Observed from the Bench : The terms of the liferent are most ample, and the liferentrix is entitled to draw, under the term "profits," whatever arises from the bank-stock ; nor has the fiar any other interest than to prevent the stock from being diminished.

Lord Ordinary, CRAIG.—Act. WILLIAMSON.—Agent, Jo. IRVING, W.S.—Alt. Ross.—Agent, Jo. DUNDAS, W.S.—Clerk, COLQUHOUN.

J.

Fac. Col. No. 9, p. 18.

No. 3. [4] LAIRD v. FENWICK. February 10, 1807.

Whether a liferenter is entitled to the benefit of improvements made upon the subject by the fiar ?

Patrick Honey purchased a field in the immediate neighbourhood of Perth, and took the disposition to himself and his wife Elspeth Laird, in conjunct fee and liferent, and in the event of her surviving, for her liferent use. Some years afterward, he borrowed £80, for which he and his wife granted heritable security over it. His affairs having afterward gone into disorder, his estate was sequestrated, and the trustee having exposed it to sale, it was purchased by William Fenwick.

In the disposition granted to Fenwick, it was provided, that he was to be burdened with the jointure to which Elspeth Laird was entitled, in the event of his surviving her husband, in so far as it affected the subject disposed.

Fenwick erected a large tenement upon this piece of ground, besides laying out considerable sums of money in meliorations, so that at the death of Patrick Honey, which happened a good many years after his bankruptcy, this subject had become much more valuable.

Upon the death of her husband, Elspeth Laird raised an action of mails and duties before the magistrates of Perth, against the tenants and possessors of the subjects, in the course of which the question occurred, Whether she was entitled to the liferent of the subject, as it stood at the date of her infestment, exclusive of the consequent meliorations, or was entitled to take the subject as it stood, with the benefit of those meliorations.

Upon this point the Magistrates pronounced the following interlocutor (21st May 1805) : " Find, That the pursuer's right of liferent in the yard mentioned in her infestment, does not entitle her to the liferent of the valuable tenements of houses since erected thereon by the defenders, and with the money of her husband's creditors, but that she is entitled to the full value yearly of what that yard would now bring, if it were now to be let in the state in which it was when she was infest therein, that is, to the full yearly value of what a yard of the extent it then was, exclusive of the buildings, is now worth, all circumstances considered."

[5] The cause was afterward brought by advocacy before the Supreme Court, and was taken to report by the Lord Ordinary.

The liferentrix

Pleaded : A liferenter, from the moment his right begins to operate, has a right to the actual possession of the subject, and to the enjoyment of all its fruits, in so far as they can be taken, *salva rei substantia*. The pursuer is entitled to the rents arising from the buildings erected on the ground which she liferents, *quia in edificatum solo cedit solo*, and as this liferent appeared upon the face of the purchaser's titles, he must have erected these buildings in the full knowledge of his right, and in the belief that it was his interest to erect them even under this burden. The purchaser, therefore, has no right to a recompence, on the footing of a *bona fide possessor* : Kames' Principles of Equity, p. 114 ; Campbell of Otter, 16th February 1666, No. 5, p. 8241.

Answered : The pursuer's liferent is expressly limited to the garden-ground, and therefore cannot be extended to houses built on a part of it with the funds of others. Her husband's creditors were not barred, in the event of his insolvency, from taking possession of this garden-ground on account of an eventual contingency which depended upon her surviving him ; and had the pursuer then come forward with her claim, all that she could have insisted on was, that the creditors should find security for payment of her liferent, after which the creditors were at liberty to employ the subject in the most advantageous way, by building houses or otherwise ; Craig de Licit. § 13 ; Crawford v. Mitchell, June 22, 1743, No. 31, p. 8266 ; Creditors of Mitchell v. Warden, February 9, 1742, No. 38, p. 8275. And if a recompence is due *in quantum lucratus* by a person who builds *mala fide* on another's ground, Stair, b. 1, tit. 8, § 6, the defender, who acted *bona fide* in building these houses, must, in every view of the case, be entitled to the interest of the sums laid out on these buildings, or the pursuer must be satisfied with the value of the garden ground before they were erected.

The Lords (17th December 1806) " find, That the pursuer Elspeth Laird is entitled to the liferent of the subject in question, with the benefit of the houses built thereon by her husband, but under deduction of the interest of the bond of £80 Sterling granted by her husband, and duly ratified by her, to those having right to receive the same : Find, That William Fenwick, one of the defenders, is to be considered as a *bona fide* possessor, and is entitled to the annual interest of the meliorations made by him on the said subject, under which burden the pursuer must take the right of liferent ; and remit to the Lord Ordinary to proceed accordingly."

And afterward, the Court refused, without answers, a reclaiming petition for the defender.

Lord Ordinary, JUSTICE CLERK.—Act. CRANSTOUN.—Agent, W. INGLIS, W.S.—Alt. HAGART.—Agents, MACRITCHIE & LITTLE.—Clerk, WALKER.

J.

Fac. Col. No. 268, p. 601.

No. 5. [8309] JOHN MURRAY, and Others v. COLIN M'FARQUHAR, and Others.
June 25, 1785.

It was found an infringement of literary property, to print in the *Encyclopedia Britannica*, in the way of abridgement, a great part of Stewart's *History of the Reformation*.

M'Farquhar, and other editors of a dictionary, entitled, *Encyclopedia Britannica*, having, under the article relative to Scotland, inserted a history of that kingdom, at the æra of the Reformation, which they had extracted, in a great measure, *verbatim*, from two treatises published by Dr. Gilbert Stuart, though it was so far abridged as not to exceed in extent a half of the original works ; Murray, and others, who had purchased the copy-right of those publications, sued the above-mentioned editors in an action founded on the act 8th of Queen Anne, for having the printing and sale of the article stopped, for the statutory penalties, and for damages.

Pleaded for the defenders ; By the terms of the statute in question, which, from its penal tendency, demands a strict interpretation, the exclusive property thereby created is confined to complete or entire compositions, and does by no means extend to partial extracts or passages taken from authors. Otherwise, not a single sentence, it is evident, nor a line of a book, could be quoted without as real an infringement of the statutory property, as if ever so large a portion of the work had been extracted. This consequence shews how unreasonable such a construction would be, and how much exploded by daily usage in the publication of magazines, reviews, annual registers, and other periodical miscellanies, which could not exist without the unrestrained freedom of borrowing select passages from all such treatises as excite curiosity.

If, indeed, in this matter, fraud were to be committed, and even partial extracts made, in order to interfere with the profits of the literary proprietor, the sanction of the statute might be rightly applied. To that case alone, except when entire performances have been extracted, all the actions on this statute which have been sustained in this Court, or by the English Judges, will be found to refer. But in a case similar to the present, action was denied in the equity Court of Exchequer in England, 25th July 1783, *Longman and Broderick v. Fielding*. In this instance, neither have the entire works in question been published by the defenders, nor have they, in following out the plan of their undertaking, used any means to deprive the pursuers of the benefit of their property.

Answered ; If the simple device of publishing a treatise in separate parts were sufficient for eluding the protection afforded by the enactment under consideration, the argument no doubt of the defenders would be good, and the statute nugatory. But that is a supposition which, though evidently inseparable from their plea, is in itself highly unreasonable, and is contradicted by every [8310] authority on the subject. In many cases similar to the present, action under this statute has been sustained ; such as, *Skinner and Taylor contra The Editors of the Town and Country Almanack*, No. 4, p. 8308 ; and in England, *Macklin v. Richardson and Urquhart* ; and *Mason v. Murray*. But in none of those instances was there a greater infringement of literary property than that which occurs in the present case.

The cause was reported by the Lord Ordinary, when

The Court "repelled the defences."

And to this judgment they adhered, on advising a reclaiming petition and answers.

Reporter, LORD ESKGROVE.—Act. LORD ADVOCATE, BLAIR.—Alt. SOLICITOR-GENERAL, WIGHT.—Clerk, HOME.

S.

Fol. Dic. v. 3, p. 389. *Fac. Col.* No. 216, p. 340.

No. 5. [8325] NICOL SOMMERVILLE *v.* ——. June 20, 1673.

Where the matter is litigious before assignation, the cedent's oath is good against the assignee, not as a witness, but as a party, and he may therefore be holden as confest.

There being a point of form reported from the Outer-house to this effect : An assignee having charged the debtor, he suspended upon a reason of compensation, which was found relevant to be proved by the cedent's oath, because the cause was litigious before the assignation, and a diligence was granted to the debtor against the cedent to depone ; but he not having appeared, the question was, Whether the debtor should proceed in further diligence by horning and caption, to force the cedent to appear, as if he had been a witness to prove his exception ; or if that the debtor might cite him personally, or at the market-cross of Edinburgh, if out of the country, and thereupon might obtain him holden as confessed upon the verity of his reason, and if his being holden as confessed would prove against the assignee, or if the assignee was obliged to produce him.

The Lords found, that the assignation being taken after the cause was litigious, it could not prejudice the debtor, but that if the cedent was personally apprehended, or at the market-cross of Edinburgh, if out of the country, it would prove against the assignee.

Fol. Dic. v. 1, p. 552. *Stair*, v. 2, p. 191.

No. 9. [8333] HOUSTON v. NISBET. January 21, 1709.

A Lady raised reduction of a bond granted by her ; but, after executing against the creditor, allowed the reduction to fall, by lapse of year and day. Found, that this did not make the cause litigious against an onerous assignee, whose right was dated after the summons had fallen, so as to give the pursuer the benefit of the cedent's oath.

James Houston having charged Agnes Nisbet and her husband with horning upon a bond of £125, granted by Agnes Nisbet before her marriage, payable to David Fitzgerald, some time merchant in Glasgow, and assigned by him to the charger : They suspended, and raised reduction upon this ground, that, though the bond bear money resting owing by Agnes Nisbet to Fitzgerald, yet truly she owed him no money, but granted the bond to him *intuitu matrimonii*, which was offered to be proved by his oath ; and she had reason not to marry him, when she discovered him to be an Irish Papist.

Alleged, for the charger, The cedent's oath cannot prejudice him, an assignee for an onerous cause.

Answered for the suspender, The charger can be in no better case than his cedent, in respect, before the assignation, the bond was rendered litigious by an executed summons of reduction thereof. For a citation makes a thing litigious, being a challenging of one to a trial at law ; as is clear from the civil law, Novel 112, cap. 1 and cap. 3 ; and, by our law, citation interrupts prescription, and makes a depending plea, Arg. act. 54, Parl. 7, James III.

Replied for the charger, No respect to the executed summons, seeing it was never called nor libelled ; for, by the civil law, *lis*, whence *litigiosum* comes, is never understood in a proper sense, till after *res in judicium est deducta*, l. 31, § 1, *D. De Novat. L. Un. C. De Lit. Con.* ; 2do, The summons of reduc-[8334]-tion not having been called within a year after elapsing of the last diet of compareance, it expired, and the instance perished ; for my Lord Stair, Institutes, lib. 4, tit. 34, No. 4, allows wakening after the year only, when the process has been called within the year ; and denunciation cannot proceed upon a charge of horning after year and day. It was decided 27th July 1708, Drummond v. Stewart, *voce* PROCESS, that a summons not called within a year of the day of compareance expired, so as it could not be awakened ; and November 7th, 1684, Belshes *contra* Earl of Loudon, Ibidem, the Lords found no process upon a summons not called within year and day after the days of compareance, and found that the instance perished, and could not be wakened ; 3tio, The Lords will sustain a summons for interruption, upon which they would not sustain process, as was lately decided in the case of Forbes of Tolquhon, See PRESCRIPTION.

Duplied for the suspenders, If *vitium litigiosi* were only contracted after a summons is called, he who is master of an unjust bond may, how soon he finds himself attacked by a citation, assign the bond, and so disappoint the debtor's just objections against the cedent ; 2do, The 9th act, Parliament 1669, supposeth that every citation that would have made an interruption may be wakened within five years.

Triplied for the charger, 1mo, *Incommodum non solvit argumentum* ; besides, it would be a greater *incommodum* to commerce, to make an assignee for an onerous cause lose his money upon such a pretext ; 2do, The act 1669 must be understood *in terminis juris habilibus*, viz. that the causes to be so wakened were called in due time ; and the stile of a summons of wakening is, that the Judge should proceed where he left off ; but *in simplici postulatione*, or citation, *nulla pars judicis*.

The Lords found, that a summons executed only, and lying over for year and day, without a calling, was not competent to found the exception of *res litigiosa* against an assignee for an onerous cause.

Forbes, p. 308.

No. 11. [8335] JAMES MORISON and COMPANY v. WILLIAM ALLARDES. March 8, 1787.

Land rights not rendered litigious by the mere execution of a summons.

James Morison, Andrew Murison, and William Boggie, entered into a Copartnership for carrying on a manufactory; and, with that view, purchased a house and a small piece of land. The disposition from the seller was conceived in favour of all the three *nominatim*, "equally amongst them, their heirs and assignees, heritably and irredeemably."

Soon afterwards Boggie, one of the partners, borrowed a sum of money from Allardes, to whom he granted an heritable security over the above mentioned subjects. But some days before this, a summons, in the name of the other partners, was executed against him, concluding for having it found, that the subjects, having been purchased for the Company, could not be alienated, or charged with debt by any of the partners, till the Company debts were paid.

An action was afterwards instituted by the partners, for setting aside the infestment granted to Allardes, on this ground chiefly, that, by the execution of the summons against Boggie, the subjects had become litigious; and, of course, incapable of alienation.—The defender

Pleaded, The rule, that, *pendente lite nihil innovandum*, though of considerable importance to the efficacy of judicial proceedings, must always be so limited in practice, as not to encroach on the security of *bona fide* purchasers and creditors. Hence, by the Roman law, from which the maxim has been introduced into Scotland, the *vocatio in jus*, which was of the nature of our summons, was not held to create litigiosity, this being only inferred from the *litiscontestatio*, whereby the parties joined issue on the matters in controversy, and the dispute became so public, as to put third parties on their guard. In the same way with us, so strong an effect has never been given to the mere execution of a summons; but the cause must have been called in Court, or some litigation must have ensued, from whence the dispute may be supposed to be generally known; Voet, *ad l.* 44, tit. 6, ff. l. 1, *D. De Litigiosis*; Bankton, b. 4, tit. 23, § 14; 9th January 1760, *Menzies contra the Creditors of Gillespie, voce SALE*.

Indeed, it may admit of doubt, whether, since the establishment of the public registers, the doctrine of litigiosity ought, with regard to land-rights, to be of any force. It is easy to see how little benefit would be derived from that institution, if, on account of judicial proceedings which do not enter any proper record for publication, and still more, if, by the mere execution of a summons, the work perhaps of a mean and needy messenger, transactions of the greatest importance were liable to be set aside. When to this it is added, that in questions of this nature every litigant, by using inhibition, may immediately notify his claim to the public in general, as well as to the person against whom his action is directed, it must appear most just, that any loss arising from his neglecting to use this precaution should be made to fall on himself. And it is of no importance, that, in the case of an inhibition, the intimation to the debtor, if duly followed with registration, and in adjudications the execution of the summons, are sufficient to bar a posterior alienation. Neither of these can be viewed as an action, but as a form of legal diligence, to which, by enactments in 1621 and 1672, when the utility of the records was not fully understood, extraordinary privileges were annexed. And, even although they could, with propriety, be mentioned as exceptions from the general rule, this surely ought not to pave the way for any farther deviation.

Answered, If the prohibition arising from litigiosity is to be of any use, it must have its commencement from the time at which the claim is first notified to him against whom the action is brought. To allow of any interval, would only hasten those fraudulent alienations which it was intended entirely to repress.

In the usage of ancient Rome, litigiosity was not established by the *vocatio in jus*; because, from the manner in which this was at first performed, it conveyed no intimation of any particular claim. But when a more decent method of summoning was introduced by Justinian, the defender being furnished with a schedule, containing the grounds of the action, this was immediately altered. The practice of Scotland, confessedly derived from this source, has continued to run in the same channel;

and hence a summons, once marked by the Clerk, or called in Court, though such proceedings are of no greater notoriety than the execution of the summons, has been found to prevent alienation; Hienecius, *ad tit. D. De in jus vocando, Authentic. litigiosa*; Gudelinus, *de jure novissimo*; 9th January 1760, *Menzies contra the Creditors of Greenhill, voce SALE*.

Neither has the establishment of the records produced any alteration in this part of our law. In no case do the statutes provide a remedy for a defect in the right of the person from whom a conveyance is obtained; the sole purpose of the Legislature being to enact, that, in a competition of rights of the same nature, and acquired from the same person, such deeds as have been registered should, without regard to priority of date, be preferred to those unregistered. And, with respect to judicial proceedings, the only provisions that have been made in 1669, c. 10, and 1696, c. 19, relative to the interruption of prescription in real rights, being grounded on the idea, that all summonses were at common law effectual, even against third parties, from the date of their execution, tend, in the strongest manner, to enforce the present argument. The effect, too, which is still given to an inhibition, after it is personally intimated to the debtor, and to the execution of the summons in processes of adjudication, cannot be accounted for in the way suggested on the other side. The statute of 1621, it is true, set aside alienations in favour of a creditor, after the commencement of legal diligence at the suit of another creditor; but the same thing is observed with regard to a purchaser, a case neither within the words, [8337] nor in the purview of that enactment. And, besides the adjudications introduced by the statute 1672, instead of appraisings, there were others formerly known, which have been always attended with the same consequences. As to the supposed neglect of the pursuers, in not using an inhibition, the observation seems entirely groundless: For, not to mention that this form of diligence is not properly applicable to declaratory actions, such as the one giving rise to the present dispute, it is evident, that, in this way, the doctrine of litigiousity might, with regard to land rights, be altogether laid aside.

“The Lord Ordinary sustained the defences.”

After advising a reclaiming petition, with answers, the Court altered the judgment of the Lord Ordinary.

A petition was afterwards preferred for the defender, which was followed with answers.

The Lords ordered a hearing on the general point; after which they altered their interlocutor; thus returning to the judgment pronounced by the Lord Ordinary.

A reclaiming petition was preferred for the pursuers, which was refused.

Lord Ordinary, HAILES.—Act. LORD ADVOCATE, C. HAY, MACNOCHIE.—Alt. BLAIR, GEO. FERGUSSON, W. M. BANNATYNE.—Clerk, ROBERTSON.

C. *Fol. Dic. v. 3, p. 392. Fac. Col. No. 331, p. 507.*

No. 10. [8401] SKEEN v. ——. July 15, 1637.

Lands were let verbally. The tenant did not enter, though the master built barns, &c., for him. He was not bound to perform, but was liable for an agreed penalty to be proved by his oath.

Mr. Andrew Skeen of Halyards, pursues ———, for entry to the lands of ———, which were set by him to the said tenant, conform to an appointment faithfully accorded, and convened fully upon, betwixt them, whereby the said Mr. Andrew set the lands to the said tenant, for the space of _____ years, for payment of such a duty condescended on in the summons, at the which time the said tenant promised, that if he entered not to the lands, conform to the said agreement, that then he faithfully promised to pay a year's duty for the said lands, and therefore pursued him to enter and keep the bargain, which he referred to his oath. And the defender

alleging, That there was place of repentance ; likeas immediately after the conference concerning the said bargain, he gave it over, and declared that he could not stand to the same, which he did, and might have passed from that conference, seeing nothing had followed further thereupon ; and the pursuer sustained no prejudice, the conference being had about Whitsunday last, at which time the ground was laboured by the tenant indweller therein ; and before the crop be separated, he had, and has sufficient time to provide for another tenant ;—The Lords found, That there was place for repentance to the tenant to quit the bargain *rebus integris*, and that he could not be compelled to keep the condition libelled, to [8402] have been agreed upon, for entry to the ground, and labouring the same during the alleged space convened upon ; and they found, That albeit the pursuer had bigged barns and byres to the tenant, for his use of labouring, that yet there was no prejudice to the master, seeing they would serve for any other tenant that should enter ; neither was it a considerable prejudice, that the tenant entered not at Whitsunday to the grass, as the defender would have inferred. But because the pursuer restricted his summons to the fulfilling of that part of the alternative, alleged condescended upon, viz. either to enter to the land, and keep the tack agreed upon, or else to pay him a year's duty of the land, if he entered not ;—The Lords sustained that part, viz. for payment of the said years duty, if he liked not to enter to the land ; for the which the Lords found, That the defender could not be heard to resile and pass from that promise, if the same was proven ; and therefore the Lords sustained the action therefor, to be proven by defender's oath, whereanent the Lords found the defender had no place of repentance.—See PENALTY.

Clerk, GIBSON.

Fol. Dic. v. 1, p. 560. Durie, p. 852.

No. 12. GEORGE LAWSON, Treasurer of Edinburgh v. JAMES AUCHINLECK, Chirurgon Apothecary there. June 28, 1699.

Two parties excambed their shares in two public companies. Earnest was given, but no transfer subscribed. *Locus penitentiae* admitted, upon returning earnest, and paying damages.

Crocerig reported George Lawson, Treasurer of Edinburgh v. James Auchinleck, chirurgon apothecary there. They had entered into a bargain by way of set, whereby George excambed some shares he had in the paper manufactory and African Company, with some shares James had in the Bank, and thereon a guinea of earnest was given. James being pursued on this transaction before the Bailies of Edinburgh, he was decerned to implement and ad-[8403]-here thereto. He raises suspension and reduction, on this reason, that such agreements are only completed by writ, and till that be interposed there is *locus penitentiae*, and now he resiled, seeing the transfers of these excambed shares were not as yet subscribed. Answered, In such bargains as these, by the custom of nations, there was no more required but the set, and they were binding from the date ; and Benevenutus, Stracha, and other lawyers who write *de sponsionibus mercatorum* prove it to be the custom of all the trading towns in Italy. Replied, Though these sponsions be frequent among merchants, yet writ is necessary to their perfection and consummation ; they cannot bind till the same intervene, this being a contract *qui re perficetur* ; and if this were good law, then if lands were excambed by a set, their property should be conveyed before the dispositions were subscribed and delivered, which were absurd. The Lords thought the resiling ungenerous, but could not subvert the principle of law, whereby there is *locus penitentiae* ay till subscribing of papers ; but thought he should be reponed *cum omni causa*, and not only his guinea returned, but all his damages likewise paid, through not adhering to the bargain ; but reduced the Bailie's decreet as iniquitous.

Fol. Dic. v. 1, p. 561. Fountainhall, v. 2, p. 55.

No. 13. KINCAID of that Ilk v. STIRLING of Glorat. January 12, 1750.

A person consenting to a servitude on his land, may reseil till obliged by writ.

Sir James Stirling of Glorat built a mill for dressing lint, on the river of Glassart, resting one end of his dam for collecting the water on the opposite ground belonging to James Kincaid of that ilk, which he alleged he had done by the consent, at least by the tacit approbation of Kincaid, in as far as he had informed him of his intentions, in case Kincaid was not to build a mill himself, which he had not disapproved of; and that the mill was built, and the dam made in his view, at least in the view of his family, he himself being keeping the house, and instruments lent from his house for that purpose, and that he had sent his lint to be dressed at the mill.

Kincaid afterwards built a mill himself, for serving which he had occasion to make some alterations in a former dam belonging to him, higher than Sir James's, and to divert part of a burn which used to fall into the water betwixt their dams; whereupon mutual declarators were pursued, the purport of Kincaid's being, that Sir James could not rest the end of his dam-dyke upon his ground; which the Lords, 23rd November 1749, found.

Pleaded in a reclaiming bill; It is acknowledged that writ is necessary to create a servitude, so as to make it real on the ground; but Kincaid having, either expressly, or *rebus ipsis et factis*, consented, ought to be debarred by a personal objection from hindering the use of this; especially as in consequence of his acquiescence, Sir James has been led into considerable expenses, which else will be lost.

[8404] Answered; Writ is necessary to convey a real right; so that till it be adhibited, there is place for repentance; and therefore Sir James cannot insist on any consent by Kincaid, if it had been given, which was not reduced into writing.

The Lords adhered.—See PROOF.

Act. H. HOME.—Alt. HAMILTON GORDON.

Fol. Dic. v. 3, p. 393. D. Falc. v. 2, No. 121, p. 137.

No. 26. [8413] GEORGE BAPTIE v. CHRISTIAN BARCLAY. January 1665.

A woman prosecuted for fulfilment of a promise of marriage with one to whom she had been with child. Pleaded, She had had a second child to another. Answered, The child must be presumed to belong to the defender. Found that she must prove this, to found on it.

George Baptie gives a ticket to Christian Barclay, acknowledging that a child she had brought forth was his, under promise of marriage, whereupon she pursued him before the Commissaries of Edinburgh for adherence, and obtained a decret, whereof he raised suspension and reduction, upon this reason, That she being a taverner, loose, and of a very lewd life too, he could not deny but that he had carnal dealing with her, and was persuaded she had dealing with diverse others also, though upon him she fathered the child; and, long after the birth of the child, she did most subtly and falsely exprobrate and affirm upon him, that he had made a promise, and, upon a certain day, came to him on the streets, and told him, she would presently go and drown herself, if he would not subscribe the ticket, which he simply was moved to do, though he was content to make faith, that he had never given her such [8414] a promise; afterwards he ever still more and more abhorred her, and never used her company; meantime she brings forth another child, long after the ticket; so that, granting he had truly made a promise as the ticket bears, she has forfeited the benefit thereof, by her after whoredom, which would be a lawful ground of a divorce, if they were lawfully married, and far more ought it to be a ground to impede the solemnization of a marriage, or adherence. It was answered, That *copula*, and the ticket under his hand, bearing the promise, made a *validum et ratum matrimonium*, and any child got thereafter, the law presumes to be in the marriage, *filius enim*

est quem nuptiæ demonstrant, unless the pursuer can offer to prove her an adulteress with another; in which case he may pursue a divorce, and so it was found by the Commissaries. Replied, That though the ticket did bear a promise and *copula*, yet the marriage was not *legitime* solemnized, nor did there any cohabitation follow; and therefore she afterwards playing the whore, and bringing forth a child, unless it could be made appear that he did cohabit, or any otherwise converse with her (so that it might be at least probable that he had dealing with her), that presumption of the law in this case cannot have place.

The Lords, before answer, ordained the defender to condescend, whether or not she can make it appear, that ever she conversed with the pursuer after the subscribing of the ticket, or was in his company, and when, and where.

Gilmour, No. 137, p. 99.

No. 33. [8425] Sir ROBERT LAWRIE of Maxwellton v. MARION CRAICK, and HOMER MAXWELL her Husband. December 23, 1697.

A sale of lands found to stand, although writ had not intervened, a part of the price having been paid.

Mersington reported Sir Robert Lawrie of Maxwellton v. Marion Craick, and Homer Maxwell her husband. Sir Robert having acquired the lands of Stuarton, pertaining to the said Marion Craick's father, and she having an adjudication thereupon, he enters into communing with Homer Maxwell her hus-[8426]-band, and they agree for 6000 merks, whereof Homer receives 1000 merks in hand, and the other 5000 merks is sealed up and consigned in a neutral person's hands till the disposition were signed by the said Homer and his wife, but they declined to subscribe, unless a reservation were insert to secure her against her father's debts. Maxwellton pursues them for implement. Alleged, This being a right of lands, it was no perfect consummate bargain till writ had followed thereon and been delivered, till which there was always *locus penitentiae*. Answered, There could be no resiling here, because there was *rei interventus* by the delivery of the 1000 merks, and the consigning the rest, and which they offered to prove by the notar's instrument, and the depositions of the witnesses insert. Replied, Whatever may be pretended that *res* is not *integra* by Homer's accepting the 1000 merks in the first end, and in contemplation of this bargain, yet the consigning the rest of the money is no such consummation but it might be resiled from, and no instruments nor witnesses can prove such an agreement, else heritable rights might be disposed by witnesses; but the terms must be only proved by my writ or oath.—The Lords found the *rei interventus* took off the power of resiling, and that *res* was no more *integra* if he took the 1000 merks in part of the price; but found this could not be proven by witnesses, but only *scripto vel juramento* of Homer Maxwell, whether he took it in contemplation of this bargain or *quo alio nomine* he got it, or if he reserved to himself freedom to resile on reponing Maxwellton *cum omni causa*, and refunding his damage. The question was, on whom the loss of the annualrent of the consigned money should fall? For the consigners in the clerk of the bills hands, by order of a judge, are free of interest, yet such voluntary consignment as this *non sistit cursum usurarum*. See PROOF.

Fol. Dic. v. 1, p. 563. *Fountainhall*, v. 1, p. 804.

No. 37. [8430] GEORGE LOCKHART of Carnwath v. JOHN BAILLIE of Walston. December 23, 1709.

A missive of sale signed by both parties was not delivered by one of them; yet the sale was found complete, and no *locus penitentiae*.

At a treaty of agreement betwixt John Baillie of Walston and John Hamilton writer to the signet, about the sale of Walston's estate to George Lockhart of Carnwath, a minute of sale being drawn up, signed by Walston, and given to John Hamil-

ton, upon his obligation to procure some prestations from Carnwath, and to cause him subscribe the minute under the pain of £500 Sterling; and Carnwath having signed and got up the minute from Mr. Hamilton, he thereupon charged Walston to implement the same; who suspended and repeted a reduction upon this ground, that he resiled from the bargain, and there was *locus penitentie*, in so far as, 1mo, The minute charged on is no delivered evident, the charger not having received it from Walston, but from only John Hamilton, who had no warrant to give it up to him, but only to procure his subscription to it. And it were unreasonable, that Walston should be bound to Carnwath by that copy of the minute now in his hand, before he were equally bound to Walston by delivering another signed double to him; till which time the bargain was incomplete, and might be resiled from by Walston; as Carnwath might have shaken himself loose of it, by throwing the signed minute in the fire, or cancelling his subscription. For to sustain such an unwarrantable delivery by a mandatary, *qui excessit fines mandati*, would open a door to all manner of fraud; at which rate it should be in the power of any mercenary agent, to surrender his client's bonds to his debtors; 2do, The price of the lands was not clearly determined by the minute, which bears only "21 years purchase of the free money and victual rent payable out of the lands, conform as the same shall be proven to have paid at the suspender's father's de-[8431]-cease, or his own entry, counting the chalders of victual at — the chalders"; which blank in the minute could not be filled up without consent of both parties; and contracts of sale are never understood to be perfected while the price is left uncertain, which is then only certain, when *certa quantitas exprimitur, vel de quo constat per relationem ad rem certam*. 3tio, The prestations on Carnwath's part, contained in Mr. Hamilton's obligation to Walston, are *pacta ex incontinenti adjecta*, the obligation being of the same date with the minute, and expressly relative thereto; and while these things are unperformed by Carnwath, the bargain is still open unconcluded.

Answered for the charger; 1mo, When a subscribed writ is once out of the granter's hands, and in the hands of a third party, who delivers it to him in whose favours it is conceived; law presumes that he had a mandate or commission for delivering of it, unless the contrary be proved by writ or oath of the receiver. The pretended inconvenience to Walston, by Carnwath's being sole master of the minute, did not hinder the bargain to be completed; yea, the minute in his hand was a common evident for both; upon which Carnwath could not sue without performing his part; and for recovery thereof or an extract, action was competent to Walston; and had Carnwath destroyed it, the tenor might have been made up against him by his oath, and other habile methods of proving tenors. It is no paradox in law, that a debtor becomes free upon getting up his bond from the creditor's trustee, who had counteracted his trust; for no man gives trust without running hazard by the trustee's proving unfaithful. 2do, The reason founded on the blank in the minute, and uncertainty of the price, is of no weight; for the price was determined before Walston signed the minute, to 21 times the value of the yearly product of the subject sold. And the taking an obligation from Hamilton the trustee under a penalty to procure Carnwath's subscription to the minute, did as fully empower him to fill up the blank, and liquidate the value of nine or ten chalders of victual, the rest of the rent of being paid in money; as the having of the minute empowered him to deliver it; and *ita est*, that the blank was filled up before the minute was delivered to Carnwath; so that the principle of the common law, that *emptio non est perfecta* before adjusting of the price is misapplied, the price here being fully determined before delivery of the minute. 3tio, The prestations that Mr. Hamilton engaged Carnwath should perform, cannot be reckoned *pacta ex incontinenti adjecta* to the sale; because not undertaken by Carnwath the purchaser, but only by Mr. Hamilton, as taking burden for him. Nor doth Carnwath's not performing these conditions (suppose he were liable for them) annul the bargain, but only afford action to Walston against him to perform. Besides, Carnwath is ready to perform his part of the minute; upon Walston's performing what is incumbent upon him, which is to satisfy the desire of the charge by granting a valid disposition in the terms of the minute.

[8432] The Lords found, that the minute of agreement charged on, being signed by both parties, and in Carnwath's hands, was a complete minute and bargain, and there was no *locus penitentie*; and therefore repelled the whole reasons of suspension and reduction.

Forbes, p. 374.

No. 43. [8440] Sir JAMES FERGUSON of Kilkerran v. BENJAMIN PATERSON.
November 23, 1748.

A promise in writing to dispoſe land, is binding in law.

Benjamin Paterson wanting to purchase the debts due by his father, and thereby get into poſſeſſion of his father's eſtate of Glentig, prevailed upon Sir James Ferguson of Kilkerran to deſiſt from purchasing the ſame, upon a promiſe to convey to Sir James the pendicle of Duchary, part of the ſaid eſtate, which lies interwoven with Sir James's property. This agreement was executed [8441] by a miſſive letter, delivered by Paterson to Sir James, of the following tenor : Kilkerran, 8th September 1739, " My Lord, Agreeable to what paſſed between your Lordſhip and me the other day, at your own houſe, I hereby aſſure your Lordſhip, that if I ſhall have the good fortune to get right to my father's debts, which I propoſe to tranſact with his creditors, in order to enable me to acquire right to his eſtate, I ſhall diſpoſe to your Lordſhip the mailing of Duchary, at years purchase of the preſent rental thereof. I have been informed more fully ſince I ſaw you, that it is very proper that you ſhould have it in with Knockdow ; and being ſo ſmall a matter, I expect more friendſhip by your Lordſhip in the country, than the favour of granting this to you deſerves ; and hereby obliges me to make over in your favour the ſaid mailing of Duchary, and all right that I ſhall acquire in ſecurity of your right thereto, at the price of years purchase at the preſent rental. I am," &c.

In this letter the price was left blank, it being referred verbally to Crawford of Ardmillan, who, in a communing with Paterson, having fixed the price at twenty years purchase, a poſtſcript was added to the letter, in the following words : Streton, September 18, 1739, " My Lord, Ardmillan having propoſed twenty years purchase to be paid by you to me for the above mailing of Duchary, I agree thereto, referring to your Lordſhip if you will give me any more. I am," &c.

Paterson, after purchasing the debts, declined fulfilling his engagements. Sir James brought his action upon the miſſive letter, concluding, that Paterson ſhould diſpoſe to him the ſaid farm of Duchary, &c. The defence was, that this is a mutual contract where Sir James is not bound, and therefore the defender cannot be bound.

In answer to this it was premised, that the argument fails, unleſs it can be maintained, that no bargain about land is effectual in law, unleſs conceived in the form of a mutual contract. This cannot be maintained ; for it is a point eſtabliſhed by inveterate practice, that bargains about land maybe of all the different kinds, as well as bargains about moveables ; with this difference only, that a bargain about land muſt be in writing.

There are three different forms by which men bind themſelves to each other, mentioned by Lord Stair and other writers, all of them equally productive of actions at common law ; the firſt is promiſe, the ſecond offer, the third mutual contract. A promiſe is defined to be " that which is ſimple and pure, and hath not implied as a condition the acceptance of another," Stair's Inſtitute, b. 1, tit. 10, §§ 3 and 4. But when an offer or tender is made, there is implied (ſays the author, *ibid.* § 3) a condition that, before it become obligatory, the party to whom the offer is made muſt accept. According to theſe definitions, there is little or no difference betwixt a promiſe and an offer where the performance is ſimple, without implying any thing to be done by the other. But if the promiſe, or the offer, require any thing to be done by the other, the difference betwixt the two comes to be of importance. If one make an offer to ſell a thou-[8442]-ſand bolls of wheat at twenty ſhillings per boll, the offer muſt be accepted, in order to bind the perſon to whom it is made ; and, before acceptance, the party may withdraw his offer, for this very thing is implied in the nature of an offer ; and therefore our author juſtly aſſimilates an offer accepted to a mutual contract, both being bound thereby, dict. § 3. But he conſiders a promiſe as of a very different nature ; the perſon who promiſes being bound, and not the perſon to whom it is made. Thus, if I promiſe ſimply and abſolutely to deliver a quantity of wheat at twenty ſhillings per boll, the perſon to whom the promiſe is made is not bound to accept the wheat, though he has the other bound to deliver it ; and though ſuch a promiſe requires ſomething to be performed on the

other part, yet it differs nothing in its nature from a simple promise to pay or deliver a sum of money without any condition, where the obliger is bound, and the obligee not at all.

To apply these principles to the present case, the bargain in question may be considered either as a promise or as an offer : If it be considered as a promise, the defender is bound thereby ; and it is no objection that the pursuer is not bound, because such was the intention of parties ; if it be considered as an offer, the pursuer has accepted the same, the letter being written in his presence, and delivered to him, and afterwards the postscript. Nor does our law know of any more solemn form of acceptance than is inferred from receiving delivery of a deed.

And it is trifling to plead, That such a deed may be destroyed, whereby the holder will get free of his obligation. The same may be said of a mutual contract, where there is but one double ; and the answer to both is the same, That the thing cannot be done legally ; and as to illegal acts, there is no other fence against them, but damages and penalties.

One thing is clear, that this letter must either be null and void altogether, or be effectual without the subscription of the pursuer. It is of no moment that land is the subject of the bargain ; for, as observed above, there is nothing in law to confine bargains about land to the form of a mutual contract. It is very true, that a mutual contract must be subscribed by both, or it is binding upon neither : The form of the deed requires the subscription of both ; and, till both subscribe, the deed is unfinished and imperfect. But the form of the deed under consideration admits not the subscription of both parties ; it was perfected by the subscription of the defender, and therefore must be effectual from the moment of his subscription, or not at all. It will not be disputed, that a bargain in this shape would be effectual as to moveables ; yet there is no difference betwixt land and moveables as to this particular, since the obligations are in writing. And instances of sustaining conditional obligations with regard to land, are just as frequent as sustaining them with regard to moveables.

Such conditional obligations may indeed be attended with hardships upon those who are bound, if the obligee should refuse to say, whether he will accept of performance or not. But there is a remedy in equity, if not in strict law, by [8443] a process in which the obliger will be declared free, unless the obligee declare his mind.

“ Found the defender bound by the missive letter, to dispoise to the pursuer the lands of Duchary, at the price therein specified.”

Fol. Dic. v. 3, p. 394. Rem. Dec. v. 2, No. 98, p. 175.

No. 46. [8446] FULTON v. JOHNSTON. February 26, 1761.

A promise in writ to sell land is not binding, unless delivered to the person to whom it is made.

A communing about the purchase of land, betwixt two neighbours, was perfected by a missive letter in the following words :

“ Mr. ALEXANDER FULTON,

19th June 1760.

“ In terms of our agreement this day, I hereby promise and oblige myself to subscribe and deliver to you a valid disposition of my houses and land in Coldinghame, containing absolute warrandice, a procuratory of resignation, a precept of sasine, an assignation to the rents payable for crop 1760, and downward : And I bind myself to deliver a sufficient progress, and to purge incumbrances : You, on the other hand, being obliged to pay £160 as the price, or to grant bond therefor, payable at Martinmas next, bearing interest from Whitsunday last. And, for avoiding all disputes about the true meaning of these presents, I agree to submit to John Renton, writer in Eyemouth, all differences that may occur thereanent. And I engage to perform the premisses, under the penalty of £50 Sterling, beside performance.—
I am, &c. ALEXANDER JOHNSTON.”

Alexander Fulton brought a process before the Court of Session, demanding performance of the promise contained in this missive. And the defender, who had repented of the bargain, insisted that he was not bound by the letter, because the pursuer was not bound by it; urging the maxim, that, in mutual contracts, both parties must be bound, or neither. It was answered, That this neither was a mutual contract, nor was intended to be such; that it was a promise, which is binding with respect to land as well as with respect to any other subject; with the following difference only, that a promise to sell land must be in writ.

At the advising of this cause, it was thought a material circumstance to whom the letter was delivered. The writer was not bound while the letter continued in his own hand: But, if it was delivered by him to Alexander Fulton, the delivery transferred the property of the letter to Fulton; which, of course, was a good title in him to claim performance of the promise. As the parties were not aware of the importance of this fact, they had not made any enquiry about it. This only was agreed, that the letter had been in the hands of John Renton, and had been delivered by him to the pursuer. Proceeding [8447] upon this fact, it must be understood, that the letter was delivered by the defender to John Renton; and the question is, *quo animo*? As Renton was present at the writing of the letter, it could not have been delivered to him for behoof of Fulton; for, if that was the view, why not deliver it to Fulton himself? The delivery to Renton, then, must have been in order that he might write a minute of sale. If so, the property of the letter was not transferred to Fulton, but remained with the writer, under his own power, so as not to be bound by it more than before the delivery to Renton.

"The defender was assoilzied."

Fol. Dic. v. 3, p. 393. Sel. Dec. No. 176, p. 239.

No. 47. [8449] WILLIAM PARK v. M'KENZIE & LAWSON. November 29, 1764.

If mutual missives, concerning the sale of a house, want the forms required by act 1681; found that the defect cannot be supplied by the acknowledgment of the parties, that the subscriptions are genuine.

William Park having agreed to sell a tenement belonging to him in Glasgow to William M'Kenzie and John Lawson, the terms were settled by an offer from the purchasers and the vender's acceptance. The offer is in the following words: "*Glasgow, 9th September 1761.*—Mr. WILLIAM PARK.—Sir, As you design to dispose of your tenement in Arneil's Close, we hereby make you an offer of £89 Sterling, payable at Whitsunday next, you putting us in possession, and giving us a regular progress of writs at that term. As witness our hands, WILLIAM M'KENZIE, JOHN LAWSON." The acceptance runs thus: "I hereby accept the said offer of £89 Sterling. and oblige myself to give you possession, and a regular progress of writs, under the penalty of £20 Sterling. (Signed) WILLIAM PARK. THOMAS GILFILLAN, Witness, MATTHEW PARK, Witness."

The offer is holograph of William M'Kenzie. The acceptance is also of his handwriting. William Park all along acknowledged the verity of his subscription; and though the witnesses are not designed, it was never denied but that they were witnesses to the deed.

William Park being tempted with a better offer, sold the tenement to Alexander Nisbet, March 1762, and Nisbet was instantly infett. At the same time, William Park doubting whether he might not be bound by his first bargain, took a back-bond from Nisbet, declaring his disposition to him void, in case his first bargain should be found effectual against him.

In a process at the instance of M'Kenzie and Lawson for implement, Park's defence was, That the writings above mentioned were not probative, being defective in the solemnities required by the act 1681. To which the answer was made, That the solemnities of the act 1681 are all of them contrived to prevent forgery; and, therefore, the want of them cannot be an objection to a deed where the party, by

owning his subscription, does, in effect, acknowledge the verity of the deed. The Lords found the offer and acceptance not probative; and, therefore, assoilized the defender. And what follows is the substance of a petition reclaiming against that interlocutor.

The questions that arise from this case are, 1mo, Whether this minute of sale, executed in the form of an offer and acceptance, be null *ipso jure*, from wanting the solemnities of the act 1681, so as to make it *pars judicis* to deny action upon it; or whether it be a good foundation for an action, admitting the defender to object the defects of formality, and the pursuer to remove that objection, by referring the verity of the defender's subscription to his oath, or by replying upon his owning his subscription; 2do, Whether, when the writing is supported by such acknowledgment or oath, it be, notwithstanding, competent to the defender to recede from the bargain, as if it had been verbal merely.

[8450] To clear the first question, writings must be distinguished into two kinds. The first is where the writing itself constitutes the obligation, termed, in the Roman law, *litterarum obligatio*. The other is where the writing is intended for evidence only. An English bond in judgment, and in Scotland a bond containing a clause of registration, are examples of the first kind. These ought to be complete in all the legal solemnities, so as, *per se*, to bear full faith, without needing any extraneous support; for, otherwise, they can never answer their intention of being a good foundation for execution, without the intervention of a process. And yet it is not certain that we have regularly denied execution where there is any defect in solemnity. It will be found upon enquiry, that many bonds, containing a clause of registration, have been admitted upon record for execution, without being complete in all the solemnities; which is evidently an erroneous practice, putting the party under the necessity of finding caution in a suspension, as if the bond were complete in all points.

Of the other kind, the minute of sale under consideration is a proper example. It is calculated entirely for making evidence of what is agreed upon betwixt the parties; and, considering it in this light, it is natural to apply the same rule to it that is applicable to every sort of evidence; namely, that, if the evidence founded on do not afford full conviction *per se*, it must be competent to support it by other evidence. That this rule obtains in practice, with respect to written evidence, as well as every other sort, shall be made clear by many examples of various kinds.

But, before giving these examples, it may be proper to obviate an objection that stares one in the face, upon perusing the statutes that require certain formalities in all writings, under the certification of nullity and of making no faith. After taking a cursory view of these statutes, we shall examine whether any satisfactory answer can be made to the said objection. Our first statute, regulating the solemnities of writings, is the act 117th, Parl. 1540, enacting, "That, in time coming, no faith be given to any writing under seal, without the subscription of the party." The act 179th, Parl. 1593, ordains "the writer to be named and designed, otherwise the writ to make no faith." And the act 5th, Parl. 1681, enacts, "That the want of the designation of the writer and witnesses shall be a nullity, and not be suppliable by a condescendence." The writing in question is deficient in every one of these solemnities, excepting only the subscriptions of the parties. And why ought it, then, to be exempted from the statutory certification of being null, and of making no faith? This objection seems, at first view, invincible; and yet, upon a narrow inspection of these statutes, two answers occur that are separately relevant.

The first is, that, in requiring certain solemnities, to prevent falsehood or forgery, it could not be the intention of the Legislature to comprehend deeds acknowledged to be true by the parties, and, consequently, free from any suspicion of falsehood or forgery. Every Lawyer knows, that words alone, without intention, will not avail in a statute more than in a private deed; and that there is nothing more common than for a Court of Equity to deny any effect to a statute beyond the intention of the Legislature, however express the words may be, similar to what is always done with respect to private contracts. And if it can be made evident, that a writing, the verity of which is acknowledged by the parties, is not meant to be comprehended under the said statutes, but is left upon its natural evidence, without requiring any solemnity, the objection mentioned falls to the ground. And to make this evident, the following arguments are submitted.

Originally, before writing was common, a deed was attested by the seal of the

party. At that time, both in England and in Scotland, it was the defendant's privilege to plead *quod non est factum*; or, in other words, to deny that the seal was his or his predecessor's; and this obliged the pursuer to prove the seal. But if the defendant acknowledged the seal, he was not admitted to deny the writ to have been made with his consent or that of his predecessor; but was compelled to warrant the writ and to fulfil the same, or, as more strongly expressed by Glanvil, "*Ubi sigillum suum esse publice recognoverit in curia, cartam illam precise tenetur warrantizare, et conventionem in ipsa carta expressam, omnino servare sine contradictione.*" Glanvil, l. 10, cap. 12, *Reg. Mag.* l. 3, cap. 8.

Thus stood our law when the statute 117, Parl. 1540, was made; it proceeds upon the narrative, that seals being lost or forged may occasion much hurt; and enacts, "That in time coming no faith be given to any writing under seal, without subscription of the party." To carry on the chain of the argument, it is of importance to consider, whether a party's owning his subscription must not have the same effect with his owning the seal, when sealing only was necessary. That it ought to have the same effect must be evident upon considering, that owning the subscription banishes all suspicion of falsehood or forgery still more effectually than owning the seal. And, therefore, it may justly be taken for granted, that if after this statute a party acknowledged his subscription he was not at liberty to deny the writing, but was bound to fulfil it in every article. Upon this plan it remains only to be examined, whether the law, with respect to the point under consideration, has suffered any alteration by subsequent statutes. And with a view to this examination, I proceed to the statute next in order, viz. act 179, Parl. 1593, the preamble of which is as follows: "That the Parliament understanding falsehood to increase daily, especially by employing obscure writers who are not notaries, and whose hand-writing is not known"; therefore enacts, "That the writer be specially named and designed, otherwise the writ to make no faith in judgment nor outwith." It is yielded, that the certification here is applicable to registrable writs in the strictest sense of the words: No bond defective in any solemnity required ought to be admitted upon record for execution, because [8452] no deed is entitled to that extraordinary privilege but what is complete in every article. But with respect to writs serving for evidence only, and acknowledged by the parties to be true, the following reasons evince that these are not comprehended under this statute, but were intended to be left upon their former footing. 1st, The acknowledgment of the truth of the writ, is of all the most complete evidence, so as to render every other check unnecessary. 2d, The enacting clause of a statute can never go beyond the purpose and intentment of the statute, declared in the statute itself. Here the declared purpose of the statute is to prevent falsehood; and for that good reason the enacting clause cannot be applicable to a writ which is free from all suspicion of falsehood. And 3d, As there was no occasion earthly to alter the law with respect to an acknowledged subscription, it ought not to be lightly supposed that the legislature intended to alter established law, unless such intention had been expressed.

In the act 5th, Parl. 1681, two particulars are enacted, first, "that no witnesses shall be probative unless they subscribe"; and next, "that the want of the designations of the writer and witnesses shall be a nullity, and not be suppliable by a condescendence." The former was to prevent an inconveniency arising from defect of memory; for after a long distance of time, a man might readily forget that he had been witness. The latter was intended to put an end to the former practice of supplying defective writs, by condescending on the writer, &c., which had occasioned much vexation to the lieges, by dark and doubtful probation. But it deserves well to be remarked, that this statute requires not witnesses to be adhibited in any writing where they were not formerly requisite. And consequently, if they were not made requisite by former statutes in writs acknowledged to be true, the statute 1681 makes no alteration.

Nor is there any thing new or singular in pleading as above, that such writs were never meant to be regulated by the foregoing statutes. The Court of Session has excepted another writ from these statutes; and that is a holograph writ without witnesses, though more liable to forgery than a writ acknowledged to be true. A holograph writ is not accepted *verbatim* in any of the statutes; and therefore if words alone be regarded, it is null, and can make no faith. Yet this writing has always been sustained as an exception from the statutes. For what reason, but

that the checks introduced by the statutes to prevent forgery, are scarce applicable to a holograph writ, which is very little liable to forgery ? This argument concludes *a fortiori* to the present case. The certainty of the subscription, vouched by the defender's acknowledgment, is more satisfying evidence of the truth of the deed, than can arise from a holograph writ, without that acknowledgment. If therefore a holograph writ be unexceptionable evidence, no reason can be assigned why the writing in question ought not to be equally so : If the former be an exception from the statutes, the latter is better entitled to be an exception. And with respect to ra-[8453]-tional evidence, a holograph writ must undoubtedly yield the preference : It may possibly be forged ; there is no possibility of forgery in the other.

I proceed now to the second answer, which is, That even supposing writs like that in question to be comprehended under the statutes, yet that when any solemnity is neglected, it is not the intendment of these statutes to declare every such deed to be *ipso jure* null, as if it were merely a blank paper, but only to afford an objection or ground of reduction, which the party has in his power to pass from, or which he may be barred from pleading by homologation, by competent and omitted, or by acknowledging his subscription.

And to explain the meaning of the legislature upon this point, it is proper to be premised, that the term nullity bears different senses in our statute law. Sometimes it means an intrinsic nullity ; but for the most part, no more is intended by it but to afford an exception or a ground of reduction. I take the liberty to stop a moment for a few instances out of an endless number. A disposition granted by a bankrupt to a confident person without a necessary cause, is declared null and void ; and yet the Court of Session never sustains this as an *ipso jure* nullity, but always requires a formal reduction. The like of deeds granted within threescore days of notour bankruptcy, though declared null and void by the statute. Vassals failing to pay their feu-duties for two years, are declared by the statute to forfeit their feu-right *ipso facto* ; and yet in this case, the Court always requires a declarator and reduction. With respect to entails, many contraventions are declared to have the effect of an *ipso facto* forfeiture, both by the statute and by the tenor deeds of entail ; and yet such a contravention has never been sustained otherwise than by a declarator and reduction.

And now to shew that the terms mentioned above in the statutes, of nullity and of making no faith, are not to be strictly interpreted with respect to writs that serve only for probation ; and that no more is intended by such expressions, but to afford an exception or a ground of reduction, will appear from the following considerations. 1mo, In general, the law is never presumed to enact a severe or rigid certification, when one more mild is equally effectual. The defence of a defect in solemnities afforded by statutes to guard a defender against forgery, is as complete a remedy as he can reasonably wish, considering, that the objection is not to be overcome otherwise than by proving that he has owned the writing to be a true deed, whether by appearing in Court without objecting the nullity, or by homologation, or more directly by acknowledging his subscription. And for that reason, any deeper certification is with respect to him unnecessary ; and with respect to his party, it may happen to be unjust and destructive ; for it is not possible always to avoid mistakes and oversights ; and it would be extremely hard to deny a remedy in such a case, especially where the remedy proposed is safe and salutary, and in particular, can never subject the defender to any hardship if he intend nothing but what is fair and honest. It is for this reason, that in the cases [8454] mentioned above, the Court has given no effect to the statutory nullities further than to found a reduction. 2do, We meet with an antagonist still less formidable in the expression, " that a writ defective in solemnities shall make no faith," for the natural meaning of this expression is, that the writ *per se* shall make no faith ; which does not exclude collateral or additional evidence. It is no sort of deviation from this certification to admit a writ that is in itself no good evidence, to be supported by the party's acknowledging it to be a true deed. 3tio, By the certification of nullity in the act 1681, we have no reason to suppose any thing further intended than by the certification in the former statutes " of making no faith." Neither can it go further than the certification in a former clause of the same statute, " that none but subscribing witnesses shall be probative," which certainly does not exclude the acknowledgement of the party ; for when a party acknowledges his subscription, there can be no need of witnesses to prove it.

And, after all, when it is considered that a subscription acknowledged is more to be relied on than all the checks that have been devised to prevent or to detect forgery, and also considering that from the beginning of our law, such acknowledgement has been held sufficient to make the writ effectual ; it will require more express words than are found in the act 1681, or in the former statutes, to make an alteration in this branch of our law, so rational in itself, and so firmly established by length of time.

Having endeavoured thus to unfold the true meaning and sense of the statutes with respect to writs used as evidence, we proceed to what was promised above, which is to show in manifold instances, that the construction here given to the statutes has been adopted by the Court of Session ; and also to show, that such writings, when defective in the statutory solemnities have always been allowed to be supported by proper evidence.

The first instance is of actions that are every day sustained upon bonds and contracts though defective in solemnities, the designation of a witness for example, or of the writer. It is never held *pars judicis* to take notice of such objections, but to leave them to the defender. If there be no compearance, a decree in absence passes of course ; which is not null and void, but requires a suspension as in ordinary cases. And if adjudication have passed upon such a decree with possession, the objection to the bond will be cut off by the negative prescription. Now, none of these things can follow, if a bond defective in solemnities were null and void, so as not even to found an action ; for upon that supposition, every judicial proceeding following upon the bond would be no less null and void than if the process were founded upon a newspaper or upon any other insignificant writing. Next, if a party be sued for payment of a contents of a bond understood to be subscribed by himself, and a decree pass against him, repelling every one of his defences ; the want of the designation of the writer or of a witness, will not be sustained to him in a suspension ; for this objection will be found competent and omitted. This [8455] shows evidently that it is not *pars judicis* to take notice of such defects, unless they be stated by the defender ; for competent and omitted relates to defences only, and never bars the defender from objecting any intrinsic nullity. Third, Such a deed has always been capable of homologation ; witness among many others, a decision in Bruce's Collection, 17th February 1715, Sinclair *contra* Sinclair, *voce* WARR, where it was objected to a bond, that one of the witnesses was not designed, and therefore that the bond was null by act 1681, cap. 5 ; the Court repelled the objection, the bond having been homologated by payment of the annualrents, and part of the principal sum. A bond subscribed by two notaries before three witnesses only, where four are requisite, is not less null than the writing under consideration ; and yet this bond was found homologated by payment of interest. 20th November 1627, Lockie, *voce* WARR. And even deeds signed but by one notary are capable of homologation. 7th March 1612, Boswell, *voce* WARR ; 23d November 1699, Grierson, *IBIDEM*. A bill of exchange bearing annualrent and penalty is null ; and yet such a bill was found homologated by a partial payment, February 1733, Brown *contra* Irvine of Wiseby, *voce* WARR.

And agreeable to the doctrine above laid down, there are many decisions upon the precise point under consideration. A contract null upon the act 1681, as being subscribed by one witness only, was found suppleable by referring the verity of the subscription to the party's oath. 26th December 1695, Beatie *contra* Lambie, *voce* WARR ; a decision that ought to carry the greater weight, as being recent after the 1681, when it is probable that several of the Judges who assisted in framing the act were still alive. And the same has always been the rule in similar cases. A discharge null, as being subscribed by one notary only, was supported by referring to the creditor's oath his command to the notary to subscribe for him. 22d June 1611, Redpath, *voce* WARR. A strong authority to the case in hand, because a deed subscribed by the parties without witnesses, is truly not so defective as a deed subscribed by one notary only, where two are made requisite by the act 80th Parl. 1579. The like, 29th November 1609, Weir, *voce* WARR ; 8th July 1623, Sheriff of Cavers, *IBIDEM* ; 4th July 1739, Corabie *contra* Sheill, *IBIDEM*.

To conclude upon this head, there cannot in the nature of things be better evidence of a contract than a minute of it subscribed by the contractors, and acknowledged by them to be so subscribed. And therefore it were at least to be wished that there should be no law to make such a deed improbable. Such a law must be hurtful

to commerce, without serving any good end or purpose. And from the arguments above urged, we have reason to be satisfied that there is no such law.

The second point shall be discussed in a few words. It is objected, That this deed which is null by the act 1681 cannot bar the privilege of repentance ; and therefore that there is still *locus pœnitentiæ*, the bargain being about an heritable subject. This objection is in effect obviated in the answer to the [8456] first objection. If the deed be intrinsically null, so as not even to found an action, it is no better than a bit of blank paper, and the party who wants to be free has no occasion to plead that there is *locus pœnitentiæ* ; he was free from the beginning, there being no evidence of the bargain. On the other hand, supposing the minute of sale under consideration to be complete in all the legal solemnities, a writer named and designed, witnesses subscribing and designed ; it will be admitted that such a writing must bar repentance. Now it is contended, that the present minute of sale, adminiculated by the party's acknowledgment of his subscription, is in every view equivalent to a minute perfect in every solemnity. It has been shown above, that the present deed, though defective in the solemnities, is a good foundation for an action ; that it is liable to an objection indeed, but that the objection may be removed by referring the verity of the subscription to the defender's oath, or by his acknowledgment which saves the reference to oath ; and that such oath or acknowledgment makes the deed no less effectual in law than if it had been originally liable to no objection. If so, it must be no less effectual to bar repentance, than if it were complete in all the formalities.

It carried notwithstanding to adhere, upon a ground, that, in my opinion, has no support from reason, analogy, or decisions, namely, that a deed defective in the solemnities of the act 1681 is null and void, and no better than blank paper ; and that therefore there must be *locus pœnitentiæ* as if the bargain had been entirely verbal.

Fol. Dic. v. 3, p. 394. Sel. Dec. No. 226, p. 289.

No. 52. [8463] JAMES BARRON v. SARAH ROSE. January 23, 1794.

A bargain concerning heritage, entered into by missives, found not to be binding, where one of the missives was improbativè.

James Barron conveyed his right in certain houses to Sarah Rose, by the following holograph missive :

"MADAM,

Fort-George, 24th November 1792.

"I promise to give you possession of all the houses belonging to me in Campbeltown, at Whitsunday 1793, according to our agreement of this date."

[8464] Mrs. Rose, on the other hand, granted another missive, of the same date, to Barron, obliging herself to pay the price at the term of her entry ; it was, however, neither holograph nor attested by witnesses.

James Barron afterwards brought an action, concluding against her to fulfil the bargain.

In defence, she urged, that as her own missive was not holograph, she was entitled to depart from it ; 26th February 1761, *Fulton v. Johnstone*, No. 46, p. 8446.

The Lord Ordinary found, "That the counter missive by the defender not being holograph, or otherwise probative, the bargain, which related to an heritable subject, was incomplete, and the defender at liberty to resile, and therefore assoilzied her."

In a reclaiming petition the pursuer

Pleaded ; It is no doubt a settled point, that in bargains respecting heritage, there is *locus pœnitentiæ* till they are completed by a formal writing. But, as the defender's missive related merely to the price, and had no reference to the conveyance of heritage, it was not necessary that it should be holograph ; on the contrary, a verbal obligation proved by her oath, would of itself have been sufficient. The delivery and acceptance of the regular missive, obliging the pursuer to convey the subject, completed the transaction, and barred *locus pœnitentiæ* ; *Stair, b. 1, tit. 10, § 9 ; Rem. Dec. 23d November 1748, Lord Kilkerran v. Paterson, No. 43, p. 8440 ; 10th August 1759, Muirhead v. Chalmers, No. 45, p. 8444.*

Observed on the Bench ; A bargain concerning heritage may indeed be completed by an unilateral obligation. But the present is not a case of that kind. It is a mutual contract, entered into by missives, which must be binding on both or neither of the contracting parties. This is the rule in all bargains concerning heritage, as has been solemnly decided ; 29th November 1764, *Park v. M'Kenzie*, No. 47, p. 8449 ; 22d May 1790, *Macfarlane v. Grieve*, No. 51, p. 8459, &c. Lord Kames thought otherwise, which led him, in reporting some of those cases, to give them a different turn. That of Lord Kilkerran *v. Paterson*, 23d November 1748, No. 43, p. 8440, proceeded entirely upon specialities, though it has erroneously been supposed to be a decision upon the general point of law.

The Court refused the petition without answers.

Lord Ordinary, POLKEMMET.—For the Petitioner, M. Ross.—Clerk, GORDON.

R. D.

Fol. Dic. v. 3, p. 395. *Fac. Col.* No. 98, p. 218.

No. 53. [8465] HELEN HEPBURN *v.* HAMILTON of Orbiston. December 12, 1661.

Pacta liberatoria are effectual without writ, so there is no *locus penitentiae*.

Helen Hepburn, as executrix to her father, Humble, pursues Sir James Hamilton of Orbiston, for payment of 1000 merks, due to her father by a bond. The defender alleged absolvitor, Because there being a bond of £10,000 granted by Belhaven, Humble, Preston, and Orbiston, for the use of the late Duke of Hamilton, but there being nothing to instruct that it was the Duke's debt ; yet there was a transaction with the Dutchess of Hamilton for a lesser sum, whereof Belhaven, Preston, and the defender, had paid their part ; by which transaction, the pursuer's tutrix and overseer did agree to quit this bond, in respect that her father was acquitted of any share of the bond of £10,000. The pursuer answered, 1mo, That the defence ought to be repelled, because, being but a verbal agreement, before writ was subscribed, either party might resile. 2do, The transaction cannot be instructed, there being no writ, and witnesses are not competent ; neither can the tutrix's oath prove against the pupil. The defender answered to the first, that the transaction being *pactum liberatorium*, it required no writ, and so there was not *locus penitentiae* ; and as to the probation of the transaction, though tutor's oath of knowledge of any debt of the pupil's predecessors will not prove against the pupil, because the tutor is *singularis testis*, and not *in officio*, but a tutor's oath, as to deeds done by himself *in officio*, would sufficiently prove the same.

The Lords thought there was not *locus penitentiae* from the transaction, though but verbal ; but as to the manner of probation, they ordained the tutrix and overseer's oaths to be taken, *ex officio*. See PROOF. *Fol. Dic.* v. 1, p. 564. *Stair*, v. 1, p. 67.

No. 56. [8467] STEIL *v.* The Laird of ORBISTON. February 25, 1679.

Found in conformity with *Hepburn v. Hamilton*, No. 53.

Patrick Steil, as assignee by John Hamilton, writer, to the sum of 1000 merks, adjudged for as due by umquhile Orbiston, to whom this Orbiston is heir, he pursues him for payment. The defender alleged, That Hamilton's assignation to Steil was without a cause onerous, at least the cause onerous was not adequate, and therefore the cedent's oath was receivable against the assignee, and offered to prove by the oath of Hamilton, the cedent, that he had transacted with him to accept of £40 Sterling for all. It was answered, that though the cedent's oath be receivable against the assignee, where there is no cause onerous, yet that was never extended to an adequate cause. It was replied, that though there was some part of a cause onerous, yet the

same not being adequate, the surplus is gratuitous, and as to it, the cedent's oath must be taken. The defender further alleged, that the transaction alleged upon is not relevant, because, before writ is adhibited, there is *locus penitentiae*. It was answered, That *locus penitentiae* is only where *res est integra*; but here the greatest part of the transaction was satisfied.

The Lords found it relevant to be proved by the assignee's oath, that his assignation was not for an equivalent cause onerous, and in so far as he acknowledged the same to exceed the cause onerous, found the cedent's oath relevant for proving the transaction, and that it could not be resiled from, seeing a considerable part thereof was satisfied. See PROOF.

Fol. Dic. v. 1, p. 564. Stair, v. 2, p. 703.

* * Fountainhall mentions this case.

The cedent's oath may be taken in prejudice of the assignee, where the assignation is lucrative, though at least such an assignation should have the force of a donation.

Fountainhall, MS.

No. 62. [8470] JEAN KER v. DOWNIE. January 7, 1670.

A house let, allowed to be given up within 48 hours. See No. 67, *infra*.

Jean Ker having set a house in Edinburgh to Downie for £9, 10s. Sterling, she obtains decret against him therefor. He suspends on this reason, that within 48 hours after he took the house, he did by instrument give it over, which is the ordinary custom of burghs, where there is no writ, to quit the bargain within a short space, unless some offer intervene, *medio tempore*, by which the party is damnified.—The charger answered, That this house having been taken but 14 days before the term, there is neither law nor custom to allowing either party to give over or resile, there being no competent time to set again; for albeit houses sometimes are given over when they are taken, and quit before warning time, when the ordinary occasion of setting to others may occur, yet that cannot be drawn to this case; and the instrument of over-giving was only done by Downie's wife, who showed no warrant.—The suspender answered, That there was no difference whether the house was taken before warning time or after, seeing the law gives *locum penitentiae*, or some small time, which must take place in either case; 2dly, Albeit the charger had not been obliged to accept the over-giving, yet *de facto*, she has accepted it, because it is offered to be proved, that she set the house to another, and took earnest thereupon, which did import that she quit the first bargain, seeing at once she could not set it to two; 3dly, Albeit offer was made of the keys at the term, yet it is offered to be proved, that the house was not void, but that the former tenant's goods remained therein.

The Lords repelled the first reason of suspension, upon the over-giving; but found that member relevant, that the house being given over, the same was set to another, and earnest taken thereupon; but found that point, that the tenant's goods, who possessed formerly, were not removed, not relevant, in respect of the custom in Edinburgh, not to remove peremptorily at the term.

Stair, v. 1, p. 658.

No. 63. CAMPBELL v. DOUGLAS. January 12, 1676.

Locus penitentiae competent in a bargain agreed to be reduced into writ, before the writ was subscribed.

Robert Campbell and Robert Douglas having bought the rests of debts due to a soap-work at Leith, the assignation was taken in Robert Douglas's name, and he granted

back-bond, "declaring the half to belong to Robert Campbell"; but thereafter they made a bargain, "That Robert Campbell should have 500 merks of free profit to quit his interest"; but within a few days after, Robert Douglas resiled from the bargain, whereupon Campbell pursues him before the Bailies of Edinburgh; in which process Douglas deponed, That there was a bargain as is libelled, but that it was to be redacted in writ, and that before the contract was perfected he did resile. The Bailies having found, That this [8471] part of the oath of redacting the bargain into writ, was no competent quality, but an exception, Douglas raised reduction upon iniquity; and as it was then represented to the Lords, That such a bargain needed no writ, seeing the assignation was in Douglas's name only, and Campbell, upon payment of the money, was only to give back the back-bond, and that Douglas was to give precepts for a part of the money, which was not Campbell's fault that it was not done; therefore the Lords remitted the cause, and the Bailies decerned. Douglas now suspends, and repeats the reason of iniquity, and alleges, That albeit a bargain, by its nature, require no writ, yet if the parties expressly commune and agree to perfect the bargain by writ, till the writ be subscribed, *est locus pœnitentiæ*, and either party may resile; and this being a part of the bargain, was a most proper and intrinsic quality, and the suspender ought not to have been put to prove it; but his oath being the only mean of probation, did sufficiently prove it.

The Lords having considered the oath, as it is repeated in the Bailies' decret now produced, bearing, "That the bargain should have been perfected in writ," they found, That though writ is not necessary to perfect an agreement; yet if parties expressly commune and agree to perfect it in writ, there is place for either party to resile till the writ be subscribed; and that this being a part of the bargain, was intrinsic and competent by Douglas's qualified oath: But in respect the oath did only bear, "That the bargain should have been perfected in writ," which might have been Douglas's conjecture, They ordained Douglas to be re-examined, whether it was expressly communed and agreed by the parties that this bargain should be perfected in writ. See QUALIFIED OATH. *Fol. Dic. v. 1, p. 564. Stair, v. 2, p. 396.*

No. 67.

[8472] WATT v. STEWART. February 20, 1703.

Even after arles, a man was allowed to give up a house he had taken, having done so 40 days before the term. This in consequence of an alleged practice.

Mr. Adam Watt pursues John Stewart glover in Edinburgh, for a house-mail. His defence was, That as I took your house in March to, enter at the Whitsunday after, so I gave it over to you by way of instrument *de recenti*, more than 40 days before the term, and that, by the general custom within the town of Edinburgh, such over-givings have been sustained as legal; and there [8473] was *locus pœnitentiæ*, all the penalty being loss of the arles; and being before the 40 days, the landlord has time enough to set his house.—Answered, No such custom proved; besides, it is most unequal and irrational for the tenant to have liberty to resile, and not the locator or setter; why should he be bound, and the other loose? and this contract of location conduction being once perfected, there should be no *locus pœnitentiæ*.—Replied, Tenants in possession may give over any time, providing there be 40 days yet to the term, and why may not an intransigent tenant do the same?—The Lords sustained the over-giving, in respect of the custom, though it be an evident hardship upon landlords; but some of the Lords moved, that further trial should be taken anent the universality of the custom, which was affirmed to lie just on the contrary side.

Fol. Dic. v. 1, p. 564. Fountainhall, v. 2, p. 181.

No. 72. [8475] WALLACE, GARDYNE, and Co. v. PATRICK MILLER, and Others.
June 13, 1766.

When it is a part of the agreement, that the bargain shall be reduced into writing, there is *locus poenitentiae* till that be done.

Messrs. Gibson and Balfour, and Patrick Miller, were engaged with John Weir in a co-partnery for selling and bleaching linen, under the designation of John Weir and Co.

In May 1766, Wallace, Gardyne, and Co. of Arbroath, sent a parcel of linens to be bleached by John Weir and Co. ; and, upon the 7th of that month, made offer to sell them the cloth at certain prices, upon two months credit.

By this time, the co-partnery of John Weir and Co. was dissolved, which John Weir mentioned in his answer of 16th May ; and, at the same time, offered to take the linens upon his own account, on condition that the credit should be enlarged to 4 months.

[8476] Wallace, Gardyne, and Co. agreed to the condition, by letter of the 17th, adding, " You may compute the amount, and send us your acceptance, payable in 4 months," with a postscript in these words : " Since writing, we have made out an invoice of the linens, amount £426, 18s. 11d. ; for which, if found without error, you may send us your acceptance."

Upon the 23d of May, Messrs. Miller and Gibson and Balfour protested and registered certain bills due by John Weir. Upon the 24th, a meeting of his creditors was held ; and that same day, Weir wrote to Wallace, Gardyne, and Co. explaining the situation of his affairs, and asking their directions as to the bleaching of the linens, which he now declined purchasing.

These linens were pointed by Messrs. Miller and Gibson and Balfour, upon the 1st of June, as creditors to John Weir, and claimed by Wallace, Gardyne, and Co. as their property.

Pleaded for the defenders ; The contract of sale is completed by mutual consent, and, in sales of moveables, writing is unnecessary. This consent was signified by the letter of 16th May on the one hand, and the letter of 17th May on the other. Nor is it of any consequence, that Weir had not transmitted an acceptance for the price ; that cannot be considered as a circumstance essential to the bargain ; the pursuers demanded no additional security, but had betaken themselves to the credit of Weir alone.

Answered ; When it is agreed that a contract shall be completed by writing, there is *locus poenitentiae*, till that writing be delivered. The contract, therefore, was never completed in this case, as the acceptance was never granted. But, even allowing the contract to have been completed, and the property transferred, Weir was bound in justice to give up the bargain, when he knew himself to be utterly insolvent. Accordingly, he did give it up by his letter of 27th May ; and the protesting and registering his bills the day before, did not make him a notour bankrupt, or invalidate that act, even supposing it to have been necessary for the security of the pursuers.

" The Lords found, That the sale of the cloth to Weir was never completed, and repelled the defence."

Act. DAV. GRÆME.—Alt. WIGHT.

G. F.

Fol. Dic. v. 3, p. 396. Fac. Col. No. 34, p. 256.

No. 75. [8482] WILLIAM FARRIES v. JOHN STEIN. March 7, 1799.

What degree of punctuality is required, in the acceptance of an offer to sell spirits at a given price ?

William Farries, spirit-dealer in the village of Ecclesfechan, Dumfriesshire, on the 7th November 1797, wrote to John Stein, distiller at Canonmills, near Edinburgh : " Sir, As I have sold five puncheons of the aquavitæ I bought from you last time Mr. Brown was at this place, and thinking that the other five are over few for me, I

wish to have eight or ten puncheons more. If you will be reasonable in your price, ready money I will give for the whole ; so, in the course of post, write me the very lowest you mean to take. I hope you will consider, as I take a great quantity from you. Do not disappoint me of an answer in course."

The answer returned, was "Canonmills, 10th November 1797. Sir, I am favoured with yours of 7th inst. I have no objections to let you have other ten puncheons upon the same terms as the last, say 3s. 2d. cash, 3s. 4d. credit, the whole to be taken away in the course of this month. Expecting your answer in course, I remain," &c.

Farries replied, "17th November 1797. I duly received yours of the 12th, observing that you will let me have other ten puncheons more aquavitæ at 3s. 2d., to be taken away in a month, which is rather a short time ; but we will endeavour to get it all away if possible, and shall remit you cash in course. My brother will call for four puncheons first journey."

Stein rejoined, "Canonmills, 19th November 1797. Sir, I am this morning favoured with yours of the 17th, but not having received your answer in course to my letter of the 10th instant, I have since disposed of the spirits otherwise, and therefore cannot now accept of your offer. The lowest price at the present for the quantity you mention, is 3s. 6d. cash, or 3s. 8d. three months credit. Having your answer in course, I am," &c.

Stein having persisted in his refusal, Farries brought an action of damages, in which he stated, There is a daily post between Edinburgh and Ecclesfechan, which leaves the former at nine in the morning, and the latter at six in the evening ; and letters from the one ought to be delivered at the other on the following morning. The letter of the 10th, therefore, supposing it not written till after nine in the morning, would reach Ecclesfechan on the 12th, but owing to irregularities in the delivery of letters usual in country villages, the pursuer did not in fact receive it till the 14th. He was obliged next day to attend a fair at some distance, where he sold the spirits he expected to receive from the defender. The pursuer got home on the evening of the 16th, but after the departure of the post ; and on the 17th, he accepted the offer made to him, without having heard that any rise in the price of spirits had in the meantime taken place. These circumstances are conclusive in his favour, as establishing that there was no unreasonable delay on his part, and evidently no intention to take advantage of the defender, who could not expect from [8483] a person in the pursuer's situation, who is frequently obliged to be from home, and whose dealings are not sufficiently extensive to enable him to keep a clerk to take charge of his business in his absence, the same regularity in correspondence as from a higher class of merchants. Even among them, however, there is no fixed rule as to the time within which an offer must be accepted.

Answered, An offer to sell a commodity at a fluctuating price (and there is none more so than spirits), at a given rate, must be immediately accepted, otherwise an undue advantage would be given to the purchaser. By the custom of merchants, an answer must be returned in course of post, by which is meant, that it must be dispatched, at farthest, by the post of the day following that on which the offer ought to be received. This is understood to hold, even when it is not mentioned, as the condition of the offer, and still more when it is specially required. It would not vary the matter although the receipt of the letter be accidentally postponed. Of this, however, there is no evidence in the present case, and indeed a delay of three days after receiving it is admitted.

The Lord Ordinary found damages and expenses due.

A reclaiming petition was (4th December 1798) refused without answers.

Upon advising a second petition, with answers, the Court were divided in opinion. A majority thought, that in the whole circumstances of this case, the delay on the part of the pursuer had not been such as to entitle the defender to resile from his offer ; while, on the other hand, though without expressly adopting the rule contended for by the defender, an opposite conclusion was drawn from them.

The Lords adhered.

Lord Ordinary, STONEFIELD.—Act. CORBET.—Alt. H. ERSKINE, INGLIS.—Clerk PRINGLE.

D. D.

Fac. Col. No. 119; p. 271.

No. 10. [8499] The MINISTER of Morham v. The Laird and Lady BINSTON.
November 14, 1679.

Heritors are bound to build the manse, and liferenters are free of any burden on that account.

The Minister of Morham finding the manse of his parish insufficient, did cause visit the same, and found that it required about £1000 to rebuild it; whereupon the Laird and Lady Binston being charged as having all or most of the parish, they give in a bill of suspension, and being heard thereupon, the [8500] question arose, whether the Lady as liferenter was liable for any part of the expenses, or if the heritor was liable for the whole; for whom it was alleged, That the charge being upon the act 21st, Parliament 1663, anent manses and glebes, it bears expressly, "Where there are no sufficient manses, the heritors of the parish shall build sufficient manses"; and this act being a statute *stricti juris*, cannot be extended to liferenters, unless it were expressed. It was answered, That the benefit of the ministry redounding to liferenters during their life, justice requires that they should bear a part of the burden; for, if the land were to be adjudged in consideration of the value, the liferent would be stated according to the worth and age of the liferenter, to a third, fourth, or some other proportion; and therefore, according to that proportion, she should be liable in this burden as well as in other burdens; likeas, by the 199th act, Parliament 14th, King James VI. where manses are designed, relief is ordained against the feuars, tacksmen, and possessors of the parish, and therefore, though by the last act, heritors be ordained to build, yet they may crave relief against liferenters as possessors. It was replied, That the former order of manses is wholly changed, for the building is laid only upon the heritors, and the upholding, and consequently the reparation, upon the incumbent, and in the vacancy out of the vacant stipends; but, whatever might be pretended in equity for making a statute to burden liferenters for some share for building manses, yet where the matter is fixed by a statute, the Lords ought to acquiesce therein, and cannot extend it *de casu in casum*.

The Lords found the liferenter free of any burden of the building of the manse.

Fol. Dic. v. 1, p. 566. Stair, v. 2, p. 706.

No. 18. [8503] GAVIN PARK v. Sir WILLIAM MAXWELL. July 13, 1748.

Lands united to a parish *quoad sacra tantum*, are not bound to repair the manse.

Sir William Maxwell of Calderwood's lands of Meikle and Little Drips were disjoined from the parish of Cathcart, and united to the Parish of Carmunnock, *quoad sacra tantum*; which limitation in the annexation, Sir William pleaded to exeeem him from contributing towards building a manse for the minister of Carmunnock; and the Lord Ordinary, before whom a suspension came of a charge against him for that purpose, at the instance of Gavin Park, appointed factor for collecting the money assessed upon the heritors, "found, 23d July 1747, the letters orderly proceeded."

Pleaded in a reclaiming bill, That the reservation in the decret of annexation behoved to import something, and it could mean nothing else, except that the charge of the people was alone transferred; but to all civil effects the lands remained in the former parish, and they could not be liable to burdens in both parishes.

Answered, The inhabitants of these lands are bound to attend the church of Carmunnock; they are entitled to places there, and therefore are obliged to support it; and it would seem there is as good reason for their supporting the manse; the heritors would be entitled to a vote in calling a minister, if the act [8504] of Parliament 1690 continued to be the rule; and as their charity is given there, they are undoubtedly entitled to oversee the application of the poor's money equally with the other heritors; they are in all respects to be considered as heritors in the parish

to which they are united, except that their teinds continue to be part of the old benefice.

The Lords suspended the letters.

Act. R. DUNDAS.—Alt. LOCKHART.

Fol. Dic. v. 3, p. 399. *D. Falconer*, v. 2, No. 274, p. 368.

No. 21. [8506] *HERITORS of the Parish of Elgin v. WILLIAM TROOP.* February 28, 1769.

Minister of a royal burgh, with a landward parish, not entitled to designation of a manse upon the statute 1663.

The parish of Elgin, beside the royal burgh of that name, contains a large district to landward. The cure is served by two ministers, neither of whom, at least since the Revolution, have enjoyed either a manse or a legal glebe.

In 1764, the presbytery, after summoning the heritors, ordered estimates of the expense of a manse, and contracted for the execution with William Troop mason in Elgin, to whom they ordained the money to be paid by the heritors, according to the proportions at which, by the decree of designation, they had assessed their respective lands.

A charge given upon this sentence being suspended, it was pleaded for the Heritors, That ministers of royal burghs have no title to insist for designation of a manse upon the statute 1663.

In support of this proposition, it was observed, That, in the most ancient periods of our church, the building and repairing of the manse were burdens incumbent upon the churchmen themselves. This appears from the 13th canon of a provincial council held in Scotland in the reign of Alexander II. anno 1249.

In like manner, after the Reformation, the act 1563, c. 72, provides that the popish parson or vicar should be obliged to yield up to the protestant minister serving the cure, "the principal manse, or sa meikle thereof as sall be fund insufficient for stauking of them, or that an reasonable and sufficient house be bigged to them, beside the kirk, be the parson or vicar." This provision is enforced by the 48th act of the Parliament 1572, and by 1592, c. 118, extended even to such abbeys and cathedral kirks, "quhair na uther manse nor gleib, pertaining to parson or vicar was of before; swa that the ministers presently admitted, or quhilkis hereafter sall happen to be admitted, to the office or cure of the ministry, within the said kirk, sall have an sufficient manse and dwelling-place within the precinct of the abbay quhair he servis."

From these statutes it appears, that the burden of building manses lay solely upon the ecclesiastics; nor is there the least trace of any obligation imposed, either upon the heritors, or upon the parishioners for that purpose. With regard to repairs, it is obvious, that they must have been a burden upon the incumbent, since no other person is made liable for the expense of them; and so this point is fixed by the after statute, 1612, c. 8.

Thus matters stood from the earliest period of the Scottish church, down to the year 1644, when an act passed, whereby presbyteries were empowered to design manses and glebes out of kirklands, or, in default of them, out of temporal lands: Borrowstoun kirks being always excepted.

This exception is taken away by a subsequent statute, 1649, c. 45, which "ordains the heritors of the parish, at the sight of three ministers and three [8509] ruling elders, to be appointed by the presbytery, to build competent manses to their ministers, the cost and expense thereof not exceeding £1000, and not being beneath 500 merks; and that burghs, and heritors of the landward parts of the parish, provide also competent dwelling-places and houses for their ministers, the sum not being above or beneath the sums above expressed."

The two last-mentioned statutes fell under the general act rescissory 1661, and matters returned to the footing upon which they stood by 1612, and former enactments;

and as, prior to the two rescinded acts, there was no obligation upon the heritors to build manses, it is clear, that, were this cause to be determined by these ancient statutes, the minister of Elgin could not compel the heritors to build a manse for him.

But the matter does not rest here : The act 1663, c. 21, contains sundry provisions for the benefit of ministers, and is declared, "as to the manses, to have force, as the same had been made and dated the 14th of March 1649." It is plainly copied from the rescinded act of that date : It is copied from it in so far as relates to ministers of country parishes ; but, with respect to ministers in burghs, it is entirely silent, and *ex proposito* omits to renew the abrogated provision in their favour.

As, in these circumstances, the omission cannot be considered as accidental, there is no room to doubt that the intention of the Legislature was to exclude ministers of royal burghs from the benefit of manses. And so it was expressly found in the case of the minister of Dunfermline, observed by Falconer, 30th June 1750, No. 19, p. 8504.

Pleaded for the charger, The statutes 1563, 1572, 1592, and 1594, are expressed in general terms, and necessarily import, that the minister of every parish, without distinction, was entitled to a manse.

Before the Reformation, the burden of building and repairing manses lay upon the parishioners. The veneration in which the clergy were then held, was too great to require any positive enactment of the Legislature, whose interposition indeed was in a great measure rendered unnecessary, by the almost unbounded jurisdiction enjoyed by the church, in every matter where the interest of her servants was concerned.

It appears from the books of Assembly, that many of the first reformed ministers had no larger allowance than £20 or £30 Scots ; and 200 merks was among the highest stipends. Upon such a pittance, it were absurd to suppose, that the incumbents could have been subjected to the new obligation of building or repairing their manses.

The introduction of Episcopacy, a favourite plan of James VI. was exceedingly disagreeable to the nation in general. Among other expedients devised for reconciling them to that measure, the statute 1612, c. 8, entitled, "An act anent repairing bishops manses," was passed ; by it both heritors and parishioners were freed from the building or repairing of manses, and the burden laid upon the incumbent himself.

[8510] It would appear, that this statute had not long continued in observance, with respect to the inferior clergy at least, if ever designed to extend to them ; for, by a decision 11th February 1631, Minister of Inverkeithing v. Ker, No. 4, p. 8497, it was found, That the minister "might either deal with the parishioners for bigging a manse to him, or pursue them therefor, *prout de jure*, or otherwise big his own manse, the expense whereof would be refunded to his executors by the next incumbent, conform to the act of Parliament."

Be this as it will, as, prior to the act 1612, every minister, whether of a country parish, or of a royal burgh, was entitled to a manse, so no exception is contained in that statute ; and that, *de facto*, posterior to it, ministers of royal burghs did enjoy manses, is clear from another decision, 24th July 1629, Nairn *contra* Boswell, No. 15, p. 5137.

That judgment, given in the case of a glebe, and *a fortiori* applicable to the case of a manse, is supported by the act 1644 : For, since in order to give an exemption to royal burghs, the aid of a statute was necessary, it follows, that, prior to that enactment, the ministers of royal burghs were in *pari casu* with others. The exception, however, of borrowstoun kirks was soon recalled, and the ancient common law, whereby all ministers, without distinction, were entitled to have manses built for them, restored by the statute 1649, c. 45. Such being the case, the act rescissory made no variation in this respect, but, by abolishing both the late acts, did in effect leave matters in the same situation as if the statute 1644 had never been enacted, or the statute 1649 had continued unrepealed.

The former law, by which ministers, even of royal burghs, had right to manses, being restored, there could be no occasion for an express enactment, to establish that right upon as broad a foundation as it stood prior to the date of the rescinded statutes. The principal view of the act 1663 was to vest in bishops the jurisdiction formerly exercised by presbyteries ; and it would not be surprising, though less attention had been paid to other accidental considerations. But, even in these circumstances, the act itself shows the intention of the Legislature, that ministers of royal burghs, at least in the case where there is a landward parish annexed, should be entitled to manses. For not only are the words general, and without exception, but, in relation to glebes,

it is expressly provided, "that in all designations of glebes incorporate acres, in village or town where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk." Hence it follows, that ministers of burghs are entitled to have lands designed for a glebe; and, if so, they must have equal right to the lesser benefit of a manse.

The obligation of a constant residence, is equally strong upon the ministers of royal burghs as upon others; and although, from particular circumstances, some of them may chance to enjoy larger stipends, their trouble must necessarily be increased with the greater number of their parishioners, and the expense of living must be more considerable.

[8511] Arguments taken from borrowstoun kirks, or parishes within burghs, will not apply to the present case, where the parish is not confined to a burgh, but consists of a large district to landward, which happens to comprehend a burgh within it. It would sound strangely to say, that by the erection of a burgh in an extensive parish, the minister, at the same time that he had his labour increased, should forfeit one of his most valuable rights; and, in more cases than one, ministers of royal burghs have been found entitled to manses upon this very footing, that there was a landward parish annexed.

Replied for the Heritors, The charger's whole argument proceeds upon the supposition, that, prior to the Usurpation, heritors were subjected, at common law, to the burden of building or repairing manses. But this is a mistake. It is true indeed, that the ministers of certain burghs have got right to manses, by coming in place of the popish clergy. These may derive assistance from inveterate use, and to them the decisions quoted must be referred. In the same manner might perhaps be explained the words of the statute 1663, referred to by the charger, though, by the expression of villages and towns, burghs of regality or barony ought properly to be understood.

The Lords determined the question upon the point of law, and found, That the minister of Elgin was not entitled to insist for the designation of a manse, upon the statute 1663.

Reporter, BARJARG.—For the Heritors, LOCKHART, W. MACKENZIE.—For the Charger, DAVID DALRYMPLE, GEO. WALLACE.

G. F.

Fol. Dic. v. 3, p. 398. Fac. Col. No. 90, p. 163.

No. 22. Sir LAURENCE DUNDAS v. ARTHUR NICOLSON, and Others. July 2, 1778.

The superior not liable to be assessed for the expense of building the manse.

The presbytery of Lerwick in Zetland assessed the parish of Nesting for rebuilding the manse, and proportioned the assessment among the heritors according to their number of merk lands.

Messrs. Nicolson and Hunter, who held their lands in the parish, feu of Sir Laurence Dundas, for payment of a considerable feu-duty, having objected to [8512] this assessment, by which no part of the expense was laid on the superior, brought a suspension of the presbytery's judgment, and called Sir Laurence in an action of declarator.

Pleaded for the pursuers; 1mo, In the general case, the superior is bound to contribute to the expense of supporting the manse. By the stat. 1663, c. 21, renewing an act in 1649, the heritors of the parish are subjected to this burden. The term heritor applies to every person who has a feudal right in lands, superior as well as vassal. By heritor is understood superior in the acts 1661, c. 35, and 1681, c. 21.

This interpretation is agreeable to justice. The expense of kirks and manses is a public tax on the landed property, for the necessary purpose of supporting a religious establishment. It is equitable that both superior and vassal should contribute to this purpose, in proportion to their respective interests in the lands; the superior

for his feu-duties, and the vassal for his rent, deducting the feu-duties, unless it is otherwise stipulated betwixt them.

The general practice of assessing for parochial burdens by the valuation-book, interprets the statute in this manner. Though in Zetland there is no valuation of the lands, the same principle must regulate the assessment.

2do, The feu-duties stipulated in the feu-rights of the pursuers, are very nearly equal to everything the tenants paid for them at the time. The superior having thus the substantial benefit from the lands, has continued ever since to pay the whole cess. If there had been a valuation in Zetland, the superior, as he paid the cess for the lands, would have at least stood valued for these feu-duties, and would have been assessed for parochial burdens, according to his valuation. But further, the whole of these parochial burdens have likewise been paid by the superior. This implies that it had been understood betwixt the parties, when these feus were constituted, that the superior should remain liable for the whole of these burdens.

Answered for the defender, to the 1st plea; By heritors in the act 1663, must be understood holders of land in property. So the word is explained by Sir George Mackenzie, in *Observ. on act 1662*, c. 6. And there was no reason that the expense of these parochial burdens should by the act have been made to reach the superior, who has no interest in the purposes for which they are imposed. He is not entitled as superior to a residence in the lands, nor even to a seat in the church. The heritor has the whole benefit of the parish-church; and therefore ought to be subjected to the whole expense of upholding church and manse.

It is not required by the statute 1663, that the cess-roll should be the rule of assessment for these parochial burdens.—As it will answer, in most cases, to point out who are liable, it may, in general, be safely followed. But if, in any case, it should not correspond with the intendment of the statute, a different rule must take place.

[8513] To the 2d plea; Payment of the cess does not imply being liable in the parochial burdens. As to the parochial burdens, the practice in Zetland cannot be traced further back than 1631, and is not uniform.

The Court, before advising the cause, ordained an inquiry to be made by the parties, whether, in the general practice over Scotland, the superior was subjected in payment of any part of parochial burdens.—The Court, upon advising certificates of the practice, with informations, were of opinion, that the expense of building the manse is to be laid on the property, and not on the superiority; and that, by heritors in the statute 1663, proprietors are to be understood; that there has been no usage, either in the general case over Scotland, or in Zetland, sufficient to establish any contrary rule of assessment; and found, "That Sir Laurence Dundas cannot be assessed in any proportion for building the manse, on account of lands of which he is only superior."

In a reclaiming petition for the pursuers, it was urged, that, although the superior was not liable in parochial burdens, the effect of this exemption must fall on the heritors at large. The vassal is only liable, along with them, in proportion to his interest, that is, his rent, deducting the feu-duty. In that manner, he would have stood valued, and been assessed, for these parochial burdens, in any other country where the superior paid no part of them, and the defender's vassals in Orkney are so valued and assessed for these burdens.

The Court refused the petition without answers.

Act. RAE, CROSBIE.—Alt. LORD ADVOCATE, BLAIR.

Fol. Dic. v. 3, p. 399. *Fac. Col.* No. 26, p. 42.

No. 1. [1] MINISTER of Dunfermline v. The HERITORS. November 19, 1805.

The minister of a royal burgh, with a landward parish, having been once in possession of a manse, but having accepted a sum of money for manse-rent, may insist upon a manse being provided for him.

The minister of Dunfermline, after the Reformation, was possessed of both a manse and glebe. In 1658, an agreement was entered into between the minister on

the one part, and the Magistrates of the burgh and the landward heritors, on the other, that £40 Scots should be paid to the minister, instead of house-mail. The manse had by this time probably become ruinous ; but that it once existed, is proved by a case reported by Durie ; Lady Dunfermline *contra* Macgill, 13th February 1629, No. 14, p. 5137.

The Reverend James Thomson, minister of Dunfermline, applied to the Presbytery to have a manse designed to him, instead of receiving the £40 Scots as he had hitherto done. The judgment of the Presbytery was brought under review of the Court ; when it was “ found, that the minister in this case is not entitled to a manse, and that the Presbytery has no power to design him one.”

A reclaiming petition being offered, the Court “ refuse the desire thereof, and adhere to their former interlocutor, with this explication, that the petitioner is not entitled to have a manse designed to him in terms of the act of Parliament (30th June 1750), reserving to him to sue for a dwelling-house, as he shall judge competent, as accords.”

Matters remained on this footing, till the Reverend Allan Maclean, the present incumbent, presented an application to the Presbytery, to design a manse to him, which they (7th Jan. 1803) did accordingly, within the precincts of the abbey.

[2] This judgment was brought under review by advocacy, and reported to the Court.

The heritors

Pleaded : That by the previous judgment upon this point, the claim was set at rest for ever : But the majority of the Court did not listen to the plea of *res judicata*.

Upon the merits of the application, the heritors

Pleaded : By the law of Scotland, the minister of a royal burgh is not entitled to have any manse built for him, at the expense of his heritors, although part of the parish consist of a land district. The act 1644, c. 31, which gives power to every presbytery to design manses and glebes to ministers, at any parish kirk within their bounds, specially excepts from this privilege boroughs-town kirks, which means those parishes which, besides a burgh, contain also a land district. This interpretation is put beyond doubt by act 1649, c. 45, made to supply the defects of former laws, by which “ it is appointed, that burghs, and the landward parts of the parish, provide all competent dwelling-places and houses for their ministers.” These two acts having been rescinded at the Restoration, the act 1663, c. 21, was made to supply their place ; but carefully omits to re-enact the clause which obliges the burgh and heritors of a landward parish, to provide a manse for the minister. It probably was thought, that it would be easy for a minister, having a royal burgh within his parish, to hire a house, when it might be impossible to find room within its bounds for building one. But this exception against the general rule of providing a manse for the minister of the parish, has been uniformly recognized ; Thomson *v.* Heritors of Dunfermline, 30th June 1750, No. 19, p. 8504 ; Heritors of Elgin *v.* Troop, 28th February 1769, No. 21, p. 8508 ; Nisbet *v.* Magistrates of Montrose, 29th February 1779 (See Note, p. 8511) ; Scott *v.* Earl of Moray (See same note) ; Mutter *v.* Earl of Selkirk, 16th June 1784, No. 23, p. 8513.

Answered : The parochial clergy, in times of Popery, were all provided with manses ; and it was natural, that (the Legislature should desire that, the reformed clergy should enjoy the same privilege. The easiest way was to give them a right to the manses which had been enjoyed by their predecessors. This is the object of all the early statutes ; and the same benefit is by act 1592, c. 118 extended to abbey and cathedral kirks. These were in many instances situated within royal burghs ; so that under these acts it would seem the parochial clergy of every description were entitled to manses. By 1649, a considerable alteration was made in the law, by which the burden of providing competent manses was laid upon the heritors of the parish ; and the case was expressly provided for, where the parish consisted partly of a burgh and partly of a country district. The clause by which this was provided not having been repealed in 1663, c. 21, gives room for argument that this was done for the express purpose of withdrawing the claim which ministers so situated had upon [3] their heritors for a manse : but this was not the interpretation at the time : Anderson *v.* his Parishioners, 17th December 1664, No. 1, p. 5121 ; Williamson *v.* his Parishioners, 25th March 1685, No. 2, p. 5121 ; nor since ; Dobie *v.* Magistrates and Heritors of Linlithgow, 5th March 1802. (See note.)

But it is unnecessary to discuss this abstract point, whether a minister of a royal burgh, who never had a manse, is now entitled to have one designed to him ; for his predecessors were at one time actually in possession of a manse, and they have been long in the use of receiving a sum of money in name of a manse-rent, by a special agreement. This agreement may be put an end to whenever either of the parties chooses.

In delivering their opinions upon this case, many of the Judges held, that, by law, every minister of a royal burgh, having also a landward parish, was entitled to claim a manse from the heritors ; and that the interpretation given to the act 1663 in so many cases was erroneous. Others of the Judges, however, rested their view of the justice of the minister's claim to a manse in this case, upon the specialty of his having previously enjoyed one ; instead of which, by a special agreement, he had accepted a sum of money ; so that this case cannot be said to change the interpretation of the act 1663, which has been so repeatedly sanctioned by the Court.

The Lords repel the reasons of advocacy ; and remit the cause simpliciter (17th January 1805) to the Presbytery.

To which judgment the Court " adhered."

Lord Ordinary, WOODHOUSELEE.—Act. ROBERTSON.—Agent, AD. ROLLAND, W.S.
Alt. W. ERSKINE.—Agent, THO. SCOTTLAND, W.S.—Clerk, PRINGLE.

F.

Fac. Col. No. 222, p. 503.

No. 1. [8547] Creditors of JAMES MASON, Merchant, Supplicants. November 30, 1665.

[] Caption was granted summarily against a fraudulent bankrupt.

James Mason, merchant in Edinburgh, having unexpectedly broke and fled, his Creditors gave in supplication to the Lords, bearing, That he had most deceitfully broken, having the price of the goods that he had sold *meditatione fugæ* in his hand, and that he either lurked in the Abbey or was to go out of the country ; and therefore craved a warrant to messengers-of-arms to secure his goods and apprehend his person wherever the same could be found, until the matter were heard.

The Lords having considered the case, that the occasion was very extraordinary, and also the desire, most were of the opinion that the Lords might grant the desire, which was done accordingly, with a recommendation to the Duke of Hamilton, keeper of the King's house, not to suffer him to lurk there, but to expel him that he might be apprehended ; for, albeit ordinarily the Lords grant not caption or warrant of warding the persons of the King's free lieges till they be denounced rebel ; yet, seeing the magistrates of burghs and the admiral grant acts of warding against parties, until they find caution to answer as law will, the Lords, who had eminently in themselves these jurisdictions, they might do the like in the like case ; but some thought that was a special privilege not to be extended, and this was of dangerous example to secure persons unheard, more proper for the Council, as a case extraordinary, than for the Session.

Fol. Dic. v. 1, p. 571. Stair, v. 1, p. 317.

No. 6. [8549] BARROWFIELD v. WEATHERSPOON. June 1727.

The Lords were unanimous, that upon application to any inferior magistrate, a debtor *sub meditatione fugæ* may be summarily incarcerated—See APPENDIX.

Fol. Dic. v. 1, p. 571.

No. 8. [8550] Dr. ANDREW HERON of Bargaly v. Captain WILLIAM DICKSON of Ednam. December 16, 1773.

One whose residence is not in this country, may be arrested, when occasionally here, without regard to his having a landed estate in it, until he shall find caution, *judicio sisti*, at the suit of a native, upon belief that he is going out of the country, without his alleging, or giving oath of credulity, that his debtor is in *meditatione fugæ*, as in the case of residents.

Captain Dickson having a claim of debt against Dr. Heron, applied by a petition to the Sheriff of Edinburgh, setting forth, "That Dr. Heron, a native of Scotland, but who, for some time, had resided abroad, was debtor to James Dickson of Ednam, now deceased, in the sum of £150 Sterling, by two promissory notes, to which the petitioner had right as executor testamentar, decerned and confirmed to his uncle: That the said two notes were not at present in his custody, but in his repositories at Kelso: That he had wrote for them, and expected them in a few days; but that, in the meantime, he was ready to depone to the verity of the debt: That Dr. Heron was at present, and for some time past, had been in this country, residing in and about Edinburgh, waiting, as the petitioner was informed, for an opportunity of again going abroad, so as to deprive him of the payment of the debt justly due to him"; and the petitioner prayed the Sheriff "to consider the premises; and, as the petitioner is ready to make oath on the facts above stated, to grant warrant to apprehend and incarcerate the said Dr. Andrew Heron in the tolbooth of Edinburgh, therein to remain until he find caution, *judicio sisti et judicatum solvi*, in any action to be brought at the petitioner's instance against him, for payment of the above sums: or to give such relief in the premises as shall seem meet."

Upon this petition's being presented to the Sheriff, the confirmed testament, in which the aforesaid two promissory notes are contained, was produced; and Captain Dickson emitted the following deposition: "That the said two sums were justly resting to the deceased James Dickson, at the time of his death; and are still unpaid; and that he has good reason to believe, and is credibly informed, that the said Dr. Andrew Heron, is about to leave this kingdom."

The Sheriff thereupon granted warrant to apprehend and incarcerate in the tolbooth of Edinburgh, the person of the said Dr. Andrew Heron, until he should find caution, *de judicio sisti*, in common form. Dr. Heron having been committed upon this warrant, presented a bill of suspension and liberation; and also a petition and complaint to the Court of Session, complaining of these proceedings as illegal and oppressive: And the Court having passed the bill of [8551] suspension, containing warrant for liberation, without caution or consignment, it was found unnecessary to give any deliverance upon the complaint.

Dr. Heron next instituted an action of oppression and damages against Captain Dickson, on account of the aforesaid imprisonment, which was conjoined with the suspension. And it was argued for the pursuer, 1mo, That at the date of this warrant for summary apprehension, he had a landed estate in Scotland, which rendered him subject to the laws, and amenable to the courts of this country, by an ordinary action: That formerly his fixed residence having been in London, he had been in use to come to this country, to look after his estate, and certain law-suits concerning it; but, for some time past, he had taken up his residence in the neighbourhood of Edinburgh, where he was apprehended upon this warrant. If then Dr. Heron's residence in this country, and having an estate in this country, shall not be thought sufficient to protect him from summary incarceration, at the instance of every creditor that may take it into his head that he means to leave it, it does not occur in what circumstances a person can be safe who owes a shilling of debt, and whose business may at any time call him to go to London or elsewhere. Nay, it is not necessary that he should have an intention to go elsewhere. It is enough that the creditor figures to himself that he has such an intention, and is willing to make oath, that he believes that his debtor has a journey of this kind in view, no matter whether to avoid payment of his debts or not.

2do, The warrant in question was applied for against the pursuer, not upon the footing of his being a foreigner, for it does not say so; on the contrary, makes him

a native of Scotland ; but is founded entirely upon the supposition of his intention to go abroad, whereby the Captain would be disappointed of recovering his payment from him. This supposes him to have a *forum* in Scotland ; but, that the effect of the decree to be obtained against him, might be frustrated, by his retiring out of the country. The case, therefore, does not fall under the rule with regard to foreigners, but under the rule laid down by Lord Bankton, b. 1, tit. 23, § 37, with regard to summary warrants against the subjects of this country, upon suspicion of *meditatio fugæ*. Agreeably to which, in order to found Captain Dickson in his application for a warrant of summary apprehension, he ought to have been in condition to say, that Dr. Heron was in *meditatione fugæ* ; and he ought further to have shown some probable grounds of suspicion of the designed flight, such as privately disposing of his furniture and effects. But Captain Dickson has not yet condescended on any circumstance to justify the oath which he emitted before the Sheriff, bearing, that he had reason to believe, and was creditably informed, that the said Dr. Andrew Heron was about to leave this kingdom, meaning thereby, that he was in *meditatione fugæ*, to withdraw suddenly from the kingdom to disappoint his creditors ; for in that way alone was the oath relevant to infer the conclusion.

Pleaded for the defender ; There is no foundation for damages in this case. Such, warrants are well known in the law. If the debtor lives in Scotland, and [8552] does not intend to leave it, there is no occasion for this remedy ; because he can be convened at any time ; but, where the debtor has not a fixed residence in this country, the creditor is entitled to obtain from any magistrate, within whose territory he may be found, a warrant to secure his person, until he find caution, *judicio sisti*. It is no defence against such a demand, that he may have a land-estate in Scotland ; because the law allows a creditor to have recourse either to personal or real diligence against his debtor, whichever of them he may think proper to use ; and, indeed, in small debts particularly, personal diligence is by much the most expeditious method of operating payment. At the same time, it is ludicrous, in this case, for the pursuer to lay so great stress upon the circumstance of his having a landed estate in this country at the date of these proceedings, when the real state of that matter is attended to : But holding the fact to be so, it was so much the easier for the pursuer to have found the caution required, which was only *judicio sisti*, after he had refused to give Captain Dickson, who was acting, in discharge of his duty, as executor, the same security which he owned he had granted to other creditors over that estate.

It is not surprising that Captain Dickson should not have been perfectly certain where the pursuer was born, as he gives contradictory accounts of this matter himself. But it is of no importance in this question what country gave him birth. It was set forth in the petition to the Sheriff, that his residence was abroad, that he was here occasionally, and was about to leave the country, and that was sufficient for the purpose. The pursuer has repeatedly said, that he is an Englishman, residing in London, which makes him, in the eye of the law, as much a foreigner as if he had been born and resided in Japan.

Again, the oath emitted in this case was sufficient to justify the Sheriff's warrant. In questions of this kind, there is a material difference between the case of a person having his fixed residence within this kingdom, and that of a stranger occasionally here, having his fixed residence elsewhere. As to the former, it may be reasonable, that, before a creditor obtain a summary warrant against his debtor, he should be able to say, that he is in *meditatione fugæ*, in order to avoid payment of his debt. Where the debtor is only to leave the kingdom for a time, without any view of withdrawing himself, or his effects, from the diligence of his creditors, there is no good reason why summary execution should be granted against the person of the debtor ; but there is no occasion to allege and prove a *meditatio fugæ* against one who has his residence in another country. A man's return to the place of his fixed residence, is presumeable, and it is lawful and allowable ; but, as creditors are entitled to attach the person of their debtor, in order to force payment of what he owes ; and, as by leaving the kingdom, though lawfully, his person is withdrawn from the reach of his creditor's diligence, under the authority of the laws of this country ; so the creditor is entitled to avail himself of the circumstance of his finding his debtor in this kingdom, and to seize and lay hold of his person in a summary manner ; as it is highly presumeable, that, if a previous charge were to be given, a person, [8553] whose residence was out of this kingdom, would not stay in this country till the days of the charge

are elapsed : And a case, similar to the present, occurred in the year 1755, between John Hennis, merchant in Rotterdam, and Robert and John Lidderdals, merchants in London, No. 11, p. 2044.

The Court, without respect to origin, considered Dr. Heron in the situation of a person not having a residence here, but in England ; and were of opinion, That a debtor's being owner of a land-estate, does not protect his person from diligence, it being optional to his creditors which diligence to use ; 2dly, That it was a proper distinction that has been established between the case of persons residing in this country, and persons residing abroad, that, with regard to the latter, there was no necessity to allege, or prove *meditatio fugæ*, to found an application for a warrant of summary apprehension : And, therefore,

" Assolizied the defender from the process of oppression " ; and, upon a reclaiming bill and answers, " adhered."

Act. DEAN OF FACULTY, SOLICITOR-GENERAL, ILAY CAMPBELL.—Alt. R. M'QUEEN, PAT. MURRAY.—Clerk, PRINGLE.

Fol. Dic. v. 3, p. 400. *Fac. Col.* No. 97, p. 248.

No. 9.

WRIGHT v. GAMMELL. February 6, 1782.

An action was raised at the instance of a Scotsman against a person who had been his factor in America, and who intended to return to that country. During the dependence, the pursuer applied for a *meditatione fugæ* warrant, which was granted, but the Court allowed the defender to find caution to appear within six months after requisition by the pursuer.

Gammell instituted an action against Wright, who had been one of his factors in America, to oblige him to account for the proceeds of two ships and their cargoes, said to be purchased by him for the pursuer's behoof ; otherwise concluding for the sum of £5000 Sterling as the amount of the profits arising from that transaction, together with £1000 as the expense of process.

During the dependence of this action in the Court of Session, Gammell applied to the Sheriff-depute of the county of Lanark, within whose jurisdiction Wright then resided, setting forth the action then depending, the defender's having no funds in this country, and his intention soon to leave the same ; and therefore praying that he should be apprehended, and obliged to find caution *judicio sisti* to the extent of the sums found due in the said action.

Wright having been called before the Sheriff, acknowledged the truth of the facts set forth ; and the Sheriff immediately granted warrant for incarcerating him till he found caution in the terms prayed for. Against this judgment Wright applied to the Court of Session, and

Pleaded ; The arrestment of one's person, as in *meditatione fugæ*, is an extraordinary exertion of the civil power ; and as it may be the handle of much oppression, and productive of great embarrassment in a commercial nation, is only to be tolerated upon the best grounds, and for the most urgent reasons.

Hence, to the due obtaining of this summary warrant, two things are essentially necessary ; first, The production of a clear and determinate ground of [8554] debt, authenticated in some degree by proper evidence ; whereas here the incarceration proceeded upon a claim, unsupported by proof, illiquid in its nature, and so extensive in its consequences, as to intimidate every friend of the defender from interposing in his behalf. Secondly, Proof is required, either from circumstances, or at least by the arrester's oath, that the debtor means to fly the country for debt ; and on this principle, according to Lord Stair, b. 4, tit. 47, § 23, the power of judges in granting these warrants is limited to the case where the debtor meditates an escape from justice. Here no such design is imputed to the defender. His acknowledgment amounts to this, that having no prospect of employment in this country he intends to take the first opportunity of departing for America, in the prosecution of his ordinary profession.

Answered for Gammell ; To prevent suits from becoming elusory, it is now part of

the common law of Scotland, that a person having a claim against another who is about to leave the kingdom, where he has no tangible funds, may apply in the manner which has been adopted. To require evidence of the debt to justify such application, would in most instances entirely frustrate the ends proposed by it. It is therefore sufficient for the party, to make oath, that a claim exists, and that he thinks it well founded; a criterion which the defender in this case has not thought it necessary to demand. The second branch of the defender's argument is quite inconsistent with the nature of arrestments of this kind. The decision of a judge must be equally ineffectual, from whatever cause the party against whom it is pronounced departs from the territory in which he is sued. Hence Mr. Erskine, b. 1, tit. 2, § 21, properly explains the expression on which a critical argument is attempted by the defender, as including every case where the debtor means to leave the kingdom. In this case the defender's admissions superseded the necessity of proof on this point.

The Lords had no doubt of the propriety of the Sheriff's judgment, but to accommodate the defender as much as possible, they allowed him to find caution for his appearance six months after requisition by the pursuer.

Lord Ordinary, BRAXFIELD.—Act. ILAY CAMPBELL.—Alt. MAT. ROSS.—Clerk, CAMPBELL.

Fol. Dic. v. 3, p. 400. *Fac. Col.* No. 27, p. 48.

No. 10. GAVIN KEMPT v. HIS CREDITORS. January 16, 1786.

A meditatione fugæ warrant may be put in execution at any time.

Gavin Kempt, as being *in meditatione fugæ*, was committed to prison, by a Magistrate, on an application of his Creditors. He afterwards presented a bill of suspension and liberation, in which it was argued, that the arrest, having taken place on a Sunday, was illegal.

The cause was reported by the Lord Ordinary on the bills; when

[8555] The Court were unanimously of opinion, That as the imprisonment was founded on an alleged intention to defraud creditors, by flying to another country, it might proceed at any time.

The Lord Ordinary, after advising with the Lords, refused the bill.

Fol. Dic. v. 3, p. 401. *Fac. Col.* No. 246, p. 378.

No. 12. PATRICK LAING v. JAMES WATSON and JOHN MOLLISON. December 20, 1789.

A meditatione fugæ warrant was granted without taking the oath of the creditor on the amount of the debt, or examining the debtor. Damages were found due by the Magistrate and the creditor.

Patrick Laing insisted in an action of wrongous imprisonment and of damages against James Watson, a creditor of his, and against John Mollison, the Provost of the borough of Brechin, and one of the Justices of the Peace in the county of Forfar.

It appeared that Patrick Laing was in bankrupt circumstances, and had disposed of most of his effects in the borough of Brechin, with a view of removing to another part of the country, though there was no reason to suspect that he meant to quit Scotland; and that James Watson applied to Mr. Mollison for a warrant to imprison Laing, stating that he was *in meditatione fugæ*, and intended soon to leave the kingdom, at least that part of it; and with regard to this James Watson made oath.

It farther appeared, that the desire of the petition was granted, without taking the oath of Watson as to the amount of the debt, without any previous examination of Laing, and without any limitation as to the time within which any action was to be commenced against him. Laing was confined to prison for several months; no proper

measures however were taken by him, for some time, in order to obtain his release ; and it even appeared, that he was inclined to prolong his stay in prison, so as to increase as much as possible his claim of damages. The defenders

[8556] Pleased ; The ordinary form of summons in Scotland is in certain respects extremely defective. Instead of authorising a detention of the person against whom the suit is intended, as is done in England, agreeably to the ancient law of Rome, the notice thereby given seems to be calculated for enabling the defender to elude the claims that are to be made against him. To remedy this, and render the decreets of our courts effectual, it has been wisely settled, that a warrant may be obtained for imprisoning any person, being a native of this country, or having a fixed residence in it, unless he find caution to remain in Scotland till the claims to which he is liable shall be determined by a final sentence. This has now become part of our common law ; and every Judge who has authority to imprison, may issue the warrant necessary for the purpose.

The method of proceeding, however, in such a case, having been introduced by no positive regulation, has never yet been precisely defined. A variety of precautions indeed have been suggested by the writers on our law, for preventing the abuse of so salutary a remedy, such as specifying on oath the nature and extent of the debt ; a previous examination of the defender himself before proceeding to actual imprisonment ; and a limitation of the security to be found, to such actions as should be commenced within a certain period from the date of the application. But it would be extremely hard, where no *animus injuriandi* appears, to subject a creditor, for omitting any of those precautions, to a claim of damages ; and where no objection is made at the time to the regularity of the arrest, the just presumption is, that no wrong has been done.

With regard to the Judge by whose authority a warrant of this sort has been issued, it does not appear that in this, more than in any other case, where his conduct has not been accurately pointed out by a particular enactment, he can be subjected in damages, if he has proceeded without fraud, reparation being only due by persons so situated, as has been justly observed, " in the case of manifest and palpable injustice against law ; but not in dubious cases, where rational men may be of different opinions ; unless there be corruption by bribe or bias ; otherwise no one but a beggar or a fool would be a Judge " ; Stair, b. 4, tit. 1, § 5.

Answered ; An arrest of one's person as *in meditatione fugæ*, being an extraordinary remedy, and liable to great abuse, ought ever to be gone about with the utmost caution. Being of the nature of a criminal process, it ought never to be applied for without a thorough conviction, that the party is about to leave the kingdom. Nor ought it to be authorised without evidence, at least by the oath of the person requiring the warrant, that a debt of a certain amount exists, and that without the intervention of the Judge, it will be frustrated by the disappearance of the debtor. And as by the statute of 1701, cap. 6, one charged with any bailable crime must be set at liberty on his finding security to abide any prosecution that may be brought against him within six months ; it would be singular, if one accused merely of an intention to avoid the diligence of the law for a civil debt, [8557] were to be in a worse situation. In addition to all this, which arises from the nature of the proceeding itself, it has been properly suggested, that before the imprisonment, the party charged with an intention to fly ought to be examined by the Judge, so as to give him every opportunity of preventing a measure which may be attended with fatal consequences to his credit and fortune, Stair, b. 4, tit. 47, § 23 ; Bankt. b. 1, tit. 23, § 36 ; Erskine, b. 1, tit. 2, § 21.

If, therefore, without any reason for believing that his debtor is about to leave Scotland, a creditor shall have recourse to so harsh a measure, he ought to suffer the consequences of his improper conduct. And if, by omitting any of the precautions which have been thought of for the due exercise of this extraordinary power, a man has been deprived of his liberty, even the character of a Judge ought to afford no protection from the claim of reparation arising to the injured party. The distinction adopted in this matter in the Court of Exchequer seems to be a solid one. In the case of an illegal seizure of goods, neither the officer of the revenue, nor the Judge who has interposed his authority, is in general liable in damages, if the proceedings do not evidently appear to have arisen from improper motives ; but where the personal liberty of any one has been restrained without the order of law, a claim of indemnification ever necessarily follows. Indeed in such a case as this, where the Judge was at liberty

either to interpose or not, there is not any reason for admitting the same latitude as may be thought necessary in other cases, where, from the nature of the thing, he is obliged to adopt decisive measures.

Replied ; As every sentence of a Judge may, in Scotland, be enforced by imprisonment, no reasonable distinction can be made between the case of a party arrested in the ordinary way, in virtue of a decreet erroneously pronounced, and that of one apprehended in consequence of a warrant such as was here issued. In both cases, the error committed by the Judge, and the injury resulting from it to the private party, are precisely of the same nature.

It was separately urged for the pursuer, that warrants of this sort could not be granted by a Justice of the Peace ; but as the pursuer had been apprehended within the limits of the borough of Brechin, where Mr. Mollison, one of the defenders, was Provost, and as it did not clearly appear whether he had acted in the one character or in the other, little attention seems to have been paid to this circumstance.

The Judges were unanimous in finding James Watson the creditor liable in damages, as he had made the application without having any reason to believe that the pursuer meant to leave Scotland.

Somewhat more difficulty occurred with regard to Mr. Mollison, who appeared to have acted *bona fide*, and without any intention to injure. In general the Court were of opinion, that although perhaps no one of the particulars mentioned would have been sufficient to subject him, his conduct on the whole had been so incautious as, in a proceeding of this sort, justly to create an obligation to [8558] make up the loss ; which, however, on account of the pursuer's omitting to take the proper measures for obtaining his enlargement, the Court resolved to bring within as narrow limits as possible.

The Lords found " the defenders liable to the pursuer in damages and expenses."

A petition was afterwards preferred for the heir of Mr. Mollison, he having died, insisting that he should be assoilzied ; or at least, that he should be found liable *subsidiarie* only, after the pursuer had endeavoured to recover his damages from Watson, as the person chiefly guilty. The Lords appointed the petition to be answered on the last point. But after advising these papers the former judgment was affirmed. See REPARATION.

Reporter, LORD ESKGROVE.—Act. DEAN OF FACULTY, W. ROBERTSON.—Alt. WIGHT, CORBET.—Clerk, SINCLAIR.

Fol. Dic. v. 3, p. 401. *Fac. Col.* No. 99, p. 179.

No. 14. [8559] HENRY BLACKFORD SCUDAMORE, and his Attornies *v.* EDMUND LECHMERE. June 3, 1797.

A warrant may be issued at the instance of one foreigner against another, as in *meditatione fugæ*, but not unless the Judge be satisfied that there are reasonable grounds for the application.

Edmund Lechmere, an Englishman, embarrassed in his circumstances, came to Scotland, and hired lodgings for a year, in the Abbey of Holyroodhouse, in order to have the benefit of the sanctuary, in case diligence should be done against him by his English creditors.

After he had been ten or eleven months there, a petition was presented to the Sheriff-depute of Edinburgh, in the name of Henry Blackford Scudamore, of the county of Somerset, and his attornies in Scotland, stating, that Mr. Lechmere owed a large sum by bond and fitted account to Scudamore, and other two persons, who, along with him, were the joint assignees on the bankrupt estate of an Englishman, the original creditor of Mr. Lechmere ; that Mr. Lechmere had left England, in order to avoid the diligence of his creditors, and that " the petitioners have good reason to believe, and do verily believe, that he will likewise leave Scotland, in case any intimation or notice shall be given to him of the intention of the petitioners to proceed or pursue any steps against him for the recovery of the aforesaid debt." The petitioners therefore prayed, that Lechmere should be imprisoned, till he should find

caution *judicio sisti*, in any action for the debt to be brought against him within six months.

Along with the petition there were produced copies of the bond and fitted account, an affidavit by Scudamore before the Depute Mayor of Bath, in terms of the petition, and a mandate to his two attornies in Scotland, authorising either of them to apply for the warrant, and take what other steps they should think necessary for recovering the debt, for behoof of himself and the other joint assignees. This mandate was neither holograph, attested by witnesses, nor written on stamped paper.

One of the attornies made oath before the Sheriff, "That the deponent is credibly informed, and believes in his conscience, that the within designed Edmund Lechmere is in *meditatione fugæ*, and about to leave Britain, in order to avoid payment of the debt mentioned in the petition."

The Sheriff ordered Lechmere to be brought before him for examination.

Mr. Lechmere having been accordingly apprehended without the precincts of the Abbey, he, in his declaration before the Sheriff, admitted the authenticity of the documents of debt produced, and the subsistence of the debt; but said he had good defences against payment of part of it, and denied any intention of leaving Scotland.

The Sheriff granted the warrant; "but in respect of the magnitude and nicety of the case," superseded the execution of it for a few days, that Mr. Lechmere might, if so advised, apply to the Court of Session; and, in the meantime, authorised the officers of Court to keep him in safe custody.

A bill of advocacy, with the whole proceedings, was ordered to be printed, and was reported by the Lord Ordinary on the Bills.

[8560] Mr. Lechmere objected to the title of the petitioners, That the mandate was not probative, nor on stamped paper; and that one of the joint assignees could not act without consent of the rest.

It was answered, That in practice a more formal mandate was not required; and that any one assignee might take the steps necessary for securing the debt.

Mr. Lechmere further

Pleaded, A warrant against a party, as in *meditatione fugæ*, is not competent at the instance of one foreigner against another for debts contracted abroad; 6th December 1775, *Scot v. Carmichael*, No. 16, p. 2057.

Besides, the party applying ought, in addition to his oath, that he believes the debtor means to leave the kingdom, to exhibit some reasonable grounds for his suspicion; 20th December 1789, *Laing v. Watson and Molison*; No. 12, p. 8555; and none such have been offered in the present case.

Answered, There seems no good ground for a distinction in this particular in favour of foreigners. Indeed, the law in some degree considers foreigners to be always in *meditatione fugæ*, and, therefore, in the Admiralty Court, caution is required from them not only *judicio sisti*, but *judicatum solvi*. In this case, the whole circumstances support the oath.

A great majority of the Court thought the preliminary objections ill founded.

On the remaining points it was

Observed on the Bench, The Court were much divided in opinion in the case of *Scot v. Carmichael*, which, at any rate, from the period Mr. Lechmere has resided in this country, was very different from the present. But as a warrant of this sort is an extraordinary remedy, it ought in no case to be granted *nisi causa cognita*. By this, however, it is not meant, that the Judge, before granting it, ought to allow a proof of the opposite averments of parties; but that the creditor, in addition to his oath of credulity, should state some probable reason for suspecting that the debtor means to leave the kingdom; and the question is, whether any such appears in the present case?

A majority of the Judges thought, that as Mr. Lechmere had come to Scotland, to have the benefit of the sanctuary, where he had hired lodgings by the year, there was no reason to suppose he meant to deprive himself of that benefit by leaving the kingdom.

The Lords remitted to the Lord Ordinary, to remit to the Sheriff, "with instructions to set the advocator at liberty."

Lord Ordinary, CULLEN.—For Scudamore, HOPE.—Alt. H. ERSKINE.

D. D,

Fac. Col. No. 33, p. 76.

No. 1. [1] SUSANNA FRANCES TASKER v. RICHARD MERCER. March 4, 1801

The circumstances of this case found to justify the issuing a warrant at the instance of a foreign creditor against a foreign debtor, as being *in meditatione fugæ*.

Richard Mercer, a gentleman of Ireland, had considerable property in that country, but his debts exceeded its value. Owing, however, to his wife and daughters being possessed of separate funds, he was enabled to live in apparent affluence.

In 1797, he went to reside in the Isle of Man, in order to avoid arrest. In autumn 1798, he made an affidavit before the Deputy Governor, stating, *inter alia*, "that he was under dread of returning to Ireland lest he should be deprived of his personal liberty"; and his avowed object for making this affidavit was, that he might obtain from the Lord Chancellor of Ireland a protection from civil arrest, so that he might be in safety to return to Ireland for the purpose of making an arrangement with his creditors.

Mr. Mercer's application for a personal protection was not granted, but he nevertheless returned to Ireland, where, after remaining a short time, he came to Edinburgh about Midsummer 1799.

Mr. Mercer owed above £400 to Susanna Frances Tasker of Dublin, by a bond dated in 1795, on which, in 1799, she had been able to recover only one year's interest.

Mrs. Tasker, learning that Mr. Mercer had gone to Scotland, made oath before the Chief Justice of the Common Pleas in Ireland, to the verity of her debt; and, "that the said Richard Mercer left the kingdom of Ireland, in order to avoid the execution of the aforesaid judgment, and thereby defraud this deponent of her said debt: That the deponent is informed, the said Richard Mercer is now residing in the city and county of Edinburgh, in Scotland; and she is also informed, and has good reason to believe, and does verily believe in her conscience, that the said Richard Mercer will likewise leave Scotland, also with a view to defraud this deponent of her said debt, in case any intimation or notice shall be given him of this deponent's intention to proceed, or pursue any steps against him for recovery of said debt, [2] the amount of which is specified in this deponent's affidavit to the verity thereof, dated the 30th June last, also here referred to: That the affairs of the said Richard Mercer in Ireland are in an embarrassed state; and this deponent, who is a destitute widow, must inevitably lose her money, which is her only dependence, unless the person of the said Richard Mercer is secured, having reason to believe his having carried money with him."

Mrs. Tasker's agent in Ireland transmitted this affidavit, along with the documents of her debt, to Robert Dick, writer in Edinburgh, accompanied with a power of attorney by Mrs. Tasker, authorising him to take such steps as should be necessary for recovery of the debt. Mr. Dick, accordingly, presented a petition to the Magistrates of Edinburgh, in which, after narrating the grounds of debt, he stated, "That he was credibly informed, and believed in his conscience, that the said Richard Mercer is *in meditatione fugæ*, and about to leave Scotland, in order to avoid payment of the foresaid debt to the other petitioner Mr. Tasker." The petition therefore prayed, that Mr. Mercer should be imprisoned till he should find caution *judicio sisti*, in any action for the debt which should be brought against him within six months.

Mr. Dick made oath before the Magistrates, to his belief of the facts stated in the petition.

The Magistrates ordered Mr. Mercer to be brought before them for examination.

Mr. Mercer, in two different declarations, admitted, that his affairs were embarrassed; but denied, that he had left Ireland in order to avoid arrest by his creditors, asserting, that one of his daughters was afflicted with a lingering complaint, on which account he had been advised to put her under the care of Dr. Monro and Dr. Gregory; that this was the sole cause of his coming to Scotland; and that as his daughter's cure was yet far from being accomplished, he had fixed no time for leaving this country. Mr. Mercer further admitted, that he resided in lodgings which he hired by the week, and that in the course of about four months he had changed his lodgings three or four times; but he denied that he had done so to prevent

his being discovered by his creditors ; in proof of which he stated a fact, which was not denied, that he appeared openly at all times, both on the streets and in places of public resort.

Mr. Mercer, for the purpose of confirming his statement, called Dr. Gregory, who deponed, " That he knows Mr. Mercer and his family : That about a year ago, Mr. Mercer applied to him for medical assistance to one of his daughters : That the defendant had at that time an account of the case, which was a difficult one, from Dr. Pellieson of Dublin : That Miss Mercer had been ill for ten or twelve years : That she has found some relief from the treatment of her disorder in Edinburgh ; and that Mr. Mercer has very often, and very strongly expressed to the deponent his intention to continue in Edinburgh for the purpose of carrying on the cure. Depones, That the cure is far from being completed. And being interrogated, Whether he [3] knows any thing, from which he infers or suspects, that Mr. Mercer has an intention of leaving Edinburgh ? depones, *Negative* ; and that, on the contrary, some time ago, Mr. Mercer would not leave Edinburgh to go to Moffat, although he was advised to do so by the deponent and Mr. Benjamin Bell, who were of opinion, that it would contribute to the health of his daughter : That the deponent understood Mr. Mercer's reason for not leaving Edinburgh to be, that he wished the deponent to be near him. Depones, that six months ago, or more, the deponent offered to give Mr. Mercer all his receipts, and full written directions, for the management of his daughter's case, that he might return to Ireland, which the deponent understands to be his native country ; and the deponent thinks that he offered to correspond with Mr. Mercer upon his daughter's case ; at least he thinks it probable he made this offer, as it followed of course had Mr. Mercer agreed to go to Ireland ; but Mr. Mercer declined to go, and for the reason above-mentioned, that he wished to have the deponent's immediate assistance ; and the deponent never knew any other reason why Mr. Mercer should have declined leaving Edinburgh at the time ; but the deponent adds of himself, that Mr. Mercer had informed him that his affairs were embarrassed, which was a reason with Mr. Mercer for not going back to Ireland. Depones, That shortly after Mr. Mercer came to Edinburgh, the deponent had some conversation with him with respect to the consequences of his being prosecuted for his debts ; Mr. Mercer asked the deponent, Whether he thought he would be safe here ? The deponent said, he thought not ; and he mentioned to him, that he might be taken up, without any warning, upon a *fugæ* warrant, and he thought he would be safer in London, within the verge of the court : That he does not recollect that anything was mentioned about the sanctuary of the Abbey, though he does not think it unlikely that it would be mentioned. But depones, That the deponent, who is no lawyer, advised Mr. Mercer not to trust to his opinion, but to consult men of business ; and the deponent referred Mr. Mercer to Mr. Hotchkis, as the person whom the deponent employs in his own affairs. Depones, That when Mr. Mercer remained in Edinburgh after this, the deponent could only account for it by his extreme desire to carry on the cure of his daughter. Depones, That Mr. Mercer told the deponent he had been with Mr. Hotchkis, and Mr. Hotchkis told the deponent the same thing ; but the deponent does not recollect anything particular as to the advice which Mr. Mercer got, and thinking Mr. Mercer in good hands, inquired no more about the matter, and would have thought it indelicate to do so."

On the other hand, Mrs. Tasker examined two messengers at arms, who had been sent to execute the warrant for bringing Mr. Mercer before the Magistrates, one of whom deponed, that after he had informed Mr. Mercer of the warrant, " one of Mr. Mercer's daughters came forward, and request-[4]-ed of the deponent to go away ; and both she and Mr. Mercer himself said, if he would go away he should have a handsome present."

The other messenger deponed, " That a young lady, whom he understood to be Mr. Mercer's daughter, came up to him in one of the rooms of the lodging, and said, that she wished him to go away, and say he had not seen Mr. Mercer, and that he should have a handsome present. Depones, That at this time Mr. Mercer himself was standing close by the said young lady ; but the deponent cannot recollect that Mr. Mercer himself said anything upon that subject. Depones, that the deponent having refused Miss Mercer's offer, she did not repeat it : That the lady seemed to be much grieved, but Mr. Mercer, who was in his night-gown, did not seem to be much concerned."

The Magistrates advised these documents with written pleadings for the parties, and considering the case to be attended with nicety, pronounced the following judgment : " In respect that Mr. Mercer has found caution in the books of court, to appear in judgment at any time when required, for ten days from this date, and thereafter, if a bill of advocacy be presented within that time, until the said bill is advised, refuse the desire of the petition, and decern."

Mrs. Tasker complained of this judgment by a bill of advocacy, and

Pleaded : Till of late, it appears to have been understood, that the creditor of a foreigner was entitled, in all cases to insist, that he should find caution *judicio sisti* ; 7th March 1755, *Herries v. Lidderdales*, No. 11, p. 2044 ; 21st June 1763, *Ray v. Bellamy*, No. 13, p. 2051 ; 6th February 1782, *Wright v. Gammell*, No. 9, p. 8553 ; and although this rule may now be departed from, yet the creditor is entitled to this remedy whenever he can shew probable grounds for suspecting that the debtor has it in contemplation to leave the country before the creditor shall have time to get his debt constituted. Now, in the present case, the grounds of suspicion are numerous. Mr. Mercer's circumstances are so embarrassed, that it appears he cannot return to Ireland, for fear of arrest by his creditors ; and if he finds that they are following him here, the natural inference is, that he will move off to some other country where he may hope to find them less troublesome ; a supposition which is strongly corroborated by the attempt made by him and his daughter to bribe the officers who were sent to apprehend him for examination.

Answered : The warrant against a debtor as *in meditatione fugæ*, is an extraordinary remedy sought by a creditor for an extraordinary wrong, namely, where his debtor means to leave the kingdom, in order to defraud him ; and, accordingly, unless this fact can be reasonably instructed, the warrant will not be granted, although the debtor should be in the most embarrassed circumstances ; 3d June 1797, *Scudamore v. Lechmere*, No. 14, p. 8559. Now, the whole evidence in the present case goes to show, that, while the de-[5]-fender has the strongest inducement to remain in Scotland, he cannot conveniently return to his native country, and there is not the slightest reason to suppose that he means to go elsewhere. The words used by him and his daughter to the officers arose from consternation, in consequence of their unexpected appearance ; and, although his daughters' offer had been accepted, he had no intention of leaving the country, but only of retiring to the sanctuary.

Some of the Judges expressed a strong sense of the importance of preserving uniformity in the decisions of the Court ; and therefore that the warrant could not be granted in this case, after having been refused in the case of *Scudamore*.

But a majority of the Court thought the whole circumstances sufficiently justified the pursuer's apprehensions of Mr. Mercer's fleeing the country ; that the case of *Scudamore* was ill decided, and that, even supposing that decision to have been right, there were circumstances in this case which did not occur in the other, and which justified an opposite determination.

The Lord Ordinary (20th November 1800) after advising with the Court, remitted the cause " to the Magistrates of Edinburgh, with instructions to recal the interlocutor complained of, and grant warrant, in terms of the application made by the complainers, for incarcerating the respondent Richard Mercer, until he find caution *de judicio sisti*, in any suit to be brought by her for payment of the debts stated in said application, within the space of six months from the date of such caution being found ; but supersedes execution until a reclaiming petition shall be advised, in case such shall be presented in due time by Mr. Mercer, upon Mr. Mercer's finding sufficient caution to the effect mentioned in the enactment of caution before the Magistrates of Edinburgh, until the expiry of the reclaiming days, and thereafter until such reclaiming petition (if presented) shall be advised."

A reclaiming petition was accordingly presented by Mr. Mercer, but, upon advising it with answers, the Court, by a considerable majority, " adhered."

Lord Ordinary, BANNATYNE.—For Mrs. Tasker, C. HOPE, W. M. MORISON,
T. W. BAIRD.—Alt. H. ERSKINE, Jo. CLERK.

No. 109. [8684] Captain BASIL HERON v. JOHN SYME of Meikle Culloch.
February 14, 1771.

Infestment taken in virtue of a clause of union and dispensation in a Crown charter.—
See Skene v. Ogilvie, and Dundas v. Freeholders of Linlithgow, Sect. 5 of this Division.

At the Michaelmas meeting for the stewartry of Kirkcudbright, in October 1770, Captain Heron claimed to be enrolled a freeholder upon titles, part of which consisted of a special retour, by which the lands of Drumnaught and Glengornane were retoured to a thirty shilling land, and the lands of Torquinnock to a ten shilling land, making together a forty shilling land of old extent.

[8685] To these titles, it was objected by Mr. Syme, that though the charter founded on by Captain Heron contained a clause of dispensation to Mr. Home, in whose favour it was granted, for taking infestment upon the lands of Little Park, or upon any other part of the lands thereby disposed, yet that privilege was personal to Mr. Home, or at least could only go alongst with the whole lands, if he had disposed them to one person. By parcelling them out to different persons, he had broken the union created by the charter; so that he could not convey the benefit of the dispensation to apply to every person to whom he might dispose; and as the disposition from Mr. Home to Captain Heron did not convey that benefit, and as it appeared that infestment had been taken only upon the lands of Torquinnock, he was not infest in the whole lands upon which he claimed to be enrolled.

The freeholders having refused to enrol, Captain Heron, in a reclaiming petition, maintained,

It was an adjudged point, as to lands in a Crown charter, containing a clause of union, and declaring infestment to be taken at a principal messuage, or upon any other part of the lands, that infestment thereof, provided it was taken in virtue of the precept contained in the charter, was good for the whole, however discontinuous, and notwithstanding they had been conveyed to different persons. This point was decided in a question from the county of Forfar in 1768, Spence *contra* Skene, where the Court had sustained the objection, but the House of Lords had reversed the judgment. Thirteen cases from the county of Forfar, besides several from the county of Linlithgow, had been decided the same way; so that the question was at rest.— (See Sect. 5 of this Division.)

The principle upon which this doctrine rested was unquestionable. It could not be denied that the Crown had full powers to unite tenements lying discontinuous; so that infestment taken upon one should be sufficient for the other, though at any distance. Upon the same principle could the Crown authorise an infestment to be taken upon any part of the Crown's property, the whole falling to be considered as an united tenement in the Crown, who authorised it; and infestments so taken occurred frequently in practice. There was no distinction betwixt the case from Forfar and the present. The clause of dispensation evidently gave a power of taking more than one sasine; it gave authority to take "*unica sasina nunc et in omni tempore futuro*"; and it gave this power not only to the person in whose favour the charter was granted, but "*ejusq. prædict.*" that is to say, *hæredibus et assignatis*; and hence, though infestment had actually been taken by the grantee, his heirs would have been entitled, without any new charter, but upon a special service, to take another sasine by virtue of the clause of dispensation.

Mr. Syme answered;

The general rule as to the feudal investiture was, that there must be real or symbolical delivery of the lands *super fundum terrarum*; and where lands were discontinuous, the infestment must be taken upon the several tenements. As [8686] this general rule might be dispensed with by the royal prerogative, such dispensation might be more or less comprehensive, according as the Sovereign or the Barons of the Exchequer should see cause. It might be so limited as to be personal to the granter; it might be allowed to be taken at one particular place only, or upon any part of the lands; or it might authorize one general infestment only, in either of the ways mentioned, for the whole lands.

In every case of this nature, the tenor of the dispensation and precept of sasine

must be carefully attended to as the rule of judgment. By the tenor of the dispensing clause, in the present instance, bearing, "*Quod unica sasina per prefat. G. Home, ejusque prædict.*" no more was authorized than one infeftment on any part of the lands for the whole, in favour of George Home himself, or of any other person to whom he might dispose the lands, with the benefit of the dispensation; but a dispensation so qualified did not authorize twenty different infeftments upon as many different fractions of the lands disposed. The precept, in this case, authorized delivery of sasine "*Præfato G. Home vel suo certo auctonato, latori presentium tot. et integ. et secundum formam et tenorem antedictæ cartæ,*" precisely corresponding to the limited construction contended for; so that this infeftment, not having been taken in the form and manner prescribed by, but disconform to the warrant, was on that account null and void.

The decision from the county of Forfar could not be regarded as fixing any rule applicable to the present case. The clause of union and dispensation was very different. In the Forfar case, the dispensation granted was not limited to the infeftment to be taken in execution of the precept in the charter, but was to continue in force, and operate *omni tempore futuro*. It differed from the clause of union and dispensation in George Home's charter in this other respect, that as the one authorised one infeftment only to be taken for the whole upon any part of the lands, the other authorised the renewal of the infeftment *omni tempore futuro*, by taking it upon any part; and declared it sufficient, not only for the whole lands, but for any part of them. In the Forfar case also, there was no absolute alienation of the united lands, but grants of liferent merely, which were but temporary burdens upon the property.

It was observed upon the Bench, That, in questions of this nature, they were tied down by the judgment of the House of Lords in the cases from Forfar referred to; and hence it was found, that the freeholders had done wrong in refusing to admit Captain Heron upon the roll, and he was ordained to be enrolled accordingly.

The same judgment was given in the complaint of Edward Maxwell *contra* Syme.

For Heron, A. FERGUSSON, CROSBIE.—For Syme, LOCKHART.

The same day the Court decided a complaint brought by Copland of Collieston *contra* John Busby, who, at the Michaelmas meeting, had stated as an objection to Copland's titles, that the pages of his sasine were not numbered in terms of the act of sederunt 1756, the first page being omitted. The freeholders had sustained the objection, but the Court overruled it, and ordained the complainer to be added to the roll.

For Copland, CROSBIE.—For Busby, WIGHT.

R. H.

Fac. Col. No. 76, p. 219.

No. 129. [8740] LAUCHLAN GRANT of Drumphad v. FREDERICK CAMPBELL, Esq., and other Freeholders of Dumbartonshire. February 22, 1760.

Wadset of a superiority, where the feu-duty payable to the wadsetter was precisely equal to the interest of the redemption-money, found a proper wadset, so as to entitle to vote.

Sir James Colquhoun of Luss, having purchased the five-merk land of Drumphad, in the county of Dumbarton, from the Lord Cathcart, obtained a charter under the Great Seal, of these and other lands; after which Lauchlan Grant, writer in Edinburgh, acquired a freehold upon them in the following manner.

Sir James, after taking out his charter, obtained himself infeft in the lands upon a special procuratory granted by him to take infeftment in his name upon the precept *de me* in Lord Cathcart's disposition.

He next granted a feu-charter of the lands of Drumphad to Charles Crawford (supposed to be a trustee for Sir James), for payment of a yearly feu-duty of 16s. 8d. Sterling; upon which Crawford was infeft upon the 23d March 1758.

The property of the lands being thus separated from the superiority, Sir James, upon the 24th March 1758, entered into a contract of wadset with Lauchlan Grant, whereby he wadsetted to him the lands of Drumphad, under the exception of Charles Crawford's feu-right, redeemable at the term of Martinmas 1763, for £16, 13s. 4d.; the legal interest of which sum exactly corresponded with the yearly feu-duty leviable by the wadsetter. Sir James, at the same time, assigned to Mr. Grant so much of the precept of sasine in his own charter from the Crown as corresponded to the lands of Drumphad; and as it still remained to take Sir James's base infeftment out of the way, so as to bring Crawford's sub-feu to be held immediately under the wadsetter, Sir James, in order to accomplish this, resigned the lands, *ad perpetuam remanentiam*, in the hands of Lauchlan Grant; and the base right being thus consolidated with Grant's right of superiority, Grant, in the next place, obtained himself infeft upon the precept in Sir James Crown-charter, and assignment thereto.

Lauchlan Grant having claimed to be enrolled upon these titles at the Michaelmas head-court held at Dumbarton in October 1759, his claim was objected to; and the objections having been sustained by a majority of the freeholders, Mr. Grant complained to the Court of Session.

Pleaded for the defenders, 1mo, The titles produced by the complainer carry evident marks of a nominal and fictitious qualification, created with the sole view of making a vote at an election, without intending to confer any substantial interest in the land. Had a real purchase been intended, the parties would never have gone about it in the manner they have done. Mr. Grant has made no real acquisition, but has only lent his name to create a vote. He has acquired the subject, not for his own behoof, but to serve his author; and [8741] though it may true, that he is under no positive engagement to Sir James Colquhoun; yet he is, from the nature of the thing, under a tacit and implied obligation, which is equally binding in conscience. It was plainly with a view to guard against practices of this sort, that the oath required by the 7th of King George II. was introduced. It is not enough that the person claiming to vote has given no promise nor backbond, directly or indirectly; he must likewise be able to say, "That his title is not nominal or fictitious, created or reserved in him, in order to enable him to vote at an election; but that the same is a true and real estate in him for his own use and benefit," &c. It is plain, therefore, that the legislature reprobates all such nominal votes; and if the Court is satisfied, from the face of the deeds, and the nature of the transaction, that the complainer's title fall under that description, it is the same thing as if Mr. Grant had acknowledged, upon oath, that his qualification was nominal and fictitious.

2do, The defenders apprehend, that the right upon which the complainer's claim is founded, is not a proper wadset, in the meaning of the acts 1661 and 1681, which declare, that proper wadsetters having lands of the holding, extent, or valuation required by law, shall have right to vote. Wadsets of superiority distinct from the property, are a modern invention, and could not be in the view of the legislature at that time. In the act 1661, c. 62, a proper wadsetter is described, "as taking the hazard of the fruits, tenants, war, or troubles"; but a wadsetter of naked superiority cannot possibly run any such hazards. Such a wadset, therefore, is more nearly allied to the improper kind; if indeed the terms proper and improper can at all apply to wadsets of superiority. In the present case, the complainer is secured in a feu-duty precisely equivalent to the interest of his money; he runs no risks, and he is much in the same case with a wadsetter who holds the lands at a certain rent, or who grants a back-tack to the reverser for a tack-duty equal to the legal interest of his money; in both of which cases the wadset becomes improper. Neither is there any chance for the fall of casualties before the time at which the wadset is redeemable; and though there were, it is not every minute and trifling inequality that is sufficient to render a wadset proper; as was found in the case of *Doul v. Creditors of Young*, 18th July 1718, *voce* USURY.

3tio, It was irregular in Sir James Colquhoun, after the lands were resigned in the Crown's hands, the resignation accepted of, and in consequence thereof a charter of resignation granted by the Crown in his favour, to stop short, and, in place of executing the precept in that charter, to go back upon Lord Cathcart's disposition, and grant a special procuratory to take infeftment upon the precept *de me* therein contained.

Lastly, It was improper in Sir James Colquhoun to assign away and divide the precept in the Crown-charter among two or three different people, so as thereby to

obtrude several vassals upon the Crown, in place of one. It has been found, that a vassal could not have three superiors in place of one ob-[8742]-truded upon him ; and there is no reason why a superior should not be equally a favourite of the law.

Answered for Lauchlan Grant ; To the first objection, that a title cannot be nominal or fictitious, where the claimant is truly possessed of the whole right that is set forth in the writings produced. Here the complainer possesses the lands with the burden of Mr. Crawford's feu-right ; he uplifts the feu-duties, he is entitled to uplift the casualties when they fall, and he is under no obligation to account for the same to any person. The whole right, such as it appears from his titles, is fully and truly in him, for his own behoof, without any promise or obligation to the contrary, and consequently it is a true and real estate in him, for his own use and benefit, and for the use of no other person whatsoever, in terms of the statute referred to in the objection.

Answered to the second objection, It does not alter the nature of an improper wadset, that the rent is certain and well paid, which may happen in lands possessed by good tenants, as well as when they are held of the wadsetter in feu. It is still a proper sale during the not redemption. If any alteration happen in the interest of money, it affects the reverser, who has the price in his hands. And, *e contra*, whatever alteration happens as to the lands, by the falling of casualties, or superveniency of burdens, these affect the wadsetter, who is purchaser, as long as the right is not redeemed. Wadsets of superiority have always been sustained as good titles for a qualification, when the lands amount to the extent or valuation required by law.

In answer to the third objection, Sir James had it in his power to take infeftment, either in the one way or the other, as the feudal right was still in Lord Cathcart.

And, in answer to the fourth objection, When the Crown or any other superior, grants a charter to a vassal, and his heirs or assignees, of the lands A, B, and C ; as the vassal may take infeftment of the lands of A only, so, if he thinks fit, he may dispoise these lands to a purchaser, or a creditor may adjudge them from him, without acquiring right to the other lands ; and he may afterwards sell the rest of the lands to another purchaser ; nor can the superior refuse to receive these purchasers or adjudgers.

" The Lords found, That the complainer had a good title, and appointed him to be enrolled."

For the Complainer, FERGUSON.—Alt. ILAY CAMPBELL.—Clerk, KIRKPATRICK.

P. M.

Fol. Dic. v. 3, p. 416. Fac. Col. No. 215, p. 390.

No. 175. [8799] Sir WILLIAM DUNBAR, Bart., and Others v. GEORGE SUTHERLAND.
March 10, 1790.

Found that the date of presenting sasines to the keeper of the register is to be reckoned the date of registration, though they should not be ingrossed in the register for some time after.

George Sutherland claimed enrolment as a freeholder in the county of Caithness, at the Michaelmas meeting held on 30th September 1789.

In support of his claim, Mr. Sutherland produced, among other writings, an instrument of sasine, with an attestation on the back of it by the keeper of the record in the county, bearing, that it had been presented on 29th September 1788, and recorded on the same day. Mr. Sutherland was accordingly enrolled.

It was afterwards discovered, that the instrument of sasine had not been ingrossed in the register for several days after 29th September 1789, and that it could not be marked in the minute-book directed to be kept by 1693, cap. 14, no such book being kept in the county of Caithness. In a complaint, therefore, founded on the circumstances already mentioned, Sir William Dunbar and others, freeholders in the county,

Pleaded ; By act 16th Geo. II. cap. 11, it is provided, That " no purchaser or singular successor shall be enrolled till he be publicly infeft, and his sasine registered, or charter of confirmation expedie, where a confirmation is necessary, one year before enrolment." Thus, the recording in this instance not having been performed for a

full year before enrolment, the judgment of the freeholders was manifestly erroneous, and ought to be set aside.

The statute of 1617, cap. 16, evidently required, that the sasine or other writing should be actually transcribed into the record, the attestation on the back being only intended to establish the claim of reparation against the keeper of the record, if the business of registration was not conducted with sufficient accuracy. This was the opinion of Lord Stair, who justly observes, that no purchaser could be secure if a different rule were to be adopted. And even although this might have admitted of a doubt, especially after the enactment of 1686, cap. 19, the subsequent statute in 1696, c. 18, has declared, in the most express terms, that "no sasine or other writ or diligence appointed to be registered, shall be of any force or effect against any but the granters, unless it be duly booked and inserted in the registers"; Stair, b. 2, tit. 3, § 21.

It is true, that where a sasine has been regularly presented to the keeper of the records, and by him duly entered in the minute-book, as required by 1693, cap. 14, a claim of enrolment founded on it has been sustained, although some delay has occurred in transcribing it into the record. As this minute-book, which is open to public inspection, contains a general description of the lands, and as the instrument of sasine or other document is retained in the hands of the keeper of the record till it is engrossed *ad longum*, such a determination can be attended with little loss. Great care, however, must be taken, that by a gradual infringement of the general rule, the public security provided for by the records may not suffer a fatal injury. If a sasine were to be sustained, [8800] though not marked in the minute-book, nor to be found in the record, no singular successor could be safe; and persons might be admitted to the privilege of voting, who have no real interest in the welfare of the community, although, in order to prevent such undue enrolments, a previous publication of the infeftment for so long a period has been made necessary.

Answered; General laws cannot be framed in such a manner, as to be precisely applicable to the circumstances of every case. It is therefore the province of courts of justice so to construe these enactments, as to adapt them to common use. Where such a construction has been given, by the usage of the country, and especially where it cannot be attended with any loss, this rule appears to be highly expedient and just. In giving effect to the statutes respecting registrations, it has been often followed. By the enactment of 1617, it is required, that the sasine or other writing should be engrossed within forty-eight hours after it is presented to the keeper of the register; yet, as in the case of many sasines being given in at the same time, this cannot be done, it has been held sufficient if the presentation of it has been duly notified in the minute-book. So likewise in the case where it has been certified in the minute-book, that the writing was recorded on a certain day, it is not allowed to prove that the booking took place at some after period; this being agreeable to the common practice, and attended with no inconvenience, as the keeper of the register retains in his possession the sasine or other writing, for the information of those who may wish, in the meantime, to examine the record. In the same manner, in a case where no minute-book has been kept, it must be enough to shew, that the sasine was duly presented for publication, as is done by the attestation on the back of the writing itself, and that the deed continued in the hands of the public officer, until it was regularly engrossed; Wight on Elections, 4to edit. p. 221.

The Court were much divided in opinion, and the question was at length determined by a very narrow majority.

After advising the petition and complaint, with answers and replies,
The Lords dismissed the complaint.

Act. HONYMAN, TAIT, *et alii*.—Alt. DEAN OF FACULTY, *et alii*.—Clerk, MITCHELSON.

Fol. Dic. v. 3, p. 423. *Fac. Col.* No. 126, p. 244.

No. 183. [8807] WILLIAM M'DOWALL and GEORGE HOUSTON v. JAMES HAMILTON.
January 19, 1793.

An heir-apparent may be enrolled, although his predecessor had only a base infeftment, which has been made public by confirmation since his death.

James Hamilton was enrolled as a freeholder in the county of Renfrew, in the character of heir-apparent to his father, upon production of the following titles ; 1mo, A disposition of lands in favour of his father, affording a qualification ; 2do, An instrument of sasine, proceeding on the precept in the disposition ; 3tio, A charter of confirmation of the disposition and infeftment, obtained by the claimant after his father's death. In a petition and complaint, Messrs. M'Dowall and Houston

Pleaded, An heir-apparent is only entitled to be enrolled where his predecessor could have claimed that privilege.

[8808] But the claimant's father having only a base infeftment, was not qualified, and the charter of confirmation, obtained after his death, cannot be considered as part of his titles ; 3d July 1753, *Abercromby v. Gordon*, No. 177, p. 8801.

Answered, A charter of confirmation makes the base infeftment public from its date ; *Erskine*, b. 2, tit. 7, § 15 ; *Stair*, b. 2, tit. 3, § 28. The intermediate death of the party infeft does not hinder its operation ; and to entitle an heir-apparent to be enrolled, it is sufficient for him to produce titles in the person of his predecessor, which would have given him that privilege.

The Court, upon the grounds stated for the defender, dismissed the complaint.

Act. GEORGE FERGUSSON.—Alt. CHA. HAY.—Clerk, GORDON.

D. D.

Fol. Dic. v. 3, p. 425. *Fac. Col.* No. 14, p. 30.

No. 189. [8815] HENRY ERSKINE KNIGHT v. GEORGE ROBINSON. July 26, 1786.

The freeholders having struck off the roll the name of a person, enrolled in right of his wife, during her lifetime, as it appeared from the investitures, that she was only a singular successor, and was since dead ; the Lords, on a complaint, allowed the complainer to produce evidence in the Court of Session, by a deed of settlement, that his wife, being an heiress of provision, he had right, as tenant by the courtesy, to continue on the roll.

Mrs. Erskine, spouse to Henry Erskine Knight, was, in virtue of marriage articles, entitled, as heir of provision, to succeed to her father in the lands of Pittodrie, to the exclusion of a brother by a former marriage.

Her father, however, having made out a disposition in her favour, she did not complete her titles after his death by a service, but executed the procuratory contained in the disposition, and afterwards obtained a charter of resignation from the Crown.

In virtue of these investitures, and without founding on the marriage-contract, Mr. Erskine Knight was enrolled, during his wife's life, as a freeholder in the county of Aberdeen.

At the meeting for electing a Member of Parliament, in 1786, George Robinson, a freeholder, objected to Mr. Knight's continuing on the roll. Mrs. Knight was then dead ; and although she had left children, yet the rights formerly produced being those of a singular successor, her husband, it was con-[8816]-tended, had no right to the courtesy, nor, consequently, to the privileges of a freeholder.

The proceedings of the freeholders, who sustained the objection, having been brought under review in the Court of Session, it was agreed, that Mr. Knight, on exhibiting the marriage-contract before mentioned, might be readmitted to the roll. But the question was, whether a new claim was necessary.—For George Robinson, the objector, it was

Pleaded, Mr. Knight's qualification was twofold ; first, In right of his wife, during her life ; and, 2dly, In his own right, as tenant by the courtesy ; which last qualification arose after his wife's interest in the estate had terminated, and depended on circumstances altogether different. The claim on which he was admitted to the roll, as well as the writings then produced, was solely applicable to the former state of his titles, while the existence of his wife's brother, by a former marriage, gave every reason to suppose, that a demand on his part to be enrolled, as the husband of an heiress, would have been unwarranted and unjust.

The judgment of the freeholders, therefore, was perfectly unexceptionable ; nor can the Court of Session, on account of writings now referred to, and which were not so much as mentioned to the freeholders, pronounce a contrary decision. For though collateral or explanatory evidence may be adduced in the Court of Review, it never can be thought that such documents as are absolutely necessary for constituting the freehold qualification itself, may be there exhibited for the first time ; Sir John Gordon v. Fraser, affirmed on appeal, *infra*, h. t.

Answered for Mr. Knight, If a husband has been enrolled during his wife's life, in virtue of her infetment, his right as a freeholder must subsist after her decease, in consequence of the courtesy, unless it can be shown, that the peculiar circumstances of the case have created a disability. There is no necessity for a new claim ; which, however, would be required, if his right of voting were understood, at the two different periods, to be essentially different.

Hence the only proper object of discussion here is, whether the objector has produced sufficient evidence to support the proceeding of the freeholders, in striking Mr. Knight off the roll ; and it is evident that he has not. As the method in which Mrs. Knight completed her titles did not, in the least, derogate from her character of an heiress ; so a reference to those titles was far from affording satisfactory proof of her being a singular successor. The slight presumption, for it is no more, which this circumstance occasioned, may, of course, be competently obviated, by proper evidence, in the Court of Review. The case is the same as if it had been asserted, that Mr. Knight had no right to the courtesy, because no children had existed of the marriage ; an allegation which, though credited by the freeholders, Mr. Knight would have been allowed to refute by a proof in the Court of Session.

The Lords, by a considerable majority, found that a new claim was unnecessary.

For Mr. Knight, LORD ADVOCATE, BUCHAN-HEPBURN, GEO. FERGUSON.—ALT. DEAN OF FACULTY, WIGHT.

C. *Fol. Dic. v. 3, p. 426. Fac. Col. No. 289, p. 444.*

No. 190. Sir JOHN MAXWELL v. M'MILLAN. June 9, 1741.

Found, That a superior could not, without consent of his vassal, split the superiority among more superiors. See SUPERIOR and VASSAL.

Fol. Dic. v. 3, p. 426. Kilkerran (SUPERIOR AND VASSAL), No. 4, p. 529.

* * * C. Home reports this case.

The question betwixt these parties resolved in a neat point of law, to wit, whether the superior of lands holding blench, could split or divide his right of superiority without consent of the vassal ?

Sir John the vassal brought a declarator, to have it found and declared, That the superior could not ; and pleaded, That it has been universally held by our lawyers, as well ancient as modern, that a superiority is indivisible. It is laid down as a maxim in our feudal law, *non cogitur vassalus, pro uno feudo duas fidelitates facere*, see lib. 2, tit. 55, § 1, *Cujacius*, Book I. *De feudis*. Craig, lib. 2, Dieg. II. § 18. And that it arose from this principle, that, when heirs-portioners succeed in the heritage of the ancestors, superiorities and their casualties are not divided, as the

other particulars of the heritage, but the eldest portioner alone succeeds without any division; for this very reason, lest the condition of the vassal be rendered worse, should the superiority be split among several heirs-portioners. If it were allowed to multiply superiors, numberless inconveniences would arise. A sub-vassal is liable to many casualties, from the accidents which befall his immediate superior, his death, delinquencies, &c. If he is subjected to twenty superiors instead of one, he must be involved in as [8818] many questions with respect to those casualties, as he hath superiors, when the different events fall out; or suppose this should not happen, he must be at the charge of a number of different infeftments, instead of one, when it is necessary to renew his right, or otherwise be subjected to as many processes of non-entry; or, if his superiors should refuse to enter him, he must run precepts against every one of them; and if they should happen not to be entered themselves, he must pursue declarators against them all before he can establish a right to his feu. These hardships, in many cases, might be so heavy, that it would be more eligible for the vassal to give up his feu, than to submit to them. And as a superior cannot divide his superiority, neither can a vassal voluntarily dispoise his feu without the superior's consent, either in whole or in part, so as to compel the superior to receive the purchaser as his vassal. The heir of the vassal may run precepts; but there is no form of process known in our law, whereby a singular successor can directly compel the superior to enter him. The law indeed in favours of creditors, has given them a remedy, by apprising and adjudication, to affect their debtor's estate; and thereupon, by legal diligence, to proceed against the superior to enter the creditor *faciendo prout de jure*; but, from none of the statutes relative thereto, can any inconveniency arise to the superior, but rather an advantage, by having an opportunity of taking the land to himself at a competent avail, or, in his option, a year's rent for entry of the new vassal; but, if any inconveniency should arise to the superior, it is believed, that even this bout-gate way of stating the purchasers as creditors, so as to carry on adjudications, would not avail, *e.g.* If a feu-holding, for which the vassal paid £10 of feu-duty, should, by diverse alienations of small parcels, be split into 100 parts, so that each of the vassals should be only obliged to pay pence for pounds, the superior, upon showing cause, would not be obliged to divide the superiority, or the feu-duty attending upon it, into such small reddendo's as would not be worth levying; but each of these parcels divided at first by the voluntary act of the vassal, without consent of the superior, would be subject *in solidum* to the payment of the superior's feu-duty, leaving recourse of relief to the vassals paying, against the remaining co-vassals in the same feu. And this principle is so strongly ingrafted in our constitution, that, in the case where a superiority falls to many singular successors, by apprising or otherwise, the vassal needs only take infeftment from the appriser having the greatest interest; at least this doctrine is laid down by Lord Stair, b. 2, tit. 4, § 17.

Pleaded for Mr. M'Millan, &c., the superior, That anciently when feus were understood to be granted from the sole favour of the superior, neither the one nor the other could alienate without consent, as is evident from lib. 2, *feud.* tit. 55, *pr.* § 1, though even then it appears, that in some cases feus were divisible. But ever since they became the proper subject of commerce, both superior and vassal are considered to have very different interests from what was competent to them by the ancient feudal customs; and, therefore, the vassal [8819] can either sell or gift, not only without, but contrary to the will of the superior; and, upon the same principle, the superior can dispose of the superiority, without consent of the vassal. A vassal may alienate the whole or a part, either directly or indirectly, upon which the superior must grant infeftment, though it cannot be denied, that it is prejudicial to the superior to receive partial vassals in the fee; and if this holds with respect to the vassal, it is not easy to discover upon what principle the same rule should not hold with respect to the superior, his obligation to the superior not being stronger than the counter-obligation of the vassal to him. The superior is understood to have feued out his lands at a lower rate, in respect of the reserved superiority; and it is known to be the case, that even in a blench holding, one can sell his lands at a higher rate, than he can feu them out to be holden of himself blench. Besides, as a superiority may be purchased for money, it is as much the superior's estate, as the feu is the vassal's, and as the vassal may multiply vassals, why should not the same thing be allowed to the superior? To illustrate this, put the case, that the superior's whole estate consists in a superiority, yielding yearly £1000 per annum, that he contracts £500 of debt;

and that the creditors bring an adjudication ; will it be said, that such a creditor is not under the regulations of the statute 1672, that he must not bring a special adjudication in terms of the statute ? may not the debtor, complying with the rules of that act, save the rest of his estate from being adjudged ? and will not such special adjudication expire, and evict the part of the superiority adjudged ? The statute makes no distinction, whether the debtor's estate consists in superiority of lands feued out or in the feu of such lands. In the case where no purchaser offers, the act 1681 directs the estate to be divided amongst the adjudgers, without distinction what kind of an estate belonged to the debtor, whether property or superiority ; which, upon the pursuer's plan, is impracticable. Again, in the case of adjudgers within year and day, who is the vassal's superior ? as the statute has put them upon the same footing. In the next place, though the defender's right is a superiority *quoad* the pursuer, yet *quoad* the Prince, the immediate superior, his right is a right of property, a feu. Now, if the pursuer's doctrine holds, where there are many intermediate superiors, there can be no partial alienation of any of them, no adjudication could go against them in terms of the statute 1672 ; that statute could only refer to the vassal entitled to the natural possession of the lands. And, with respect to any inconveniency that may arise from the multiplying charters and sasines, the law does not regard that, when the relief is not augmented ; no more than in the case where the vassal divides his feu amongst many different hands, which always puts the superior to more trouble in levying his feu-duty ; see Voet. in his digression *de feudis*, No. 103, July 30, 1678, Luss, *voce* SUPERIOR and VASSAL.

The Lords found the superior could not convey the superiority to different persons without the vassal's consent. *C. Home*, No. 169, p. 284.

No. 195. [8322] Duke of MONTROSE, and Others v. Sir JAMES COLQUHOUN.
January 31, 1781.

Division of superiority null, when made without consent of the vassal.

Sir James Colquhoun is proprietor of certain estates in Dumbartonshire, which he holds of the Duke of Montrose, as superior ; who having, with the design of creating freehold qualifications, parcelled out the superiorities of these lands among fourteen different persons, by granting to them liferent-rights, Sir James instituted against him and his disponees, a reduction of these rights, as being productive of an undue multiplication of superiors.

Pleaded for the defenders, *Imo*, "*Alienatio superioritatis permittitur dominis, dummodo vassali conditio in ea non sit deterior.*" This rule is delivered by Sir Thomas Craig (lib. 2, D. 11, § 35), and results from the first principles of law relative to property in general. If then no real damage arises to the pursuer from the present alienations, they ought to receive the sanction of the Court.

Those parts of the feudal law, which are now obsolete or abrogated, being overlooked, it is evident, that the connection of superior and vassal, imports only, on the part of the superior, an obligation to enter the heirs or singular successors of his vassal ; and, on the part of the latter, that of acknowledging the former, by taking the holding from him, and paying the casualties of entry and relief, together with the ordinary annual prestations. In none of these respects does the condition of the pursuer become worse, in consequence of the present multiplication of superiors, by liferent infeftments, which are all liferents by constitution. For, as to the casualties, it appears, from the authorities of our lawyers, as if liferenters of this sort had not even the power of entering heirs ; but it is clear, that the existence of a liferent, though by reservation, does not bar the fiar from the exercise of his right of superiority ; and consequently leaves to the vassal an option of resorting to him for an entry ; Craig, l. 2, d. 12, § 16. *Ib.* d. 17, § 42 ; Erskine, b. 2, t. 9, § 42. Since then such an option is reserved to the pursuer, his condition, in this respect, is nowise altered for the worse. And, with respect to the annual prestations, these wholly consist in blench duties of an elusory nature ; and no effect of real moment can be produced in them by any multiplication of superiors.

Answered, It is a doctrine of the feudal law established in ours, “*Ut vasallus pro uno feudo plures dominos habere non compellatur.*” Consuet. feud. Stat. Rob. III. 9th June 1741, *Sir John Anstruther v. Alexander Macmillan*, No. 190, p. 8817. Hence a superior cannot convey his right of superiority, so as to interpose another person between him and his vassal. And hence that right is considered as a *jus individuum*, which of course falls to one only of several heirs-portioners.

The defenders have denied the wisdom or expediency of this principle, in relation to the present case ; but their reasoning is erroneous. The power of [8823] entering vassals is the characteristic of the right of superiority. Accordingly, though the infestment of a person, interposed between the superior and vassal, is, *quoad* the right of superiority, void and null ; yet this infestment will carry in favour of the grantee, as a donatary or assignee, all the duties and casualties of superiority ; and the only criterion of its nullity is, that it confers not the power of entering vassals ; Lord Stair, b. 2, l. 4, § 5. *Douglas of Kelhead v. Vassals*, 30th Jan. 1671, *voce* SUPERIOR and VASSAL. Every right of superiority, therefore, whether in liferent or in fee, necessarily comprehending the privilege of entering vassals, it is plain, that in this, as well as in other respects, the right of the liferenter, while it subsists, is exclusive of that of the fiar ; which, meanwhile, remains dormant or suspended ; Stair, b. 2, l. 6, § 8. And hence has arisen the general practice, that liferenters concur with fiars in granting charters or precepts of *clare constat*. Thus, it is evident, that the multiplication of superiors, which the liferent-conveyances in question were designed to create, would be attended with every effect belonging to the right of superiority ; and, of course, would subject the pursuer to the obvious inconveniences which must result from a vassal's subordination to thirteen additional superiors.

The Court “sustained the reasons of reduction.”

In a reclaiming petition against this judgment, the defenders endeavoured to found an exception from the general rule thereby adopted, upon this alleged speciality, that several of the subjects in question, though by the indulgence of the superior, they have been contained in one charter, were, however, different tenements, and held for different prestations. But the Court refused this petition, without answers.

Lord Ordinary, GARDENSTON.—Act. BAILLIE.—Alt. LORD ADVOCATE, H. ERSKINE.—Clerk, ROBERTSON.

S.

Fol. Dic. v. 3, p. 427. *Fac. Col.* No. 25, p. 46.

* * This case was appealed.

The House of Lords, 19th February 1782, “Ordered and Adjudged, That the appeal be dismissed, and the interlocutors complained of be affirmed.”

No. 212. [8838] *Sir JOHN SCOTT of Ancrum, Baronet, and PATRICK KERR of Abbot-rule, Esq. v. Sir JOHN DALRYMPLE of Cowsland, Baronet.* January 17, 1781. :

The objections to a claim, that there had been a want of form (not essential) in taking the sasine, that there was a confusion in the description of the lands, and that the writer of the disposition was not properly designed, were repelled.

Sir John Dalrymple claimed to be enrolled at the time mentioned in No. 97, p. 8681 ; and, as his qualification stood upon part of the same lands with Sir Gilbert Elliot's, the same objection was stated upon the decret of division, and reference was made to the arguments pleaded for and against Sir Gilbert Elliot. But the three following objections were also stated.

In the first place, There is a nullity in Sir John Dalrymple's sasine. It bears to have proceeded upon the precept contained in the charter from the crown in favour of Sir Gilbert Elliot ; and, although it mentions that a disposition and assignation was granted by Sir Gilbert Elliot, in Sir John Dalrymple's favour, which might, if

properly used, have authorised infetting Sir John under the crown-charter ; yet the instrument of sasine does not mention that this disposition and assignation was received by the bailie from the attorney, or that it was delivered to the notary, and, by him, or any other person, openly read and published to the witnesses ; or that, after such publication, sasine was given to Sir John, in virtue of the assignation. The sasine, therefore, was given, not only contrary to the uniform practice in all such cases, but contrary to the clearest principles of law and common sense ; for it was, in fact, the same as a sasine without any warrant whatever. In order to shew the practice, and make the imperfection of the present sasine appear more evident, a copy was subjoined to the petition, with the omissions printed in *Italics*.

In the second place, The lands of Kaimside-park and Kaimsmuir-park, fall under the lot of Sir John Dalrymple's qualification, but are neither in his disposition nor sasine.

And, lastly, The writer of the disposition, by Sir Gilbert Elliot to Sir John Dalrymple, is not designed, and, consequently, the disposition itself is absolutely null and void, by the acts 1593, c. 175, and 1681, c. 5. The writer is called John Scott, clerk to the signet ; but there is no such person in existence ; so that, if the writer's name be truly John Scott, yet surely his designation is false, which comes to the same thing as no designation at all.

[8839] In answer to the first objection, it was observed, That there was a distinction made by our lawyers, between the formalities of a sasine and its essentials ; but that the publishing and explaining the assignation of a precept was never said to be even a formality, and much less an essential solemnity of the sasine. It may have been introduced into some practice, *ab majorem cautelam*, but was never necessary ; and, so far is the practice from being uniform, as set forth by the complainers, that, in the very book which is put into the hand of every notary, as his guide, called, *The Art and Office of a Notary Public*, there is no more required than what was done in this case, viz. producing and exhibiting the assignation, without a syllable of reading it over, publishing, or explaining. The form in the Supplement of Spottiswood's Styles differs a little from that now mentioned, but still more from the complainer's form, particularly, in so far as concerns this objection. The rule laid down in act 1693, c. 35, respecting the sasine of an heir or assignee, is clearly to the same purpose.

The second objection arises from a mistake in point of fact ; for Kaimside and Kaimsmuir are only parcels of Kaims-farm, which is all in Sir John's infetment ; and the reason why they got particular names, was in order to ascertain the rent of them by the oaths of the tenants, when the decree of disjunction was applied for. The farm of Kaimes, all excepting these parcels, was in Sir Gilbert Elliot's own possession.

As to the third objection, it is confessed that there is here a trifling omission ; for the writer, through the hurry of making out different dispositions, wherein he was designed, " John Scot clerk to Cornelius Elliot writer to the signet," had, in this, omitted the words, " To Cornelius Elliot writer." But though this might seem to fall under the letter of the law, yet it does not fall under the spirit of it. The acts 1593 and 1681 were meant to prevent frauds in testaments, and other deeds, which appeared after the granter's death, where the strictest precaution are necessary. But here both the writer and granter are at hand, to confirm the authenticity of the deed ; and the Court have allowed an omission of this kind to be supplied, in cases of much more importance. This was done particularly, in the case of *Duke of Douglas v. the Creditors of Littlegill*, *voce Writ*. In that case, which was a ranking of creditors, an adjudication was produced, which proceeded on a docketed account in 1663. The writer of the docket was not designed ; but the Court allowed that want to be supplied by proof.

Replied on this last objection ; That the acts are so far from being in any shape limited to testaments, that the very deeds expressly mentioned in them are charters and contracts. And, as to the case of the Duke of Douglas, the decision there went upon a relaxation of the act 1593, or a doubt of its meaning. This is evident from a decision collected by Fountainhall, Maxwell *contra* Earl of Nithsdale, *voce Warr*, where the Lords found that the practice had [8840] allowed the condescending upon the writer, or his designation, till that was discharged by act 1681.

Duplied ; The freeholders could not judge of the validity or truth of any deed, which was, *ex facie*, complete, as in the present case ; and, even suppose a regular

process of reduction had been brought, the acknowledgment and homologation of the grantor would have been an unanswerable defence.

"The Lords repelled the objections, and dismissed the complaint."

Act. H. ERSKINE.—Alt. R. BLAIR & R. DUNDAS.

D.

Fac. Col. No. 15, p. 28.

No. 234. [8858] JAMES LINDSAY CARNEGIE v. GEORGE ROBERTSON SCOTT.
February 26, 1796.

Where an objection is palpable, and can be verified *instantly* by documents produced, it is incumbent on the freeholders to reject the claim. Thus it is a competent objection in a court of freeholders, that the sasine of a claimant proceeds on an exhausted precept.

Miss Isabella Scott was infeft in 1773, upon a Crown charter, in lands in Forfarshire, which afford a freehold qualification.

It having been discovered, after the death of the notary who took the infeftment, that he had omitted to sign the 2d, 4th, 6th, and 8th pages of the sasine (which consisted in all of 14), she, in 1789, took infeftment a second time, on the same precept, and a second instrument of sasine was made out. Both sasines were duly recorded.

Mr. George Robertson having married Miss Scott, he claimed to be put on the roll of freeholders, as her husband, and produced, as his title, the charter above mentioned and sasine 1789.

Mr. Lindsay Carnegie objected, that a former sasine having been taken on the charter, that produced by the claimant was null, as proceeding upon an exhausted precept.

The Court of freeholders having repelled the objection, Mr. Carnegie presented a petition and complaint, along with which he produced an extract of the sasine 1773.

In defence, Mr. Robertson Scott

Pleaded; 1mo, The sasine 1789 is *ex facie* legal and regular; and it is an established rule of election law, that freeholders are not entitled to refuse enrolment upon any objection, which, like the present, requires extrinsic evidence to support it; Wight, p. 222; 26th February 1745, Dunbar, No. 220, p. 8844; 5th February 1760, Campbell, &c. v. Muir, No. 8, p. 7783; 28th July 1761, Stewart, No. 18, p. 8579; 9th January 1755, Forrester, No. 137, p. 8755; 17th February 1779, Burn, No. 230, p. 8852.

But, 2do, The sasine 1789 is in fact unexceptionable; for, although two valid sasines in fee cannot be taken on the same precept, yet, where the first is inept, the second will be effectual. Now, the act 1696, c. 15 (which appears from the act of sederunt, 17th January 1756, to extend to sasines) directs every page to be signed by the notary; and such accordingly is the invariable practice. The sasine 1773 was therefore null, four of its pages not being signed by him.

Answered; 1mo, The objection stated to Mr. Scott's enrolment did not require the aid of extrinsic evidence; for the sasine 1773, being part of the claimant's own titles, could not be so considered. Besides, any written evidence by which a nullity in the title is proved, is competent to be judged of by the freeholders; and new evidence may even be received in this Court. See Wight, p. 143.

2do, The sasine 1773 is in every respect legal and valid. The act 1696 regulated the subscription of securities only. The mode in which notaries must subscribe sasines, was previously settled by 1686, c. 17, which declares it lawful to write sasines by way of book, "each leaf being signed by the notary and [8859] witnesses," an enactment which was strictly complied with in the sasine 1773; and that the statute 1686 is altogether independent of, and was not repealed or qualified by the act 1696, is clear from the latter only requiring that the witnesses should subscribe the last page of the deed, whereas the former ordains that the witnesses to a sasine shall sign every page of it; a form which is at this day indispensable.

The act of sederunt 1756 is inaccurate, in supposing that the act 1696 regulates the subscription of sasines.

The Court, on the grounds stated for the complainer, "found the respondent was not entitled, in virtue of his titles claimed upon, to be enrolled in the roll of freeholders for the shire of Forfar; and therefore granted warrant to, and ordained the Sheriff-clerk of the said shire to expunge his name from the said roll."

For the Complainer, LORD ADVOCATE DUNDAS, SOLICITOR-GENERAL BLAIR, GEO. FERGUSSON, ARCH. CAMPBELL, JUN.—Alt. H. ERSKINE, HAY, MAT. ROSS, AD. GILLIES, GEO. ROBERTSON SCOTT.—Clerk, HOME.

R. D.

Fol. Dic. v. 3, p. 431. Fac. Col. No. 207, p. 491.

No. 255. [8871] PATRICK PROCTOR v. Sir DAVID CARNEGIE. May 14, 1796.

A claimant having produced, before a court of freeholders, a disposition from Commissioners, containing an assignation to a precept of sasine in a Crown charter in favour of their constituent, and his claim having been rejected, because he did not produce the commission under which the disposition was granted, it was found, that the objection might be removed by his afterwards producing it in the Court of Session.

Patrick Proctor claimed to be enrolled as a freeholder in Forfarshire, and produced a charter from the Crown, containing lands affording a freehold qualification, in favour of the Earl of Strathmore; a disposition thereof to himself by Thomas Lyon and James Dundas, the Earl's Commissioners, containing an assignation to the unexecuted precept in the charter, and an instrument of sasine taken in virtue of it in his favour.

But he did not produce the Earl's commission to Messrs. Lyon and Dundas; and although it was referred to in his claim, neither its date nor that of its registration were specified. Nor did it appear from his sasine, that it had been produced by his attorney to the Bailie when the infestment was taken.

To these titles Sir David Carnegie

Objected; A claimant before his enrolment, must produce to the freeholders "the whole titles and vouchers of his qualification"; 16th George II. Mr. Proctor ought therefore to have produced Lord Strathmore's commission to Messrs. Lyon and Dundas, as forming an essential part of his titles; because without it, he does not connect them with the charter on which his infestment [8872] proceeds; for it is as essential to their validity, that the commissioners should be connected with the charter, as that he should connect himself with them by the disposition; 17th February 1767, Sir John Gordon, No. 157, p. 8874; 10th February 1781, Moodie, No. 180, p. 8806; 23d February 1790, Nisbet, No. 231, p. 8855.

2do, The act 1693, c. 35, declares, "That all sases in favour of a disponee, different from the person to whom the original precept is granted, shall be null, unless the titles by which the former has right to it are deduced in the instrument." Mr. Proctor's sasine is therefore void, from its neither narrating the commission to Messrs. Lyon and Dundas, nor stating that it was exhibited by his attorney to the Bailie. Indeed, independently of a statute, a Bailie, at common law, cannot give a valid infestment, unless the attorney shew a complete right to the precept in the person of his constituent; Craig, l. 2, d. 7, § 8; Stair, b. 2, t. 3, § 16; which he certainly did not do in this case, merely by producing the disposition by Messrs. Lyon and Dundas, without the commission empowering them to grant it.

Answered; 1mo, The commission from Lord Strathmore formed no part of Mr. Proctor's title of enrolment. It was at best merely a link in his progress, which it was sufficient to refer to in his claim, and which he was not bound to produce; 10th February 1781, Haldane, No. 181, p. 8806.

2do, In all cases, the delivery of the precept of sasine, and of a conveyance to it, *ex facie* regular, is a sufficient warrant to the Bailie to give infestment; Stair, b. 3, t. 2, § 17; Ersk. b. 2, t. 3, § 35; Office of a Notary, pp. 71, 76; and in practice nothing further is required. Nor can any harm arise from this; because, if it should after-

wards appear that the conveyance of the precept flowed *a non habente*, the sasine will be void ; while, on the other hand, to sustain this objection would strike at the rights of many landed proprietors.

The first only of these objections was stated before the freeholders ; and they having sustained it, Mr. Proctor presented a petition and complaint against their judgment, and, at the same time, produced an extract of the commission to Messrs. Lyon and Dundass.

On advising the complaint, with answers for Sir David Carnegie, in which the objection to Mr. Proctor's sasine was first made, a majority of the Court thought the decision of the freeholders right on the first objection, which rendered it unnecessary to determine the second.

But on advising a reclaiming petition for Mr. Proctor, with answers, the Court altered their opinion, and thought both objections should be repelled. The commission by Lord Strathmore (it was observed) forms no part of Mr. Proctor's titles, although, in order to support them, he is no doubt bound to produce it, if required. But as a claimant may not have it in his power instantly to exhibit collateral or supplementary evidence of this sort, it is fixed by the case of Gordon, No. 160, p. 8876, that if he should be rejected by the freeholders [8873] for not doing so, he may remove the objection, by afterwards producing it in this Court.

The objection to Mr. Proctor's sasine, is neither sanctioned by the statute 1693, nor by practice.

The Court unanimously repelled the objections.

For the Complainer, LORD ADVOCATE DUNDAS, SOLICITOR-GENERAL BLAIR, GEO. FERGUSSON, AR. CAMPBELL, JUN.—Alt. H. ERSKINE, HAY, M. ROSS, GILLIES, ROBERTSON SCOTT.—Clerk, HOME.

Fol. Dic. v. 3, p. 434. *Fac. Col.* No. 214, p. 505.

No. 6. [8889] LINDSAY, &c. v. ROBERT DRUMMOND. July 20, 1744.

The number of messengers in the shire of Edinburgh, is, by statute, limited to 24. The Lyon, heralds, and pursuivants, are not comprehended in that number.

Robert Drummond having got a commission from the Lord Lyon to be a messenger for the shire of Edinburgh, a bill of suspension was offered by the messengers of Edinburgh upon two grounds ; 1mo, The bad character of the said Robert Drummond ; 2dly, By the act 46th Parl. 11, James VI. the number of messengers to serve within the shire of Edinburgh is limited to twenty-four, whereof the Lyon and his brethren the heralds and pursuivants make seventeen ; that the number is already compleated ; and that there is a *jus quasitum* to the messengers already admitted to bar the admission of a greater number. This bill of suspension being reported to the Court, it was unanimously refused as incompetent. The President reasoned, That Mr. Drummond was *de facto* a messenger by the Lyon's commission, and that it was not com-[8890]-petent to turn him out of his office by such an application to the Court of Session without first applying to the Lyon, against whose sentence there might be an appeal to the Court of Session, not otherways. Elchies said, That if the Lyon should name one to be a messenger who is infamous by a public sentence, or otherways rendered incapable, remeid might lie by a suspension ; but was of opinion with the President in the present case. With regard to the number of messengers, the Court was of opinion, that the Lyon, heralds, and pursuivants, are not to be counted upon to fill up the number of messengers for the county of Edinburgh.

Fol. Dic. v. 4, p. 1. *Rem. Dec.* v. 2, No. 55, p. 84.

No. 13. [8893] WELSH v. M'VEAGHS. January 18, 1781.

Cautioner of a messenger only liable for his actings *qua* messenger.

John Syme, messenger, was entrusted by Welsh with letters of horning and caption against one of his debtors. Instead of attaching the debtor's effects by poinding, the messenger received them from the debtor himself, sold them, by public roup, to the extent of the debt, and applied the proceeds to his own use. He became insolvent; and Welsh, the creditor, pursued M'Veagh's his cautioners, for the debt, who

Pleaded, In poindings, the office of a messenger is to appreciate the debtor's goods, to offer them to the debtor, upon payment of the debt to the creditor or his attorney, and, upon the debtor's not paying, to adjudge and deliver them to the creditor or his attorney. The creditor, or his agent, is, by the form of the diligence, supposed to be present to receive the money or the goods, and to take instruments thereon. Stair, book 4, tit. 47, §§ 32, 33; Office of a Messenger, pp. 299, 315. And the messenger has neither the custody of the one nor of the other.

The defenders are cautioners for the messenger's faithful and exact performance of the duty of a messenger. Beyond that they have no concern. Had the creditor, in this case, attended personally, or employed an agent in due form; as the money was recovered from the debtor, it would have been delivered to him. Instead of doing so, he has employed the messenger as his agent. If the messenger has betrayed that trust, the creditor has himself only to blame.

This defence is clearly established by the statute 1587, cap. 46, defining the nature of the obligation imposed on the cautioners of a messenger. No security is there directed to be taken against embezzlements; although the species of malversation would have formed its most important object, if falling within the compass of the office. It provides solely against the improper execution of diligence. In like manner, the bond of cautionary lodged in the Lyon Court takes the securities bound "for the damage, interest, and expenses, which the lieges shall sustain through the negligence, fraudulent, or informal execution of the messenger."

Such being the nature of a messenger's duty, to which the obligation of his cautioner precisely corresponds, no practice of creditors entrusting messengers to levy money, can subject the cautioners beyond their bond. But the general custom is to send a writer along with the messenger, who acts as attorney for the creditors; so that the practice is likewise in favour of the defenders. It may be said, that the messenger ought to have executed the caption; and the cautioners being confessedly liable for the messenger's negligence will be subjected to the debt on that ground. The answer is, that the messenger having recovered payment of the debt, could not execute the caption.

Answered for the creditors, The statute 1587 requires security to be found "for the skaith, damage, and interest of parties grieved by the falsehood, negli- [8894] -gence, or informality of the officer." The bond of cautionry bears, "that the officer shall leally, truly, and honestly, use and exerce the office of messengery." So far as the messenger did not execute the diligence of law, by poinding and imprisonment, he has neglected his duty; so far as he recovered a debt, in consequence of the diligence, and embezzled it, he has not honestly exercised his office, and his cautioners are therefore liable.

The *verba solemnia* in the execution of poindings do indeed seem to imply the presence of the creditor, or his attorney. But as this practice would be very inconvenient and expensive, it is scarcely ever followed. Accordingly, there is not a week in which messengers do not recover debts in consequence of ultimate diligence. If, by means of such subtle distinctions as the present, their cautioners could shake themselves loose from their obligation, the salutary regulation introduced by the statute 1587, for the security of creditors unacquainted with the character of the messengers they employ, would, in a great measure, be frustrated.

Neither is the trust conferred on the messenger, nor the risk to which his cautioners are subjected, greater in this case than in many others which fall within that department. Thus, if a messenger is employed in executing a caption, and allows the

debtor to escape, or if he is directed to inhibit, and neglects it, Are not his cautioners bound to indemnify the party suffering ?

“ The Lords sustained the defences.”

Lord Ordinary, STONEFIELD.—Act. JAMES BOSWELL.—Alt. ALEXANDER MILLAR.—Clerk, CAMPBELL.

C.

Fol. Dic. v. 4, p. 1. *Fac. Col.* No. 16, p. 30.

No. 1. [8895] Lord FLEMING v. Lord ROSS. February 7, 1566.

Ane miln is not comprehendit nor cumis under the generall word or appellatioun of pertinentis ; because ane miln requires ane speciall and severall sasine.

Fol. Dic. v. 1, p. 574. *Balfour* (PERTINENTS), p. 175.

No. 2. Countess of HUME v. Tenants of ALCAMBUS and Mr. RODGER HOG. February 5, 1667.

Though mills are distinct tenements and not carried as part and pertinent ; yet in a barony, which is *nomex universitatis*, mills though not expressed are comprehended.

The Countess of Hume being provided, by her contract of marriage, to the lands of Alcambus, Pyperlaw, and Windilaw, extended to twenty-four husband-lands, she gets a charter upon her contract, bearing, for implement thereof, to dispoñe to her the lands and barony of Alcambus, &c., with a sasine taken at Alcambus. She thereupon pursues the tenants. Compareance is made for Mr. Roger Hog, and other creditors, who bought these lands from Wauchtoun, who had bought them from the Earl of Hume, and alleged absolvitor from the mails and duties of the mill of Alcambus, because my Lady by her contract of marriage was not provided to the mill, neither was she infet therein, *per expressum*, and mills do not pass as pertinents, without special infetment ; 2do, Absolvitor for the rents of Pyperlaw and Windilaw, because my Lady's sasine, bears only infetment in the lands of Alcambus, and mentions not these lands which are particularly in the contract. The pursuer answered to the first, That by her charter, she was infet in the lands of Alcambus, with the mills, with other lands mentioned therein, &c. ; 2dly, That Alcambus bore, by her charter, to be a barony, which is *nomem universitatis*, [8896] and carries mills, albeit not exprest. To the second, It is offered to be proven, that Alcambus is the common known designation, and is commonly known to comprehend Pyperlaw and Windilaw, as parts and pertinents thereof, and that they are all holden of one superior, and lie contigue, so that they are naturally united, and without any further union in a barony or tenement, and a sasine upon any place of them serves for all. It was answered for the defender, to the first point, Alcambus was not a barony, neither doth the designation thereof by the Earl of Hume, make it a barony, unless it were instructed. 2dly, The adding of mills in the charter, if the Lady had not right thereto by the contract, is a donation by a husband, and is revoked by his disposition of the lands of Alcambus, and mill thereof, to the Laird of Wauchtoun, the defender's author. The pursuer answered, that the charter was but an explication of the meaning of the parties, that by the contract the intention was to dispoñe the mill, especially, seeing the mill hath no sucken but these husband-lands of Alcambus, which are dispoñed without any restriction of the culture, so that the mill would be of little consequence without the thirle.

The Lords having compared the contract and charter, found that, by the contract, the Lady could not have right to the mill, albeit she would be free of the multures ; and found that the charter did not only bear for implement of the contract, but

also for love and favour ; and so found the adjection of the mill to be a donation revoked ; nor had they respect to the designation of the lands as a barony, but they found it relevant, if the Lady should prove that it was a barony, to carry the right of the mill, or that in my Lords infestments, there was no express mention of the mill, but that my Lady had them in the same terms my Lord had them ; they found also, that reply relevant, that Alcambus was the name of the whole lands, to extend the sasine to the lands of Pyperlaw and Windilaw, though not named, and that they might be yet parts and pertinents of the tenement, under one common name.

Fol. Dic. v. 1, p. 574. Stair, v. 1, p. 436.

No. 3. The Lady HALLIBURTOUN v. The Creditors of HALLIBURTOUN. July 27, 1670.

Though a mill cannot pass as a pertinent, yet when it is built after a purchaser's infestment, it accresces to him, and therefore a liferentrix infest on lands on which a mill was afterwards built by the proprietor, was preferred to a posterior appriser infest expressly in the mill.

The Lady Halliburton being provided by her contract of marriage to the mains of Halliburton, with the mill and pertinents, and her precept of sasine bearing warrant to infest her in the mains and mill, by earth and stone of the land, and by the clap of the mill ; her sasine having the said precept engrossed bears her by virtue thereof to be infest by the earth and stone of the land, but mentions nothing of any symbol for the mill, or of any reason that sasine was not taken of the mill, because it was demolished ; the mill being there-[8897]-after built or re-edified, the creditors having apprised, did take infestment of the mains by earth and stone, and of the mill by clap and happer ; and now in a competition betwixt the Lady and them anent the rents of the mill, it was alleged for the Creditors, that they ought to be preferred, because they were infest in the mill, and the Lady was never infest therein, albeit her precept of sasine bore an express warrant to infest her therein by clap and happer. It was answered for the Lady, that her infestment of the land, with the mill and other pertinents, is anterior to the Creditors, and must extend to the mill, albeit she took no special sasine thereof, because there was no standing mill at the time of her sasine ; so that the mill being built by her husband thereafter, *solo cedit*, and belongs to her as a pertinent ; for though where a mill is before infestment, it cannot pass as a pertinent without a special sasine, yet where it is only built thereafter, it accresces to any party infest in the land, especially being infest in the land, with the mill thereof.

The Lords preferred the Lady, she proving the mill at the time of her contract and infestment was not at all built, or having been built was demolished.

Fol. Dic. v. 1, p. 574. Stair, v. 1, p. 701.

No. 4. M'DOUGAL v. M'CULLOCH. February 28, 1684.

Proprietor of thirled lands cannot build a mill within the thirle.

M'Dougal of Logan pursues M'Culloch of —, to demolish a mill he had built within his thirlage. Alleged, 1mo, A mill that has once gone 24 hours cannot be thrown down, *ob favorem alimentorum*. 2do, Though my lands be thirled to your mill, which is the mill of the barony, yet that cannot hinder me, unless my charter did expressly restrict me, to build a mill within my own lands, especially I having a clause "*cum molendinis et multuris*" in the *tenendas* ; seeing I am willing to declare that none within your thirlage should grind at my mill, but only others who voluntarily were pleased to come ; and that Craig was clear of this opinion, l. 2, diag. 8. Answered, That the building a mill within his thirle could be interpreted to be done with no other design but in *emulationem vicini*, and that it was tempting those within

the sucken to abstract, and go away to that nearer mill ; and whatever was Craig's opinion *non refert* : Yet he seems only to mean where one was thirled for a dry multure *allenarly, ad annum prestationem*, that one so thirled might *in suo molam edificare*. The Lords on the report of Lord Boyne, find that the defender ought not to have built a mill upon the thirled lands, and that *inest de jure*, [8898] though he be not expressly restricted and prohibited in his charter ; and therefore ordain the said mill to be demolished ; but find that the defender is not obliged by the nature of his thirlage to go to the pursuer's wind-mill, but only to his water-mill to which he is thirled ; and that notwithstanding of the alleged defects of the mill, find the defender liable for the multure of the abstracted corns, except those that are acknowledged by the pursuer ; but find him liable for the hynd bolls ; but declare that in case the time of the abstraction, the mill of the barony be not in condition to serve, then find the defender liable for the multure, but not for the small duties due for service.

M'Culloch having reclaimed against this interlocutor ; and it being of new reported, how far one might build a mill within another's thirlage, they reviewed the affair, but still adhered to their former interlocutor, on the 13th March 1684. See THIRLAGE.

Fol. Dic. v. 1, p. 574. Fountainhall, v. 1, p. 276.

No. 5. CRAWFORD of Carsburn v. Sir JOHN SHAW. February 28, 1695.

Found in conformity with the above.

The Lords determined the controversy betwixt Crawford of Carsburn and Sir John Shaw of Greenock, about the thirlage to Greenock's mill ; and they adhered to their former interlocutor, declaring the thirlage in Greenock's favour, notwithstanding the prior resignation and infeftment in Carsburn's person, *cum molendinis et multuris*, and the practise cited in 1691, Newbyth *contra* Whitekirk ; See THIRLAGE. Then Carsburn insisted on that conclusion of his summons, seeing no more was thirled but his *grana crescentia*, and that he had a [8899] burgh of barony wherein corn was daily imported, of the growth of other lands, that *quoad invecta et illata* he might build a mill of his own, to which it might come, and which could not be construed to be in emulation of Greenock, seeing he was to take nothing of his thirlage from him ; and Craig, speaking of mill-multures, thinks any heritor may build a mill on his own property, though his lands be thirled to another mill, providing he do no wrong thereto, but only take out-landish sucken, and not grind corns that are astricted. But this is a temptation to transgress, and the remedy the other has of pursuing them for abstracted multures, when the transgress is not sufficient. And the decision Skene and Dundas, No. 5, p. 5008 ; does not come up to this point ; for there it was controverted whether Hallyards was thirled or not ; and therefore the Lords would not, *medio tempore*, ordain his mill to be summarily demolished ; and therefore the Lords discharged Carsburn to use either hand-mills or curns in prejudice of Greenock's astriction.

Fol. Dic. v. 1, p. 574. Fountainhall, v. 1, p. 674.

No. 6. The MAGISTRATES of EDINBURGH and the TACKSMAN of their Mills v. JEAN ALEXANDER, Relict of Bailie Adam Cleghorn, Brewer in Edinburgh. December 19, 1710.

A charter granted to a Royal Burgh, containing this clause, *una cum molendinis et cæteris pertinentiis suis*, was found to constitute a thirlage, and, of consequence, to restrain the brewers from using hand-mills for grinding malt, though the brewers founded on the common presumption of liberty, and on their *reddendo*, which was only watching and warding ; but it was found incumbent on the Town to prove possession, for preserving their thirlage from the negative prescription.

In the action at the instance of the Magistrates of Edinburgh, and the Tacksman of their mills v. Jean Alexander, for abstracted multures of malt, brewed within

the liberties of the Town; the pursuers founded upon an ancient charter, granted by King Robert the Bruce to the Town of Edinburgh, bearing, "Sciatis nos dedisse et ad feudifirmam dimisisse, et hac præsenti carta nostra confirmasse burgensibus burgi nostri de Edinburgh, prædictum burgum nostrum de Edinburgh, una cum Portu de Leith, molendinis et cæteris pertinentiis suis, tenend. et habend. eisdem burgensibus et eorum successoribus de nobis et hæredibus nostris libere, quiete, plenarie et honorifice per omnes rectas metas et divisas suas, cum omnibus commoditatibus, libertatibus et asiamentis quæ ad dictum burgum juste spectare solebant tempore bonæ memoriæ Regis Alexandri, predecessoris nostri ultimo defuncti, reddendo inde nobis et hæredibus nostris annuatim dicti burgenses, et eorum successores, 52 mercas Sterling, ad terminos Pentecostes, Sancti Martini in hieme pro equali portione": Whereby they contended, That a right of thirlage was clearly constituted in favour of the Town, confirmed and cleared by subsequent charters from the Sovereign, in the years 1603 and 1636, containing *novodamuses*, mills, and multures, and also by many acts of Town Council, from the year 1655 inclusive, till the year 1660, discharging any indweller within the freedom of the burgh, to pass from the common mills with their malt to grind at any other mill.

[8900] Answered for the defender, A simple charter *cum molendinis*, without so much as the usual words *cum multuris*, can never infer a new thirlage; especially considering, that this charter appears not to be the original erection charter of the burgh, from its confirming to the burgesses all their privileges, as possessed in the reign of King Alexander; and, therefore, could not, if the thirlage was constituted before, impose a burden upon the burgesses without their consent; seeing *jus meum auferri nequit sine facto meo*, or the methods of law. For, though the disposition of a mill conveys a thirlage constituted before, as an accessory, though not expressed, it never constitutes a thirlage. It is, indeed, essential to a mill, to take hire for grinding, to which all who grind subject themselves; but an obligation not to withdraw from the mill is not essential, but requires to be constituted as other adventitious rights. Mills are mentioned in this charter, not from a view to constitute a new thirlage, but only to convey the property, and, in consequence, any former astriction: Because, they are considered as *separata tenementa*, which do not pass as part and pertinent, except where united in a barony; and *non constat* that the Town's common good, lying without the Royalty, was erected into a barony: Yea, further, a clause, even *cum molendinis et astrictis multuris*, in the ordinary acceptation, doth not constitute a new astriction, but only multures formerly constituted; unless the proprietor of lands dispoise his mill *cum astrictis multuris*, who is presumed to thirl thereby his own lands; but the King was not proprietor of the burgher-tenements. Nor is there any implied servitude upon the burgesses of Edinburgh to the mill of the burgh, more than upon any other heritors through the country. Their being united in a community is so far from rendering their condition worse in this matter, that the granting of the mills with the other common good, to be subservient to the community, argues for their freedom, and that they are in a manner the masters; the erection of a Town Council being for order's sake; consequently, their property is not presumed to be subjected by such a general charter; whatever effect it might have against the lands, and possessors of the common good, which the community, as masters, may thirl.

Replied for the pursuers, King Robert Bruce's charter runs in the express terms of an original charter, giving, granting, disponing, and perpetually confirming, &c. And the clause, with all the commodities and liberties pertaining to the Town in King Alexander's time, doth not hinder it to be an original, especially as to the mills. Nor doth it import, that the charter bears not *cum multuris*; for a disposition of mills carries the multures, especially where mills are disposed, as here, *cum suis pertinentiis*, in a short charter, when the simplicity of the age did not use many words to express the same; multures being the proper pertinents of mills. So that the pursuers are under no necessity to instruct, that the thirlage was constituted before the said charter; 2do, It is a mistake, that a disposition of mills doth not carry the servitude of multures not constituted before; for the whole lands of a barony are naturally a-[8901]-stricted to the mill thereof, without any thirlage in writ, and nothing but an infettment of any land thereof, *cum molendinis et multuris*, can secure against such a thirlage; July 17th, 1629, the Laird of Newliston v. Inglis, voce PRESCRIPTION. And the erection of a Burgh Royal, with a disposition of mills, as a part of the common

good thereof, hath as great a privilege as any erection of a barony. Besides, the Town's mills, being a part of the Royalty of the burgh, are in the case of the King's mills, to which thirlage is sufficiently instructed by simple coming to the mill, without any adminicle in writ; and here the constitution of thirlage by the foresaid charter is cleared and fortified by acts of the Town Council, and a continual acquiescence of the brewers, till of late that the defender began to abstract.

Duplied for the defender, The parallel doth not hold betwixt a barony and a burgh; for it is upon the Baron's right of property of the lands, and his presumed inclination to have his own tenants go to his own mill, that the presumption of thirlage is founded; since greater jurisdictions, as a lordship, county, or stewartry, afford no such presumption. As the Magistrates and Town Council of a burgh (who are not proprietors of the burgher-tenements, but only administrators of the common good) could not constitute a servitude by their deed; so no presumption can arise from it. Besides, it seems unnatural for a burgh to be thirled, it being designed for habitation and trade, and liable to no burdens but what are imposed by Parliament. Again, though the disposition of a barony will carry mills, if any be, as a pertinent, and sasine taken on the lands will include a mill, without any distinct specific symbol; yet it cannot be conceived that a Baron is under a necessity to thirl his lands to his mill. On the contrary, it was found not sufficient to thirl lands, that they were part of a barony, whereof the mill belonged to the pretender to the thirlage; July 12th, 1621, *Douglas v. Earl of Murray*, voce *PRESCRIPTION*; and July 13th, 1632, *Earl of Morton v. Feuars of Muckart*, *IBIDEM*; though, indeed, less proof in such a case will be sustained to infer a thirlage. As to the case of Newliston and Inglis, as it is a very singular decision; so my Lord Stair, book 2, title 7, § 17, supposeth plainly that this thirlage had been constituted before, and that disposing a part of the lands of the barony did not infer a liberation, unless there had been clauses to that purpose; 2do, There can be no reasoning from the parallel of the King's mills, without proving immemorial possession. Besides, that privilege being restricted to the King's property, can never be extended to burghs.

The Lords found, that, by the charter granted by King Robert the Bruce to the Good Town of Edinburgh, a thirlage within the Royalty to the Town mills is constituted; by which the Good Town is enabled to restrain and hinder the brewers to make use of hand-mills, or other engines, or do any other thing whereby the said thirlage may be prejudiced and diverted. *Fol. Dic. v. 1, p. 574. Forbes, p. 453.*

No. 7. [8903] *WILLIAM CUNNINGHAM of Craighens v. THOMAS KENNEDY of Pannel.*
November 22, 1713.

An heritor was found entitled to build a dam-dyke, both ends of which rested on his own ground, above a mill belonging to an inferior heritor; the water returning into the same channel.

In a process of declarator, at the instance of William Cunningham v. Thomas Kennedy, and the counter declarator, at the instance of the latter [8904] against the former, the Lords found, that Thomas Kennedy could build a dam-dyke on the water of Lochre, for gathering of the water to his own mill, above the place where William Cunningham had a mill upon the said water; both the ends of the dam-dyke being made to rest on Thomas Kennedy's own ground; and it being so built, as not to divert the water that comes over it, or goes from his mill, from returning to the channel of the water, and going to William Cunningham's mill, below.

Albeit it was alleged for William Cunningham, That he, beyond all memory, had been in possession of the free course of the said water to his mill, without any dam-dyke above upon it; and Thomas Kennedy's building one now was *novum opus*, which would hinder William Cunningham of that *aqueductus*, so far as necessary to the going of his mill, acquired by the positive prescription. To clear that *jus aqueductus* may be so acquired, he cited l. 3, § 4, *D. De aqua quotidiana et aestiva*, l. 1, § . in *med. D. De aqua et aqua pluviae arcend.* And a recent case of Thomas Aitkenhead of Jaw v. Russell of Elrig (not reported).

In respect it was answered for Thomas Kennedy, Albeit the master of a lower tenement is obliged to receive therein the water flowing off the higher tenement, it was never before pretended, that the master of a superior tenement was obliged to let the water run free; Donell, lib. 11, c. 9, l. 15, c. 47. L. 1, § 12, *D. De aqu. et aquar. pluviar. arcend. et opus aliquod in suo faciente novum non potest nuntiari*, l. 2, *D. De operis novi nunciacione*. Nor can any prescribe a right to hinder another to do in *suo* what he pleases, especially what depends *ex mera facultate*. The water's having always run free, can neither be called Craigens' nor Thomas Kennedy's possession of the free course of the water, possession being rather *facti* than *juris*; and *jus aqueductus*, and a free water-course, quite different things. So that this case hath no affinity to that of Jaw and Elrig, where it was not a declarator of the free course of the running water, but of a water-gang, made by way of ditch, proceeding furth of the Loch of Elrig, to which Jaw had an express title by charter and sasine; whereas, Craigens cannot pretend to infetment in the free course of the water of Lochre.

It seemed also to weigh with the Lords, that this running water was but *flumen privatum*, or a burn, which is considered as a part of the lands it runs through; and therefore, the heritor of the lands can dispose of it at pleasure, by damming up, or otherwise, for his own use, *qui hoc facit in suo*, provided the natural course be not diverted, so as to hinder the water to turn into the former channel, when it comes to the bounds of the heritors of the lands below.—See PROPERTY.

Forbes, MS. p. 4.

No. 1. [8906] SOMERVILLE v. HAMILTON. January 23, 1541.

The Lords of Council decerned in a cause of spuilzie, moved by one Somerville, Parish Clerk of the Kirk of N. v. one called, *ut recorder*, Hamilton and his Son, That the said son ought to answer *in causa spoliis intentata*, notwithstanding that, *tempore spoliis*, Mr. Thomas Marjoribanks, his Procurator alleged he was but six years old, and so could not *peccare, nec vim committere*, nor yet be obliged *ex delicto causante defectu intellectus in illa causa*. Which allegiance the Lords thought reasonable, *in causa criminali, sed non civili, nec cum aliena jactura locupletetur et injuste rem alienam detinuerit*.

Fol. Dic. v. 1, p. 575. Sinclair, MS. p. 4.

No. 6. [8907] AITKEN v. HEWAT. January 9, 1628.

In an exhibition of evidents, the Lords found no process against John Hewat, who was convened as haver of the evidents, because it was alleged that he was within ten years of age, and so could not be called as haver.

Fol. Dic. v. 1, p. 575. Kerse, MS. fol. 186.

* * Spottiswood reports this case :

In the action pursued by Aitkin v. Mr. Peter Ewart, the defender having raised an incident for recovery of some writs that were in the keeping and custody of umquhile Alexander Mowat, and now were in the hands of John Mowat his eldest lawful son, the Lords would not sustain the incident against John Mowat, because he was a pupil within the age of 12 years, for it was thought that a pupil could not be convened as haver, seeing he had not himself (so to say) not being *sui potens*, and it was holden *pro confesso*, that a pupil could not *inchoare possessionem rei alienae*: but the question was, whether the pupil might continue his father's possession (as was in this case), and so might be convened as haver of any writs which were in his father's hands the time of his decease; which sundry of the Lords thought might be, because otherwise it might be prejudicial to them that had writs or evidents lying in other men's hands. Yet the most part thought a pupil could not *teneri de*

facto non magis alieno quam proprio, unless he were heir to his father ; or if he have tutors, they may be convened *nomine tutorio* as havers, and not the pupil.

Spottiswood (MINORS AND PUPILS), p. 211.

No. 9. [8909] The Tutors of Sir ROBERT GORDON of Gordonston, Supplicants.
July 17, 1707.

The Lords, upon a representation given in by the Tutors of Sir Robert Gordon of Gordonston, found that neither he, nor his Tutors were bound, in the ranking of the Creditors on Sir Patrick Ogilvy of Boyn's estate, to depone upon the verity of a debt for which he the pupil was a creditor by adjudication. And therefore stopped any certification against his interest for not deponing, until he were of age to depone ; and allowed his interest to be ranked in the mean time.

Fol. Dic. v. 1, p. 575. *Forbes*, p. 184.

No. 11. [8910] THOMSON v. KER. January 27, 1747.

A minor may be imprisoned on a decree for debt.

Edward Ker having obtained a decree against Katharine Thomson while pupil *et indefensa*, soon after her pupillarity he charged her thereon ; and, on a caption, imprisoned her in the tolbooth of Edinburgh.

In the suspension and reduction of this decree, and action of damages therewith conjoined, the question only turned upon the formality of the decree and regularity of the extract ; but supposing the decree regular, it was no part of the complaint, nor thought illegal that the imprisonment was of a minor. Nay, it would rather appear from the act 41st, Sess. 6th, Parl. 1st, of King William, that before that act, even minors under pupillarity might have been imprisoned for a civil cause.

Fol. Dic. v. 4, p. 3. *Kilkerran (MINOR)*, No. 6, p. 348.

No. 12. BOWER, Complainer. July 29, 1750.

Power competent to the Lords, in case of undue influence on a minor in the election of his curators.

Bower of Kincaldrum settled his estate, failing heirs of his own body, upon Alexander Bower eldest son of Bower of Easter Methney, and the heirs-male of his body ; whom failing, upon Patrick Bower, eldest son to Bower of Kinnettles, &c.

[8911] About a year thereafter, Kincaldrum died without issue, whereby the succession opened to Alexander Bower, son of Easter Methney, an infant, whose affairs were managed by his father during his life ; but upon his father's death, while he was about ten years of age, Archibald Bower, author of the *History of the Popes*, his nearest agnate, residing in England, and not being in a situation that made it fit for him to claim the office of tutor, Bower of Kinnettles, the next agnate, and whose family had the next interest in the estate, obtained a gift of tutory dative ; but means were found to disappoint him of the custody of the pupil's person, by certain of his relations of the Popish religion, who carried him to France, where he was settled in the Scots College at Paris ; and as soon as he arrived at the age of 14, a project was formed for their getting the management of his estate, which till now remained with Kinnettles the tutor-dative.

On July 12th, 1749, there was a nomination signed by the boy at Paris, whereby he named and elected to be his curators five or six persons, and the accepters or survivors of them; and because he could not himself attend, he authorised an agent to raise the proper precepts or summonses for expending the act of curatory. Accordingly such process was carried on before the Court of Session, where, as a matter of course passing among the regulations, it goes on with less observation than if it were before the Judge Ordinary; and at the same time, the persons summoned as nearest of kin of the father's side were really not the nearest but very remote relations; but on the mother's side there was no hazard in taking the nearest, they being of the popish religion.

But when the matter was brought so far, that at a calling on the 23rd June 1750, the pursuer's procurator represented that the whole curators had accepted and given their oath *de fidei*, and craved they might be authorised, Kinnettles, from whom, though the nearest agnate, the matter had been kept a dead secret, having got notice of these proceedings, appeared by his procurator, representing, That he was nearest agnate, and objected to the proceedings as all null, in respect he, though a nearer agnate than any of those cited as such, had not been called; and here the process was dropped; the plot hatched in the Scots College at Paris was now discovered, and could not be carried into execution.

Upon this Kinnettles, whose interest in the minor and his estate has been above stated, applied to the Lords, setting forth the case, with a variety of other circumstances in relation to the singular management of the process, and craving that the Lords would, in terms of their act of sederunt of February 13th, 1730, appoint a factor upon the minor's estate, signifying his own willingness to accept of the office, and craving that the Lords would at the same time authorise him to bestow such expense as should be proper or necessary towards recovering and bringing home the person of the minor; and give such other relief to the petitioner, on behalf of the minor his late pupil, as to their Lordships should seem meet.

[8912] On advising this petition, the Lords, on June 29th, 1750, "Appointed the petitioner *curator bonis* to the said minor, upon his finding caution in terms of the act of sederunt; and in the mean time empowered him to lay out such sums of money as he should be advised were necessary towards recovering the person of the minor; and in the mean time stopped all further procedure in the process for election of curators."

The ground of law on which the Lords sisted further procedure in the process for election of curators was this, that wherever there is suspicion of undue management, or of imposition on the minor, it is competent to the Court *ex officio*, in order to prevent undue influence, to sequester the person of the minor for some time; whereof there is a precedent in the case of Sir Robert Gordon, No. 10, p. 8910. And accordingly the doers for the minor in this case were let to know, that no curator of his choice could be appointed till he should appear in Court.

Kilkerran (MINOR), No. 13, p. 354.

No. 16.

[8915] GORDON v. Earl of ERROL. June 1582.

Found that a minor may be an arbiter.

The Laird of Pitlurg, Gordon, pursued for letters conform to a decree-arbital given between him and the Earl of Errol, and the said decree was given by the Earl of Huntly, being *minor annis*, unto whom the said parties compromised by a blank. It was alleged by the said Earl, that no letters ought to be given, because the said submission and compromit, whereupon the said decree past, was null of itself, by reason the submission was made to the Earl of Huntly *minor annis*; nam de jure minor annis, arbiter esse non potest, cum l. 41, D. De recept. arbit. aut ullo modo judex, l. 57, D. De re judicata, ac etiam de jure nostro municipali, prout in l. 2, regia majestate L. servis autem. To this and to the laws was answered, That the parties had homologated the submission, and compromitted by submitting of a blank; and

as to the laws they were understood except the parties had not consented in *predictum comitem*, by the subscribing of a blank, and also the laws appear to be understood, de arbitrio et non de arbitratore et amicabile compositore ; and there is great difference inter arbitrium et arbitratorem, sivi amicabilem compositorem, ut notatur per Joannem Petr. de ferra, in forma libelli, de quo arg. ad pœnam ex compromisso, nam arbirer procedit in specta forma judicii et tanquam judex ordinarius, arbitrator autem prætermisso juris ordine, et prout equum sibi visum fuerit ; and into all their submissions which are made by blanks, he unto whom it is compromitted, and into whose hands they are put by reason of the great liberty that is given unto the filling of the same, he cannot be accounted arbirer, and restricted as *judex ordinarius*, but rather *arbitrator et amabilis compositor*, having liberty as he pleases to fill the blank. To this was answered, of the practick of Scotland, Judges, arbi-[8916]-ters, and, amicable compositors are all but one, and under one form and manner of proceeding, but as to the word "arbitrator," *non est de jure*, but a *commentatoribus excogitatum*, and as to the consent of parties, and their homologation unto the minor, they might not do that in prejudice of the law, *quia jus commune privatorum pactionibus tolli non potest*. After long reasoning and advising, it was pronounced by the President, by reason of the equality of voting among the rest of the Lords, the matter stood, that the foresaid submission was lawful, notwithstanding of the foresaid alleged laws.

Fol. Dic. v. 1, p. 576. Colvil, MS. p. 332.

No. 21. [8917] MAITLAND v. CASCHOGILL. January 16, 1623. 1

Found that a minor might make oath *super facto proprio*.

Maitland of Eccles pursued Caschogill, as donatar to his ward, to pay him for his entertainment since the year 1606, to the year 1618. It was excepted by the defender, He should be assoilzied, because the pursuer was all that time entertained by his mother, which he referred to his oath ? and that he, by paction with the pursuer's mother, had allowed her yearly some bolls of meal and some money to entertain her son, pursuer, which she had accepted and done, which he referred to her oath. It was replied, That the probation could not divide, but the whole exception behoved to be referred to the pursuer's oath, neither could he be urged to swear, being minor. The Lords found, the exception relevant and probable on the several members, by the oaths of the mother and son, and that he, therefore, albeit minor, might give his oath *super facto proprio*, especially being eighteen years of age.

Fol. Dic. v. 1, p. 575. Haddington, MS. No. 2723.

No. 22. [8918] Executors of KINNIER v. Executors of ADAM RAE. January 28, 1623.

The executors of umquhile James Kinnier, writer, who had written, and formed diverse writs and securities to umquhile Adam Rae, pursues the executors, and bairns of the said umquhile Adam, for payment to them, of the prices of the said writs, and referred to their oaths the summons, viz. both anent their knowledge of the said umquhile James's forming, and writing to the said umquhile Adam their father, diverse writs and securities ; and also to their knowledge, that the same remained yet unpaid. The Lords found, that the defenders ought not to be compelled to give their oaths, albeit the pursuers referred the knowledge of the debt, that it was true, and that it remained unsatisfied as yet, to their oaths, seeing they were minors the time of the forming and making of the said writs, and could not have knowledge thereof, neither could they have knowledge, nor depone, whether it was paid or not.

Act. HOPE & BELSHES.—Alt. NICOLSON & LAWTRIE.—Clerk, HAY.

Durie, p. 42

No. 24. E. MARR v. HIS VASSALS. June 19, 1628.

The oath of a minor may be taken in an exhibition.

In an action of improbation by the Earl of Marr v. the Vassals of Marr, an incident being used by one of the defenders, who were minors, for having of the writs libelled, and the pursuer referring the having of these writs to the parties oaths; it being controverted, if minors could be holden to give their oaths, or if certification should be granted against them, and they holden as confest for not compearance, being for that effect cited, the Lords found, That minors, albeit within 21 years, yet if they were past the age of 14 years, and so past tutory, ought to give their oaths in this and the like cases, and [8919] that if they were present they should give their oaths; and if they compeared not after citation, they should be holden as confest.

Act. KING'S ADVOCATE, AITON, NICOLSON *et* STUART.—Alt. BELSHES, CUNNINGHAME, MOWAT *et* LAWYER.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 575. Durie, p. 375.

No. 26. [8920] FORBES of Gask v. LAIRD of PITSLIGO. July 1, 1628.

Forbes of Gask is obliged, by his bond, to pay to the Laird of Pitsligo 2400 merks; the bond is registered and the Laird charges for the money. The defender suspends, alleging, The Laird of Pitsligo and his curators promised to discharge him of 400 merks of the said sum, and referred the same to the Laird's oath of verity and his curators. It is alleged by Pitsligo, That his curators might not depone to his prejudice, and that he was ready to give his own oath. The Lords found the reply relevant, and ordained the Laird to give his oath. *Auchinleck, MS. p. 133.*

No. 30. [8922] Countess of BUCCLEUGH v. EARL of TARRAS. February 7, 1662.

The Countess of Buccleugh pursuing reduction of a contract of marriage betwixt her sister and the Earl of Tarras.

The Lords would not sustain incident for the Earl of Tarras, albeit he was minor, that contract being his own writ, and not his predecessor's. *Stair, v. 1, p. 93.*

No. 33. [8925] GEORGE HERIOT v. MR. HENRY BLYTH. November 1681.

A curator having, in obedience to a letter sent from his minor abroad, furnished the minor's younger brother with 300 merks, the Lords sustained the article of payment in the curator's discharge, though quarrelled upon minority and lesion, in regard it was *res minima*, and done to a brother who was indigent, and had but 400 merks of stock. *Harcarse (MINORITY), No. 697, p. 197.*

No. 35. [8927] HARPER v. HAMILTON. July 1687.

In a pursuit at the instance of Harper v. Henry Hamilton, for a sum in a bond by John Hamilton the defender's father, as principal, and himself as cautioner, expressly declared to be for shoes and boots to the defender,

Henry alleged minority and lesion, that he had raised reduction *ex eo capite*; 2do, That the father could not authorise the pupil.

Answered; The goods were *in rem versum* to the minor, and he was forisfamiliar. The Lords found the answer relevant. *Harcarse (MINORITY), No. 717, p. 203.*

No. 37. [8928] ISABEL DUNCANSON, and her Assignee v. JAMES DUNCANSON.
June 28, 1715.

A woman, minor, entered into co-partnership, and her tutors paid part of her money to the company, and expended the rest on her maintenance. The money had borne no interest. Found that her money might be employed in the joint trade, but could not be diminished by her aliment.

Robert Duncanson of Garshake, by his latter will, provides the said Isabel his daughter (a minor) in 500 merks, payable by her eldest brother, the said James Duncanson, out of the readiest moveables, at her marriage or majority, but bearing no annualrent; and in the same testament, there is subjoined a nomination of tutors and curators to his children, of whom three to be a quorum, and the eldest brother *sine quo non*, with power to them to intromit with his rents, &c., for the children's education. Isabel coming to be *in confinio majoris ætatis*, enters into a co-partnery with another woman, who was a shopkeeper; and in regard she was to furnish the half of the shop with wares, her said brother paid out for her £22 Sterling for goods, and bestowed the remaining balance of the 500 merks for her board, cloathing, &c., and took a discharge of the tocher from her, being authorised by her other curators, who, as taking burden for her, do subscribe the same with her.

Of this discharge, she and Thomas Hall, her assignee, raised a reduction *ex capite minorennitatis et læsionis*, and it was alleged for them, as to the £22 Sterling, That the brother could not be in *bona fide* to pay the same, either to or for the minor, since he was expressly bound up by the words of the testament, whereby the tocher was only payable at majority or marriage. Nor, 2do, Did the consent of the other curators validate the discharge, since himself was *sine quo non*; nor could he be *auctor in rem suam*, and consent to a discharge granted to himself.

Answered for the defender, 1mo, That as the stock bore no annualrent, so although it had, so small a sum could never be a fund for the minor's maintenance; and therefore his bestowing part of the stock for putting her in a way of living, was certainly both prudence and piety, and is nothing that is *novum*, but a course very commonly taken by parents with their own children; specially that the goods purchased were not absolutely intrusted to herself, but another who was habit and repute to be of integrity and skill in the trade, joined with her. 2do, Since he could not be *auctor in rem suam*, the authority of the other curators in this case was undoubtedly sufficient; it being universally received, that when any affair occurs betwixt a minor and one of his curators, the authority of the others is sufficient, since otherwise affairs of this kind could never be extricated.

The pursuer having also insisted for reducing the discharge as to the balance paid out for board, cloathing, &c.; it was answered for the defender, That since the stock bore no annualrent, it behoved to be diminished for entertaining the minor; for although the defunct, in his will, appoints the rents of his estate for years to come to aliment his children, yet these are not the subject of a testamentary disposition.

[8929] Replied for the pursuer, That by the current of decisions, it has been determined, that the heir is bound to maintain his brethren and sisters, in case of their having no fund of their own for their aliment; as 29th January 1663, Children of Netherly *contra* the Heir, No. 50, p. 415; 11th February 1663, Frazer *contra* Frazer, No. 51, p. 415, nor is there any thing more conform to nature and humanity. So that the pursuer needed not make any other use of the destination in the testament than to shew the defunct's *enixa voluntas*, that the children's portions should be paid to them entire at the terms he had appointed.

The Lords found, That the curators might employ the minor's stock in joining with a person held and repute of knowledge and reputation in trade; but found, that the stock could not be diminished for the aliment.

Act. HALL & COLVIL.—Alt. SMOLLET & BRUCE.—Clerk, ROBERTON.

No. 39. HAY of Hopes v. HEPBURN of Monkrig. July 25, 1735.

A Commissioner of Supply, by the nature of his office, is a judge, and also liable as cautioner for the collector; and, therefore, it being objected against a Commissioner of Supply, in a question which of two was legally chosen collector, that he was minor, the objection was sustained. See APPENDIX. *Fol. Dic.* v. 1, p. 576.

No. 42. [8930] Lord DRUMMORE v. Miss MURRAY. January 27, 1744.

Lord Drummore, Sir John Baird, and others, being named curators to Miss Murray, by her father, desired her to sign a factory, which she refused, on the ground, that her curators concealed from her the state of her affairs, for which reason she declined to concur with them in any deed. The curators gave in a complaint to the Lords, praying, that they might be authorised to act without her. Answered, *Imo*, The Lords cannot even give curators to a minor, contrary to her inclination, much less authorise curators to act without the minor's consent, nor was this demand authorised by the law of any country. *2do*, The minor had a right to know the state of her affairs; and from the circumstances of the case, the demand made by the curators concerning the signing of the factory, was unjust and unreasonable. The Lords unanimously refused the desire of the petition. See APPENDIX.

Fol. Dic. v. 4, p. 8.

No. 43. [8931] Earl of MORTON v. MUIRHEAD. February 10, 1749.

A tutor purchased land for his pupil, and borrowed money to pay it, although he had sufficient funds in his hands belonging to the pupil. The pupil notwithstanding liable to the creditor.

The late Earl of Morton lent 5000 merks to Alexander Muirhead of Linhouse, grandfather and tutor-in-law to Alexander Muirhead, now of Linhouse, for which he got his bond, bearing that the sum was borrowed for paying a part of the price of the lands of Welheads purchased by the tutor at a public roup from the trustees of the Lord Torphichen, for the use and behoof of his pupil and grandchild.

In the process at the instance of the present Earl, against the then pupil, Alexander Muirhead, now of Linhouse, it was for him alleged, That as there was no evidence of the money being applied by the tutor towards the price of that purchase, so *2do*, *Esto* it had been so employed, he could not be liable, as the money had been unprofitably borrowed, the tutor having at the time other money in his hand sufficient for that purpose; and a diligence was craved for instructing, that the tutor had before the purchase intromitted with funds sufficient to pay the price of the lands purchased by him.

But the Lords were of opinion, That it is not necessary for the lender to maintain that the tutor had no other money to answer the purpose for which it was lent; that is what the creditor has nothing to do with, for whom it is enough to say, that the money lent was so applied; and the following circumstances were found sufficient to shew that the money was so applied, viz. The narrative of the bond, the sale tallying in point of time with the bond, the parties' admission that the price was paid, and the tutor's character for frugality; and therefore "they repelled the defence."

Fol. Dic. v. 4, p. 6. *Kilkerran* (MINOR), No. 8, p. 350.

No. 44. JEAN JOHNSTON v. HUNTER JAMES FERRIER, Son of James Ferrier, Tacksman of Gorton Coal. November 17, 1770.

A male under the years of pupillarity, incapable of contracting marriage.

James Ferrier Hunter, a minor, with concurrence of his father as curator, raised a process of scandal and putting to silence against Jean Johnston ; who, on the other hand, brought a declaration of marriage against him.

The Commissaries having allowed a proof to both parties, it was established, that the pursuer, who was a servant in the defender's father's house, and the defender had, in the month of June 1769, gone to Edinburgh together ; and after meeting with some obstacles which both endeavoured to remove, had been married by a person who was said to be a minister, in presence of witnesses, and by interchanging marriage lines, which were produced and dated 15th June 1769. The parties were also seen in bed together towards [8932] the end of July following ; and it was affirmed by the pursuer, though denied by the defender, that they had frequently had carnal knowledge of one another subsequent to the marriage. The defender was born on the 15th August 1755 ; and hence, at the time of the marriage, wanted two months, and at the time the parties were found in bed together, wanted two weeks at least of being fourteen years of age. The pursuer was then about twenty. There was also a good deal of evidence, that the pursuer, three years before her connection with the defender, had been in extremely familiar habits with one Nash a dragoon ; though it did not, on that head, amount to sufficient proof of a marriage.

The Commissaries pronounced an interlocutor, finding "the facts, circumstances, and qualifications proved, not relevant to infer marriage between her (Jean Johnston) and the said Hunter James Ferrier ; and therefore assoilzie the said Hunter James Ferrier from the whole conclusions of the said Jean Johnston's libel ; and of consequence find and declare, in terms of the libel at the instance of the said Hunter James Ferrier, so far as respects the putting the said Jean Johnston to silence."

Jean Johnston brought an advocacy of the cause ; and the Lord Ordinary having ordered memorials, it was

Pleaded for the pursuer,

Though it now turned out that the defender, at the time of the celebration of the marriage, was somewhat under fourteen years of age, yet he had, upon that occasion, affirmed to the clergyman who married them, that he was between sixteen and seventeen. The pursuer believed this to be the fact, and was authorised to do so, as well from his own positive affirmation, as from his manly appearance. In this case, accordingly, the exception from the general rule, as to the nullity of the marriage, when the male was under fourteen, "*nisi malitia suppleat aetatem*," pointedly applied ; that too, in the strongest sense, as well on account of the defender's bodily powers, as of his mental qualifications. The last was sufficiently evident from his whole conduct, in particular the deceit he had put upon the clergyman, and even upon the pursuer herself ; and the former fell to be presumed, from the situation in which they were found in bed together at night, as man and wife ; so that, notwithstanding the defender's denial, no doubt could remain but that the marriage had been actually consummated. Lord Bankton, b. 1, t. 5, § 26.

The defender's plea, that he was entitled, as a minor, to the benefit of restitution, was not applicable. The circumstances had gone farther than a mere civil contract ; for, by the consummation *res non sunt integræ*, and by the Roman law, the benefit of restitution was denied to a minor, "*qui se majorem dolose dixerit*." Kennedy v. Weir, 23d Feb. 1665, *voce* PRESUMPTION.

Pleaded for the defender,

[8933] It was an established point in the law of Scotland, that marriage could not be entered into before the complete years of pupillarity ; 29th June 1756, Cameron v. Malcolm, *voce* PROOF. The exception introduced by the canon law, viz. "*nisi malitia suppleat aetatem*," was in this country of very difficult application. The *malitia* was applicable to the mind only, and was frequently explained by the word *prudencia*. It was, according to the canonists, to be presumed from the ability of the party to consummate ; but as the decency of our practice confined the proof of this presumption of *malitia* to a view merely of the person, there could seldom, upon

this point, be an accurate conclusion formed. It would add much to the dangerous situation of youth, were an exception of this anomalous nature to be sustained; and as no instance could be pointed out where this exception had legitimated a marriage solemnised within the years of pupillarity, it did not appear, that it was at all applicable to the law of this country.

As to the effect of cohabitation to ratify a marriage entered into in pupillarity, there was a distinction to be taken betwixt cohabitation after, and cohabitation prior, to attaining the years of majority. The one might be effectual, the other could not; but as to both, it was certainly fair, that this ratification should not be presumed from every species of cohabitation or unpremeditated rencontre, but from an open, regular, and avowed cohabitation as man and wife. In the present instance, there had been no cohabitation after pupillarity; and even that consummation which was alleged to have taken place, was not of that open and avowed nature as was required by the law to validate the marriage; but, on the contrary, appeared from the proof never truly to have taken place at all, or at least was not from the circumstances to be presumed. As no consummation again after pupillarity was either proved or was to be presumed, he was entitled, on the head of minority, to be restored against the injury he would otherwise sustain.

The Judges, in very strong terms, reprobated the action. The maxim of the canon law *nisi malitia, &c.*, was not received in the law of Scotland; and it was observed, that though a marriage contracted under pupillarity might, without any new ceremony, be validated after pupillarity, when done solemnly and *ex animo*, yet it would be highly dangerous if this could be accomplished merely by lying with the woman, as that was done not *ex animo*, but *ex libidine*, and from enticement.

They therefore unanimously approved of the Commissaries' judgment, and remitted the cause *simpliciter*.

Lord Ordinary, STONEFIELD.—For Johnston, A. BALFOUR.—For Ferrier, GEO. CLERK.

R. H.

Fac. Col. No. 45, p. 130.

No. 45. [3934] ROBERT GRAHAM, and Others v. ELIZABETH GRAHAM. August 8, 1780.

A female just 12 years of age, to whom her mother and several other persons had, by her father, been named curators,—at liberty, in opposition to the latter, to accompany her mother to a foreign country, with the purpose of residing there.

Mr. Graham of Gartmore appointed, as tutors and curators to his children, who were all daughters, "for managing and governing their estate, real and personal, and directing and overseeing the care of their persons and education," Robert Graham, his brother, his own wife, the mother of the children, and several other persons.

For some years after his death, the children lived in family with their mother; till, upon the near prospect of her marriage to a gentleman who resided at Lisbon, it was thought proper that they should be placed at a boarding-school in Edinburgh. The eldest of them, Elisabeth, was then drawing near to the legal age of puberty, that of 12 years. On the fifth day after she had attained it, she had addressed a letter to her guardians, informing them of her resolution to accompany her mother, and not to go to the boarding school, adding, that by law she was now become mistress of her own person.

A majority of the guardians, alarmed at this message, presented a bill of suspension to the Court, praying "for an interdict against Miss Graham from going, and against her mother, and every other person, from carrying her out of its jurisdiction."

Pleaded for the suspenders, Experience shows, that in order to render the general rules relative to the age of puberty, which our law has borrowed from that of the Romans, consistent in this northern climate with reason and propriety, these rules must suffer such a controul and limitation as are suited to the circumstances which really prevail. It is a power inherent in the supreme Court to regulate their application, whether with respect to the marriage or place of residence of minors. Of the former, the case of Niven *contra* Cuming, March 6, 1688, is an example. Of the latter, it does not appear that circumstances so extraordinary as the present have before

occurred to produce one. No child of twelve years of age has till now insisted on being carried away from her native to a foreign country.

But the same authority has been exercised by the Court, on the same principle, in cases analogous to the present. If it is supposed, that minors, immediately after puberty, have the disposal of their own persons, it is equally admitted, that, when not prevented by the father's nomination, they may chuse their own curators. Yet in the case of Bower, July 29, 1750, No. 12, p. 8910, in which a young man of fourteen years of age, had, by some Popish relations, been carried over to the Scots College at Paris, where a scheme was formed by them of getting the management of his estate by his nomination of them as his curators, the Court authorised the nearest agnate, who had been his tutor of law, to recover the person of the minor, and to bestow such expense out of the minor's funds as might be necessary for that purpose. The principle on which the Court interfered was, according to the remark of the learned [8936] collector, "That wherever there is a suspicion of undue management, or of imposition on the minor, it is competent for the Court, *ex officio*, to prevent undue influence, to sequester the person of the minor for some time, as in the case of Sir Robert Gordon, No. 10, p. 8910, observed by Forbes." In this case, indeed, not only the minor's power of nominating his own curators was controuled by the Court, but they gave directions also for regulating the place of his residence.

Though the law has fixed the age of puberty at an early period, and in general has annexed to it a power in minors of disposing of their own persons; yet, when their safety or advantage requires the interposition of the Court in the controul of this power, it is not to be withheld. In the present instance, the removal of a young lady to a distant and a foreign country, would be attended with such consequences as call for the protection of the Court to the unexperienced person who is thus threatened with them. This application, the suspenders are more particularly entitled to make, that besides being along with the mother, nominated tutors and curators by the father, they have specially conferred on them "the care of his children's persons and education"; and thus possess all the authority which he himself would have if he were in life.

Answered, There is no doubt in our law at what period pupillarity ends and minority begins. Nor is the maxim less unquestionable, that "*tutor datur personæ, curator rei*"; whence arises the free disposal of the persons of minors by themselves in marriage, and surely not less the free choice of their place of residence, which is of such inferior importance, and so evidently implied in the former. A pupil indeed has no person in a legal sense, and tutors must act for him. But by the common law, and prior to the statute 1696, as soon as the years of pupillarity were past, minors were free to act for themselves; nor could their fathers, or any other person, impose curators on them, except as a condition of a gift proceeding from themselves; and then the administration of these curators was confined to the special subject granted; so far were they from obtaining any controul over the persons of minors, December 10, 1675, Scot *contra* Kennedy, *voce* TUTOR AND PUPIL. Neither does that statute alter the nature of curatory; it only gives to the father the power of nominating curators as well as tutors. The persons of minors are still exempt as before from the curatorial authority, and in particular with respect to their place of residence, July 25, 1741, Marshal *contra* Macdowal, No. 41, p. 8930. The case of Bower, No. 12, p. 8910, reported by the same collector, proceeded, notwithstanding the opinion of that learned judge, altogether upon the statutes 1661 and 1700 relative to Popery. Nor does that of Niven afford any instance of controul upon the choice of a minor in marriage, but of the punishment of a crime, and the redress of a wrong.

This minor then possesses the right of disposing of her person as she pleases, and, in particular, by chusing her place of residence. Her curators are not entitled, from any notions of expediency, to controul her. Yet were it otherwise, it would still be incumbent on them to show that there is any impropriety in a daughter accompanying, or living and receiving her education under the [8936] care and protection of an affectionate mother, whose character is irreproachable.

Observed on the Bench, The law of Scotland has not conferred on curators that controuling power over the persons of minors which is here claimed; and the *nobile officium* of the Court ought never to be at variance with the law. Indeed the measure of which these curators complain, appears not to be attended with any real hazard to the young lady.

The Lords "repelled the reasons of suspension, and removed the interdict."
To this judgment the Court adhered, on advising a reclaiming petition and answers.

Reporter, LORD BRAXFIELD.—For the Suspenders, SOLICITOR-GENERAL MURRAY,
ILAY CAMPBELL.—Alt. CROSSIE.—Clerk, TAIT.

Fol. Dio. v. 4, p. 9. *Fac. Col.* No. 123, p. 226.

No. 46. JOSEPH SCOFFIER v. WILLIAM READ and SAMUEL READ, his father, and administrator in law. July 26, 1783.

A minor drew bills on his father in London, in favour of a haberdasher in Edinburgh, who advanced some cash on them, and furnished goods for the remainder. Acceptance of the bills was refused. The minor found not liable for the cash, and only for such part of the goods as was applied for his own personal use. His father had sufficiently supplied him otherwise.

William Read, the son of a merchant in London, in the sixteenth year of his age, was bound apprentice to Mr. Hay, surgeon in Edinburgh, who had directions to advance every thing necessary for his subsistence and education.

Soon after his arrival in Scotland, Mr. Read became debtor to Joseph Scoffier, haberdasher in Edinburgh, in the sum of £50 Sterling, partly on account of money advanced by Mr. Scoffier, and partly for goods furnished by him. For [8937] this sum, Mr. Read drew bills on his father, which the latter refused to accept.

In an action for recourse against the minor, in which compearance was made for Mr. Read the father, the Lord Ordinary pronounced the following judgment, which was adhered to by the Court upon advising a reclaiming petition for Mr. Scoffier.

"In respect it is admitted by the pursuer, that the defender, William Read, is a minor, and that he, the pursuer, who is not a banker or professed dealer in bills of exchange, had no mandate from his the said William Read's father, the other defender, to make advances to or for him; but that, on the contrary, such commission had been given by his father to Mr. Thomas Hay, in whose house the said William Read lodged, and to whom he was then bound an apprentice, and who, it is not alleged, had refused to supply the defender William Read with such furnishings as were necessary and suitable; finds, That the pursuer acted rashly and improperly in lending or advancing to the said William Read, on the 23d of October 1782, the sum of £16, 16s. 6d. Sterling, upon getting the said defender's bill or draught on his father, then residing in London, for £20 Sterling, and so soon as the 4th of November following, advancing to him another sum of £16, 2s. 11d. Sterling, upon getting a second bill or draught from the defender on his said father for £30 Sterling, and both which bills were returned protested for not acceptance; and in respect the pursuer does not offer to prove that the said two sums of £16, 16s. 6d. and £16, 2s. 11d. Sterling were afterwards usefully applied to the clothing, education, or maintenance of the said defender; finds, That the said two bills must be held as in so far granted by the defender, a minor, without consent of his father as administrator-in-law, to the lesion and prejudice of him the said defender; therefore assolvies as to the said two sums, part of the contents of the two bills sued on; and also assolvies as to the farther sum of £6, 9s. 6d. Sterling, admitted to have been included in the contents of the £30 bill, as the price or value of a woman's black silk cloak, which the pursuer must have known to have been intended for the use of a person of the female sex, and not to be used or worn by the defender; but in regard it is admitted on the part of the defender, that the remaining sums contained in the said two bills, viz. the sum of £3, 3s. 6d. contained in the first bill for £20, and the sum of £7, 7s. 8d. included in the second bill of £30, were sums due by the defender William Read to the pursuer, on account of articles of wearing apparel furnished by the pursuer to the

defender, decerns against the said defender William Read for the said two last mentioned sums, amounting together to the sum of £10, 11s. 2d. Sterling."

Lord Ordinary, ESKGROVE.—Act. CULLEN.—Alt. RO. SINCLAIR.

C.

Fol. Dic. v. 4, p. 3. *Fac. Col.* No. 115, p. 179.

No. 49. [8939] M'ADAM v. Laird of LAG. July 24, 1605.

M'Adam pursued the Laird of Lag for registration of an obligation of 500 merks. It was excepted, The obligation could not be registered, because it was null, being made by him, being minor, having curators, without their consent. It was replied, That the sum therein contained was applied profitably for the behoof and utility of the defender, for the redemption of his land. It was answered, That the obligation was null of the law; and, therefore, the party could not be held to dispute upon utility or lesion; notwithstanding whereof, the Lords repelled the allegiance, in respect of the reply.

Fol. Dic. v. 1, p. 576. *Haddington, MS.* No. 942.

No. 50. SETON v. L. CASKIEBEN. March 21, 1622.

In an action pursued by Mr. George Seton v. the Laird of Caskieben, the Lords found, that a tack taken by Caskieben, a minor, without consent of his curators, was as null as if he had made a disposition without their consent; because, his acceptance of that tack, if it should stand, would prejudice him of a valid tack for more years, and a less duty, which he had before.

Fol. Dic. v. 1, p. 576. *Haddington, MS.* No. 2620.

* * Kerse reports this case.

The Lords found an exception of a tack by a minor, who had another right in his person standing, being done without consent of his curators, null *ipso jure*.

Kerse, MS. fol. 146.

No. 51. DRUMMOND v. B. BROUGHTON. June 22, 1627.

Mr. James Drummond having charged the Baron of Broughton for his fees, conform to his obligation, containing the sum of 200 merks, the Baron suspending, that, at the subscribing of the said obligation, he was minor, having curators, who consented not thereto; the Lords found this allegiance relevant against the reason, that the bond bore to be given to him, who was his Pedagogue, for his fees and service; and that he offered to prove that he was his Pedagogue, and served and attended him, as the bond bore; so that this cause being expressed in the bond, and the verity thereof being proved, which they found probable by witnesses, and found no necessity to refer it to the suspender's oath; they found this sufficient to maintain the bond against the reason of minority, and having of curators not consenting to the bond; seeing the suspender alleged not that his fees were satisfied, and he compensated *aliunde* by any other.

Act. PRIMROSE.—Alt. —.

Fol. Dic. v. 1, p. 576. *Durie*, p. 298.

No. 55. [8941] JOHN INGLIS v. The Executors of Umquhile JOHN SHARP.
February 5, 1631.

A merchant may lawfully supply a minor with clothes, and other necessities, without orders from his curators.

The Executors being convened for £417, as the price of certain clothes and wares, furnished by the pursuers to the said John in the years 1627 and 1628, for the abuilziements of his body; and the said executors alleging, That the said Sharp was minor the time of the said furnishing, and then had curators, without whose consent or direction the said furnishing being made, the pursuer could not have action therefor; the Lords repelled this allegiance, in respect the minor, the time of the furnishing, was 18 years of age, and that the same was made to him for his necessary abuilziements, and that he being a young man of a good estate, the furnishing was not immoderate, the defenders never alleging, that the minor was otherways furnished by his curators; and the pursuer also offering to prove, that he had made the like furnishing to the minor in other preceding years, for which he was satisfied; in respect whereof, the action was sustained; and the Lords found no necessity, that the minor's curators should be first discussed, before the executors could be convened.

Act. NICOLSON & NEILSON.—Alt. BURNET.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 576. Durie, p. 565.

* * Auchinleck reports this case.

John Douglas, merchant, pursues Anna Sharp, relict of umquhile Robert Bruce of Pittellie, executrix confirmed to umquhile John Sharp, for payment of certain merchandize, furnished for apparel to the said umquhile John Sharp, [8942] a little before his decease. It was excepted by the defender, That the said umquhile John Sharp being minor, his executors cannot be obliged for any gear furnished to him, without direction of his curators. It was replied, That the pursuer being his merchant before, and in use to furnish him, and being past 16 or 17 years of age, might very lawfully take up such merchandize as was necessary for him, viz. apparel, whereof he produced the account, and offered to prove the receipt of the particulars by the minor; and referred to the Lords the reasonableness of the prices. The Lords repelled the exception, in respect of the reply.

Auchinleck, MS. p. 135.

No. 58. [8943] BELL v. WILSON. January 30, 1639.

Found that minority might be proved, although from the terms of the act of curatory, the party, by caculation of time, would have been major.

One Bell having charged Wilson for payment of a sum, contained in his obligation, who suspending, that the bond was null, he at the subscribing thereof being minor, and having curators, who has not consented thereto; which being received, and found relevant by way of suspension, he produced his act of curatory, and desired a day to prove his minority. And the charger alleging, that the act of curatory contained in the body thereof, that the minor was at that time of the chusing of his curators past sixteen years complete, whereby the time of the date of the bond, it appears clearly he was more than major; and the other answering, that notwithstanding of that assertion, which if he made it, he was then also minor, and could not know his age, and was it not pertinent to the judge and clerk to insert any such narration in an act of curatory, that yet he might be heard to prove *veritatem rei*, and that he was minor the time when the bond was subscribed; the Lords repelled this allegiance, and found that the minority might be proved, notwithstanding of the assertion contained in the act of curatory, which if it had been true, he would have been major when the bond was subscribed; and the said declaration contained in the act was not respected.

Durie, p. 872.

No. 59. STUART v. STUART and HUME. March 23, 1639.

A bond granted by a minor for necessities, without her father's consent, was sustained.

George Stuart having furnished some money to Christian Stuart, daughter to John Stuart of Coldinghame, and having received her bond thereupon, and registrate the same, arrests in the hands of Hume of Rentoun, the money adebted by him to the said Christian, to be made forthcoming for payment of the said debt, and pursues therefor; wherein the said Christian compears, and alleges the said bond to be null, because it was made by her, she then being in *familia paterna*, and the same is not authorised with his consent, who is her curator in law. And it being replied, that seeing she is now past *annos uiles*, and had never quarrelled this bond by action of reduction, or restitution, that the exception ought not to be respected, especially seeing this bond was granted by her, when her father was not within the country. The Lords found, that before they would decide this question, that the party ought to qualify for what cause the bond was given, for if it was granted for necessary furnishing, and at the time when the father was not in the country, it were no reason that the party in such a case should be deprived of his just debt, and therefore superceded to discuss the allegiance, while the pursuer should condescend upon the cause of the debt, that the Lords might consider thereof. *Fol. Dic. v. 1, p. 576. Durie, p. 886.*

No. 60. [8944] CORSER v. DEANS. February 24, 1672.

Found in conformity with M'Adam v. Lag, No. 49, p. 8938.

Barbara Corser as executrix to her husband, pursues George Deans notary for payment of bond of 137 pounds granted to the defunct, who alleged absolutor, because the bond is null, being granted by him when a minor, and his father on life, without his consent, who as lawful administrator was curator to him, which was found in the case of Mackenzie v. Fairholm, No. 72, p. 8959. It was answered, that the defender was not then in *familia paterna*, but was a notary and messenger acting for himself several years. 2do, The bond bears, that the sum was advanced for making him notary and messenger, which being so profitably employed, he is liable as *lucratus* thereby, which is effectual against any minor. It was replied, that the father remains as curator, whether his son continue in his family or not, in the same way as other minors, though not in the family of their curators, yet cannot act without their consent; neither does a minor's skill as notary or messenger take away the hazard of his levity in managing affairs; neither can the minor's assertion in the bond prove that the money was employed to make him notary or messenger; for *eudem facilitate*, that minors may be induced to borrow money unprofitably, they may be induced to declare what is not truth; and though this bond were null, the pursuer may pursue for any thing profitably employed for the minor, but not on this bond.

The Lords sustained the allegiance to validate the bond, that the sum was employed to make the defender notary and messenger, but found that it was not proven by the acknowledgment of the bond, but that it might be proven *prout de jure*. See PROOF.

Fol. Dic. v. 1, p. 576. Stair, v. 2, p. 78.

No. 62. [8949] Sir WILLIAM HAMILTON of Preston v. The Laird of LAMINGTON.
January 9, 1678.

Found in conformity with Macadam v. Lag, No. 49, p. 8938.

Lamington suspends a bond on this reason, That it was granted by him, having creditors, without their consent.—Answered, He was not lesed, for it was for an onerous

cause, a debt of his goodair's, to whom he is now served heir.—Replied, He needs not say lesion, when the deed is *ipso jure* null ; 2do, He was not then served heir, and so they had no ready execution.—The Lords found a minor, having creditors, might validly grant a bond without their consent, when he was not leased ; but assailed him from all annualrents of the land preceding his service ; but the reason was, because the service here was not for many years after the grandfather's death.

Fol. Dic. v. 1, p. 576. Fountainhall, MS.

No. 63.

STEVENSON v. ALLANS. November 30, 1680.

A minor having curators, may test without their consent, and may nominate his own curators to be his executors.

Umquhile — Allan having nominated William Stevenson his executor and universal legatar, he obtained decret for a sum belonging to the defunct. Two Allans, the defunct's cousins-german, raise reduction of the testament and decret upon this reason, That the nomination was by a minor, in favour of his own curator, who could not authorise him, and who was his step-father and master ; and the minor having lain sick a fortnight, none of his relations were acquainted therewith ; likeas he had also formerly nominated his nearest relations his executors and legatars, and therefore this testament had been unwarrantably elicited ; likeas the defunct died a few hours after he signed the same ; and albeit minors having curators might test without their consent, yet not in such circumstances as these ; therefore most of the neighbouring nations have restricted the power of testing to 18 years of age ; and if this be authorised, the portions of children, which are oft times wholly testable, may be carried away from their relations in favour of strangers, or any who happens to be about them the time of their death ; and by the Roman law, heirs nominated were excluded, if it proceeded upon suggestion ; and more must be presumed in this case, where the defunct had formerly preferred his friends.—It was answered, That none of all these grounds are relevant to reduce a testament, neither can any thing less than an act of Parliament restrict the power of testing after pupillarity ; nor is there any reason for such a law in Scotland, where testing is so restricted by law, that it can reach no heritable rights, and that it can neither exclude the wife nor bairns' share ; and though the Romans, who were zealous to have the power of testing to extend to the whole estate, excluded suggestion, and made many restrictions, yet our restrictions are more than them all ; and if upon such pretences testaments could be reduced, then the nomination of wives, parents, children, and brothers, who all may have greater [8950] influence than a curator, would bring most of testaments in question, and lay foundations for infinite pleas, to the exhausting of the defunct's means.

The Lords found, That the defunct might test, though having curators, without their consent, and might nominate their curators ; and repelled all reasons of reduction, seeing neither incapacity of mind, force, nor fraud were alleged ; but, if importunity had been alleged, by urging the defunct by reiterated desires, threats, or sharp words, to any particular way of disposal, by which defuncts might not be in tranquillity to die in peace, but might be obnoxious to such importunity, the Lords might have enquired into the matter of fact ; but this was not insisted on by the pursuers.

Fol. Dic. v. 1, p. 577. Stair, v. 2, p. 807.

No. 64. GEORGE YORKSTON, Goldsmith v. AGNES BURN, and WILLIAM SHEILS, Her Husband. January 13, 1697.

Found in conformity with the above.

Philiphaugh reported George Yorkston, Goldsmith, against Agnes Burn and William Sheils, her husband, for reducing a testament made by the said Agnes's

daughter when she was about 14 ; 1mo, Because she had curators, and they did not consent. The Lords found this not necessary. 2do, Because it contained special legacies in favours of her own curators, under whose influence she was when she died, and was a tender valetudinary child. The Lords also repelled this, unless they would condescend either on methods of persuasion or threatenings used to make the same. But the third reason stuck with the Lords, viz. That, by her father's assignation of the debts to her, there was a substitution of his own brothers and sisters (who were her nearest of kin *ab intestato*), in case of her decease before the age of 21. This was contended to be of the nature of a condition, and declaratory of the father's meaning, that she should have no power of disposal of the sums till her majority. It was answered, This substitution was no more but a pure destination, that if she died without disposal, then it should go to the substitutes named by him, and was not to retrench her natural power of testing, which is sufficiently restricted in other cases, and therefore should be left free where law impedes not.—Replied, The substitution could have no import that way ; for, in case of her decease without disposal, these substitutes should succeed however.—Duplied, The substitution had still its effect, for it divided it unequally amongst them, some had more, some had less ; whereas, by succeeding to her, they would all draw their equal shares. And, by the Roman law, a father was permitted *per substitutionem pupillarem* to make a testament for his children, while under pupillarity, but no longer unless they were furious.—The Lords all agreed, that as to the legacy of the bygone annualrents preceding her decease, the testament was valid, because [8951] that was only the product ; but many demurred *quoad* the £1000 legacy left out of the stock ; yet, in regard there was no prohibitory clause restraining her, they found the testament good *quoad* the whole, by a plurality of seven against six.

November 18, 1697.—*Yorkston v. Burn and Sheill*, decided *supra*, 13th January 1697.—The Lords reconsidered their interlocutor, after a new debate, wherein the Roman law was much urged, §§ 8 and 9, *Instit. De pupillar. substitut.* and l. 7, *D. eod.* where a parent's substitution cannot reach to majority, and vanishes with their age of 12 and 14. But the lawyers shew this was a nice scrupulosity of that law ; and the recent customs sustain such, at least as a *fidecommiss.*—See Gudelin, Gronovegen, and Vinnius, on the Pupillar Substitutions. And Covarruvias, with Paponius, shew it has been so decided in the Sovereign Courts. And when either Notaries drew testaments with such clauses, or fathers subscribe them, what other meaning and design can they have, but that the minor shall do no voluntary deed to evacuate it, during his minority ? On the other hand, it was contended, This substitution was no more but a pure destination how the succession should be regulated, in case there was no intervenient deed to cut it off ; and what if a father should say, “ And in case my son or daughter should die before they arrived at the age of 30 or 40, then I appoint their uncles to succeed them ” ; would that substitution hinder the institute's disposal on the sums ? No more should it here, seeing a minor has *testamenti factio* as well as a major. The Lords now, by the plurality of one vote, changed the former interlocutor, and found the substitution equivalent to an implied prohibition ; and, therefore, she could not, during her minority, legate upon that sum.

It might be argued, that the minor might at least dispose so far as her legitim extended, and the father's substitution could not prohibit that.

Fol. Dic. v. 1, p. 577. *Fountainhall*, v. 1, p. 753 and 795.

No. 65. *The Lady CARDROSS v. The Representatives of ALEXANDER HAMILTON*, Bailie to Sir William Stuart of Strathbrock. February 20, 1708.

A tack granted by a minor, without consent of his curators, found null.

Sir William Stuart of Strathbrock having, in anno 1671, set a three 19 years tack of some lands in Broxburn to Alexander Hamilton, his bailie, bearing expressly with advice and consent of Sir William's curators under subscribing, which yet no curators

subscribed ; the Lady Cardross, as heir to Sir William Stuart, pursued a removing from these lands against the Representa-[8952]-tives of Alexander Hamilton, who defended themselves upon the tack, as yet standing unexpired.

Alleged for the pursuer, That the tack was *ipso jure* null, being granted by Sir William when minor, without consent of his curators. For instructing the minority, and his being clothed with curators at the time, the pursuer produced the following evidences, viz. A suspension and a summons in anno 1666 ; a summons in the 1670 ; a charge in 1671 ; an act and commission in 1669 ; and a summons in the 1672 ; all at the instance of Sir William Stuart and his Curators, with a registered factory in the year 1672 ; tack and factory in anno 1667, set and subscribed by him and them, to which two last Alexander Hamilton himself is a subscribing witness ; a certificate under the hand of Mr. Mercer, Commissary Clerk-depute of Edinburgh, that Sir William's act of curatory stands in the Minute Book the 8th of May 1667, and that he could not give an extract, by reason of the warrants that year being disordered ; Mr. James Nasmyth's receipt of the act of curatory itself in the year 1671 ; and an extract of Sir William's baptism in the 1652 ; which documents, the pursuer contended, could not be controverted by the representatives of Alexander Hamilton, who, by subscribing the tack quarrelled as a party, and the other tack and factory as a witness, all bearing the consent of curators undersubscribing, and the two last subscribed by curators, hath acknowledged Sir William's minority and his having curators. For as a minor, *se majorem dicens*, cannot be restored ; so a major acknowledging his party's minority, should be bound to the consequences of it ; especially in this case, where Mr. Hamilton, as Sir William's chamberlain and bailie, could not be ignorant of his circumstances.

Answered for the defenders, None of the documents adduced are sufficient proof of Sir William's having had curators lawfully chosen : Because, from the rule, *in iure non dantur curatores*, the presumption that minors have no curators ariseth, which cannot be elided but by a judicial act of curatory. A third person's authorising a minor, *qua* curator, doth not infer that he was chosen curator in a legal way, but only renders the authoriser obnoxious as procurator. Again, as no private arguments or deeds are sufficient to supply the want of the legal solemnities that law requires, in the judicial establishing of curators ; far less will the minor's asserting himself to have curators, alter his condition, so as to annul the deed ; and a witness to a paper is only presumed to know what he sees ; i.e. the party's subscription, and not the age or quality of the subscriber. Yea, though it were proved, that there was an act of curatory, *non constat* but the same was null and informal. Nor are the documents produced sufficient to clear when Sir William was born, so as to infer that he was minor at the making of the tack quarrelled ; because, testificates of baptism are by decisions found not probative of minority, however they may prove majority : Therefore, the instructions above mentioned are in vain adduced for proving jointly the points in controversy ; when all of them taken separately signify no [8953] more to the purpose, than so many cyphers, without a figure, to the making up a number.

The Lords sustained the nullity of the tack, as granted by Sir William Stuart in minority, without consent of his curators ; though no lesion was qualified.

Forbes, p. 247.

No. 66. [8955] DAVID MUIRHEAD *v.* AGNES MUIRHEAD of Drumpark, and her Husband. November 17, 1724.

Found, That a minor having curators could not, in his contract of marriage, without their consent, alter the destination of succession in a tailzie from heirs-male to heirs of line ; but found, that if the minor had no curators, he might, in his contract of marriage, alter such destination of succession.

The settlement and possession of the estate of Drumpark is narrated in a decision, marked February 11th, 1724, *voce* MUTUAL CONTRACT, which having gone in favour of Agnes, and she ready to extract her decreet, David Muirhead, grandchild to old David by a second son, insisted in a reduction of the destination in John's contract of marriage, by which he altered the succession from heirs-male to heirs-female, upon

these grounds, that he was minor, and could not make such an alteration ; and though he could, yet the contract was null, because he had curators, and their consent was not adhibited to it.

It was answered, That a minor might do any deed which was not to his lesion ; that the settlement was onerous, being in John's own contract of marriage, and was so far from being to his hurt, that it was rather for his interest, since thereby the estate was settled upon his daughters, in exclusion only of extraneous heirs-male ; 2do, Though he had curators (which was denied), yet he might, without their consent, do any rational or beneficial deed for himself, and his onerous deeds would be binding ; December 11th, 1629, Earl of Galloway, No. 54, p. 8941 ; February 5th, 1621, Inglis v. Sharp, No. 55, p. 8941 ; January 9th, 1629, Brown v. Nicolson, No. 52, p. 8940 ; and February 24th, 1672, Corsar v. Deans, No. 60, p. 8944.

The Lords found, that a minor having curators cannot, in his contract of marriage, without their consent, alter the destination of succession in a tailzie, from heirs-male to heirs of line ; but found, that if the minor had no curators, he might in his contract of marriage alter the said destination of succession ; which not being revoked *intra annos utiles*, was binding, and not reducible.

Act. JA. GRAHAM, SEN.—Alt. JA. FERGUSON, SEN.—Clerk, GIBSON.

Edgar, p. 118.

No. 67.

CRAIG v. GRANT. July 5, 1732.

A Bill, granted by a minor, safe from the exception of minority and lesion, because he was a trading merchant at the time, was challenged as null, being without consent of the minor's father, administrator-in-law. Answered, That, if the minor's being a trading merchant is sufficient to presume it a reasonable act, so as to defeat the exception of lesion, it must, of course, also defeat the nullity arising from want of the administrator's consent ; for deeds done by minors, without consent of curators, are effectual, if rational and prudent, as well [8956] as where they are *in rem versum* of the minor.—The Lords repelled the defence.—See APPENDIX.

Fol. Dic. v. 1, p. 577.

No. 68. KATHARINE CRAIG v. WILLIAM LINDSAY, and Others. December 14.

A deed *inter vivos*, made by a minor, without consent of his curators, void.

John Craig, at his death, left a son, William, and a daughter, Katharine, both infants. To William he gave his land, worth about 400 merks yearly, and a general disposition to his moveable subjects, worth 600 merks, with the burden of debts. To Katharine he gave a bond of provision of 3600 merks, which was a debt upon her brother.

William Lindsay, and three others, tutors to William Craig, during William's minority, saved out of the rents of the estate 2200 merks, and lent it out upon moveable bonds. A few months before his majority, they prevailed upon him to grant to themselves, and to eight others, their relations, a deed, whereby " he bound and obliged him, his heirs and executors, &c., thankfully to content and pay, upon the first term after his decease, to the persons therein named, the several sums therein expressed, with annual rent from and after the term of payment : And for the more sure payment of these respective sums, he thereby constituted and appointed them his lawful cessioners and assignees, in and to the particular debts and sums of money therein mentioned." And by an after clause in the same deed, he " disposed and assigned to the same persons his whole *bona mobilia*, body-clothes, &c., with power to them, immediately after his decease, to intromit with and dispose upon the premises." The sums contained in this obligation exhausted the whole moveable subjects of William ; and the bonds assigned in security of that obligation, were the bonds which had been taken by the tutors for the savings of the estate. This deed contained a power of revocation. William died soon after, and before majority.

Katharine, upon her brother's death, brought a reduction of this deed ; and pleaded, That if it was to be considered as a disposition, which it truly is, seeing it creates an obligation, and contains an assignation in security thereof, then it is void, as being a gratuitous deed, granted by a minor, having curators, without their consent ; or if it be considered as a testament, then it is void, as gratuitously granted, in prejudice of the relief competent to the heir from the testator's moveable subject, and to that relief which Katharine herself was entitled to, for the payment of her own portion of 3600 merks.

Answered for the defenders, If the deed in question is to be considered as a disposition *inter vivos*, minors are not disabled to make such dispositions, unless where they make them to their prejudice. It conveys only moveable [8957] bonds granted to the minor himself, or his curators for his behoof, of which he had the absolute disposal, and might have bequeathed them by testament or legacy to any person he had a mind. It seems impossible to say, the minor suffered any prejudice by this deed ; because he reserved an express power to himself, at any time after, *etiamsi in articulo mortis*, to alter the same, and dispose of the premises, in whole or in part, at his pleasure. And as little can it be said, that any prejudice is done to his nearest of kin, to whom the moveables would otherwise have devolved, that he has conveyed them to another by such revocable deed. The subject was by law at his disposal. He could, without consent of curators, disappoint their succession by testament. And as they have no legal right by the succession, but upon the failure of his settling it otherwise, it cannot be said they have sustained any legal prejudice, whether he has settled it in one form or another.

And, therefore, it is too whimsical a regulation to be presumed in the law, that a minor, who can effectually dispose of his whole moveables by testament, without consent of curators, should be laid under a disability of doing the self-same thing by another form of writing, by which he himself is nowise prejudiced ; and when the succession of his heirs *in mobilibus* is equally disappointed, whether he declares his will in the one form or in the other.

But if, on the other hand, the deed in question is to be considered as of a testamentary nature, which it truly ought to be, seeing it bequeaths a moveable subject, and does not take effect till death, then there is no doubt in law, that a testament by a minor, without consent of his curators, is good. And, with regard to the obligation of relief, which William is said to have been under to his heir, it truly supposes an obligation upon the minor to heap up all the rents and profits of his estate during his possession, and to preserve the same as a fund for payment of his predecessor's debts. But it would be highly unreasonable, that a minor, who has the full property of an estate, without any limitation, should not be allowed to dispose of the fruits of it during his possession. This would be to put him in a worse case than an heir of tailzie, who is fettered by limitations and irritancies ; or than an interdicted person, who, by reason of incapacity, is deprived of the administration of his affairs ; for such persons are still at liberty to do with their rents what they please.

Many worse consequences would follow from this doctrine. A minor, possessed of an estate which goes to male-heirs, cannot burthen it with a shilling in favour of his daughters, if he should die in minority ; but, by this new doctrine, it should not be in his power even to give them the savings he had made out of the rents by his own good management ; but they must be applied, contrary to his will, to pay the debts of his predecessors, which affect the estate settled upon heirs-male.

The Lord Kilkerran, Ordinary, found, "That it was not in the power of the deceased William Craig, a minor, gratuitously to dispose of his moveables, in prejudice of the relief of his moveable debts, competent to his heir from his [8958] moveable subjects ; and, therefore, reduced the bond and assignation, and decret following thereon, in so far as the same are prejudicial to the pursuer's relief of the defunct's moveable debts."

But the Lords took up the matter upon the first point ; and

"Found, That the deed in question was a deed *inter vivos*, made by a minor, without consent of his curators ; and, therefore, void and null."

Act. JO. DALRYMPLE, LOCKHART.—Alt. AND. PRINGLE, BROWN, FERGUSON.

No. 69. SALTCOATS v. The JUSTICE-CLERK. February 8, 1623.

A minor cannot discharge a bond, even with consent of curators, without payment made.

Saltcoats being bound as cautioner to the Justice-Clerk, to infest Mr. William Kellie in lands redeemable upon 3000 merks, and to pay the principal upon requisition, charged the Justice-Clerk to relieve him of his cautionry. The Justice-Clerk suspended, upon an acquittance made by his daughter (who was assignee to Mr. William Kellie), authorised by himself as lawful administrator to her. Saltcoats alleged, That in effect the offer was, that the Justice-Clerk should discharge himself, and that the daughter might revoke the discharge, and annul the acquittance given to the cautioner, without payment. In respect whereof, the Lords found not the discharge sufficient.

Fol. Dic. v. 1, p. 577. Haddington, MS. No. 2753.

No. 70. LOCKHART v. LOCKHART. July 25, 1626.

A discharge, granted by a minor, without an onerous cause, was found null, although she might have disposed the sum in testament.

One Marion Lockhart having given discharge to Lockhart of Bar of a sum of money, wherein the father of the said Lockhart of Bar was obliged to the said Marion ; the said Marion pursues an action of restitution *in integrum* against the said discharge, by reason the same was done in her minority, having neither received money nor other good deed ; which action was sustained, notwithstanding the defender alleged, that this action could not be sustained, except the pursuer would allege, that the said discharge was given by her *sub* [3959] *spe numerandæ pecuniæ*, which followed not, or that the defender promised her payment, and hath not done the same, without which the action ought not to be sustained ; for, as a minor, past twelve years of age, might make a testament, so also she might lawfully at that age dispone upon that sum, or discharge it. This allegiance was repelled, and the reason found relevant.

Fol. Dic. v. 1, p. 577. Durie, p. 227.

No. 71. SIR JOHN SEATON v. SIR JOHN HEPBURN. December 1633.

Although a minor cannot discharge a debt gratuitously, yet a promise to grant such a discharge was sustained.

By contract of marriage between Sir Robert Hepburn's son and Sir John Seaton's daughter, Sir Robert was bound to possess his son with 20 chalders of victual for his maintenance. Sir John having charged Sir Robert for fulfilling of this part of the contract, he suspended, upon this reason, that his son had discharged him of four chalders of the twenty, and had obliged him to content himself with sixteen. Answered, This bond being but a private deed and paction, *contra publicam tabularum nuptialium fidem*, was null, and ought not to be respected, as being *contra bonos mores*, especially it being given upon the day of the contract, which the youth was induced to do *amoris ardore*, and least the contract should have been dissolved.—The Lords found this allegiance against the reason of suspension relevant.

January 15, 1634.—Afterwards the suspender offered to prove, that his son, long after the marriage, came to him willingly, and promised to abide by the former condition he had tied himself to. Answered, He was yet minor, and revoked presently any such promise made in prejudice of the contract of marriage, especially there

having nothing followed thereupon, but being *nudum pactum*. Next, his promise could not prejudice his father-in-law Sir John to seek implement of the condition, he being a contractor. Replied, He was *majoritati proximus*, and could not revoke a promise made in favour of his own father. Next, he prejudged none but himself during his own time ; for, if he died before his wife, his promise could not bind her, but her father might seek implement of the whole in her behalf.—The Lords found this part of the reason of suspension relevant to be proven by his oath.

Fol. Dic. v. 1, p. 577. Spottiswood (MARRIAGE), p. 205.

No. 73. [8962] CARSTAIRS v. MONCREIFF. February 20, 1672.

A bond of caution, granted by a minor, with consent of tutors, was sustained.

Mr. David Moncreiff being debtor to James Brown in a sum of money, he did procure William Moncreiff his son as principal, and Sir John Moncreiff as cautioner, to grant a bond to the said James Brown for the said sum ; and Sir [8963] John being minor, the bond is granted with consent of Mr. David as his curator ; and being now assigned to Robert Carstairs, he charges Sir John, who suspends, upon this reason, that the bond is null, as being done by a minor having curators, without their consent ; and as to the consent adhibited by Mr. David Moncreiff, it is null, because no curator can authorise his minor *in rem suam* to the curator's own behoof ; and it is offered to be proven that this curator was debtor in the same sum before, and caused his own son grant this bond, and his minor as cautioner in place thereof, whereby the curator himself was liberated of the prior bond. It was answered, That albeit a curator cannot authorise his minor to any deed done directly in favours of the curator, as if the minor should grant a bond to his curator, or should be cautioner for his curator ; yet, where the curators behoof is but indirect and consequential, neither our custom, nor the Roman law, from whence it is drawn, prohibits or annuls such consents of curators, as is clear in the case of a tutor or curators authorising a pupil to enter heir to a person who was debtor to the tutor, that yet his consent was valid, l. 1, *quanguam D. De autoritate & consensu tutorum* ; and if this were drawn in consequence to every remote advantage of curators, neither could creditors be secured, nor minors authorized. It was replied, That the behoof of the curator is not remote in this case, neither could the creditor pretend to be *in bona fide*, as not knowing the curator's interest or behoof, the curator being debtor to him in the same sum before ; and this being a fraudulent unwarrantable act of the curator, unnecessarily to engage his minor as cautioner, the creditor was *particeps fraudis*, and did collude with the curator in engaging his minor.

The Lords considering, that the charger did not plead his interest as a singular successor, but was content that his cedent Brown should depone, they found only the knowledge and collusion of the creditor of importance to annul the curator's consent to a deed not directly to his own behoof ; and therefore, before answer, ordained Brown's oath to be taken *ex officio*, that it might appear whether there was any collusion or not. See TUTOR and PUPIL. *Fol. Dic. v. 1, p. 577. Stair, v. 2, p. 73.*

No. 76. [8964] HUNTER v. ——. December 24, 1728.

A remuneratory donation of two small tenements in the town of Ayr, granted by William Hamilton, a minor, above twenty years of age, to his brother uterine, was reduced at the instance of the heir upon this medium, that a minor, though he has power to test upon moveables, can do no gratuitous deed in prejudice of his heir. See APPENDIX.

Fol. Dic. v. 1, p. 577.

No. 77. [8965] M'CULLOCH v. M'CULLOCH. January 29, 1731.

A man, in his second contract of marriage, obliged himself "to lay out a certain sum upon good security, in lands, to himself and his future spouse, and to the children to be procreated betwixt them; which failing, the same to accresce, pertain, and belong to the husband's nearest heirs and assignees." In a pursuit at the instance of the heir of this marriage, being minor, for the above sum, against the heir of the first marriage, it was found that the pursuer might uplift the sums pursued for, but that he could not, in his minority, gratuitously defeat the substitution; but found no necessity at present to determine what might be competent to him after his majority. See APPENDIX. *Fol. Dic. v. 1, p. 578.*

No. 78. WADDEL v. WADDEL. January 6, 1739.

Whether a minor can test upon moveables, notwithstanding a substitution.

A father having made a settlement of his estate, consisting all of moveables, in favour of his son and daughter, equally between them; and failing any one of them by decease before marriage or majority, to the survivor, their heirs, executors, or assignees; after the father's death, the son died while minor and unmarried, after having by testament conveyed his half to his sister in liferent, and her children in fee; which being quarrelled by his sister, as to her prejudice, it was found, "That the pursuer's brother having died minor and unmarried, could not, by deed of his, dis-appoint the father's destination."

N.B.—It was admitted, that notwithstanding a substitution in moveables, the institute might thereupon test in his minority; but in respect the substitution was here limited to the event of the person's dying before majority or marriage, it was considered not as a simple substitution, but to imply a prohibition to alter before majority or marriage. *Fol. Dic. v. 1, p. 578. Kilkerran (MINOR), No. 1, p. 345.*

No. 79. WILLIAMSON v. FRASER. December 1739.

Found, that a minor, who had submitted with consent of his curators, in a case, which of its nature was pretty much involved in fact, *utebatur jure communi*, and could not be heard to quarrel the decret arbitral upon iniquity; and in the reasoning, taken for granted, that he might with their consent have transacted.

It might be very prejudicial to minors, if in such cases especially as are proper subjects of transaction, yet they could not terminate them by submission [8966] or transaction; yet, if an enorm lesion should appear, it is not doubted but the minor would be reponed. *Fol. Dic. v. 4, p. 3. Kilkerran (MINOR), No. 3, p. 347.*

No. 80. FRANCIS CUNYNNGHAME v. Sir JOHN WHITEFOORD, and Others.
March 8, 1797.

A minor cannot dispone his heritage *mortis causa*, even with consent of his curators.

Mr. Whitefoord dispomed his estate of Dinduff, failing heirs of his own body, to the two younger sons of Sir John Whitefoord *nominatim*, and the heirs of their bodies; whom failing, to Francis Cunyngham; and named tutors and curators to the substitutes, in case of their succeeding in minority.

Mr. Whitefoord having died without issue, he was succeeded by James Whitefoord, the son of Sir John, first called by the disposition, who, in his 17th year, with consent of the curators named by Mr. Whitefoord, and after the death of his brother without

issue, disposed Dinduff, failing heirs of his own body, to his father and his heirs-male; whom failing, to his own five sisters, and their children, and the other heirs-female of Sir John in their order.

James Whitefoord died in minority, and unmarried, and Sir John made up titles to Dinduff.

Francis Cunynghame afterwards brought a reduction of his right, and

Pleaded; It is perfectly settled, that a minor cannot alter the destination of his heritage *mortis causa*, even with consent of his curators; Stewart's Answer v. Minor; 30th November 1680, Stevenson, No. 63, p. 8949; Marquis of Clydesdale v. Earl of Dundonald, No. 3, p. 1265; Bankton, b. 1, tit. 7, § 54; Erskine, b. 1, tit. 7, § 33. And the rule is in itself reasonable, as it is fair to presume, that it is for the minor's interest, that the heirs under the subsisting investitures should succeed to him, and, besides, it would give room for much arbitrary proceeding, if the validity of the deed were, in each case, to depend on its supposed rationality.

It is true, a minor may sell his lands with consent of his curators, and may make a testament without it. But a sale may frequently be necessary; the price received affords a good criterion of the fairness of the transaction; and if the judgment of his curators does not protect a minor from an unfavourable bargain, he can be restored against it. But there is no necessity for his executing deeds *mortis causa*; and in the execution of them, he exerts merely an act of volition, where the judgment of others cannot so well supply his own defects. The minor's power of making a testament has probably arisen from the small value of moveable property, at the time the point of law was so fixed.

Answered; The rule contended for by the pursuer did not exist in the Ro-[8967]-man law, Voet, lib. 28, t. 1, § 32; and it is not a settled point in our law. It is not countenanced by our older authorities, Balfour, p. 181, § 11; Craig, lib. 1, d. 12, § 30; Dirleton v. Minor; Stair, b. 1, t. 6, § 32, 33, 34; and our later writers rest their opinions entirely on the case of the Marquis of Clydesdale, which was decided on other grounds.

Nor is the rule in itself well founded; a minor who either has no curators, or who having curators, acts with their consent, has the same powers over his property with a person of full age. The only difference between them is, that the former has certain privileges, particularly that of restitution against transactions which are unfavourable to him; but to make room for this privilege, the heir of a minor must establish not merely that he, the pursuer, was hurt by the transaction, but that the minor himself was so, which surely cannot be said of a disposition preferring his own family to a stranger.

Indeed a minor may do many things very material to his interest, even without the consent of his curators, against the consequences of which he cannot be restored; he may marry, he may choose his profession and his place of residence, Graham v. Graham, No. 45, p. 8924. He may make a testament as to his moveables, although from its requiring fewer solemnities, and from its being lawful to execute it *etiam in extremis*, there is more danger of imposition with regard to it, than with regard to dispositions of heritage. And it is admitted, that a minor, with consent of his curators at least, may make onerous transactions as to his heritage, to take effect *inter vivos*; yet these require greater strength of mind than the execution of deeds *mortis causa*. And accordingly the latter have often been sustained when made by a person who would have been held incapable of entering into an onerous bargain, 17th November 1789, Scott v. Jerdons, No. 60, p. 4964; 3d March 1795, Frank v. Frank, *voce* Warr.

The Lord Ordinary reported the cause on informations.

The Lords considered the law to be perfectly fixed in favour of the pursuer, and unanimously gave judgment in his favour.

Lord Ordinary, GLENLEE.—Act. HAY, *et alii*.—Alt. SOLICITOR-GENERAL BLAIR, ROLLAND.—Clerk, HOME.

D. D.

Fac. Col. No. 11, p. 50.

No. 87. [8970] SCOT v. KENNEDY. December 10, 1675.

Umquhile ——— Wallace granted assignation of several bonds to his two bairns, and appointed Robert Kennedy overseer to them to manage these sums during their minority, and in case of the miscarriage or debauchery of either of them, to apply their share, or a part thereof, to the other. The boy being set by Robert Kennedy to one Reid goldsmith, was seduced and withdrawn by one Purves, whom he chose curator, and became apprentice to one Scot goldsmith, who is also chosen curator. Kennedy alleged, That the father had committed the administration of the sums assigned to him during the children's minority, and made him overseer, which in effect was tutor ; and therefore having set the boy to a master during his pupillarity, he ought to be restored to him and to be put to his former master ; and, albeit parents cannot appoint curators, yet where they do expressly assign their means with that provision, it is valid as a condition of the assignation.

The Lords found that the management of the sums assigned belonged to Kennedy by virtue of the assignation, not as curator but as administrator ; and found the minor might choose other curators, but that they could not meddle with the sums assigned ; and found, that after pupillarity the minor's person was free, but as to what master he should serve, ordained both indentures to be produced, and both the masters to be heard.

Stair, v. 2, p. 380.

No. 90. [8972] MORISON v. STEWARTS. December 3, 1747.

A minor whose administrator in law was out of the kingdom, was authorised by the Lords to receive money, and employ it on a security approved by them.

John Stewart, grandson and heir to the deceased Lord Roystoun, having right by progress to an heritable bond granted by William Morison of Craigleith, to Sir William Baird of Newbyth, did, with consent of John Stewart elder, his father and administrator in law, convey the same to Mrs. Isabel Stewart, widow of George M'Kenzie, younger of Roystoun, in security of £100 annuity payable by said John Stewart the heir to her.

William Morison proposing to extinguish the debt, duly premonished the said John and Mrs. Isabel Stewarts to receive the money as at Martinmas last ; and understanding that the said John Stewart the creditor was under age, and that his father and administrator was out of the kingdom, applied by bill of suspension, craving that he might be authorised by the Lords to consign or to pay up the money on getting a valid renunciation, and that the said John Stewart might be ordained to chuse a curator, who might concur with him in such renunciation.

This bill was passed upon report, and a tutor *ad litem* appointed to John Stewart on his application ; and now at discussing, Isabel Stewart admitted the facts stated in the bill and consented to the raising the money and re-employing the same ; and represented that she had procured an heritable bond for that purpose on the estate of Inverighty, in security of the said £100 of annuity to Mrs. Stewart, and to the said John himself, ready to be delivered upon payment of the money ; and concurred with the debtor in praying that the Lords might, in such a manner as they should think proper, interpose their authority, that there might be a valid renunciation.

The point reasoned on the Bench was, In what manner the Court was to interpose in this case, Whether by directly authorising the payment and acceptance of the security offered for the money, or by appointing an *interim* curator who should find caution ? Some of the Lords inclined to the last, doubting how the Court could directly authorise, as they knew not the sufficiency of the person who was to grant the new bond ; and that if he was insufficient, the Court was caution for the money. Others again doubted, if the Court could at all appoint an *interim* curator even *ad effectum*, as the minor had an administrator ; [8973] but thought, that as the administrator was abroad, they might interpose and directly authorise, and they would no more become cautioners than they do in any case, which frequently happens, of money's being re-employed at the sight of the Ordinary : That in this case, there

was little reason to doubt the new security offered, as the liferentrix was so much satisfied with it; mean time, to remove all scruple, it might be remitted to the Ordinary to make further enquiry and to report.

Which accordingly was done; and thereafter, upon the Ordinary's report, the Lords "authorised the payment of the money and acceptance of the new security offered."

This was by some said to be what the Court could not refuse, as the administrator was abroad, and the money in effect *in manu curiæ* by the offered consignation; adding, that it were well that the Court had the same, or at least part of the powers the Chancellor has in England of seeing to the application of minors' money.

Fol. Dic. v. 4, p. 6. Kilkerran (MINOR), No. 7, p. 348.

No. 91. JEAN HAY, Spouse to Home, and their CHILDREN v. GRANT.
February 22, 1749.

The Court appointed a *curator bonis*, and authorised him to uplift and discharge, with instructions to re-employ.

Thomas Grant purchased the lands of Blackburn from Alexander Home, the price whereof he paid, except 12,000 merks, which he retained to answer a [8974] liferent of 600 merks secured on the land to Helen Spence, relict of the former proprietor; for which sum he gave bond payable at the first term after the decease of the said Helen Spence, to Jean Hay wife to the disponent, during the joint lives of her and her husband, and that for the aliment of herself and children (the said disponent thereby renouncing all right or interest in the said 12,000 merks, and particularly his right as administrator in law to his children) and after his decease for her own liferent use, and in fee to the children equally among them.

Upon the death of Helen Spence, Thomas Grant proposed to pay the money; but the question was, How he was to be discharged? Jean Hay was willing to grant discharge for her interest, and, if it could be of any use, the husband was willing to concur, such of the children also as were past majority were willing to discharge; but the difficulty lay in this, that some of the children were within pupillarity, others of them were past pupillarity, but within majority, and had no curators, and could find none willing to accept.

In this situation, Thomas Grant presented a bill of suspension, in order to his safe payment. And it being alleged for the chargers, That a discharge by a minor, not having curators, is a sufficient exoneration to the debtor, and which the minor children were willing to grant, and for such of them as were within pupillarity, it being craved, that a factor might be named, with power to discharge their interest, the Ordinary found, "That the presenter of the bill was not bound to accept of a discharge from such as are past pupillarity, and within majority, not having curators, and refused to name a factor for those who were within pupillarity," as what was more proper to be obtained upon application to the Lords.

The case being laid before the Lords by the relict and whole children, for such authority as might be proper to enable them to discharge, to prevent a loss by consignation, some seemed to think, that where one is past pupillarity, and has not curators, he may discharge; which point the Lords avoided determining, but generally agreed in this, that no cautious debtor would venture to pay a minor without curators, otherwise than *auctore prætoris*.

The next question was, How a curator could be authorised for a minor? And, in general, it is what the Lords never do; but here the case was special, a part of the money belonged to a pupil; and as the whole money was liferented, it could not be divided; it was therefore thought, the Court might appoint a *curator bonis* for the whole minor children.

And accordingly the Lords "authorised a *curator bonis* with power to discharge, he finding caution"; but with this quality, "That he re-employ the money in the same terms as devised by the bond at the sight of the Ordinary on the bills."

Fol. Dic. v. 4, p. 4. Kilkerran (MINOR), No. 10, p. 351.

No. 92. [8975] KOEHLER, and His CURATOR *ad litem* v. PAUL NEIDRICK.
January 31, 1772.

Payment made to a minor, not having curators, valid and effectual by the law of Scotland.

An action was sued by George Frederick Koehler, son to the deceased George Frederick Koehler, and William Henry, his attorney (by virtue of a letter of attorney signed by him, according thereto, a minor of 15 years, with consent of Isaac Hawley of Portsmouth, his uncle), concluding against Neidrick, as executor appointed by Koehler senior, for payment of the half of the defunct's personal estate, bequeathed by his will to the pursuer. The Lord Ordinary, in respect of the pursuer's being minor, appointed William Henry (the attorney) curator *ad litem*, and afterwards passed an interim decree for a balance confessed by the defender.

In a suspension of this decree, which came to be discussed by the Lord Ordinary to the original action, the charger having produced an appointment, by the Chancellor of England, of Isaac Hawley to be his guardian, the Lord Ordinary "found the letters orderly proceeded; but found, that the said Isaac Hawley, the charger's uncle and guardian, must concur with him in granting the discharge to the suspender for the sum charged for." And, upon a representation for the suspender, stating it to be the law of Scotland, that no person was obliged to pay a debt to a minor, unless that minor was legally authorised by tutors and curators to receive the money; and that the appointment, produced, of the charger's uncle to be his guardian, did not, from its nature, sufficiently authorise him to receive the money charged for, but seemed rather to resemble the nomination of a curator *ad litem*. The Lord Ordinary found, "That, by the law of Scotland, a payment made to a minor not having curators, is a valid and effectual payment; and that the authority of the English guardian, in this case, is required by the interlocutor, only for the further security of the minor, that the money may not be squandered by him, for which reason it was not opposed by the pursuer; therefore, refused the desire of the representation, and adhered to the former interlocutor." And, afterwards, "found the charger entitled to the expenses incurred by him in the suspension, and also the expense of extracting the decree."

Pleaded by Neidrick, in a reclaiming petition; That payment of any considerable sum of money made to a minor, though not having curators legally authorised to act for him, is not, by the law of this country, such a valid payment as can effectually liberate the debtor who makes that payment at the hands of the minor; and that, as well in the nature of the thing, as according to the principles both of the civil law, and that of this country.

In the nature of the thing, it is a duty incumbent upon every debtor, either when he makes offer of a voluntary payment to a minor-creditor, or is called upon by that creditor to do so, to take care that the money so paid by him be not embezzled by coming directly into the minor's own hands; and that, if he [8976] neglects his duty, he is answerable to the minor, unless he shall be able to make it appear, that the money was profitably applied for his use.

Again, that the principles of the civil law were favourable to his plea, appeared from the following texts, l. 2, C. Si tut. vel cur. interven. ; l. 1, C. Si advers. solut. ; l. 25, C. De administrat. tut. § 3. Institut. Quib. alien. licet vel non ; l. 7, § 2, De minor.—And, as to the practice of this country, there occurred no reason to the suspender, why the principles of the civil law, which seem to be solidly founded in common reason, should be held to be departed from; as the law of this country has, in many particulars, adopted the principles of that law, especially in the matter of tutors and curators; and he has never been informed of a decision of this court, whereby it was found, that a debtor was in safety to pay to a minor without consent of his tutors or curators, or that he could be compelled so to do; on the contrary, it is supposed by a decision, Watt v. Panton, No. 88, p. 8971, that a debtor was not bound to pay to a minor not having curators.

Answered; Two points are clearly established in the law of Scotland; 1mo, That no minor whatever, who has no curators imposed upon him by his father, can be compelled to accept of any; since every minor, who has sufficient confidence in

his own abilities in this particular, is entitled to take upon himself the full management, and free administration of his own affairs, subject to as little controul as if he were a major; 2do, That no person whatever can be compelled, on any account, to act either as a tutor or curator to another. And, by the practice of this country, numberless minors do every day manage their own affairs, without the aid or interposition of curators, as fully and freely, in all respects, as if they were majors; either because they do not choose to elect curators to themselves, or that the persons who have been appointed curators to them decline to accept the office. In a trading country, such as this, not only many minors, but the whole subjects, would be put in a most disagreeable situation, were the suspender's doctrine to be held as the law of Scotland. But he has not been able to point out a single authority from our law books, nor one precedent from decisions, tending to support it. The decision cited rather serves to refute it; and is, indeed, when examined, a precedent in point for the charger. His reliance, then, is on a few quotations from the civil law, the subtleties whereof we have not adopted; neither are they applicable to the present case. On the other hand, the judgment of the Lord Ordinary is agreeable to the language of all the writers on the law of Scotland, such as Stair, Bankton, &c.; and Erskine's words are precisely in point, tit. Minors, &c., §§ 6 and 18.

"The Lords adhered, and found the petitioner liable in the expense of the answers."

Act. W. M'KENZIE.—Alt. D. GRAEME.—Clerk, ROSS.

Fol. Dic. v. 4, p. 5. Fac. Col. No. 2, p. 2.

No. 93. [3977] JOHN KIRKMAN v. JOSEPH PYM. August 1, 1782.

The Supreme Court would not authorise a debtor to pay his debt to a minor not having curators.

Pym was indebted to Kirkman's father, an Alderman of London, in a large sum of money, secured by an heritable bond upon some houses in Edinburgh. On the death of Alderman Kirkman the son succeeded to his heritable fortune; but no curators had been appointed to him, and he chose none for himself. In the seventeenth year of his age, he demanded payment of this debt; when Pym objected, that as he was without curators, payment could not then be made to him with safety; but, at the same time declared his willingness to pay the debt, upon being secured by a judgment of the Court, *causa cognita*, against the hazard of being obliged to make payment a second time.

Observed on the Bench; This question, which relates to the payment of a principal sum, or *scots*, is to be distinguished from all cases in which the interest only of money, or the rents of subjects, are claimed; those ordinary acts of administration which might be necessary for a minor's support. Accordingly

The Lords were of opinion, That as the debtor could not, even by making full money, be secure against future challenge, unless the money were to be afterwards profitably employed for the minor's behoof, so the Court ought not to interpose their authority, in order to compel him to do an act which would subject him to that hazard.

But as the minor at last made an offer of sufficient security for the debtor's indemnification, the interlocutor of the Court was as follows.

"The Lords find, that in this case, the Court ought not to interpose to oblige the suspender to pay the debt charged on upon the discharge and renunciation offered; and remit to the Lord Ellick Ordinary, to proceed in the cause, and to hear parties procurators upon any further security that may be offered by the charger for the indemnification of the suspender."

Reporter, LORD ELLIOCK.—Act. CULLEN.—Alt. H. ERSKINE.—Clerk, HOME.

Fol. Dic. v. 4, p. 4. Fac. Col. No. 60, p. 96.

No. 96. [8979] KINCAID v. —. May 20, 1561.

Alienation by a minor, having curators, made without their consent, found *ipso jure* null. But if the minor have no curators, the alienation is valid, till it be reduced.

Anent the action pursued by John Kincaid of P., anent a gentlewoman of the —, for removing from certain lands; it was alleged by the said gentlewoman, That she ought not to remove, and the said John had no power to warn her from the said lands, because that he who was heritable possessor before him had given the said lands to her in liferent. It was replied by the said John, That he that gave them to her was minor, and within age the time of giving thereof, and so the said gift was null in itself; which allegiance of the said John was repelled by the Lords, and found that a minor wanting curators may give or analzie lands, which gift shall not be null; but the minor when he comes to perfect age may reduce the same; and if he have curators, and gifts or analzies without their consent, that is null in itself, as was reasoned among the said Lords.

Fol. Dic. v. 1, p. 579. Maitland, MS. p. 135.

No. 97. BRUCE v. —. January 24, 1577.

A deed granted by an infant is *ipso jure* null.

There was one of the Bruces of Easter Kennet that warned one to flit and remove from certain lands. It was answered, That he would have no just action to warn to flit and remove, because that, long time before the warning, he had renounced and overgiven all right and interest that he had to the said lands. To this was answered, That the renunciation was null in itself, because the time of the alleged making thereof he was in his infancy, viz. of six years only, and did the same without consent of his tutors and curators, *et in ea ætate neque velle neque nolle censetur habere pupillus*. To this was answered, That he was now *major annis et virili ætate, et tacuit per utile quadriennium*, and so he ought to have bought the ordinary remeid of the law, *et beneficium restitutionis in integrum cum causæ cognitione*. To this was answered, That he insisted not to seek the same *ordinaria via*, because, *fuit nullum ab initio, et quod est nullum ab initio non potest tractu temporis convalescere, et cum ipso jure tutus fuit pupillus, et communi auxilio non opus fuit nec extraordinario l. 16, D. De minoribus*. The Lords found by interlocutor, that the renunciation of the pupil being of seven years old was null from the beginning, without reduction, albeit that the pupil *tacuit per utile quadriennium*.

Fol. Dic. v. 1, p. 579. Colvil. MS. p. 261.

No. 98. [8980] CRAIG v. JOHN COCKBURN. 1583.

Mr. Thomas Craig advocate being bound as cautioner in the sum of 1000 merks for one John Cockburn, obtained this bond transferred in John's son who was minor, and thereupon charged him to relieve him thereof. He suspended, and alleged, That the decret of transferring was given against him for not compearance; likewise, now he offered to renounce *re integra*. Replied, In respect of the decret standing, he could not be heard to say against it, but *via restitutionis in integrum, et via actionis*. Duplied, *Setentia lata adversus minorem indefensum est ipso jure nulla*, and he being presently content to renounce, he should not be put to a new action. The Lords found the decret should stand until it were reduced.

Spottiswood (MINORS AND PUPILS), p. 212.

No. 99.

ROBERTSON v. OSWALD. January 1584.

A minor having alienated lands without consent of his curators, the Lords found, that, although he had been silent for many years after the *quadriennium utile* was expired, yet he might pursue *via ordinaria*, to get the alienation declared null *ab initio*, and that the circumscribing minors within the *quadriennium utile*, is only in case they need the *remedium extraordinarium* of a reduction.

There was one called Oswald, that had made one Robertson cessioner and assignee to an action of reduction, of certain infeftments and dispositions made by the said Oswald. The reason of the summons was qualified, that the said infeftments and dispositions were made by Oswald, *sine consensu tutorum aut curatorum*; and his father, who was at that time his lawful administrator, he being in the mean time *pupillus et minor annis*; and so he pursued not *via restitutionis in integrum et juxta ordinaria via*; but desired the infeftment to be declared null and of no effect. It was first alleged by the defender, That the pursuer, as cessioner and assignee to a minor, could have no action to pursue, because that all the privileges and benefits which of the law are granted to minors, are all personal, *et non egrediuntur persona minoris saltem ejus hæredis et universalis successoris, et nullo pacto potuit minor transferre in singularem successorem*. To the which was answered, That the reason of the summons was not founded upon the privilege granted to the minor *restitutionis in integrum*; nor yet the assignation made to that effect; but the minor had made the said assignation to pursue "*via ordinaria, et ubi minor communi auxilio et mero jure manitus est, non debet ei tribui extraordinarium auxilium, prout in l. 16, D. De minoribus; ut in presenti casu,*" the foresaid pupil had made alienation without the consent of his father, being lawful administrator to him for the time, or not authorised by his tutors or curators, and the minor in this case used the privilege granted to him of the law, *per viam restitutionis in integrum*, but he might here, as if he had been major, make assignation of his action of reduction. It was answered, That he could never now be heard, *neque ordinaria neque extraordinaria via et modo*, because he had not only kept silence and ceased, *per spatium utilis quadrennii*, but also by the space of 20 or 24 years. It was [8981] answered to this, "*quod tempus quadriennii non currit contra minorem nisi quando utitur privilegio et extraordinario auxilio,*" and so the minor or his assignee could never here be debarred from the pursuit of his action more than he were any other person. The Lords repelled the exception, and found that the minor had place here to make an assignee, notwithstanding of his taciturnity *per longum temporis spatium*.

Fol. Dic. v. 1, p. 579. Colvil, MS. p. 395.

No. 100.

HAMILTONS v. HAMILTON. February 1587.

A bond granted by a minor without consent of curators, found *ipso jure* null; and, therefore, though no revocation was made *intra annos utiles*, the Court found, that he might still object to it.

Margaret, Jeillis and Janet Hamiltons, daughters natural to umquhile John Hamilton, pursued John Hamilton, their brother, to hear and see a bond registered, wherein the said John being *minor annis*, was bound and obliged, with consent of his curator, to give to either of his sisters the fee of 500 merks. It was alleged against the registration of the same, that it was null of the law, and therefore ought not to be registered, because it was done the time of his minority without consent of his curators, "*ut in l. 3, Cod. De in integrum restitutione minorum.*" Answered, That they could not allege the nullity, because *lapsa utili quadriennio*. Answered, That he needed not to make any revocation in respect of the foresaid law; and so was found by the Lords.

Fol. Dic. v. 1, p. 579. Colvil, MS. p. 423.

No. 101. HAMILTON v. SHARP, and Others. February 2, 1630.

A reduction was pursued by a minor's successor, of an alienation made by the minor and his curator without the sentence of a judge. The Lords refused to sustain this reason of reduction, unless the pursuer would also allege lesion; and found also that this ought to be pursued within the *quadriennium utile*.

Sir John Hamilton intends a reduction against Mr. John Sharp, John Inglis, and one Armour, for reducing at his instance as proprietor of the lands of Bargany, an infertment public, anterior to his right of annualrent of £1000 out of these lands, granted to the Lord Ochiltree by the Laird of Bargany, and Josias Stuart his curator, for the cause expressed in the said infertment. The reason was the minority of the disposer, and want of authority of the Judge Ordinary, viz. the Lords of Session, finding upon trial the alienation necessary, and for the good of the minor. Which reason the pursuer alleged to be relevant *quocunque tempore*, as well *post annos utiles minoris* as within the same, whenever it were pursued to reduce such alienations; and that as it was enough to the minor himself after the expiring of these years after his minority, so to his successors, to reduce upon that ground of wanting of a sentence of a Judge, albeit he qualified no lesion done thereby to the minor, seeing he alleged it to be a nullity of the law, and that the deed being null of the law, as is evident by the civil law *de alienationibus prædiorum minoris*, and that this case was different from the restitution of minors upon lesion, which requires pursuit to [8982] be made within four years after minority. The Lords would not sustain this reason, except the pursuer joined therewith lesion; and also found, that the same ought to be pursued within four years after the minority, as is appointed by the "l. 3, Si quando Cod. Si major factus alienationem factam sine decreto ratam habuerit, quæ est tit. 74, lib. 5, Cod." and because the pursuer condescended in his reason upon lesion, and that he replied, that the minor himself had revoked *débite tempore*, and intended his action of reduction of that alienation; therefore this reply was sustained to interrupt the prescription, and it was found, it being so interrupted once by the minor himself, the singular successor might *de novo* intent this new action of nullity, without necessity to insist upon that prior reduction. See PERSONAL AND TRANSMISSIBLE.

'Act. STUART.—Alt. NICOLSON.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 579. Durie, p. 488.

No. 104. THOMSON v. STEVENSON. December 13, 1666.

Although the lands of a pupil may not be alienated without authority of a judge, those of a minor may.

Janet Thomson pursues a reduction of a disposition made by her to Stevenson upon minority and lesion; and also upon this reason, that the disposition was done within some few days after her pupillarity, and it being of land, ought not to have been done without authority of a Judge, especially seeing she had no curators. The defender answered to the first, There was no lesion, [8983] because the disposition bears a sum equivalent to the value of the land. To the second, *Non relevat*. The pursuer answered, That the subscribing and acknowledging the receipt of money by a minor, cannot prove itself, but the minor is lesed in subscribing the same. The defender duplied, That he offered to prove by witnesses, that the price was truly paid, and profitably employed.

The Lords found not the second reason of reduction relevant, the authority of a Judge being only required to the alienation of lands made by tutors of their pupils' lands. See WITNESS.

Fol. Dic. v. 1, p. 579. Stair, v. 1, p. 411.

* * Dirleton reports this case :

In a reduction of a right and disposition of certain houses, being pursued *ex capite minoris ætatis* ; it was alleged, That the disposition did bear 500 merks to be paid, and the defender was content to quit the right being paid of the sum.

It was found, that the allegiance was not relevant, unless he should offer to prove it really paid, and profitably employed for the use of the minor.

In this process the Lords would not sustain the reason *per se*, unless lesion were joined and libelled, viz. that the lands were disposed *sine decreto judicis*.

June 4, 1667.—In the case Thomson *contra* Stevenson, the Lords found, that the extract out of the kirk-session books, is not a sufficient probation of age to infer reduction *ex capite minoritatis* ; but the case being *difficilis probatio* after a considerable time ; they found, that *aliqualis probatio* ought to be received, with the adminicle foreshaid. See PROOF.

NORVEL.—Alt. WALLACE.—Clerk, HAMILTON.

Dirleton, No. 61, p. 26, and No. 72, p. 30.

No. 106.

[8985] BELL v. SOUTHERLAND. January 1728.

A minor *in familia* with his father, having attested a cautioner in a suspension, without his father's concurrence, and being pursued for the debt, proponed this defence, that his deed was *ipso jure* null. It was answered, That deeds by minors, without their fathers' consent as administrator, are not *ipso jure* null, but need reduction, and now the *quadriennium utile* is past without any challenge made to the obligation. The Lords found the deed *ipso jure* null. See APPENDIX.

Fol. Dic. v. 1, p. 579.

No. 107.

JAMES THOMSON v. WILLIAM PAGAN. July 3, 1781.

Deeds granted by a minor who has no curators, subsist till set aside in a proper action, and that action cannot be brought after the *quadriennium utile* is expired ; but deeds granted by a minor, having curators, without their consent, are *ipso jure* null, and to them the *quadriennium utile* does not apply.

James Thomson, a minor, granted a receipt, along with his father, for two bills, which they became bound to give back entire, or otherwise to pay the contents to William Pagan the original holder of them. The bills were delivered to the father, who afterwards became insolvent ; and Pagan, at the distance of ten or twelve years, brought an action against the son for payment, or re-delivery. He again brought a reduction of the debt, *ex capite minorennitatis*, in which it was

Pleaded for Pagan ; That the action was incompetent, as not having been brought within the *quadriennium utile* ; Erskine, b. 1, tit. 7, § 35.

Answered ; A distinction should be made between deeds which are *ipso jure* null, and deeds which are valid till cut down by a rescissory action.

Of this last kind are deeds granted by a minor who has no curators ; or by one having curators, with their consent. These subsist till set aside in a proper action ; and that action cannot be brought after the *quadriennium utile* is expired.

But, where deeds are granted by a minor, having curators, without their consent, there is no occasion for a rescissory action. They are *ipso jure* null. The *quadriennium utile* does not apply ; and the exception arising from the minority of the granter need not be pleaded, till he finds it necessary to defend himself against the consequences of his imprudence.

This distinction we have borrowed from the Roman law ; and it is adopted by all our lawyers, particularly by Lord Bankton, b. 1, tit. 7, § 88.

In the present case, the pursuer was certainly under the legal curatory of his father. But no curator can be *actor in rem suam* ; and, therefore, his consent to the deed in question, of which he himself was to reap the whole advantage, was the same as if no consent whatever had been interposed.

[8986] As the deed was clearly in favour of the father, who could not be *actor in rem suam*, the Court adhered to the judgment of the Lord Ordinary, "sustaining the reasons of reduction."

Lord Ordinary, KENNET.—Act. CHA. HAY.—Alt. D. ARMSTRONG.—Clerk, COLQUHOUN.

L.

Fol. Dic. v. 4, p. 7. Fac. Col. No. 64, p. 104.

No. 108. EDGAR v. Executors of EDGAR. January 1614.

In an action pursued betwixt John Edgar and the Executors of umquhile Edward Edgar, the Lords found, that John Edgar minor could not be restored *in integrum* against a bond, in respect he qualified no lesion, but that the gear had made shipwreck after the date of the bond. Fol. Dic. v. 1, p. 580. Kerse, MS. fol. 146.

No. 109. HOUSTON v. MAXWELL. January 25, 1631.

In a reduction of an assignation upon minority and lesion, it was not sustained that an equivalent sum was paid for the right, unless it were also offered to be proved, that the sum was profitably employed for the minor's use.

Houston, as heir to umquhile Helen Murdoch, pursuing Maxwell for reduction of an heritable alienation of some land, made to the said Maxwell by the said Helen Murdoch, upon this reason, because at the time of the said disposition, she was minor, and received not a competent price for the said alienation, neither was there any just or lawful cause, which may sustain the said alienation, nor no sentence of any sovereign Judge interponed finding the said alienation necessary, and to be a warrant to authorise the same, without which the same cannot be sustained, the woman being within 14 years of age, and greatly prejudged ; and it being excepted for the defender, that this reason ought not to be sustained, in respect of the bond of alienation produced, which bears the woman's receipt of the money therein contained, for the alienation, and which is more than the just worth thereof, and so she could never allege lesion, no more can her heir do ; seeing he offered to prove by witnesses in fortification of the bond of alienation, that he had really paid the sum upon her great and instant desire, when she was travelling to England ; so that there needed no decret, it being given to her truly, as said is. The Lords found the reason relevant, [8987] and repelled the exception ; for the Lords found the alienation could not be sustained, albeit it bore payment of the true price of the land, and albeit the defender offered to prove the real delivery thereof to her ; seeing the payment made to herself being then of 14 years at most, neither being authorised with the sentence of a Judge, and noways qualified converted to her utility, nor consigned to be given to her, as a judge should appoint, nor given to her curators, if she any had, could not exoner defender ; but the minor was found thereby circumvened, and so the alienation could not be sustained in law ; this is conform to the L. 24, § Restitutio D. De min. 25 annis, Si adversus venditionem minor restituitur, emptori prærium esse reddendum, nisi emptor tunc prærium ei dederit, cum eum perditurum non ignoraret, nam sicut pecuniam mutuans minori eam consumpturo, non postest pro pecunia agere, sic emptor non agit pro prætio sic soluto, nisi quod parcius hoc servetur in venditione, quia ibi æs alienum solvitur, quodolvere necesse est, credere autem non est necesse, quare si necesse fuit prærium solvi, non

omnino talis emptor damno est afficiendus, sed in casu prædicto non potest doceri de prætio vere soluto, et utcumque fuerit solutum, tamen communiter tenetur, ut est in glossa in dicto § Si pecunia pro prætio minori soluta salva sit, tum est restituenda emptori, alias non. And the Lords also found, that this disposition should be reduced, from the beginning, and not from the time of litiscontestation only, as the defender desired, seeing this reduction and restitution is the restoring of the cause and the party, to the same estate wherein they were before the alienation.

Clerk, HAY.

Fol. Dic. v. 1, p. 580. Durie, p. 558.

No. 110. [8988] DAVIDSON v. HAMILTON. July 4, 1632.

A husband provided his wife in liferent of his whole means and conquest, and bound himself to pay 5000 merks to her father. He brought a reduction on minority, and lesion because he had got only 1000 merks of tocher. The contract reduced as to the obligation to the father-in-law, but not as to the wife's provision, although there might have been an eventual prejudice to the children.

In a reduction of a contract of marriage, at the instance of Alexander Davidson, made betwixt him and Robert Hamilton, and the said Robert's daughter, wife to the said Alexander, whereby the said Alexander was obliged to infest his said future spouse in all his lands and estate, and in all which he should thereafter conquest *stante matrimonio*, during her lifetime, which the said Alexander desired to be restricted to a competent provision, seeing there was only conditioned to him in tocher by the contract 1000 merks, and seeing the bairns, if the wife survived him, would be destitute of all means to live by; and also by the contract he was obliged to pay to his said father-in-law 5000 merks, and to do sundry other particulars to him, if there were no bairns of the marriage, which should live while they were married, which contract he desired to be reduced, because he was then minor and greatly hurt. The Lords sustained the reason of minority and lesion, for reducing of the contract, in so far as the pursuer was thereby obliged to his father-in-law, as said is; but the Lords found not the reason relevant to reduce the contract, so far as concerns the provision therein, introduced in favours of the minor's wife, for her liferent of the pursuers whole estate; for the Lords found, that any either major or minor, might provide his future spouse to his whole means, and that such provisions are valid by the laws of this realm; howsoever by the Roman law there was required an equal proportion *inter dotem et donationem propter nuptias*, neither was the minor esteemed to be prejudged by such provisions, in such sort that he should be restored against the same, especially where there was no creditor to the pursuer insisting in this reduction, nor complaining of this provision, *quo casu* if the wife had been provided to her liferent, and the bairns [8989] to the fee of the whole, and inhibition served thereon in their favours, the reduction then might have been more considerable, whereas it is not so now, none being pursuer but the husband alone. And where it was alleged, That by this provision the bairns of the marriage, if the wife survived the pursuer, would want all provision and means of life and maintenance, that was not to be respected, seeing it was an uncertainty, which had a possibility to be so or otherwise, for it might be that the wife should die before him, and that the bairns might die before the wife should come to have the use of her liferent; and if they should not die, but lived after their father, the mother bruiking the liferent, yet in law the wife would be compelled to grant them a reasonable modification for their education and sustentation, which is agreeable with all law, both divine, natural and human.

Fol. Dic. v. 1, p. 580. Durie, p. 639.

No. 114. [8991] Lord BLANTYRE v. WALKINSHAW. July 2, 1667.

In a reduction, the Lord Blantyre *contra* Walkinshaw, *ex capite minoritatis*, It was found, that the granting of a bond, though with consent of curators, being persons

above all exceptions, was lesion ; and that it was not sufficient to allege that the money was actually delivered to the curators, or to the minor in their presence, unless it were also alleged that it were converted to his use.

This seemeth hard, for the borrowing of money by the minor whose affairs may require the same, was not lesion, but the misimplying of it, which is the fault of the curators.

Fol. Dic. v. 1, p. 580. Dirleton, No. 88, p. 36.

No. 117. [8992] HENDERSON of Fordell v. DRYBURGH. March 1684.

Marjory Dryburgh having charged Sir William Henderson of Fordell for payment of 1000 merks contained in a bond of corroboration of a debt due to his father, and he having suspended and raised reduction upon a reason of minority and lesion, he being minor the time of granting the bond ; answered, That there was no lesion, seeing the bond was granted in corroboration of a debt due to his father, who had disposed to the suspender his estate with the burden of his debts which he had undertaken to pay by his contract of marriage, and whereof there was no reduction raised. The Lords repelled the reason of suspension, and found the letters orderly proceeded in respect of the contract of marriage produced.

Fol. Dic. v. 1, p. 580. Sir Patrick Home, MS. v. 1, No. 598.

No. 119. [8993] CARMICHAEL of Maulesley and his LADY v. The Lady CASTLEHILL and JOHN SINCLAIR of Stevenson, Younger, her Husband. February 24, 1698.

A Lady, minor, found lesed by her contract of marriage.

Sir George Lockhart having granted a bond of provision to his daughter for £5000 Sterling, she is married to her cousin, James Lockhart, younger of Castlehill, and with the advice of friends there is a contract of marriage framed, by which she assigns her portion, then extending with the annualrents to 110,000 or 115,000 merks, and, in lieu thereof, she is provided with a jointure out of the lands, said to be worth £500 Sterling per annum. Castlehill, her husband, dying abroad, and she being now married to my Lord Carmichael's son, the Laird of Maulesley, and being still minor, she revokes her first contract of marriage with young Castlehill, and raises a reduction of it against Stevenson and his Lady, on these reasons, 1mo, That it is null, being entered into by a minor wanting curators, and her husband could not authorise her, especially in a post-contract drawn up after the marriage ; for that were to make him *auctor in rem suam* ; 2do, She was enormly lesed in disposing away the fee of a vast tocher, without any clause of return of the whole, or a part, in case the marriage dissolved without children by his death, which event had existed, and had got nothing but a liferent of lands not worth 7000 merks per annum, which was but the annualrent of her own portion ; so, in effect, she had nothing from Castlehill ; and many other inequalities in the terms and conditions of the contract were insisted on to evince her lesion.—Answered to the first, Women-minors are by no law restrained to marry, nor to enter into contracts of marriage ; and a wife who is major, entering into such a contract, is destitute of authority, seeing her husband can no more authorise her than a minor *in rem suam* ; so that a minor can plead no nullity of her contract, except she qualify lesion, which brings all to the second reason of reducing ; and there can be no [8994] definition of enorm lesion, where there is no fixed *norma*, there cannot be an enormity ; but so it is, contracts of marriage and provisions have no standard, save the estate of the husband, and the various humours and inclinations of the parties contracting ; so that if there be any *casus arbitrius* in law, this is one. Now, if we consider Castlehill's estate, which was about £1000 per annum, the jointure given her is far beyond a *rationalibus tertia*, being a just half of the whole ; and whereas the 8000 merks provided to the daughters is complained of, as far below their mother's

tocher, and so urged as an evidence of the unequal terms in which the contract was drawn up, yet if that case of the daughters had existed, with the Lady's jointure, the heir would not have had so much behind as would have served him for an aliment; so the conditions were rather exorbitant than mean. And as for tochers, how great soever they are, settled *eo animo* by parents on their children *ut alienentur*, and that they may be assigned by them to their husbands in their contracts matrimonial, and the clause of return of such tochers, is unusual and extraordinary; and that Sir George Lockhart, her father, in his second contract with my Lord Wharton's daughter, notwithstanding his own vast estate, and a great tocher, secured her only in £600 Sterling per annum; and the Lady Salton, who brought more than 100,000 merks of portion, got only 7000 merks by year. And President Spottiswood, in his Decisions, *re HUSBAND and WIFE*, 28th February 1635, Sluman *contra* Ker, No. 332, p. 6117, shows, where a minor wife was provided only to the liferent of her tocher, yet the Lords found it no lesion; and at most, the Lords sustain the reason of minority and lesion, not to reduce the contract *in toto*, but only to rectify and supply its deficiency and shortcoming, as was found, 22d November 1664, M'Gill *contra* Ruthven of Gairn, No. 77, p. 5696, *voce* HOMOLOGATION. And in Montgomery, No. 43, p. 5803, a transaction was sustained, made by his Lady's curators, when minor, settling a locality in place of the courtesy, which never existed; and the like was done in Aberlady's case with his curators, who bought the Lady's jointure at six years purchase, and yet she died within a year after the transaction, and was alleged to have a cancer in her breast at the time; even as it was contended in the former case of Mr. Francis Montgomery's, that the Lady Leven was known by physicians to be unfit for procreation of children, and so there never could be a curiality; yet both transactions were sustained as rational.—Replied for Maulsley, Though minors are reputed majors, in so far as concerns the entering into marriage, yet as to the terms and conditions, they are altogether incapable; and the Lords annulled the Duchess of Monmouth's contract of marriage, because it provided the fee of her lands to his heirs, though of another marriage.* And 7th March 1623, Lord Bargeny *contra* his Son, *voce* PERSONAL AND TRANSMISSIBLE, a contract is likewise reduced on minority and lesion. And the Roman law is very plain, that restitution *in integrum* is granted to minors, where they are lesed *per immodicam dotem et donationem, tit. Cod. Si adversus dot. restitutio postul. et si adversus donationem*; and by Justinian's Novels, there was a precise equality introduced [8995] *inter dotem et donationem propter nuptias*; and whatever majors, who are *rei suae arbitri*, may yield in their contracts, that is no rule to minors, but their standards must be what majors, well advised, and acting on rational grounds and considerations, would do in such a case. The Lords found the Lady Maulsley lesed by her first contract of marriage; but reserved to themselves to consider, if this should import a total restitution against the articles of it, or only a rectification, to bring up the terms to an equality and equilibrium.

Fountainhall, v. 1, p. 827.

No. 120. PATRICK M'DOUGALL, Merchant in Edinburgh *v.* Mr. JOHN MARSHALL
July 14, 1705.

A minor, who was a master of arts, and in appearance adult, found liable for furnishings bespoke by himself, although not for himself, but for his brothers and sisters, whom he was not bound to aliment in consequence of any succession acquired by their father, whose estate had been overburdened with debt.

Mr. John having taken off mournings from the said Patrick for the funerals of his father, to the value of £96 Scots, he raises reduction thereof, on this head, That he was minor, and had *debito tempore* revoked, and was clearly lesed, they not being for himself, but for his brother and sister, whom he was not bound to furnish, he now discovering his father's estate to be overburdened with debts.—Answered, He sent for the merchant, and was the sole off-taker and engager for their payment; Mr. M'Dougall knew not for whom they were, nor bargained he with any but him; he saw him by the

* See No. 8, p. 2369.

habit of his body to be of a man's growth, and if he was minor, he could not want much of twenty-one; neither did he signify to him his minority, and so *dolose* by his silence induced him to trust him, *et non debet ex sua fraude lucrari*. Likeas, he was a master of arts, and took off cloaths to his brother and sister (which the merchant was not concerned to know) it was *debitum naturale et officium pietatis* in him, and he can retain it out of their patrimonies at counting.—The Lords repelled the reason of minority in this case, and found him liable; though the furnishings were not to himself, but to his brother and sisters, reserving his action for repayment against them as accords.

Fol. Dic. v. 1, p. 580. Fountainhall, v. 2, p. 284.

No. 123. [8996] MONCRIEF v. Creditors of MITCHELL of Balbardie. January 29, 1729.

Some years annualrent being resting to a minor upon an heritable bond, he not obtaining ready payment from the debtor, granted him a discharge thereof, [8997] and took his moveable bond for the same, bearing interest. The debtor thereafter becoming bankrupt, the minor intended reduction *intra annos utiles*. The lesion condescended on was, That he discharged the annualrent arising from the heritable bond, whereas he ought to have taken a personal bond of corroboration in further security of these annualrents, without granting any discharge, which no man of experience would have neglected, being a method calculated to secure the creditor, without bringing any additional burden upon the debtor. The reduction was sustained. See APPENDIX.

Fol. Dic. v. 1, p. 581.

No. 125. [8998] OLIVER MELVIL v. Mr. ROBERT ARNOT, Minister at Ceres.
July 5, 1782.

A slight act of homologation, occasioned by the influence of a father, and only a few days posterior to minority, not sufficient to bar *restitutionem in integrum*.

While in the nineteenth year of his age, Oliver Melvil, jointly with his father David Melvil, granted certain bills to Mr. Arnot. A state of accounts between the two last-mentioned gentlemen, of which these bills were articles, having been drawn up, with a docquet certifying its justness and accuracy, this docquet, only fourteen days after his majority, was subscribed by Oliver, together with his father.

Oliver, on the head of minority and lesion, instituted, within the *quadriennium utile*, an action of reduction of these bills; against which action it was pleaded, That having, when arrived at full age, homologated them, by subscribing the docquet above-mentioned, he had precluded himself from all claim of restitution.

The Lords were of opinion, that the salutary privilege of *restitutio in integrum*, was not to be barred in a case like the present, in which the act alleged to infer homologation was of such a slight nature; especially as it occurred so very recently after nonage, and had proceeded from duty to a father.

They therefore adhered to the Lord Ordinary's interlocutor, "finding no act of homologation on the part of the pursuer sufficient to bar reduction; and sustaining the reasons thereof."

Lord Ordinary, WESTHALL.—Act. CRAIG.—Alt. HAY.—Clerk, HOME.

S.

Fol. Dic. v. 4, p. 7. Fac. Col. No. 51, p. 80.

No. 127. [8999] ALEXANDER DRUMMOND v. BESSIE LOGAN. June 28, 1628.

A minor being confirmed executor-dative to her father, and the inventory given up by her mother in her minority, is pursued for her father's debts. The minor offers

to renounce all debt of the executry ; but the pursuer alleged, that she cannot now renounce after confirmation. The Lords found she might renounce *rebus integris*.

Fol. Dic. v. 1, p. 582. Auchinleck, MS. p. 131.

No. 128. JOHN M'DOUGAL v. MARGARET KENNEDY. January 25, 1628.

John M'Dougal having got a bond of 300 merks registrated against Margaret Kennedy, as lawfully charged to enter heir to her father, and afterwards having charged her, she suspended, upon this reason, that she was minor the time of the giving of the decret without curators, and now having chosen them, she desired to be reponed, and consigned a renunciation ; which the [9000] Lords received by way of suspensicn, albeit she had not intended a reduction of that decret of registration.

Fol. Dic. v. 1, p. 582. Spottiswood (RESTITUTIO IN INTEGRUM), p. 300.

No. 129. TAILZIFER v. DRUMMOND. June 11, 1631.

A minor pursued as charged to enter heir, offered to instruct payment of the debt, but having failed to do so, when the term came to be circumduced, he was still allowed to give in a renunciation by him and his curators.

One Drummond being convened as lawfully charged to enter heir to Sir Alexander Drummond his father, for payment of a debt due by his father, at the instance of one Tailzifer in Edinburgh ; and the minor compearing by his procurator, and alleging the debt to be paid, and litiscontestation being made therein, and a term assigned to him to prove the same ; at the term of probation the pursuer calling the act, and desiring the term to be satisfied, the defender's procurators declared, that they would pass from that exception ; and seeing the defender was convened only as lawfully charged to enter heir, he offered to produce a renunciation, subscribed by the minor and his curators, renouncing to be heir to him *rebus integris*, seeing he never had intromission. And the pursuer replying, that, *in hoc statu processus*, he cannot be heard to renounce, after proponing of a peremptor of payment, and after the term was past assigned to prove it ; for he alleged, that that made *rem non integram*, and it were dangerous to rescind litiscontestation done *partibus comparentibus* upon such an offer ; for albeit, after sentence against a party, as lawfully charged to enter heir, the Lords in suspension will permit the said party to renounce, notwithstanding of the decret so given against him ; yet it is not alike in this case, where there is an exception proponed and admitted, of payment of the debt, which *perimit totam causam* ; the Lords, notwithstanding of the act, found that the minor, *in hoc statu processus*, might be heard to renounce, for he might be heard, without all controversy, to reduce upon that reason, he being minor, and before sentence, at the first term, the Lords thought the minor might be reponed without further process ; for a major, after sentence, is heard to renounce, by suspension of the decret given only against him as lawfully charged, albeit he compeared to renounce before, and did it not.

Act. CUNNINGHAME.—Alt. PRIMROSE.—Clerk, SCOT.

Fol. Dic. v. 1, p. 582. Durie, p. 590.

No. 131. [9001] TAYLORS in Leith v. DENNISTONES. December 7, 1687.

A tutor having confirmed his pupils executors to their father, and having mispent the estate, they, after their pupillarity, raised reduction of the confirmation upon minority and lesion.

Alleged for the defender ; There was no lesion by the confirmation, the testament being opulent, but only by the tutor's mal-administration, whereof the minor will get relief from the tutor's cautioner.

The Lords refused to reduce the confirmation if the estate confirmed exceeded the defunct's debt.

Thereafter, it being alleged and proven, that the defunct's debt was three times more than the inventory of the testament, the Lords reduced the confirmation upon minority and lesion, and left the defender to recur against the tutor's cautioner in the confirmed testament, and his representatives ; because, albeit executors are only liable *secundum vires*, the minors *qua* executors would be liable to actions, and put to charges.

Harcarse (MINORITY), No. 719, p. 203.

No. 132. JAMES MURRAY, Taylor in the Canongate v. The Children of the deceased PATRICK CHALMERS, Beltmaker in Edinburgh. December 11, 1705.

Minors reponed against a presumptive passive title, inferred from their procurators proponing for them peremptory defences, and failing in the probation.

In the action at the instance of James Murray, taylor in the Canongate, against the Children of the deceased Patrick Chalmers, beltmaker in Edinburgh, the defenders being found liable for a debt of their father's, as subjected to the passive titles by their procurators proponing peremptory defences, and failing in the probation.—The Lords reponed them against the passive titles, in regard they were minors ; because minors are not only restored *de juri communi* against contracts and obligations entered into by them when lesion appears, but even against judicial acts ; Stair, b. 1, t. 6, § 44 ; December 1, 1638, Steuart *contra* [9002] Steuart, No. 138, p. 9008 ; February 14, 1677, Duke and Duchess of Buccleuch v. The Earl of Tweeddale, No. 8, p. 2369.

Fol. Dic. v. 1, p. 582. *Forbes*, p. 52.

No. 133. ERSKINE v. The Daughters of ERSKINE. December 22, 1739.

A party had been cautioner for a teller in a bank, who, after the cautioner's death, run in arrear. The cautioner's children were found liable, although they pleaded minority and lesion ; alleging, that their tutors ought to have withdrawn the caution.

Colonel John and Mr. Thomas Erskines had been cautioners for Mr. George Andrew, as one of the tellers in the Royal Bank ; and the Colonel being charged on his bond of cautionry for the sum of , in which Andrew was deficient in his accounts, repeated a process for his relief of the one-half from the representatives of the other cautioner.

Their defence was, that the deficiency had happened since their father's death, while they were pupils ; that it was the duty of their tutors to have withdrawn their father's bond of cautionry, which every cautioner for a person [9003] in office, or his heir, may do when he thinks fit ; and that against this omission they fell to be reponed on the head of minority and lesion.

But as this was no direct lesion, but a lesion arising from the accidental bankruptcy of the principal, and that occasioned by his latent and scarce to be suspected malversation, the Lords "found it not to be a lesion of that nature, against which the minor could be reponed ; and therefore repelled the defence."

It is a different question, how far tutors are liable to make up the loss arising from their omissions ; for though, in this case, even the tutor would not be liable, as it was such an omission as a prudent man might have fallen into, yet, in many cases, minors will not be reponed against their tutors' omission, to the prejudice of a right acquired by third parties, when yet the tutor may be liable to make up the minor's loss.

Fol. Dic. v. 1, p. 582. *Kilkerran* (MINOR), No. 4, p. 347.

No. 138. [9008] STUART v. STUART. December 1, 1638.

A decree of exoneration obtained by a tutor against his pupil and curators, was reduced *ex capite minorennitatis, et lésionis*, although the curator appeared and defended, several articles having been omitted by the tutor, out of the charge, and several answers having been neglected to be proponed for the minor.

One William Stuart pursues restitution, after he had past the age of 21 years, but far within the time of *anni utiles*, against Robert Stuart, who was his tutor, while he was a pupil, and which tutor had obtained a decret of exoneration before the Lords, against his said pupil, and his curators, they compearing after count and reckoning, and thereupon heard and allowed, and decerned by the Lords; against the which sentence, and articles of the count, this party desiring to be reponed, as being thereby enormly prejudged, by sundry omissions left out by the tutor, and by sundry answers omitted to be given in to his charge, by his curators; and the said Robert compearing, alleged, That this action ought not to be sustained, in respect of the sentence given against him, authorised with his curators compearing, who, if they had done him any wrong, either in commission or omission, they are answerable to him therefore, and they are his direct parties, who are in law countable to him, and he cannot come back again upon him, to crave a new account, as prejudged by the first, in respect of his sentence *parte comparente*, whereby he is *in tuto*; otherwise there could never be an end of such actions, which were a dangerous prepara-[9009]-tive, if decreets of the sovereign Judge in *actione tutelæ et rationum reddendarum* could not secure tutors. The Lords repelled this allegiance, and ordained the pursuer yet to be heard, to allege what he may say justly against the foresaid counts, given in by his tutor, and so ordained them to meet before one of their number, whom the Lords nominated to be their auditor, and to give in the articles of the counts, and answers thereto, notwithstanding of the prior sentence.

Act. LAWRENCE OLIPHANT.—Alt. HOB0.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 583. Durie, p. 863.

No. 141. [9011] Earl of ANNANDALE and COWHERD v. JOHNSTON of Breakenside. December 20, 1679.

Minor *non tenetur placitare*, not even in a question of meiths and marches, seeing that may cut off some of his inheritance. Here it was repelled, because proponed *post conclusum in causa, et minor lite se obtulit*; and they found the last Earl had intruded.

Fol. Dic. v. 1, p. 582. Fountainhall, MS.

No. 144. [9016] JOHN ALEXANDER v. PARK and ORD. January 14, 1697.

A minor being lesed *in facto*, by omitting to produce a contract in a reduction, the Lords restored him *contra rem judicatam*.

It was a reduction of a certification, in an improbation of a minute of sale of a tenement of land, on these two reasons; 1mo, Park was minor at the time of obtaining it, and has quarrelled it *intra annos utiles*; 2do, You was *in mala fide* to crave certification against that minute, because it was in your hands, and you had made use of it by serving inhibition thereon. Answered, Minority is no ground of restitution *quoad points in jure*, as was found between the Marquis of Montrose and Cochran (See APPENDIX). 2do, Though I have a mutual contract in my hand, yet I may call for your double of it, and crave it to be reduced for not implement, or any other legal grounds.

The Lords considered the minor was here lesed *in facto*, by omitting to produce the paper called for ; and therefore law restored him in such cases *adversus sententiam et rem judicatam*. And as to the minute, it did not appear that there were two principles, and therefore they reponed the minor to this defence against the certification, that I offer to prove you had the writ called for (and against which you took the certification), in your own hand at the time, because as it was competent to me then, it was competent for me to propone it now.

Fol. Dic. v. 1, p. 583. Fountainhall, v. 1, p. 755.

No. 146. [9017] CUBIE v. CUBIES. November 7, 1699.

A minor's procurators rashly referred to the other party's oath. The minor although plainly lesed had no remedy.

In the concluded clause, Cubie *contra* Cubies, it was alleged against some bonds of provision, granted by a father to his children, 1mo, They were never delivered, 2do, They were satisfied and paid, in so far as they had got sums equivalent thereto from their father, posterior to these provisions ; whereunto it was answered (as appeared by the debate in the act of litiscontestation), that these bonds being now in their hands, they needed not prove delivery ; neither did such writs require a formal delivery. To the second, That donations by parents were presumed to be *distinctæ liberalitates*. Replied, That cannot be supposed, because they offered to prove by their oaths that they were given in satisfaction of their former debts. Which reply being found relevant, three of them compeared, and deponed, that when their father gave them these sums, he expressly declared he gave it them over and above their bonds of provision ; and the fourth said, she got her sum from her elder sister, Helen Cubie, but neither said it was in satisfaction or not. These oaths falling to be advised this day, it was objected by the pursuer of the reduction, that he was minor, and disclaimed the debate made for him, being plainly lesed thereby, seeing the presumption of law militated for him, that the posterior payments must be ascribed to satisfy and extinguish the prior bonds, *quia debitor non præsuntitur donare*, and there was no necessity of referring it to oath, that it was either given or accepted in satisfaction ; and therefore craved to be reponed, as has been often decided, Young *contra* Paip, voce PRESUMPTION, and 12th Nov. 1698, Sydserf, *IBIDEM*. The Lords were sensible the process was wrong managed, but seeing it was *juratum*, they refused to repon him now. But as to the sister, whose oath was not special, they ordained her and her sister Helen to be re-examined, what the father declared when he gave Helen the money to deliver to her younger sister, [9018] if he said it was over and above what she was provided to, or in part of it *pro tanto*, and what Helen said to her sister when she gave it her. Neither did the Lords regard that it was contended to be an extrinsick quality, that the father gave it them over and above their portions, and so ought to be *aliunde* proved, for they thought the *causa dandi* intrinsick. Parallel cases to this have been so oft decided and marked, that this might have been omitted, had it not been for the special circumstance of the oath, which exeems it from the common case and presumption, "*quod debitor non donat nisi expresse id actum fuisse appareat* ;" and that it was unnecessarily referred to oath by a procurator, to the prejudice of a minor, his client.

Fol. Dic. v. 1, p. 584. Fountainhall, v. 1, p. 65.

No. 148. [9019] RICHARD OAKLEY v. JAMES TELFER. January 23, 1705.

A minor was not reponed against a material defence omitted by his procurator.

Richard Oakley, merchant in London, having furnished some merchantware to Robert Telfer, he took his bond for £50 Sterling, as the price ; and distressing

him for it, James Telfer of Haircleugh, his brother, in December 1679, writes a letter to the said Mr. Oakley, entreating him to forbear distressing his brother Robert till Whitsunday, and he formally engages to pay him at that term. On this letter he forbore him; and both Robert and James Telfers dying within a year or two after this, without paying the debt, Richard Oakley raises a pursuit against James Telfer of Haircleugh, as heir to his father, and as lawfully charged, and founds on his father's letter; and in 1682 obtains a decret against him *in foro contradictorio*, wherein there is compearance and sundry defences proponed; and thereon leads an adjudication. Of this decret, and the diligence following thereon, Haircleugh raises a reduction, and insists on these reasons, that he was the time of obtaining the said decret, in 1682, a minor, and truly upon the matter *indefensus*; for though several defences were proponed, yet the material objection was omitted, that the letter founded on was not probative, being neither holograph, nor mentioning writer's name nor witnesses, and so null of the law; and though competent and omitted be not regularly admitted, as receivable against decreets *in foro*, yet it can never be obtruded against him, an infant at the time, and who now propones the same. And, by the common law, *tit. C. Adversus rem. judicat.* minors are sometimes restored against judicial sentences. Answered, Though the privileges of minority be very great, yet they are not such as to restore minors to [9020] obvious allegiances, which, if they had been true, could not have been omitted; but they had not the confidence to deny the verity of the letter at that time; and now it ought not to be received, when so long a course of time as 22 years has made such an alteration in prejudice of the party with whom they have to do, as what was easy to adminiculate and astruct them of being his handwriting, is next to impossible now, all the parties being dead; and if you have, by your delay, deprived me of that probation, you ought to reap no benefit thereby, seeing if you had quarrelled it then, I would have infallibly proved it; and minors may be reponed in points of fact, but not *in jure*, as was found since the Revolution, betwixt Cochran of Kilmaronock and the Marquis of Montrose (See APPENDIX), and the Lady Kincardine v. Purveshall, No. 145, p. 9016; 2do, There is no necessity for these solemnities in this case; for, though Haircleugh was no merchant, yet his brother Robert, and Oakley, with whom he contracted, were, and the subject-matter was trading and merchantware; so that such missives need neither be holograph nor have witnesses. Replied, As soon as he came to understand his business, he insisted vigorously in his reduction; and this is neither *res mercatoria* nor *inter mercatores*. It is true, bills of exchange are regulated *jure gentium*, and are dispensed with as to these solemnities; but this letter is not of that kind, but a mere fidejussory obligation; and cautioners in law are very favourable. Duplied, That the principal party's employment, and the subject-matter determined, if it was *res mercatoria*; and even a minor merchandising, giving bond for ware, will not be reponed: And here he is not so much cautioner as *expromissor*, and taking the debt upon him in *constituta pecunia*. The Lords repelled the reasons of reduction, and adhered to the decret *in foro*, and refused to repone the minor in this case.

Fol. Dic. v. 1, p. 583. Fountainhall, v. 2, p. 260.

No. 149.

ANDERSON v. GEDDES. January 14, 1732.

A Decree having been obtained against a common debtor, during the minority of another creditor, reduction was intended of the same, upon minority and lesion; and it was pleaded for the creditor-reducer, That the decree was iniquitous, an obvious objection lying against the claim upon which it was founded; and that he had an interest to reduce, in regard that, at the time of establishing this unjust debt, the common debtor had not a sufficiency of funds to satisfy both. It was answered, That the very objection now founded on was proponed by the common debtor himself, and repelled, and minors are never restored against proponed and repelled. And *esto* it had been omitted, minors are only restored to their defences, which were competent and omitted in processes against themselves, where their interest is direct, but not where the pro-[9021]-cess is against a third party, though such process may occasionally

affect their interest ; because this would tend to make pleas endless. The Lords assoilized from the reason of reduction.—See APPENDIX. *Fol. Dic. v. 1, p. 584.*

No. 150. JAMES CAMPBELL *v.* Representatives of JAMES GRAHAM.
December 5, 1752.

A minor cannot be reponed against a decree of reduction of a minute of sale, after the land is bought by a third party, on the faith of the reduction.

James Graham being incumbered with debts, sold his lands of Longbodholm, anno 1728, to James Jardine, who died before any part of the price was payable, leaving a widow and three infant children. There being no readiness on their part to pay the price, James Graham, pressed by his creditors, brought a declarator of irritancy of the minute of sale, which was allowed to pass in absence. This decret of declarator paved the way to a trust-disposition, granted by James Graham, anno 1730, in favour of his creditors. The trustees, by the powers contained in that disposition, sold the lands, anno 1732, to Edward Cutlar ; and the purchaser, to clear the lands of incumbrances, brought a reduction and improbation, in which the Representatives of Jardine were called, and obtained a certification anno 1735.

No earlier than the 1750 did James Campbell, in the right of the Representatives of James Jardine, bring a process of reduction of the decret of declarator of irritancy of the minute of sale betwixt Graham and Jardine, as not only being in absence, but against an infant undefended ; and concluding also against the trust-disposition, and all that followed upon it. The defence was principally laid upon the decret of certification obtained by Cutlar, the purchaser, against the Representatives of James Jardine ; but which the Court did not regard ; because, it was discovered, that the pursuer had at the time one of the doubles of the minute of sale in his possession. But, with regard to the reduction of the minute of sale, at Graham's instance, against the Representatives of Jardine, it was the opinion of the Court, that the decret, though against a pupil undefended, was still equal to a decret in absence ; that, quoad a decret in absence, minority cannot enter into the question ; because, a major may be reponed *quandocunque* against a decret in absence, upon paying expense and damage, and that a minor can have no stronger privilege ; but that, in the present case, where Graham had sold the lands, trusting to his decret of reduction, though in absence, being the best security he could have for the time, it was impossible the minor could be reponed against the decret, when it was no longer in Graham's power to fulfil the minute, by disposing the lands to the minor. Upon this ground, "the Lords sustained the defence, that the minute of sale was at an end by the decret of reduction, and by the after sale to Edward Cutlar, in consequence thereof." *Sel. Dec. No. 27, p. 30.*

No. 151. [9022] M'WILLIAM *v.* SHAW. June 26, 1576.

A minor insisting upon minority and lesion, must first make offer of what he received in contemplation of the bargain.

Anent the action pursued by N. and M'William *v.* John Shaw, for reduction of a contract and infetment passed thereupon, the pursuer alleged, That they should be reduced ; because, the said contract and infetment were made by him in his minority. The defender alleged, That the pursuer had no place to call for reduction, without he had offered the sum of money which he had received for the infetment of the lands contained in the contract ; which allegiance of the defender was admitted by the Lords, and the other repelled *ab agendo*, until he restored the said money.

Fol. Dic. v. 1, p. 584. Colvil, MS. p. 253.

No. 152.

FARQUHAR v. CAMPBELL. March 22, 1628.

A minor having kept a tack, whereof his father was in possession, and being charged to enter heir, offers to renounce. Answered, He could not now renounce, in respect of the tack which he has possessed since his father's decease.—The Lords found he might renounce, restoring the benefit which he made of the tack to all parties having interest.
Auchinleck, MS. p. 131.

* * Durie reports this case :

In an action by Robert Farquhar, as assignee to the L. of Carnehill v. George Campbell, as lawfully charged to enter heir to Campbell of Cuinziecleugh his father, who was obliged in some money to the pursuer's cedent, for payment of the said sum, the defender offering to renounce to be heir ; and the pursuer contending, That he could not renounce, seeing *se immiscuit* by intromitting with the duties of certain lands diverse years after his father's decease, whereof his father was heritor, or tacksman at least, which were bruiked by his father *per tacitam relocationem*, the time of his decease ; and the defender duplying, That there was a decreet of improbation against him, decerning all right whatsoever made to his father to make no faith, whereby he could not be reputed heir for any intromission he had of the said lands, seeing he stood obliged, [9023] and would be compelled by law to restore the duties of the said lands to the heritor thereof, and so reaped no benefit by his father ; this exception and duply was sustained by the Lords, that the defender should not be holden as heir ; albeit the pursuer answered, That once the defender had entered to these lands, which were bruiked by his father the time of his decease, *per tacitam relocationem*, he being tacksman thereof before, by the which entry the defender having no right otherways behoved to enter as successor to his father ; and there was no decreet of improbation, but which was only obtained since the defender's father's decease, against the defender's self, and was never intended against his father, and so cannot purge the defender's entry after his father's decease, and before that decreet of improbation, and which cannot make him cease to have succeeded therein to his father. Likeas, notwithstanding of that decreet, he hath thereafter still intromitted with the profits and duties of the same lands. Which answer was not respected, but the exception and duply sustained, as said is, seeing the decreet foresaid would make the defender accountable for his intromission with the said lands, and so he could not there-through be reputed heir. See PASSIVE TITLE.
Durie, p. 367.

No. 155.

[9024] GAIRDNER v. CHALMERS. July 10, 1636.

A minor, who was a notary, was not permitted to reduce on minority a bond written by himself, which it was alleged he had homologated, by payment of annualrent after majority, and this last fact was allowed to be proved *prouit de jure*.

John Gairdner intended a reduction of a contract, whereby he was obliged to infest Alexander Chalmers in an annualrent of £40 by year, redeemable upon payment of 600 merks, upon this reason, That he was minor the time of the subscribing it.—Alleged, He could not be heard to reduce upon minority, [9025] because that is granted only to minors that are circumvened through facility, and know not what they do ; whereas the pursuer was a notary, and drew the contract with his own hand, and besides not far from majority ; likeas, since his majority he had homologated the same, by payment of the said annualrent.—Replied, His quality of notary will not make him lose the benefit competent to minors. As to his homologation, it is only probable *scripto vel juramento partis*.—The Lords, considering the quality of the pursuer, that he was a public notary the time of the subscribing the contract libelled, and was the drawer of it himself, sustained the last part of the allegiance, bearing the pursuer to have homologated the contract, by payment of annualrent since his majority, to be proved *prouit de jure*, notwithstanding it was to fortify a contract reducible by law, whereby a minor had disposed his heritage.
Spottiswood (MINORS AND PUPILS), p. 214.

No. 156. WEMYSS v. CREDITORS. February 27, 1637.

An allegiance, that a minor affirmed himself to be major at the time of granting a bond, is a relevant defence against him pursuing a reduction of that bond, *ex capite minoritatis et læsionis*.

Umquhile Mr. John Wemyss, minister, and his son John Wemyss as cautioner for him, being obliged to diverse persons in certain sums of money, the son convened all these creditors, to hear and see him restored *super capite minoritatis et læsionis*; and some of the creditors defending, alleged, That the pursuer could not quarrel the bonds given to them, because at the time of the subscribing of [9026] the bonds the said pursuer confest and affirmed himself to be major; and as the law provides that minors should be reponed, so the law provides that minors should not deceive majors, *quia jura minoribus deceptis non decipientibus subveniunt*.—The Lords found this exception relevant for these bonds, seeing the pursuer replied upon no fraud nor circumvention upon the defender's part, whereby they induced him to make that confession; but found the allegiance ought only to be proved by oath of the pursuer, or by writ, and not by witnesses. And it being alleged by some other defenders for their bonds, That at the subscribing thereof, the pursuer swore that he was then major; this was also found relevant to sustain these bonds to be sicklike proved *scripto vel juramento*, and no otherways. And other defenders alleging, That the pursuer promised never to revoke these bonds granted to them; this allegiance was repelled; for as he had wronged himself in the act of subscribing these bonds, against which the law restored him; so of like reason he ought to be restored against that naked promise, neither being judicially made, nor sworn in judgment, nor out of judgment. Item, Some others of the defenders alleging, That their bonds were granted upon monies furnished to the pursuer *quæ erant in rem ejus versæ*, in so far as they offered to prove, that they were given to his merchant from whom he bought stuffs, which were employed to be bridal cloaths to him, and which were worn by him at his marriage, and kept thereafter in his possession; this allegiance was also found relevant to elide the restitution craved against these bonds. And lastly, some others of the creditors alleging these bonds were made for cloaths, meat and drink, necessarily furnished by these creditors to this pursuer's brethren and sisters, and which they did at his special command and direction, and without which direction, they would never have made this furnishing; this allegiance was repelled, because the direction being given (if any had been which was not granted) was given while his father lived, and the said furnishing also made during his lifetime, and the pursuer not being holden in law to furnish them, he cannot be convenable therefor; and notwithstanding of any alleged directing, the Lords found he ought to be restored. See PROOF.

Act. STUART.—Alt. GILMORE & CRAIG.—Clerk, GIBSON.

Fol. Dic. v. 1, p. 585. Durie, p. 831.

No. 158. [9027] GALBRAITH v. LESLY. June 20, 1676.

The Lords found, That a bond being granted by two persons, conjunctly and severally, being merchants, and for the price of merchant ware, the same could not be questioned upon that pretence, that one of them was minor the time of the granting the same; it being offered to be proved, that he was then, and is since a trafficking merchant:

Sir David Falconer having reported the same, in order to his trial, when he was admitted a Lord of the Session.

Clerk, MONRO.

Fol. Dic. v. 1, p. 584. Dirleton, No. 360, p. 175.

* * Stair reports this case :

George Galbraith having charged Patrick Lesly for payment of a bond granted by him and James Balfour, acknowledging them to have received certain merchant ware from the charger, and obliging them conjunctly and severally to pay the same, Lesly suspends, and raiseth reduction upon minority and lesion, in so far as he had bound himself *in solidum*, whereas he should have been only bound for his half.—It was answered, That it is always an exception against minority, that the minor was then a trading merchant.—It was replied, That albeit a merchant *in re mercatoria* is not restored, yet in other things they enjoy the common privilege ; but here the obliging *in solidum*, was not *res mercatoria*, but only the price and goodness of the ware.

The Lords found it relevant that the suspender was then a trading merchant, and found that the buying of ware in communion or society with other merchants, and receiving the ware jointly, was binding as *in re mercatoria*. *Stair*, v. 2, p. 428.

* * This case is also reported by Gosford :

In a reduction and suspension raised by Patrick Lesly's instance, who was charged upon a bond granted to Galbraith by the said Patrick and James Balfour, for a parcel of goods bought by them jointly as merchants, wherein they were bound conjunctly and severally, upon this reason, That he was minor when he subscribed, and at most could only be liable for his own half ; it was answered, That he being actually a trafficking merchant, as being in society, could never reduce this bond granted for the price of goods delivered and received, as hath been the constant decision in such cases.—The Lords found, That the minor was not in the case of a cautioner, but being bound conjunctly and severally with one in society with him for a joint stock, was liable *in solidum* ; and so repelled the reason upon minority and lesion.

Gosford, No. 864, p. 845.

No. 160. [9029] PETER ROGERS and DEVREON *v.* Bailie BAIRD of Saughtonhall. December 1681.

Peter Rogers, merchant in Amsterdam, a Dutchman, having granted a factory to John Devreon his prentice, who was minor, to intromit with and discharge his debts ; and the factor having by mistake given a discharge for more than he received, he pursued for restitution upon minority and lesion.

Alleged for the defender, That the pursuer was a merchant, and so to be looked on as a major.

Answered, The stating of accounts is not properly *res mercatoria*. 2do, A factor who was major could not without an onerous cause discharge the constituent's debt, *multo minus* the minor, who was a stranger.

The Lords reponed the minor, he proving lesion.

Harcarse (MINORITY), No. 700, p. 197.

No. 161. JAMES CRAICK *v.* JOHN MAXWELL. March 1682.

Although the Lords would not reduce upon minority a decree, upon which a comprising had followed, and been disposed to a singular successor ; yet they appointed the defender to refund to the minor so much as he would have saved, had he been restored *in integrum* against the decree.

In a pursuit against a minor for his father's possession for several years, a probation by witnesses being led, the Lords having decerned for the several years pursued for, viz. the years 1663, 1664, 1665 ; and the decret being assigned to the Lord Queensberry, there was a reduction raised upon minority and lesion, especially con-

sidering that the defunct died in 1662 ; the Lords of consent restricted the decret to the year 1662, but would not reduce as to some other points, the cedent being sufficiently solvent, and the said cedent being now insisted against for repetition, in so far as he was lesed by the first decret.

Alleged, That the decret proceeding upon the advising of the depositions of witnesses, and upon compearance, it is not allowable to reconsider them.

Answered, Why may not the Lords re-consider witnesses as well as oaths and writs ?

The Lords inclined to recommend it to one of their number to inspect the depositions, to see if there was a clear and obvious mistake of these and the interlocutor, and if it was so, they inclined to give some remedy, as they did in Bargeny's case *contra* Pinkell (See APPENDIX), and Elizabeth Pitillo *contra* Stark of Killermouth (See APPENDIX), where, in both cases, the decret was turned into a libel, though both parties were major, and a new probation led.

November 1682.—Thereafter the pursuer having insisted for damages he sustained by that decret which the Lords would not reduce upon minority, in respect a comprising had followed thereon, which was disposed to a singular successor for onerous causes before intenting of the reduction ; and the defender was solvent ; [9030] The Lords decerned the defender to refund to the minor so much as he would have saved, had he been restored *in integrum* against the said decret.

Harcarse (MINORITY), No. 701, p. 197.

No. 162. MR. RUTHVEN *v.* Sir ALEXANDER HOPE of Carse's Son. March 1682.

A minor being pursued for payment of his predecessor's debt, to whom he was served heir, he revoked, and raised reduction of the service, and craved he might be free of personal execution.

Alleged for the defender, The pursuer cannot be heard to reduce the service, without restoring the rents intromitted with by him and his curators since his entry.

Answered, Those rents were expended in the payment of debts.

The Lords assolizied the defender in respect of the restitution ; and here the minor was but eighteen years of age.

Harcarse (MINORITY), No. 702, p. 198.

No. 165. [9031] The Earl of ABERDEEN, and other Creditors of GORDON of Rothemay *v.* GORDON *alias* BARCLAY of Towie, his Son, and his Curators. December 1, 1708.

A minor, after being served heir, and intromitting with rents, finding the estate overburdened with debt, raised reduction of the service upon minority and lesion, and offered to account for the rents applied to his own use, but not for those embezzled by his curators, who were insolvent. The Lords refused to restore the minor against his service, except he counted to the creditors for the rents intromitted with by his tutors and curators, whether applied to his utility or not.

Towie having succeeded to two estates, viz. Rothemay by his father, and the estate of Towie by his mother, and being in his pupillarity, served heir, by his tutors, to his father, in the lands of Rothemay ; and his curators now finding that estate overburdened with debt, he, with their concurrence, raises a reduction of his service on minority and lesion, whereby he would turn the whole debts upon Rothemay, and keep his mother's estate of Towie free, though it is alleged that part of the debt was contracted by his father to disburthen his wife's lands of Towie ; and it were but reasonable that every estate bear its own debt. Alleged for the Creditors of Rothemay, they could not hinder him to seek restitution against this service and retour, as the Roman

law repones minors *contra additionem hereditatis*; but that reposition must be understood *in terminis juris*, that he account for the rents of Rothemay, his father's proper estate, intromitted with by his tutors and curators these twelve years bygone, and restore the same to the creditors, which will exceed one hundred thousand merks, that the restitution may be mutual and equal on all sides, the law being clear, that *minorum restitutio* must be such *ut unusquisque jus suum recipiat*, l. 24, § 4, *D. De minor*. Answered for the minor, He is content to hold count for the bygone rents of his father's estate of Rothemay, and his tutor's intromission therewith, in so far as the same came to his use, or were profitably employed, either as *locupletior factus* or *in rem ejus verum*, and to extend it farther, were to make his benefit of restitution wholly elusory and unprofitable; for what you give me with the one hand, you take it away by the other, if you make me accountable for the whole rent uplifted by my tutors; and it may be squandered and misemployed, either with paying their own debt, or luxurious mispending of the same, as happened in this case. Rothemay named Grant of Crichtie and others to be tutors testamentar to his son; and so being his father's choice, were not obliged to find caution; and, after many year's intromission, having broke without making any account, there is no reason why this *damnum fatale* should fall on the minor, who could not help it, but rather on the [9032] creditors who had a legal remedy of doing diligence for affecting the estate, by adjudging and arresting, and yet made no use of it, but suffered the tutors-intromitters *vergere ad inopiam*; and as this is congruous to reason, so it is clearly founded in the Roman law, where it is expressly determined, that a minor restored against his entry to an inheritance *debet prestare si quid ex hereditate in rem ejus pervenit*, and no more; and the learned Sande, lib. 1, tit. 15, decis. 2, shews it was twice so found, both in 1607 and 1633; and Duarenus *ad tit. Cod. Si minor ab heredit. abstineat*. And the creditors are not wholly destitute of a remedy, for they may pursue the tutors who intromitted, and evict the same from them. Replied, That though minors have a double action, one against the party with whom their tutors contracted, and the other against the tutors themselves, yet this can never be detorted to the prejudice of their predecessors' creditors; for to turn them over to pursue the minor's tutors, now broke, were to make them cautioners for their debtor's tutor's fidelity, contrary to all reason; neither can any fault be charged on the creditors, for if they had done diligence, they would have ruined the minor much more by heaping vast expenses on him, *vide* l. 5, *D. De conduct. indeb.* The Lords found the case very strait, the favour of minors on the one part, and of creditors on the other; but by plurality, they refused to restore the minor against his service, except he counted to the creditors for the rents of his estate of Rothemay intromitted with by his tutors and curators, whether applied to his utility or not with deduction of cess, dead, poor, and waste, and such other necessary defalcations. See 30th November 1665, *Boyd v. Telfer, voce TUTOR AND PUPIL*; and 2d July 1667, *Lord Blantyre, No. 76*, p. 2215. *Fol. Dic. v. 1*, p. 584. *Fountainhall, v. 2*, p. 468.

No. 166. [9034] THOMAS DUNDAS, Merchant, and one of the Bailies of Edinburgh
v. JOHN ALLAN, Writer there. January 17, 1711.

A bill accepted by a minor without consent of his father, his administrator-in-law, for merchant goods sold to another, found reducible upon minority and lesion, although the sum was small, and the acceptor was a writer doing business for others, and paid part of it during his minority.

Bailie Dundas having obtained a decret before the Bailies of Edinburgh v. John Allan, for £34, 12s., as the remains of £47, 5s. 6d. Scots, contained in a bill accepted by him, payable to the Bailie, John Allan suspended and raised reduction upon minority and lesion, in so far as the bill was accepted by him when minor, without consent of his father, his administrator-of-law, as a cautionary security for the price of goods furnished not to himself, but to the Lady Cousland.

Answered for the charger, The reason of suspension and reduction ought to be repelled; Because, Imo, The subject of this debate is so very small, that no such lesion could thence arise, as deserves the extraordinary remedy or restitution *ex capite minor*

ennitatis, which must be enorm, February 14, 1677, the Duchess of Buccleugh *contra* Earl of Tweeddale, No. 8, p. 2369. For *prætor non curat de minimis*, and such an extraordinary cure is not to be applied to every trifling case. 2do, The suspender was a writer versant in business, and so presumed more capable to deceive, than to be deceived. 3tio, The suspender entered in payment after he was forisfamiliaried by being married, and living separately from his father; which, by the civil law, was such an homologation as obliged one to pay debt contracted by him while *in familia paterna*, notwithstanding of *Senatus-consultum Macedonianum*, l. 7, § 13, *et ult. D. Ad Senatus-consultum Maced.*

Duplied for the suspender, 1mo, The smallness of the debt cannot influence the decision, seeing quality, and not the quantity, of the debt is to be considered; and what may seem a small matter to one, may be considerable to another. 2do, Whatever might be pretended, had the suspenders engagement been in the business of his employment as a writer, yet his undertaking a cautionry for the price of merchandise sold to another, was palpable lesion. And so anxious have the Lords been to secure minors from prejudice by rash cautionry, that a bond signed by a minor as cautioner, and his father as principal, was found null *quoad* the minor, though he was therein designed student of law, and afterwards proved an eminent lawyer, December 7, 1666, Mackenzie *contra* Fairholm, No. 72, p. 8959; July 25, 1667, p. 8960. Nor, 3tio, Can the suspender's paying part of the sum charged for be any homologation to fix him, since the partial payment was made during his minority; and he is [9035] entitled to repetition *condictione indebiti*. Law doth not distinguish between minors married and unmarried, seeing marriage doth not always bring prudence along. And if the suspender be forisfamiliaried, he is so without a portion, having got nothing to this day from his father, as a separate mean of subsistence by himself.

The Lords sustained the reason of reduction upon minority and lesion.

Fol. Dic. v. 1, p. 585. Forbes, p. 477.

No. 167.

WALL v. BROWNLEE. July 1724.

A minor having become signed cautioner to a deed without consent of curators, the Lords sustained the nullity, though it was offered to be proved, that at the time of signing, he was habit and repute major, kept shop, was married, and had public trade for some time before he became cautioner. See APPENDIX. *Fol. Dic. v. 1, p. 585.*

No. 168.

CAMPBELL v. Lord LOVAT. January 15, 1731.

A bond granted by a minor, without consent of his father, administrator-in-law, was found void and null, though, at that time, he was *majorennitatis proximus*, and had a commission in the army. See APPENDIX. *Fol. Dic. v. 1, p. 585.*

No. 169.

CRAIG v. GRANT. July 5, 1732.

A bill being challenged as granted in minority, the Lords found it relevant to sustain the bill, that the acceptor was bred a wright, and was trading at the time of accepting it. For drawing and accepting of bills of exchange is of itself a branch of trade. The money must be presumed advanced *in artis suæ vel mercaturæ exercitio*. If this presumption be not sustained, a minor merchant cannot deal otherwise than by ready money, which, in effect, is saying, a minor cannot be a merchant. See APPENDIX. *Fol. Dic. v. 1, p. 585.*

No. 170.

[9036] GRIEVE v. TAIT. July 14, 1732.

The defender was assoilzied from a reduction of a bill granted to him for the price of goods sold by him to a minor who was a merchant at the time, though, in fact, the minor was employed by a third party to buy the goods for him, who accordingly received them; and therefore, in effect, the minor was but a cautioner, but the seller was ignorant of this. See APPENDIX. *Fol. Dic. v. 1, p. 585.*

No. 171. ROBERT JOHNSTON v. The Hon. WILLIAM MORDAUNT MAITLAND, and the Earl of LAUDERDALE, his Administrator-in-law. November 20, 1782.

A minor, who had a commission in the army, found liable for various articles bought by him, although the persons liable by law to aliment him could not have been obliged to pay for them.

Mr. Maitland, in the 15th year of his age, received a commission in the army; and having, in the course of a few months after, run in debt to Mr. Johnston, toyman in Edinburgh, he granted his acceptance for the amount, being £17, 7s. A few days after he incurred a farther debt of £7, 18s. Of the furnishings composing this debt, some might have been deemed altogether useless and frivolous; but the greater part were articles which, although not absolutely necessary, are commonly possessed by young gentlemen of fashion and fortune.

Payment having been refused, Mr. Johnston commenced an action before the Sheriff of the county, and attached Mr. Maitland's horses in security. The Sheriff "ordained the articles which were still in the defender's possession, to be delivered up, and assoilzied *quoad ultra*"; and Mr. Johnston having brought this judgment under review of the Court of Session by a bill of advocacy,

Pleaded; By following a profession, and enjoying an income independently of his father, the defender's situation is different from that of a minor living in the house, and under the immediate direction of his curators, either legal or dative. Hence, furnishings made to him *bona fide*, for no more than an adequate price, like money lent on bond or bill to a minor who is a writer or merchant, ought to be sustained as the foundation of diligence for attaching his proper estate. To require a special mandate in transactions of this sort, would be attended with much unnecessary embarrassment to the minor, and those interested in his welfare.

Farther, As a merchant may lawfully supply a minor with clothes, and other necessities, the privilege of restitution is inapplicable to the present case. Under the appellation of necessities are not included food and clothing alone. Furnishings even for the purposes of luxury and show, when becoming, or usually possessed by persons of like rank and fortune, are to be put in the same class. And the bulk of those now under con-[9037]-sideration being of that description, the few remaining articles will fall under the maxim, *De minimis non curat prætor*.

Lastly, As most of the articles were such as could not be destroyed in the using, the Sheriff's interlocutor, instead of limiting the restitution to those still in the defender's possession, ought to have obliged him to declare where they were; the pursuer, from the nature of restitution, being entitled to recover the possession of them wherever they are to be found.

Answered, The general rule in this matter is undoubted, that every contract entered into by a minor without the consent of his curators, and which is not conducive to his real advantage, is *ipso jure* void and null. Nor does the present case afford an exception from this salutary regulation. Although effect be given to the obligations of minors relative to the trade or profession in which they are employed, because a contrary practice, by excluding them from all commerce and credit, would tend to their irreparable prejudice, it surely will not follow, that contractions nowise connected with their employment should be entitled to the same indulgence.

By necessary furnishings, in the other exception from the general rule, are meant those which are of indispensable use in the minor's subsistence and education. Some

of those now under consideration, without great impropriety, might have been made to the minor for money instantly advanced. Others are of a species so uncommonly useless and extravagant, as to exclude every pretence of *bona fides*. The circumstance, too, of the pursuer's taking a bill of exchange for the debt, by shewing, in the clearest manner, his conviction, that the young gentleman's expenses were not supplied by his guardians, and could not be afforded out of his pay as an officer, must place this claim in a most unfavourable point of view.

One of the Judges, considering the practice of merchants taking bills from minors as highly improper and inexpedient, was for dismissing the action; another was for making a distinction between the furnishings which were altogether extravagant, and the rest; and all agreed, that contractions of this sort were incapable of producing action against a father upon his natural obligation to afford an aliment to his children. The majority, however, were of opinion, That in an action against the minor himself, and to the effect of attaching his proper estate, the circumstance of his enjoying a commission in the army was sufficient to justify advances such as the present, which were in general unexceptionable.

The Lords therefore advocated the cause, repelled the defences, and decerned.

Lord Reporter, GARDENSTON.—Act. HENRY ERSKINE.—Alt. GEO. FERGUSON.—Clerk, ORME.

C. *Fol. Dic. v. 4, p. 5. Fac. Col. No. 69, p. 107.*

No. 172. [9038] M'DONALD v. —. June 16, 1789.

In general lesion is presumed when a minor borrows money, and it is therefore incumbent on the lender to prove, that it was *in rem versa*; but the Court thought, that where a minor carries on a trade, or exercises a profession, lesion is not presumed, but must be proved by the minor.

It was found in the same case, that the minor, though carrying on business, was privileged against prescription. See APPENDIX. *Fol. Dic. v. 4, p. 5.*

No. 175. [9041] JOHNSTON v. HOPE. July 30, 1630.

A bond of borrowed money granted by Johnston being desired to be reduced, because it was granted by him, being minor, and to his lesion, and was revoked *intra annos utiles*, and the action foresaid of reduction intended thereupon; and the defender alleging, that it was not reducible, because after his majority he had paid annualrent to the creditor for this sum, whereby he had ratified the same bond; the Lords found this allegiance relevant, for payment of the annualrent by him after he was major was found to be a ratification of the bond, which excluded all action of reduction upon minority and lesion, albeit the annualrent was paid for obedience of letters of horning upon that bond, which bore an obligation of annualrent, which the pursuer alleged he had necessity to obey, and that it was not a voluntary act, which was not respected, seeing he might have suspended the charges, which not being done, was a ratification of the bond.

Act. LAWTRIE & TAYLOR.—Alt. M'GILL & GILMORE.—Clerk, HAY.

Durie, p. 537.

No. 183. [9046] Marquis of MONTROSE and JOHN BUCHANNAN of Arnprior v. LIVINGSTON of Kirkland. December 28, 1697.

A minor of 17 bought timber in conjunction with his father. In a reduction upon minority and lesion, the defender was assoilzied, the reduction not having been executed *intra annos utiles*, and there having been homologation.

It was anent a bond of £10,000 given by Kirkland and his father, as the price of a wood bought by them; of which bond young Kirkland raised a reduction upon minority and lesion, that he was then but 17, and his father's subscribing with him was no authorising him as a legal curator, but was *in rem suam*, and so *ipso jure* null, as was found Mackenzie v. Fairholm, No. 23, p. 5639, & No. 72, p. 8959. Answered, He can never reduce this deed on minority, because he was sufficiently authorised by his father, as administrator-of-law; neither is this like Sir George M'Kenzie's case, which was becoming cautioner for his father in a sum of money; but this is a bargain of trade, and in law *minor mercaturam agens non restituitur*. 2do, He has not revoked. at least has not raised his reduction *intra annos utiles*. 3tio, He has homologated the bond since his majority, by assigning the bargain of timber to one Smith. Replied, That this case needed no revocation, at least there was no necessity that reduction should be raised and execute thereon *intra quadriennium utile*; and as for the homologations, they never import where the deed can be ascribed to any other cause; and it was so found, Farquhar of Tonley contra Gordon, No. 65, p. 5685; where one's pursuing for relief of a debt did not bebar him from quarrelling the bond; and sicklike, Moodie contra Macintosh, No. 72, p. 5693; the heritor's allowing the annualrents of a sum borrowed by him in his minority to his tenant, was found no such homologation of the bond, but that he might insist to have it reduced upon minority. The Lords sustained the answers, and assoilzied from the reduction upon minority, both in respect of the want of an executed reduction *intra annos utiles*, and on the homologations; and some of the Lords were clear on the first head, that he was sufficiently authorised.

Fol. Dic. v. 1, p. 586. Fountainhall, v. 1, p. 805.

No. 186. [9047] Earl of WINTON v. Countess of WINTON. February 16, 1666.

The Earl of Winton pursues a reduction of an agreement made by his tutors and curators with my Lady, giving her a certain duty for her interest in his coal, as being minor and lesed, in so far as by her contract, she had only right to the fourth part of the coal in his property; now his coal for several years has been in his feuers' lands by reservation in their rights. And also craved the bygones. It was answered, That *bona fide possessor facit fructus consumptos suos*; the Lady by the agreement could not count for the year's duty she had gotten. It was answered, That this holds not in the case of minority and lesion. It was answered, That albeit minority repones as to any principal right, yet not as to the fruits and accrescences *medio tempore*.

"The Lords reduced, but assoilzied the Lady from repetition."

Fol. Dic. v. 1, p. 586. Stair, v. 1, p. 357.

No. 21. [9080] DONALDSON v. DONALDSON. July 12, 1749.

That the defence of *Minor non tenetur placitare* bars not an objection of nullity to the right itself.

Kilkerran (MINOR), No. 12, p. 353.

No. 31. [9086] CHRISTIAN M'FARLANE v. SOPHIA HUME, and her Tutors.
June 29, 1797.

The heir of an adjudger found not entitled to plead this privilege against the debtor.

David Stewart, a creditor of Daniel M'Farlane of Letter, after his death raised a process of constitution against his daughters, who were minors ; and their tutor *ad litem* having given in renunciations for them, Stewart, in 1742, adjudged the lands, entered into possession, and was afterwards, in 1758, infeft upon a charter from the superior.

David Stewart, at his death, disposed the lands to his brother, Dr. Hume Stewart, who obtained a charter of resignation, on which infeftment followed. By this charter the lands were destined to heirs-male.

Dr. Stewart was succeeded by his son, who did not make up titles ; but, in his marriage-contract, settled the lands upon the heirs of the marriage. The contract contained neither procuratory nor precept.

The tutors of Sophia Hume, the only child of the marriage, upon the death of her father, executed a general service, and led an adjudication in implement against the heirs-male.

[9087] During Miss Hume's minority, Christian M'Farlane, one of the daughters of Daniel M'Farlane, brought a process of exhibition, and a reduction, in which she averred, that David Stewart, when acting as pro-tutor to her and her sister, had adjudged the lands for fictitious claims ; and therefore concluded, that the adjudication, and the subsequent titles, should be set aside.

Miss Hume's tutors produced Dr. Stewart's charter and infeftment, and pleaded the maxim, *Minor non tenetur placitare super hereditate paterna*.

The Lord Ordinary ordered the party to argue, in memorials to the Court, " 1mo, Whether the lands of Letter, which once belonged to the pursuer's father, and are now held by the defender under the titles produced, are, in her person, such a *hereditas paterna* as properly falls within the rule or brocard founded on by her ; 2do, Whether the nature of the present action, said to be a challenge of the defender's right upon the alleged fraud, not of the defender's father or grandfather, but of her granduncle, their author, is sufficient to render it an exception from the application of the foresaid rule ; and, 3tio, Supposing the defender entitled to the benefit of the rule in this case, whether the same must operate as a total bar to all further procedure in this action during the defender's minority ; or if the pursuer may still be entitled to a further production of writs, or be allowed, *in hoc statu*, a proof by witnesses of relevant allegations, or before answer, to be kept *in retentis* till the expiry of the defender's minority."

The defenders, pleaded ; 1mo, Miss Hume is heir of her father, and through him of her grandfather, in whom the subject was feudally vested ; it is therefore *hereditas paterna* in her person.

Nor does it signify that her father was not infeft. It would have been enough to make room for the application of the maxim, *Minor non tenetur, &c.*, that he had been able to connect himself even with a stranger who was infeft, see No. 17, p. 9070.

It is of as little consequence that Miss Hume led an adjudication in implement. This was merely the form of completing her titles, and she represents her father just as much as if she had connected herself with him by a special service.

2do, The object of the maxim is to prevent minors from being deprived of their paternal inheritance, in consequence of their tutor's being ignorant of the proper defences to be stated for them ; Stair, b. 1, t. 6, § 45 ; and there is even more occasion for it in a case like the present, which requires an investigation into facts, happening at a remote period, than where the question turns upon a point of law ; Gordon, 51, p. 9100 ; Bankt. b. 1, tit. 7, § 115.

3tio, The maxim, from its object, must operate as a bar to all proceedings, which are not necessary to establish that the subject is *hereditas paterna* ; Bankt. v. 1, p. 190, § 114 ; Ersk. b. 1, tit. 7, § 46.

[9088] Answered ; 1mo, The maxim founded on is now considered more a matter of antiquity than of practice ; Pitmedden's MS. in the Advocate's library ; * and if not

* This MS. contains the decisions by Sinclair, Maitland, and Colvil.

wholly in desuetude, it ought to receive the strictest interpretation, as it is unreasonable that a minor should be allowed to retain possession without investigation, where his right is disputed. It applies only where the defender holds the subject by special service as heir of the last investiture; see No. 11, p. 9063; whereas, the right of the defender depends on a personal deed, executed by a person not infeft, by which he altered the destination, and his daughter holds the estate in consequence of an adjudication from the heirs-male; Stair, b. 1, t. 6, § 45; 31st January 1665, Kello v. Pringle, No. 11, p. 9063; 27th November 1678, Guthrie v. Guthrie, No. 16, p. 9069; Ersk. b. 1, t. 7, § 46.

2do, The maxim does not apply where the right of the ancestor is challenged on the head of fraud; Reg. Maj. lib. 3, c. 32, § 15; Stair, b. 1, t. 6, § 45; Erskine, b. 1, t. 7, § 45 and 46, 27th December 1711, Crawford v. Crawford, No. 53, p. 9102; 4th February 1685, Gordon v. Farquhar, No. 51, p. 9100. And as Dr. Stewart represented David Stewart, the case is the same as if fraud had been alleged on the part of the former.

3tio, If the maxim did apply, it would not preclude an immediate full production, nor a proof to lie *in retentis* till the minor be of age, as otherwise the necessary evidence might be wholly lost; Stair, b. 1, t. 6, § 45; Ersk. b. 1, t. 7, § 45; Dict. Sect. 2 and 3, *h. t.*

Observed on the Bench; The Court have had no occasion, in the present age, to consider the application of the maxim here founded on; but it was at no time understood to protect a minor from the necessity of implementing the deeds of his ancestor, whether arising *ex contractu* or *ex delicto*. In this case, the title of the defender depends on an adjudication, in which the right of the debtor has not been foreclosed by a declarator of expiration of the legal, and the question resolves into a count and reckoning.

The Lords unanimously repelled the defences.

Lord Ordinary, ESKGROVE.—Act. W. ERSKINE, BAIRD.—Alt. ROLLAND.—Clerk, COLQUHOUN.

D. D.

Fac. Col. No. 41, p. 95.

No. 1. [9111] BEVERIDGE v. INHABITANTS of CUPAR. May 1583.

A decree upon which goods had been pointed and roup'd, was reduced. The buyers, though *bona fide* purchasers, were found obliged either to restore the goods, or the price thereof, because the decree being reduced, all that followed on it behoved to fall of consequence.

James Beveridge of the Hilton pursued for reduction of a decree given before the Sheriff of Fife, by virtue of which there were certain goods, oxen, cows, and sheep, pertaining to the said pursuer, pointed, and thereafter appraised and sold, and disposed to certain persons, indwellers in Cupar of Fife; which persons were pursued by him, together with his son, and the officer, for the spoliation of the said goods from him, they being then in his possession as his own proper goods; at the time of the advising of the process, there was no other thing found to be proven, but the officers coming to the ground, and his taking away the said goods, and thereafter the lawful appraising of the same; so the question fell forth *inter Dominos*, if that the persons who coft the goods, after that they were lawfully appraised, should be debtful of the same or not. For the 1st, it was reasoned *inter Dominos*, That, because the said persons had coft the said goods *bona fide et auctoritate judicis*, they could not in any sort be debtful, either in spuilzie or otherwise, “*pro hac re facit l. 1, Cod. Si in causa judicati pignus captum sit. Verba legis sunt; Nam in vicem justæ obligationis succedit ex causa contractus auctoritas jubentis;*” et in l. 3, *ibidem*, “*In causa judicati pignora ex auctoritate Præsidis capta potius distrahi quam jure domini possideri consueverunt.*” By the meaning of these laws, it appears to be plain, that the persons who coft the goods, after they were lawfully appraised, and then roup'd at the market cross by the officer of arms, did nothing but lawfully therein; and so the persons, buyers off the

same from the officer, after the apprising and roupings of the same, did lawfully therein-till, for otherwise, if such inconveniences were ay to fall forth in the buying of the appraised goods, that no person should buy or take the same off the hand of the officer, fearing any danger and inconvenience to come upon the same, which should be to the great hindrance and stay of the execution of justice. To this was answered, That the decret reductor behoved to take effect, which contained [9112] into it both spoliation and restitution of the goods which were taken away, and that the interposition of authority of the judge in this case might be held, “ non factum judicis sed partis, ut in l. 13, Cod. De evictionibus, et ibid Bald. et in l. 1, § 5, D. Ne vis fiat ei qui in possessionem missus erit, et ibidem Bart. et communiter doctores ” ; and also, it was lately practised betwixt the Laird of Ruthven Vans and Coutts of Auchtertoul (see APPENDIX), that the said Auchtertoul, albeit he had poinded goods and gear by virtue of a decree, was decerned to have committed spuilzie.—The Lords, after long reasoning among themselves, pronounced definitive, and decerned the buyers of the said goods from the officer, to restore and deliver the said goods, or else to pay the prices of the same, as they were appraised and roupied, to the pursuer, *et hoc omnes Domini una voce dicebant, quod rarum est.*

Fol. Dic. v. 1, p. 592. Colvil, MS. p. 364.

No. 2. Bishop of CAITHNESS v. FLESHERS in EDINBURGH. July 2, 1629.

A *bona fide* purchaser of a stolen horse was found liable in restitution to the owner, though he had purchased it in a public market. *Fol. Dic. v. 1, p. 592. Auchinleck.*

No. 4. WRIGHT v. BUTCHART. June 1662.

Moveables in a house, let with the house, cannot be sold by the tenant, for the proprietor may evict them, *a quocunque possessore.*

There being an adjudication purchased of certain tenements in Leith, and of the heirship moveables belonging to umquhile James Johnston in Leith v. Isobel Johnston his sister, who had renounced to be heir to him ; this adjudication is assigned to James Wright, hatmaker, husband to the said Isobel, who sets the lands to Alexander Comrie ; and he, as tenant, enters to the possession thereof, and of the heirship moveables within the house ; which Alexander having possess the house and goods diverse years, he did thereafter dispoone the goods to John Butchart, who meddled therewith ; whereupon the said James [9113] Wright pursued Butchart for the price of the goods. It was alleged for Butchart, That he ought to be assoilzied, because he had right to the goods by a written disposition from Comrie, who, as owner, had possess the samen, without payment of any duty therefor ; and, conform to the disposition, the goods were delivered to the defender by way of instrument, and he in possession accordingly. It was replied, That the defender cannot be heard to say, that Comrie was owner ; because the goods were *per expressum* adjudged from the apparent heir of James Johnston, who was in possession thereof, and they extant within his dwelling-house ; and Comrie cannot say that he was in possession thereof otherways than a tenant in the house under James Wright, to whom, though he paid not duty expressly for the goods, yet having taken the house from him for payment of mail and duty, and as tenant having entered to the possession of the house where the goods were, and accordingly having possess both house and goods, any possession Comrie had was the pursuer's possession, and consequently the defender's right, and pretended possession, cannot be respected.

The Lords repelled the allegiance, in respect of the answer or reply.

No. 5.

RAMSAY v. WILSON. January 1666.

Found, that jewels, and other such valuable moveables, being disposed of by a trustee, though they pass through *mille manus*, the haver of them is liable in restitution to the proprietor.

Colonel Cunningham gives in custody to the deceased Mr. James Aikenhead, certain curious jewels of a considerable value, conform to an inventory under Mr. James his hand : Thereafter the Colonel goes for Germany, and being there, draws some bills upon Mr. James, who answers them accordingly. The Colonel dies, and the jewels remain in Mr. James his hands all this time : Mr. James assigns the bills to John Ramsay, his brother-in-law, who gets the keeping of the jewels also ; and a bond is granted by him and Mr. Robert Byres, for the Colonel's use, to make them furthcoming. After the incoming of the English, John Ramsay having hid the jewels in a coal-cellar in his house at Edinburgh, the said Mr. Robert deals with the damsel of the house, and gets the jewels, and carries them north with him : And after the English were settled, he returns and keeps still the jewels, till after several years, Mr. Robert being become very necessitous, he did impignorate diverse of the jewels to James Wilson, and others ; and, before he redeemed them, he died. The said John Ramsay, by his assignation granted to him by Mr. James Aikenhead, his brother-in-law, to the Colonel's bills, confirms himself executor-creditor to the Colonel, and pursues the havers of the jewels, to make them furthcoming to him. It was alleged by James Wilson, That he should be assoilzied ; because, the jewels having been in the possession of the said Mr. Robert Byres for many years, it was lawful for the defender to take them as pledges for money [9114] lent to him, his peaceable and unquestionable possession of such moveables giving him such a right as might make any man *bona fide* to buy or block for them, just as for household stuff, or any other furniture, which are not in use to be sold in public markets. And in the law there is *usucapio in mobilibus*, which, after so long a time, establishes a right in the possessor's person. It was answered, That the jewels being *ab initio* entrusted in the hands of Mr. James Aikenhead for custody, and the truster having thereafter died out of the country, and Mr. Robert Byres his intromission therewith being vitious, as having *vis et modis* gotten them out of John Ramsay's possession, and which, by a missive letter under his hand, he obliges himself to make furthcoming ; which instructs that Mr. Robert was never owner of them, and no power to dispose upon them, by pledging them, or otherways ; but having done it, it is proper *rei vindicatione* for the Colonel's executors to pursue for them, even after so long a time, there being no prescription run by the law of this country. And though the jewels had gone *per mille manus*, the haver always is liable, who should know better the condition of the party he deals with. And the reason why the said John Ramsay did not insist against the said Mr. Robert Byres was, because he feared the English should have seized upon them, if he had pursued for them. Likewise, the defender cannot pretend a *bona fides*, in taking them as pledges as Mr. Robert Byres his goods ; because, they were so curious, and of such a quality, as it could not be presumed that Mr. Robert could be owner of such jewels, he not being a jeweller, nor ever a trader with jewels ; whereas, the defender might have had some reason for him, if the jewels had been such as men of Mr. Robert's quality are usually masters of.

The Lords sustained the summons, and repelled the allegiance.

Fol. Dic. v. 1, p. 592. *Gilmour*, No. 175, p. 126.

* * Stair reports this case.

December 12, 1665.—Colonel Cunningham having impignorated a number of jewels of great value, immediately thereafter, went out of the country, and never returned. These jewels were in the custody of John Ramsay, who and Mr. Robert Byres had given bond to make them furthcoming to the Colonel ; and now John Ramsay having been confirmed executor to the Colonel, pursues James Wilson, and others, for exhibition and delivery of the jewels. The defenders alleged, Absolvitor ; because the jewels were impignorated by Mr. Robert Byres for a considerable sum of money, who having them in his possession, it was a sufficient ground for the defenders

to contract with him, because property of moveables is presumed by possession ; and, therefore, it is not relevant to libel, that once the jewels were Colonel Cunningham's, and, therefore, they must be restored to his executors, unless it were also libelled *quomodo desuit possidere* ; so that the jewels behoved to have passed from him, without his own consent, or alienation, otherwise it is always presumed [9115] that he sold or gifted them, and needs not be proved ; else no man could be secure of any moveables ; if he who could instruct that he bought it, could recover it from all possessors, unless they could instruct all the ways the same passed from the first owner. The pursuer replied, That the case is not here as to moveables, that are ordinarily sold in market, but in relation to jewels of great value, which cannot be presumed to have been Mr. Robert Byres's, because they were never worn by him, as being his proper goods, nor were they competent to any of his quality ; and, therefore, the defenders were *in mala fide* to acquire them from him, without knowing his right.

2dly, It is instructed by Mr. Robert Byres's letter produced, that he acknowledged them to be Colonel's, before the impignoration ; and it is offered to be proved, that he broke up John Ramsay's cellar, and took them out ; 3dly, The Colonel impignorated them by writ, and so the presumption of alienating them ceased, because, he went immediately out of the country, and never returned. It was answered, That there is no difference of jewels more than any other moveables, which use to pass without writ from jewellers that sell them ; and the pursuer having possessed them these 10 or 12 years, without question, has right thereto, by usucapion.

The Lords found the allegiance jointly relevant to elide the presumption, and that there is no usucapion in moveables in Scotland, by possession, in less than 40 years, but only a presumptive title, which is altogether elided by the answers.—See *PRESUMPTION*. *Stair*, v. 1, p. 326.

No. 6. [9117] *SEMPLÉ v. GIVAN*. February 24, 1672.

A relict having, at her own hand, impignorated the defunct's moveables, and, among the rest, his heirship moveables, the heir was found to have a good action against the possessor.

John Semple, merchant in Edinburgh, having died without testament, and his children being infants, Agnes Martin, his relict, their stepmother, continued in possession ; who having married a second husband, they impignorated a part of the goods to David Givan, and others, for security of sums borrowed from them ; Agnes, only child to the said umquhile John, pursues the said David Givan, and others, havers of the goods, for delivery of the heirship moveable ; and produced a declarator by Agnes Martin, expressing the particular goods. The defender alleged, Absolvitor ; because, the goods in question being moveable, possession presumes a title, *et possessor non tenetur docere de titulo* ; and they having impignorated the goods for sums of money delivered by them to Agnes Martin and her husband, who had continued long in possession of the goods, it is sufficient for them, without enquiring to whom they belonged before ; which is necessarily introduced for commerce ; because, moveables passing from hand to hand, without writ, if any party who once had right to them, should thereupon pursue the posterior acquirers, and should overtake them, unless they could instruct a progress, which is scarce possible, no party could be secure, and all commerce behoved to cease ; and though *in rebus furtivis*, the Roman law hath introduced *labem realem*, which makes the goods recoverable from any singular successor, that can be extended to no other case, nor is it here pretended ; 2do, Agnes Martin had the communion of goods, and a half, or third was her's, and the property of heirship moveable cannot be in the heir, till they be chosen and drawn ; for the best of every kind is according to the fancy and choice of the party ; until which choice be made, the heir can have no constituted property, and so cannot pursue restitution, which is *rei vindicatio*. It was answered, That, albeit in moveables, lawful possession infer a presumptive title, and that one having had a prior right cannot put the present possessors to instruct their progress, yet that rule hath this exception, except the prior proprietor *doceat quomodo desuit possidere*, or that it was in such way, as that the goods could not pass by sale or commerce, as if the goods were stolen, or if they had strayed ;

and there is no way more competent than by the death of the proprietor ; for, if it be instructed that the proprietor had the goods in his possession at his death, it doth fully take off the presumption, that they passed from him by sale or commerce to these defenders ; and if this were not sustained, any insolvent person possessing the goods of defuncts, and selling the same, their children, or nearest of kin, should be for ever excluded ; nor hath it any importance that an heirship was not drawn, because the pursuer being the only child, hath right to the whole moveables, except the wife's part ; and though the relict's declaration should not prove, the pursuer offers to prove the goods in question were in her father's possession the time of his death, as his own goods.

[9118] The Lords repelled the defence, in respect of the reply and condescendence foresaid, unless the goods impignorated, and others intromitted with by the wife, did not exceed her share.

Fol. Dic. v. 1, p. 592. Stair, v. 2, p. 78.

No. 9.

[9119] *Hog v. HAMILTON.* January 28, 1679.

Found in conformity with *Semple v. Givan*, No. 6, p. 9117.

Mr. William Hog having right to some moveable goods from the nearest of kin to Andrew Wardlaw, and likewise having assignation from the donatar of his escheat, pursues Mr. Robert Hamilton for delivery of the goods ; who alleged, Absolvitor ; because, the possession of these goods presumes the property thereof, and there can be no ground to vindicate them upon Wardlaw's interest, who is dead 20 years ago, and the goods have always been possessed by Marion Geddes, his relict, and were *invecta* by her in the defender's lodging, and so liable to the mails and duties thereof. It was replied for the pursuer, That the property of moveables, arising from possession, is but a presumptive title, and admits of contrary probation ; but, in this case, the presumption ceaseth ; because, it is offered to be proved, that these moveables were in the possession of Wardlaw when he was denounced, and also when he died ; so that they could not pass by commerce, unless they were instructed that they were confirmed ; and the relict's possession, though for 20 years, could not infer property, because, the goods being confiscated by the husband's rebellion, the relict's right ceased.

The Lords did not sustain the reply upon the revel's possession at the time of the rebellion, which, though it exclude his relict's interest, doth not hinder the disposal of the moveables by commerce to creditors ; but sustained the reply on the possession of the defunct, unless confirmation were instructed.

Fol. Dic. v. 1, p. 592. Stair, v. 2, p. 683.

* * Fountainhall reports this case.

A Donatar to the escheat of a rebel pursues some intromitters with moveables belonging to the rebel. Alleged, I cannot deliver these moveables to you, because I have now possessed them by the space of these 20 years ; and possession in *mobilibus* presumes property, and needs no other title. Replied, Posses-[9120]-sion is only *titulus putativus et coloratus*, and makes a presumption in behalf of the possessor, unless a better title be shown, and then presumption *cedit veritati*. But here it is positively offered to be proved, that these goods belonged to the defunct rebel, and his relict only continued in the possession, *jure familiaritatis*, and so it cannot prejudice the fiak, *cui erat jus quæsitum per denunciationem*. This being reported, " The Lords found the donatar had right to the goods, he proving they were in the rebel's possession the time of his death, and this notwithstanding of the long posterior possession and taciturnity "

Fountainhall, v. 1, p. 38.

No. 11. FORSYTH v. KILPATRICK. November 18, 1680.

Restitution of a horse sustained against a *bona fide* purchaser from a person to whom the owner had lent him.

William Forsyth pursues Hugh Kilpatrick, to deliver to him an horse, hired by him to one Vauchan to Irvine. The defender alleged, Absolvitor ; because he had *bona fide* bought the horse, and paid the price, and the property of moveables is always presumed by possession, much more when he offers to instruct his right. It was answered, That the presumption is excluded by the [9121] pursuer's libel, offering to prove the horse his own, and that he did not sell him, but set him for hire, and, therefore, hath *rei vindicationem* against any haver thereof, whether he acquire *bona fide* or *mala fide*.

The Lords repelled the defence, in respect the pursuer offered to prove, that the horse did not pass from him by alienation, but by location.

Fol. Dic. v. 1, p. 592. *Stair*, v. 2, p. 801.

No. 15. [9122] Sir WILLIAM KER of Greenhead v. SCOT and ELLIOT.
January 22, 1695.

A disposition of sheep and other moveable goods, granted for relief of cautionry, with symbolical delivery, found insufficient to bar a posterior sale of the same goods, with actual delivery.

Crocerig reported the debate between Sir William Ker of Greenhead, Scot, and Elliot, on a disposition granted by Scot of Bowhill to Greenhead, &c. (for relief of cautionry) of some sheep and other goods, as many of them as would satisfy the debt, and a symbolical possession following thereon ; if this general right would defend against a posterior sale of the same goods, and an actual tradition thereon ? the Lords found it not sufficient, if considered as a vendition ; but some demurred if it might not subsist as an hypothec. But the generality of the Lords inclined to reject this as unusual in such kind of moveables, especially *retenta possessione* ; though in *legato gregis* the same individual *capita* are not requisite, their offspring coming in their room ; and actual delivery is only in absolute dispositions. But where it is for security, retention of possession does not import simulation.

January 7, 1696.—The case betwixt Sir William Ker of Greenhead, and Scot and Elliot, mentioned 22d January 1695, was again re-considered and decided. And the Lords found Scot of Bowhill's right of the goods to Greenhead was neither a vendition nor a formal hypothecation (which may take place in moveables, but then tradition should follow, which was not here), though by the subtilty of the Roman law, that pledge called *hypotheca* by them, in opposition to *pignus*, wanted delivery. The law has authorised sundry tacit hypothecs, as of the *invecta et illata in domum seu fundum* for the rent, but a hypothecation of a great flock of sheep, in security of a sum far below their value, *retenta possessione*, is unknown in law ; and such pledges were very inconvenient, for there is no register to certiorate the lieges of such impignorationes when they continue in the impleger's hand. Yet the same hazard attends double alienations of moveables undelivered ; for the symbolical tradition, or general edictal intimations of such rights at the market-cross come to the knowledge of few or none, to put them in *mala fide* to buy the same thing over again.

Fol. Dic. v. 1, p. 592. *Fountainhall*, v. 1, pp. 661 & 696.

No. 16.

[9123] SCOT v. LOW. June 15, 1704.

The buyer of goods *a non domino*, not liable for the value, unless the pursuer could allege that the defender was in possession at the time of the citation, *aut dolo desuit possidere*, or that he was *lucratus*.

Scot sells 20 sheep to Brown, who pays the price. Paterson is employed to deliver the sheep, and thereby getting the possession, he sells them to Low as his own sheep, and receives the price. Brown having obtained repetition of the price paid by him, Scot pursues Low, who bought the sheep from Paterson, for restitution of the sheep, or value : and, there being an act in the process for proving the property of the sheep, at the time that Paterson sold and delivered them, Low, the defender, offered a bill to the Lords, further alleging, That *esto* Scot could prove his property, and that they were delivered to Paterson as libelled, yet the defender having bought them from Paterson *bona fide*, finding him in the possession, which presumes his property, and having again disposed of the sheep, he could not be liable, either to restore them, or the price ; because the only action competent to the pursuer was *rei vindicatione* ; in which two things must be proved, property on the pursuer's part, and possession on the defender's ; at least that *dolo desuit possidere* ; in which case, *dolus pro possessione habetur*.

It was answered ; The defender must be held as possessor of the sheep ; because he either has the sheep in his possession, or sold them for the value ; and so has the price which comes in place of the sheep, or has employed them for the use of his family.

It was replied ; *Rei vindicatio* is founded upon the property of a *corpus* or *species*, only against the possessor, though it pass through a hundred hands, and by lawful titles of sale, or the like, and no intermediate author is liable after the goods are conveyed, though the price remain. Nevertheless, it is acknowledged, that if the defender were *lucratus*, as having sold for a greater price than he bought, or having got the goods freely by donation, and sold for a price, the pursuers might allege, he should be liable *in quantum lucratus* ; *quia nemo debet lucrari ex alieno damno* ; but, in this case, if the price remain with him, he bought them as dear.

"The Lords found the libel not relevant, unless the pursuer could allege, that the defender was in possession the time of the citation, *aut dolo desuit possidere*, or that he was *lucratus*."

Fol. Dic. v. 1, p. 593. Dalrymple, No. 48, p. 61.

No. 17.

PRINGLES v. GRIBTON. January 3, 1710.

Found in conformity with Ramsay v. Wilson, No. 5, p. 9113.

The children of the deceased David Pringle surgeon in Edinburgh, having staid with their aunt, Maxwell of Kirkhouse's Lady, and being minors, they delivered into her custody some rings and jewels of their mother's paraphernalia, and got her husband's receipt and her's, obliging to redeliver. The [9124] Lady having borrowed £16 Sterling from Irvine of Gribton, for his better security she implegged these rings and jewels to him, and he obliges himself to restore them when paid. The Pringles getting notice where their mother's rings were, pursue Gribton for restitution, and refers his having them to his oath. He depones, That the Lady Kirkhouse being his debtor by a bond produced, in £16 Sterling, she impignorated the jewels in his hands, and told him nothing of their being another's, and he really believed them to be her own. When this oath came to be advised, it was alleged for the children, Wherever they could find their own goods, they could recover them *rei vindicatione* ; but *ita est* they proved their property in them by their aunt's obligation prior to the impignoration (for if her declaration had been after, it would not have been so probative), and the defender's oath proved the having. Answered, His oath could not be divided, for he declared they were given to him as truly belonging to the Lady, who implegged them, and were not unsuitable to her quality to have the like ; and this obligation is but personal, and may give them recourse against her, and her heirs, but can never take the rings

out of his hands till he be paid. The Lords found the Lady's obligation constituted the property of the rings in the Pringles, they being the mother's (who was unfortunately executed with Daniel Nicholson, and her impignoration could not alter the case, though he was ignorant of their right; and therefore decerned him to restore them, reserving him action for his debt against the Lady's representatives, as accords of the law; for it was in effect a *depositum* proved by writ, which no deed of the *depositarius* could invert contrary to his trust.

Fol. Dic. v. 1, p. 592. Fountainhall, v. 2, p. 550.

No. 19. [9125] WILLIAM CARSE v. SIR JOHN HALYBURTON. June 17, 1714.

A disposition by an insolvent person, with an instrument of possession, but *retenta possessione* for several years, found not to transfer the property.

William Carse being creditor to Sir George Hamilton, causes a messenger offer to poind the plenishing in his debtor's dwelling-house. Sir John Halyburton compares, and produces a disposition to the plenishing and moveables in the house, conform to a particular inventory, expressing the particulars disposed, and the value exceeding the sum due to William Carse, upon which the poinding is stopt.

William Carse arrests in Sir John Halyburton's hand, and libels upon his debt and diligence, and stopping of his poinding by a simulate disposition; and concludes payment either upon his arrestment, or for damage by stopping his diligence.

The defender alleged the goods were disposed to him for just and onerous causes, which he instructed by production of bonds or borrowed money, and craved no further interest than the payment of his bonds, as likewise an instrument of possession of the goods.

It was answered, The possession was simulate, the disponent having retained the true possession of the goods by the space of three years and a half after the symbolical possession, during which time he transported the goods from one dwelling-house to another, and disposed of some of them at his pleasure, and likewise suffered the pursuer's debtors to continue the same possession for two years and a half since the poinding; so that the disposition is only a colour to cover Sir George, and defraud his creditors.

It was replied, There can be no fraud, because there was a just onerous cause instructed, and he might lawfully allow the disponent to continue a precarious possession.

It was duplied; Though the defender be a true creditor, and by the disposition have *jus ad rem*, yet seeing no true possession followed for so long time before the poinding, nor any possession taken by the defender at the time of the poinding nor since, the property was not transmitted to the defender, but did still remain with the disponent; and consequently the pursuer had right to poind the goods belonging to his debtor and in his possession, and the defender [9126] was liable to make up the pursuer's damage for hindering him to obtain his payment by completing his diligence.

"The Lords found the property was not transmitted to the defender by disposition and instrument of possession, the disponent having continued so long in possession before and since the poinding; and remitted to the Ordinary to hear the parties, whether the defender should be liable for the pursuer's debt *nomine damni* by stopping his poinding, the value of the goods in the disposition produced at the poinding being more than the debt, or if he should only have access to affect and recover the goods which would have been poinded."

Fol. Dic. v. 1, p. 592. Dalrymple, No. 106, p. 148.

No. 1. [1] HENDERSON v. GIBSON. June 17, 1806.

Rei vindicatio lies for recovery of stolen goods from purchaser at a public market.

James Gibson of Ingliston, bought four bullocks in the public market in Edinburgh. A short time afterwards, he observed an advertisement in the newspapers,

giving notice, that four bullocks of a similar description, had been stolen from Malcolm Henderson at Bonhard. He immediately informed that gentleman of the circumstance, who, upon inspecting the cattle, declared they were the bullocks which had been stolen, and required them to be immediately given up. This being refused, an action was raised before the Sheriff of Edinburgh, at the instance of Henderson v. Gibson, to have the cattle delivered, or to find him liable for their value. The Sheriff found, that the pursuer was entitled to recover the cattle, upon proving his property, and that they had been stolen; and allowed a proof. Upon advising the proof, he ordained the defender to deliver up the bullocks, on payment of grass mail, for the time they were maintained by him. It having been thought expedient to sell the cattle, the Sheriff ordered the pursuer to condescend on their value, and found the defender liable for the amount.

The cause having been removed by advocacy to the Court of Session, the Lord Ordinary, upon hearing parties, repelled the reasons of advocacy, and remitted the case *simpliciter* to the Sheriff. Against this interlocutor, Gibson presented a petition to the Court; and

Pleaded: It is essential to the interests of commerce, that a *bona fide* purchaser at a public market should be secure. Accordingly, by the law of England, it [2] is held that all sales at public markets are good, not only to the parties but to all having any right or property in the subject; Blackstone, vol. 2, p. 449. By the ancient law of Scotland, indeed, the contrary doctrine prevailed; but it was at the same time enacted, that purchasers of cattle at public market should demand a *borgh of kaimbald*, or security to warrant the possession to the purchaser, who was liable in heavy penalties, if the subject should be afterwards evicted as having been stolen; Reg. Majes. b. 1, cap. 18; Ferguson v. Forrest, 19th March 1639, No. 3, p. 9112. As this custom has now gone into disuse, the purchaser at a market has no means of security; and it is highly expedient that the old law, adapted to this state of matters, should be modified to the existing circumstances of the country, in the same manner as has been done in other cases, when the ancient law was deemed incompatible with the present state of commercial transactions.

But the petition was refused with answers. It was observed, that though a landlord's hypothec was not good in a competition with a purchaser at a public market; it was very different with regard to a *vitium reale* in the subject.

Lord Ordinary, GLENLEE.—For Petitioner, W. CLERK.—Agent, DAVID CHRISTIE.
—Clerk, SCOTT.

J.

Fac. Col. No. 253, p. 567.

No. 2. WILLIAM and JOHN CRAWFORD v. WILLIAM KERR. November 18, 1807.

Money being inclosed in a letter, which was wafered, addressed to a certain person, and committed to a servant to be given to a runner to the post-office; the person to whom the letter is addressed was held to have an exclusive right to receive this money in a competition with a trustee (not judicial) for the creditors of the sender, though the sender died while the letter was still lying in his house, and though it was opened and the money retained, and delivered to the trustee by a person who took charge (but without authority) of the deceased's effects.

George Henderson owed Messrs. William and John Crawford £296. With a view of paying this debt, on the evening of the 30th March, he wrote the following letter:—"Gentlemen, Inclosed is one half of bank notes and a bill, which, when you receive the others, per next post, will make £296, to pay my acceptance to you due to-morrow; the 2s. I will pay you the first time I am in Leith. I am," &c.

Having indorsed the bill to Messrs. Crawford, he then put it with the half notes into this letter, shut and wafered it, directed it to Messrs. Crawford, and gave it, with a penny, to a servant, to be given next morning to a runner who was in use to carry his letters to the post-office. The servant put it in a place where his letters were usually put, to be ready for the runner, who came early in the morning.

Having finished this letter, Mr. Henderson then entered in a day-book, which he kept, the bill and notes as remitted, but he post-dated this entry, making it the 31st March. The other half of the notes were left in his pocket-book.

Betwixt the hours of four and five the next morning, Mr. Henderson died suddenly.

[3] The letter was not given to nor taken by the runner, but was left on a table in the house.

One Mr. Stocks, who was in Henderson's house at the time of his death, without any authority, took some management of his affairs; and having found the letter and the half notes that were in the pocket-book, he opened the letter, took out the bill and the other halves of the notes, and received the value of them, having changed the indorsation into an indorsation to himself.

Henderson, though in very good credit at the time of his death, yet turned out to be insolvent; and his creditors, at a general meeting, without any judicial step, chose William Kerr to be trustee for the general behoof. William Kerr received the above sum of £296 out of the hands of Stocks. He divided the rest of the funds among the creditors, but the division of this sum was objected to by the Messrs. Crawfords, who claimed the whole of it. To clear this matter, the trustee raised a process of multiple-poining, in which he, as trustee, claimed this sum for the general behoof of the creditors, while the Messrs. Crawfords claimed it as belonging exclusively to them.

The interlocutor of the Lord Ordinary was (14th June 1806)—Prefers the “said William and John Crawfords upon the interest produced for them, and decerns in the preference, and against the raiser of the multiplepoining, for payment accordingly.”

And on advising a representation with answers, the interlocutor of the Lord Ordinary was (12th Nov.)—“Finds that Mr. Stocks had no right to break open the letter, addressed to the respondents, which appears to have been closed with a wafer, as part of it still remains on the edge of the paper, to score the indorsation upon the bill, to fill up a new indorsation, or in any shape to dispose of it or the other contents of the letter; refuses the desire of the representation, and adheres to the former interlocutor.”

The trustee reclaimed; and his petition was answered.

Argument for the trustee.

The trustee is willing to take no advantage whatever from the opening of the letter, but to argue as if it still remained wafered, and was in Court in that state. In that state, he contends that it and its contents would not belong to Messrs. Crawfords, because it never was delivered to them.

He admits that there was here an intention to make a payment; but the money never having left the house of Henderson, having, till the moment of his death, still remained under his power, and having afterwards fallen under the charge of those who came into his place, that act of delivery on the one hand and acceptance on the other, which is essential to a payment, had not passed, and no payment of course was made.

If Henderson had not died, it is palpable that the money was still in his power, subject to recal, or rather to stoppage.

[4] If, instead of death, bankruptcy had arisen,—if, on the morning that the letter was to be sent off, a sequestration had been obtained, and the sheriff's officer had locked up the shop and warehouse of Henderson; the sending off the letter having been prevented in this way, the payment could not have been held to be made.

Even if the letter had been sent, the creditor might have rejected the bill and notes. They were no legal tender, and the sending of them would have been no extinction of the debt if the creditor had not chosen to accept them.

Thus, it appears, that neither was the payment made, nor was it accepted; and this conclusion is drawn on the supposition that the whole of the notes necessary for completing the payment had been inclosed in the letter. But it was only half bank notes that were in the letter; the other halves were to be sent next day, and without them there could be no payment.

In short, in this case there was nothing more than a mere intention and preparation for delivery. It is just similar to that of *Salter*, 7th Feb. 1786, No. 38, p. 14202, in which it was found that there was no transmission of the property.

Argument for Messrs. Crawfords.

There was not only an intention on the part of Mr. Henderson to deliver these notes and the bill to Messrs. Crawfords, but he had actually done all that was in his power to deliver them, and had in fact completed the delivery of them. The letter with

the penny was given to his servant to be given to the runner, and was lying ready to be given to him before the time of Mr. Henderson's awaking in the morning, if he had lived to awaken. Even though he died, it ought still to have been delivered as he had ordered. His servant no doubt would have delivered it, if Stocks had not interfered. But Stocks had not the smallest right to meddle with it. Not only had he no right to open it and to change the indorsation, but he had no right to stop the letter at all. He had no more right to stop the course of this letter than a mere robber, who had taken it from the servant by force, would have had. The delivery, therefore, must be still held to have been completed, notwithstanding this interference. The creditors of Mr. Henderson cannot take any advantage of such an illegal act. It is not enough to say, then, that the letter is still to be regarded as unopened; it must be regarded as if it had reached the Messrs. Crawfords by the post, in which case there is no doubt they would have been entitled to receive the money for the notes and bill.

There was some difference of opinion on the Bench. One Judge observed, That Henderson, after he had written the letter and given it to his own servant, still retained the power of stopping it, as it was still in his own possession by means of his servant: That this right of retaining it, on this death to his creditors, and if Stocks had not interfered, it would have come into the hands [5] of the trustee in a legal way: That, in that case, the trustee would not have been bound to deliver it, but would have retained the property for the general behoof of the creditors: That, besides, only one-half of the notes were in this letter, and as to the other halves they were clearly not delivered, which rendered the delivery of the first half, even if it had been delivered, an unfinished step.

On the other hand, it was observed, That in this case there was no sequestration, the trust was merely voluntary, and therefore the creditors had not in them nor had their trustee any right to this money at all: The act of Stocks alone put it into their hands, and that was clearly an unwarrantable act, which the creditors could not take advantage of: The delivery of the letter to a servant, to be conveyed to the postman, gave the person to whom it was directed a right to receive it, the direction having never been recalled by proper authority: That as to the other half of the notes, not being enclosed, that was of no importance, because payment would have been made by the bank on the first half and the letter.

The Court "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, HERMAND.—Act. DAVID CATHCART.—Alt. GEO. JOS. BELL.—JOHN TWEEDIE, W.S. and J. & T. PEAT, Agents.—SCOTT, Clerk.

M.

Fac. Col. No. 6, p. 23.

No. 7. [9133] MARY WHITE v. JOHN BROWN. February 13, 1772.

Diligence used by a party compearing in a multiplepoinding, against the raiser of it, irregular.

White preferred a complaint against Brown, for that he had proceeded to execute horning and caption upon a decree of forthcoming recovered against her as debtor to Harris, notwithstanding his being called in a multiplepoinding at her instance, along with other creditors of Harris, and wherein Brown had entered compearance; and set forth, that in order to avoid imprisonment, she had been obliged to consign the money.

Brown pleaded in his justification, the captious conduct of his adversary, That the charge of horning was given with a view to make her suspend, and bring on the decision of the question, which she did not: That the executing of the caption was delayed; and that the money hath since been restored to the complainer by the respondent's order.

"The Lords found this procedure irregular; but modified both damages and expenses to £3."

Act. B. W. M'LEOD.—Alt. ILAY CAMPBELL.—Clerk, KIRKPATRICK.

Fol. Dic. v. 4, p. 11. Fac. Col. No. 6, p. 10.

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No. 1. [9135] Earl of BEDFORD v. Lord BALMERINO. February 18, 1662.

A person disposed his estate, and took a back-bond in trust. In a pursuit at the instance of an adjudger against the trustee to denude, the trustee was allowed to detain until he should be satisfied of all sums of money advanced by him for the truster's behoof.

The Earl of Bedford, for satisfaction of his tocher, due by his father-in-law, the deceased Earl of Sommerset, caused adjudge, in the name of a person intrusted, all right competent to the Earl of Sommerset, of the estate of Jedburgh; and being assigned to the adjudication, pursues the Lord Balmerino, for denuding himself of two apprisings of the estate of Jedburgh, conform to three back-bonds produced, granted by umquhile Balmerino to Sommerset, acknowledging that he had acquired right to these apprisings with Sommerset's own money, and therefore obliged him to denude himself thereof.—The defender alleged, That his father being intrusted by the late Earl of Sommerset to acquire the estate of Jedburgh, and having the fee thereof in his person, the defender is not obliged to denude himself, until he be reimbursed and satisfied of all sums of money, which, after the said back-bonds, he paid for Sommerset, or advanced to Sommerset, which can only be accounted to have been in contemplation of the trust, and is particularly so expressed in Sommerset's letters produced, bearing, that Balmerino should be satisfied of what was due to him out of Teviotdale, where the said estate of Jedburgh lies. The pursuer answered, *non relevat* against him, as a singular successor; 2do, *Non competit*, by way of exception; but the defender hath only action therefore, especially this trust being *fidei commissum*, which is a kind of disposition in which [9136] there is neither compensation nor retention competent; 3tio, There can be here no compensation, because the debt is not liquid. The defender answered, His defence stands most relevant, which he founds not upon compensation, but upon the exception of retention, which is competent in all mandates and trusts, by which, as there is a direct action in favour of the mandate against the mandatar, or person intrusted; so there is a contrary action in favours of the mandatar, for satisfying of all that he hath expended by reason of the trust, and which he may make use of by way of exception of retention, if he be pursued; and whatsoever be in relation to compensation, *in deposito*, by the civil law, or of the difference of action and exception, yet, thereby they, and by our uncontroverted custom, whatever is competent by way of action, is competent by exception; and if this be not receivable by exception, it is utterly lost, because there is none to represent Sommerset.

The Lords considering that Balmerino's estate was disposed and appraised by his uncle, the Lord Couper, and William Purves, the reversion whereof was shortly to expire, which they would not lengthen; and that by an account running to the expiration of these reversions, the pursuer, being a stranger, might be frustrated; therefore they repelled the defence; but declared that estate, or benefit that Bedford should make thereby, should be liable to Balmerino for what debt he should instruct to be due by Sommerset; and withal superseded the extract for a time; that if, in the meantime, Balmerino should cause Couper and Purves restrict their rights to as much rents as would pay their annualrents, and secure Bedford in the rest of his estate, and in a certain bond produced, for what should be found due; they would sustain the defence by exception, and ordain count and reckoning.

Fol. Dic. v. 1, p. 594. Stair, v. 1, p. 101.

 No. 7. [9140] Captain STEPHENS v. Creditors of YORK BUILDINGS COMPANY.
February 14, 1735.

A factor is not obliged to yield possession to his constituent, or give up any subject in his hand, until he get payment of salary and disbursements; and this is upon a stronger footing than compensation or retention. It is founded in strict law, as being implied in the mutual contract betwixt them; and, in all cases, the *actio contraria*

must meet the *actio directa*. As a consequence of this, if a factor sell his constituent's effects, and take the price payable to himself, he will be preferable in a competition to his constituent, so long as he has any thing to claim by the *actio contraria*. And, for the same reason, it was found, that he must be preferable to the constituent's creditors arresting the price in the purchaser's hand.—See APPENDIX. *Fol. Dic. v. 1, p. 594.*

No. 17. [9150] CHEISLY v. CUTHBERT. December 5, 1665.

Cheisly charges Cuthbert for his prentice-fee, who suspends and alleges, That he was set prentice to him as apothecary, and that he deserted that employment and became a druggist, and thereupon the suspender left him.—It was answered, That the breeding him as a druggist was sufficient, and that he now practised as apothecary and chirurgion.

The Lords found this answer not relevant, the suspender being set to him as apothecary, to make drugs, and not as a druggist that buys drugs, as to the time after he changed; but the charger having farther offered to prove, that he constantly in his chamber makes as well as sells drugs, the Lords found it relevant.

Stair, v. 1. p. 322.

No. 35. [9174] JAMES, ANDREW, and KATHARINE WEMYSS, Younger Children of the deceased JAMES WEMYSS and ELIZABETH TOD, his Relict v. DAVID WEMYSS, Eldest Son of the said JAMES WEMYSS. November 16, 1768.

A contract of marriage found binding, though not subscribed by the wife.

In 1730, James Wemyss, tenant in Bogie, intermarried with Elizabeth Tod, daughter of James Tod, tenant in Gelstane. The contract of marriage proceeds upon the recital of its being "concorded, agreed, and matrimonially contracted between the parties following, viz. James Wemyss, tenant in Bogie, on the one part, and Elisabeth Tod, lawful daughter to James Tod, tenant in Gelstane, with the special advice and consent of her said father, and the said James Tod, as taking full burden in and upon him for his said daughter, on the other part."

By this contract, James Wemyss binds and obliges himself to have in readiness, of his own proper means, the sum of 2000 merks, which, with the farther sum of 1000 merks of tocher, received with his said spouse, he obliges himself to employ on land or good security, and to take the rights and securities thereof to himself and Elizabeth Tod, his promised spouse, and the longest liver of them two, in conjunct fee and liferent, and the heirs and bairns to be procreated of the marriage, in fee; and whatever lands, goods, and gear, should happen to be conquest and acquired during the marriage, James Wemyss bound himself provide and secure the same to himself, in liferent, and to the bairns of the marriage, in fee. He farther obliged himself, his heirs, &c., in case of his wife surviving him, to pay her 1000 merks at the first term of Whitsunday or Martinmas after the dissolution of the marriage, and an yearly annualrent, corresponding to the principal sum of 500 merks, with the half of the household plenishing, if no children, and one-third thereof, in case of children. On the other part, James Tod, the bride's father, binds himself, his heirs, &c., to pay to James Wemyss, 1000 merks of tocher.

[9175] This contract was signed by James Wemyss, the husband, and by James Tod, the bride's father, but not by Elizabeth Tod.

In 1766, the marriage dissolved by the death of James Wemyss, the husband, when there existed David the eldest son, and a number of younger children. During the standing of the marriage, James Wemyss purchased the lands of Lathallen, the rights of which he took to himself, in liferent, and David, his eldest son, in fee. He left besides a considerable sum in money, a good deal of moveable effects, and the tack

of the lands of Cassingray, for a considerable number of years to run, and for which a grassum had been paid.

James Wemyss made no settlement of his affairs; and, soon after his death, the widow, and some of the younger children, brought an action against David, the eldest son, who had intromitted with the effects.

Elizabeth Tod, the widow, insisted, that, as she had not signed the contract of marriage, she could not be bound thereby, and was entitled to a terce of the lands of Lathallen, and a third of the moveables.

The younger children founded on the provision in the contract of marriage, by which James Wemyss was bound to secure the heirs and bairns of the marriage, in the sum of 3000 merks, and also the hail conquest, during the standing of the marriage.

It was, on the other hand, contended for David, the eldest son, that, supposing the contract of marriage not binding, the widow could not claim a terce out of the lands of Lathallen, the disposition to these lands being taken to him in fee, and his father only in liferent.

And to the claim of the younger children, he answered, that the marriage-contract never having been signed by the wife, it was an incomplete deed, and not binding on any of the parties contracting; and, therefore, the succession fell to be regulated in the same manner, as if the marriage-contract had never been executed.

The Lord Ordinary found, "That James Wemyss's contract of marriage not being signed by the wife, is an incomplete deed, not binding upon any of the parties; and therefore, that the wife and children of the said James Wemyss can only claim their legal provisions: That the widow is entitled to a terce of the lands of Lathallen, purchased by him, and to a third of the free moveables belonging to the defunct at the time of his death: That the younger children, who are parties in this process, have a right to their proportional share of two-thirds of the defunct's free moveables."

The eldest son and younger children severally reclaimed to the Court against the Lord Ordinary's interlocutor.

Pleaded for David Wemyss, the eldest son, The rule of law is, that a widow has right only to a terce of the lands in which her husband died infert; so is laid down by our lawyers, and established by the judgments of the Court, [9176] Carruthers, 29th January 1706, No. 2, p. 2253. And there is but one exception to this rule, that is, if the husband fraudulently abstains from taking infertment, merely to disappoint his wife's claim; in such case, the law will hold him infert. In the present case, the husband never was infert, nor is there any reason to suspect, that he meant any injustice to his wife.

Answered for the widow, The spirit of the law is, that a widow shall have a terce of the lands of which her husband died proprietor, whether infert or not. In this case, though the son is infert in fee, the liferent is reserved to the husband, with power to alter the deed, or burden the subject; and, in support of this doctrine, sundry authorities were referred to.

Pleaded for the younger children against the Lord Ordinary's interlocutor, Where there are but two parties to a contract, if the contract is not executed by both, it cannot constitute an obligation upon either. The essence of every contract is the *duorum vel plurium in idem placitum consensus*, so that, if either do not concur in executing, the contract can bind neither. But, if there are three or more parties to a contract, who are all reciprocally, but separately bound to one another, the contract, though incomplete between two of the parties, will still subsist as to the others. In this case, James Tod, the father of the bride, became bound to pay 1000 merks of tocher with his daughter, and this obligation be fulfilled, by paying the 1000 merks; so that, *quoad* him, the contract received full implement; and, after receiving this payment, the husband could not refuse implement of what was prestatable upon his part, to James Tod, for behoof of the children of the marriage for whom he contracted. The obligation to the children is not connected with that to the wife; and she, by neglecting or refusing to sign the contract, cannot defeat the children's claim in this case, where the husband has received payment of the portion from the father, who was the party contracting for behoof of the children.

Answered for David, the eldest son; Mutual contracts must be good to all parties, or neither can be bound. And this principle has been carried so far, that, where the contract was duly executed, and both parties fixed, if one of them becomes unable to perform, the other will be free, and the contract at an end. In this case, the con-

tracting parties are, the husband on the one side, and the wife, with consent of her father, on the other ; the wife is the principal contracting party, and not having signed the contract, is not bound ; the consequence of which must be, the contract must fall to the ground. Where there are three or more separately bound, in one contract, to each other, and the one cannot qualify any interest that he has in another's signing, who has not done so, it may be true, that the contract, as to those that signed, would subsist, because there the obligations fall to be considered, not as one mutual contract, but as separate distinct agreements, though contained in one writing ; but, if the parties signing can qualify an interest in the person's signing, who refuses to perform, the contract must fall as to the whole. If, in this case, the [9177] husband could qualify no interest in the wife's subscribing, it might afford some handle for the other party's plea ; but, it is evident, the husband had a direct interest in the wife's signing. Where the husband settles the conquest on the children of the marriage, and the wife gives up her legal claims of terce and *jus relictæ*, it must be understood, that the wife's giving up her legal claims, was the inductive cause of settling the conquest on the children ; and, therefore, if she refuse to sign the contract, the husband, or his heir, cannot be bound to implement the obligations he came under, in the belief that his wife was to accept of the conventional provisions stipulated by the contract, in place of her legal claims.

The following interlocutor was pronounced on both petitions, when advised, with answers.

"The Lords find the contract of marriage betwixt James Wemyss and Elizabeth Tod, in respect of the subsequent marriage betwixt them, subsisting and obligatory upon all parties, viz. upon David Wemyss, upon the widow, and upon the younger children."

And refused, without answers, a petition for the widow, and another for David, the eldest son, reclaiming against said interlocutor.

For David, MACQUEEN & ILAY CAMPBELL.—For the Widow, ALEXANDER BRUCE.—
For the Younger Children, LOCKHART.

A. E.

Fol. Dic. v. 4, p. 16. Fac. Col. No. 78, p. 324.

No. 38. [9182] MARGARET BAIRD v. Lady DON. July 14, 1779.

When a servant is hired from one term to another, warning is required previous to the term, otherwise tacit relocation will take place ; and in this case, where warning was omitted on the part of the master, the Lords found the servant entitled to wages and board-wages for the ensuing half year.

Margaret Baird was hired as housekeeper by Lady Don for half a year, from Whitsunday to Martinmas 1777. At that term, she received her wages, and, without any previous warning, was dismissed ; on which she brought an action against Lady Don, for payment of wages and board-wages for half a year from the term of her dismissal. In support of this claim,

Pleaded for the pursuer, When a servant is hired to a term, and no precise warning given, tacit relocation takes place, agreeably to the principles of common law, and the general practice of the country. The pursuer having received no warning, understood that she was to continue in the defender's service for the next half year after the term to which she was hired, and, on that ac-[9183]-count, did not look out for any other service. By this means she suffered the loss of which she now claims to be relieved by the defender, who was the cause of it.

Answered, When the parties to a contract have themselves fixed the period of its continuance, no intimation from the one to the other is necessary to prevent its being dissolved at the time stipulated. The parties are sufficiently ascertained of the endurance of their obligations to each other, by the express terms of their agreement.

If the servant is hired to a certain day, when the day comes, the prestations arising from the contract or agreement are no longer exigible. The servant is, eo

ipso, free from performing the service, and the master from paying the hire. To renew these obligations, for the like, or any other space of time, a new agreement is necessary, specifying the term of endurance. Though the servant should remain in the service of his master after the time stipulated, he comes under no obligation thereby, without express paction, to continue in it for any definite time. The master, in like manner, is not obliged to keep the servant longer than he chuses.

It was likewise averred to be a common practice for servants to leave their masters at the term without giving warning, and for masters to dismiss their servants in the same manner.

The Court "found the defender Lady Don, and Sir Alexander Don, conjunctly and severally, liable in payment to the pursuer of the sum of £5 Sterling of wages, and of £6, 6s. Sterling in name of board-wages, and decerned."

Lord Ordinary, MONBODDO.—Alt. CORBET.—Alt. P. MURRAY.—Clerk, ORME.

Fol. Dic. v. 4, p. 18. *Fac. Col.* No. 75, p. 165.

No. 69. [9214] JOHN MURRAY, eldest Son to the deceased GILBERT MURRAY of Conheath v. JAMES MURRAY, his younger Brother. June 16, 1710.

An appriser having entered into possession of lands, it was found that he could not thereafter invert his possession, and ascribe it to any other title, although such title was in his person prior to the apprising.

In the action of count and reckoning, at the instance of John Murray v. James, his younger brother, who had accepted a factory from the pursuer, bearing "power and commission to uplift and manage the rents of the lands of Conheath, pertaining to their father, and to submit, transact, compone, and agree all pleas, differences, and controversies arisen, or that might arise thereanent, without prejudice to James, of any acquisition made or to be made by him, of the lands and heritages aforesaid, upon his own industry, pains, and expense, either before, during, or after the factory"; the Lords found, That whatever rights the factor acquired of the said lands, conform to the last clause of the factory, viz. "That his acceptance should not be prejudicial to his acquisitions made or to be made," must stand good only for a security to him for the sums principal, annuallrents, and expenses, and interests thereof, expended by him, in purchasing and prosecuting these rights during the factory; and that upon John Murray's making payment thereof, deducting James's intrusions, the said rights shall be redeemable, and James be holden to denude in favour of the constituent, who must have the benefit of the eases, without prejudice to rights in the factor's person before the factory. Albeit it was alleged for James Murray, That since he might accept the factory with what conditions he pleased, *quæ dant legem contractui*, the last clause must operate something, viz. That his acceptance should not oblige him to communicate to John the eases of his acquisitions aforesaid, otherwise it should have no effect, and James should be equally liable as if he had accepted a simple factory; and such a clause is not inconsistent with the nature of a factory, there being mandates *in gratiam et mandantis et mandatarii*. For it was answered by the pursuer, That a factor, by the nature of his trust, is obliged to make the best he can of his constituent's pretensions relative to the subject of the factory; Fraser *contra* Keith; No. 23, p. 6953; 15th November 1667, Maxwel *contra* Maxwel, *voce* TRUST. Albeit all factories are not of a like nature, yet the clause founded on by the defender must be held *pro non adjecta*; since it is not only contrary to the very design of the factory, but also to law, *cui non derogatur pactis privatorum*; and is equally reprobated as if a tutor should adject to his acceptance of the office, [9217] that it might be lawful for him to acquire, to his own behoof, rights affecting the pupil's heritage.

January 4, 1712.—In the count and reckoning at the instance of John Murray v. James Murray, mentioned *supra* June 16, 1710, the Lords found, that the defender

having acquired a right to the lands of Conheath, from Elizabeth Maxwell, his mother, before the pursuer granted to him the factory, and entered to the possession by virtue of an apprising acquired by him during the factory, he could not alter or change the title of his possession, but must be understood to possess by virtue of the apprising, and be countable to the pursuer for his intromissions, ay and while the said right be extinct, or he denuded thereof in favour of the pursuer; but found, that after the said apprising is extinguished, or the defender denuded thereof, as aforesaid, he may compete for the possession.—See PACTUM ILLICITUM.

Fol. Dic. v. 1, p. 599. Forbes, pp. 411, 569.

No. 2. [9233] The MASTER of FORBES v. STEIL. February 17, 1687.

The Master of Forbes's pursuit v. Patrick Steil, vintner in Edinburgh, is reported by Saline, how far he was liable for the Master's cloak stolen in his house, on the edict *nautæ, caupones, stabularii*; seeing Patrick alleged from the words of the edict *salvas fore receperint*, there behoved to be a tradition or delivery of the thing to their custody; and that the *caupones* amongst the Romans were, where travellers came to lodge with their cloak-bags, of which kind Patrick Steil's house was not; and that his doors being open, and near to the high streets, he could not be answerable for all comers and goers. Yet the Lords [9234] found him liable, especially seeing it was proved, that it was lying on the bye-table, when the gentlemen's servants were removed to another room to get their suppers, during which time Steil's own servants attended, and then it was missed; and that Sir Robert Milne of Barntoun, Sir Robert Colt, and many others, had their cloaks thus stolen in this, and the other great taverns of the town; so the Lords resolved to make an example.

Fol. Dic. v. 2, p. 1. Fountainhall, v. 1, p. 448.

No. 3. [9235] EWING v. MILLER. July 1687.

Three packmen having hired a carter to carry their packs from Ayr to Kilmarnock, it was libelled that one of the packs was opened and £80 Scots taken out of it.

The Lords found, That it being proved, that the pack had been opened after delivery, the defender was liable *de receptis*; and that the packman might prove by his oath *in litem*, what money was in it when he delivered it.

Fol. Dic. v. 2, p. 2. Harcarse (SUMMONS), No. 931, p. 261.

No. 4. [9236] ROBERT MAY, Merchant in Borrostounness v. WINGATE and his Wife. February 16, 1694.

Householders in towns who let lodgings, come within the description of *nautæ, caupones, &c.*

This was a pursuit upon the edict *nautæ, caupones stabularii, ut recepta restituant*, because he lodging at their house, gave them a bag of money in keeping, and when he required it, they declared it was stolen. The first question was, if settlers of rooms, &c., were in the same case with inn-keepers and taverners. The Lords thought they were. 2do, If a man leave money or other goods, and go away for a time, and it be amissing in his absence, whether that can fall under the edict, and the strict diligence required of them, making them answerable for all incomers and other

servants ; or if it was only in the case of a *depositum*, which does not require so severe a custody ? And several Lords inclined to think, that they would only be liable as *depositarii* ; but in both cases thought their bare assertion must not be taken that the goods were stolen, but they behoved to give some evidence of it, that the trunks or cabinets were found broken at such a time, and witnesses were called to see it ; else they might give any that trusted them a very short answer, your goods are away without condescending on the accident ; though the manner being oft times clandestine cannot well be proved.

July 10.—Robert May *contra* Wingate, about the money stolen, mentioned 16th February 1694. A debate arose, whether he was liable on the Prætor's edict, as *caupo*, or only as an ordinary depository. The Lords found, seeing he had lodged in Wingate's house, and gave them the money to keep, and then went out of town and returned again, and at that time it was stolen, that therefore they were in the precise terms of the edict, and to be liable *tantum caupo*, seeing it was acknowledged, that at the accepting, she promised to secure it. But if it had been lost in his absence, then they would have been only liable as depositars ; but even then their negligence is palpable, seeing it was proved they had put his money into a trunk which had a very bad and insecure lock, which opened with a knife, whereas they had stronger and safer coffers and trunks in the house. The poor folk were to be pitied, but the law clearly struck against them, either under the one notion or the other. And it alters not the case that he had left the house, seeing he had returned, and it was not stolen *medio tempore* but the very time he lodged there. *Origo negotii et initium contractus* is always to be considered.

Fol. Dic. v. 2, p. 1. Fountainhall, v. 1, pp. 610, 627.

No. 8. [9241] CHISHOLM of Comer v. Mr. DAVID FENTON. December 10, 1714.

The master of an inn and stable found liable for a traveller's money stolen out of his valise, which was upon his horse in the stable.

Chisholm, in his way from the north, having lighted about midday at Mr. Fenton's house, and caused put his horses in the stable, and there being a bag or valise on one of these horses, wherein there was money, the bag was cut, and 1000 merks of money taken out ; which was discovered before drawing of the horses, and thereupon an instrument taken against Mr. David Fenton the master of the inn where he alighted. Comer did thereupon pursue Fenton upon the edict, *nautæ, caupones, stabularii* ; wherein, after a probation led, "the Lords found it proven, that the bag or valise libelled was brought entire upon one of the pursuer's horses into the defender's stable about midday ; and that the defender's servants assisted to lead in the horses into the stable ; and that sometime thereafter the valise was cut before the horses were drawn out of the stable ; and therefore found the defender liable for the money taken out of the valise, and allowed the pursuer to depone upon the quantity thereof."

The defender gave in a petition reclaiming, upon which the whole matter came again under the Lords' consideration ; and it was alleged in behalf of the defender, That though he did keep a public house, yet he could not be answerable for what money was brought upon a horse put up in a common stable, without any intimation or advertisement to take a special care of that cloak-bag ; in which case, if the landlord had taken the burden, or even acquiesced, he might have been liable, but otherwise not. 2do, *Nautæ, caupones, stabularii* are not liable for any diligence, further than for such things as are in use to be brought into ships, inns, or stables respective ; and therefore, if a traveller should bring a bag or valise containing jewels, or even gold or silver, more than is useful for the traveller's daily expense in a journey, the *stabularius* is not liable for such things as are not usual nor proper to be brought into his stable.

It was answered ; That *nautæ, caupones, stabularii* are all liable to equal diligence with respect to their several trusts ; and therefore what is said of any one of them in

the law regards the whole ; and “ lege 1, D. Nautæ, caupones, recipitantem saluum fore utrum si in navem res missæ,” or “ assignatæ sunt, an etsi non sint assignatæ ; hoc tamen ipso quod in navem missæ sunt receptæ videntur ; et puto omnium eum recipere custodiam quæ in navem illatæ sunt.” [9242] And whereas it is alleged, That it does not belong to the trust of a *stabularius* to be answerable for money, jewels, or precious goods, but only for the horse and accoutrements, and such things as are usually carried about with horses, but that money is to be more cautiously managed, and brought into the inn ; it is answered, The foundation laid down being established, that a *stabularius* is liable for all that comes under his trust, the extent of that trust is to be measured by the common practice and custom. It is acknowledged, that travellers, lodging all night with money in bags or valises, are in use to take off these valises, and carry them into the inn ; and therefore a *stabularius* would not have been liable, if the pursuer had come to lodge all night with his money. But, on the other hand, travellers on the road, resting at midday for refreshment of man and horse, are not in use to loose their cloak-bags, but they remain upon the horses’ back ; and therefore it belongs to the trust of the *stabularius* to see to the security of all that was brought into the stable upon the horses’ back.

It was replied ; Supposing a *stabularius*’ diligence to be as is laid down, and that the measure of his trust were according to custom, it is denied the custom will be found uniform, that travellers resting at midday do leave the trust of their money in cloak-bags to the servants of the stable, who are persons of the lowest condition ; but some cautious travellers carry their cloak-bags into the house ; others, who have servants, commit the trust and oversight of their money to them ; and, in this particular case, Grant the pursuer’s servant did call for the key of the stable, and got it, not indeed at the first, but got it before the horses were corned, and before the slitting of the valise was observed, and his master asked him, whether he had the keys of the stable, which he said he had, and was ordered to corn the horse ; whereupon he opened the door, and then observed the slit in the valise, which might have been done after he had got the key, and by himself.

It was duplied ; That seeing the law is clear, and the custom clear also, that travellers resting at midday are not in use to take off their cloak-bags, the trust lies upon the master of the stable ; and though some travellers, *ob majorem cautelam*, may allow or appoint their servants to take notice that no damage happen, yet that additional care does noways relieve the master of the stable.

“ The Lords, in respect that the pursuer was not to lodge in the house all night, but only to rest and refresh himself and horse at midday, adhered to their former interlocutor, finding the defender liable.”

Fol. Dic. v. 2, p. 2. Dalrymple, No. 126, p. 175.

No. 10. [9246] ARCHIBALD MACAUSLAND v. WILLIAM DICK, WILLIAM BYRAM, and JOHN CAMERON. February 6, 1787.

The owners of stage-coaches not answerable for the safe conveyance of money, unless where it has been delivered as such.

William Dick, one of the owners of a stage-coach plying between Glasgow and Edinburgh, received a parcel belonging to Archibald Macausland. This he marked in the way-bill, with a charge of sixpence, which is the rate demanded for all ordinary parcels not exceeding a certain weight.

The parcel not having been delivered, Mr. Macausland brought an action against William Dick, and his partners, for £200, alleged to have been contained in it ; and

Pleaded, The case of carriers by land, though not specially provided for by the edict of *Nautæ, caupones, et stabularii*, yet clearly falls within the spirit and meaning of that regulation ; and the obligation it creates does not depend on the value of the goods. If these have been received, action must be sustained for redelivery. This is confirmed by the usage of modern nations, and likewise by the conduct of the owners of stage-coaches in Scotland, who generally take care to express, by a particular

advertisement, to what extent they are to be understood to warrant the safety of goods entrusted to their care; l. 1, §§ 4, 6, *D. Naut. Caup. et Stab.*; l. 7, *ibid.*; Stair, book 1, tit. 13, § 3; Blackstone, vol. 3, tit. 9, p. 164.

Answered, The owners of stage-coaches do not, in general, undertake the conveyance of money; because, they have no proper repository for it; and because it is almost impossible for them to provide against the frauds or misconduct of the passengers. This article for the most part is, and always ought to be transmitted by a waggon, in which there is a place fitted up for the purpose. There, too, it is usual to proportion the rate of carriage, not to the bulk only, but also to the value of the goods. The consequence of admitting the present claim, would be to subject people, in the defenders situation, to a hazard which did not fall within their agreement, and for which, of course, a corresponding premium could not be stipulated.

It was also argued for the defenders, That the edict ought not to be extended to carriers by land. But the case was determined on this principle, that the [9247] owners of stage-coaches, or other carriages for hire, were not responsible for the safe conveyance of money which had been delivered as an ordinary parcel.

"The Lords sustained the defences, and assoilzied."

Lord Reporter, ESKGROVE.—Act. DEAN OF FACULTY, HOPE.—Alt. MACLAURIN, J. DICKSON.—Clerk,¹HOME.

C.

Fol. Dic. v. 4, p. 61. *Fac. Col.* No. 308, p. 477.

No. 1. [1] JAMES HAY v. SAMUEL WORDSWORTH. February 13, 1801.

A stabler and horse-breaker found liable for the value of a mare which died of an accident while under his care.

James Hay sent a mare to be broken by Samuel Wordsworth, stabler and horse-breaker in Edinburgh. Wordsworth's stables formed a part of the Circus, and the only entry to them was through the area or circular part of the building. He was lessee of the whole of it, but, by agreement with the proprietors, he was, on Sundays, to allow the use of the area, and certain other parts of the house, to a dissenting congregation, for the purpose of divine service. On this account the area was filled with benches on Sundays, and the entry to the stables narrowed to a passage of between six and eight feet wide.

While a servant of Wordsworth's was riding Mr. Hay's mare, on a Sunday, through this passage, with the intention of giving her an airing, she was attacked by a strange dog which lay concealed among the benches; upon which the mare broke from the servant, leaped among the benches, and was so severely hurt, that she died, notwithstanding that all due pains were taken by Wordsworth for her recovery.

Mr. Hay brought an action against Wordsworth, concluding for payment of £50, as the value of the mare. The action was founded upon the principle of the edict, *Nautæ, caupones, stabularii*; D. lib. 4, tit. 9.

In defence, Mr. Wordsworth

Pleaded: 1st, It was as a horse-breaker, not as a stabler, that the mare was put under his care. But the edict relates only to the latter description of persons; l. 3, § 2, *D. h. t. Voet.* § 7, *h. t.* The reason of the distinction is indeed obvious. The risks to which a stabler is exposed are well known, and easily defined. But a young horse before he is trained is exposed to a variety of accidents, [2] which the utmost vigilance of the horse-breaker cannot provide against, and to the risk of which, when there is no *culpa* on his part, he ought not to be subjected.

2dly, The edict contains an exception of accidents, arising *vi majori*, or *damno fatali*. Now, the accident in the present instance falls under the description of a *damnum fatale*, for which, even if the defender fell under the edict in his character of a horse-breaker, he would not be responsible.

Answered: 1st, It is of no moment for what purpose the mare was placed in the

defender's stables. He received hire for keeping her ; and his stable is a public one. These facts are not denied, and they bring him under the very words of the edict.

2dly, The *damna fatalia* alluded to in the edict, are misfortunes arising from lightning, shipwreck, and the like. No case which great watchfulness on the part of the *caupo* or *stabularius* might have prevented, was regarded as *damnum fatale* ; l. 1, § 1, D. *h. t.* In the present instance, if the defender chose to permit benches to be so placed as to narrow the passage to his stables, and thereby incur the danger of accidents to the horses under his care, he must be answerable for the consequences.

The Lord Ordinary found " the defence relevant, that the mare, in being led from the stable through the Circus, in order to go out to exercise, was attacked by a strange dog, whereupon she overthrew the groom, and leaped in among the benches, and thence received a wound, of which, notwithstanding all due care, she died ; this being a misfortune, *quod cuivis patrifamilias, etiam diligentissimo, accidere potest* ; l. 11, *De Minor, D.* and allowed a proof thereof to the defender, and to the pursuer a conjunct probation."

On advising a reclaiming petition for the pursuer against this judgment, with answers, several Judges were of the same opinion with the Lord Ordinary, and on the same ground. But a majority of the Court thought there was at least *culpa levissima* on the part of the defender, which, in his characters of a stabler and horse-breaker, ought to subject him in the loss, both on the edict and at common law. He ought to have taken good care that his stables should not be exposed to such accidents.

The Lords altered the Lord Ordinary's interlocutor, and found the defender liable for the value of the mare.

Lord Ordinary, MEADOWBANK.—Act. JO. CLERK.—Alt. H. ERSKINE.—Clerk,
MENZIES.

R. D.

Fac. Col. No. 219, p. 496.

No. 2. [9275] The Relict and Children of JAMES SMITH v. the Earl of WINTON.
December 1, 1714.

A sum of money being advanced by the manager of an estate to one of the proprietor's friends, who by advice of other relations of the family, went abroad to acquaint him with the state of his affairs, and to solicit him to come home, the Lords found the proprietor himself after coming home, bound to allow the money so advanced, though the friend's journey proved at that time ineffectual.

The said James Smith having served the late Earl of Winton for many years, in quality of factor or chamberlain, the present Earl being beyond seas when his father and brother died, and not having even then returned, it was concerted, at a meeting of some of his Lordship's friends, that Seton of Tough, and, upon his declining the office, Sir Walter Seton, one of their number, should go abroad in quest of the Earl, in order to inform him of the state of his affairs, and to acquaint him, that there was an absolute necessity of his Lordship's presence to manage his own business. At which sederunt, they also resolved Sir Walter should have £100 Sterling for defraying the charge of his journey, out of the first and readiest of the rent of the Earl's estate. After James Smith's decease, his children, as having right by a general disposition, pursue the Earl for payment of the £100 Sterling, and annualrents thereof, advanced by the bailie, in manner, and for the end foresaid.

Answered for the Earl ; That Sir Walter had no mandate from his Lordship, nor was he under any character that could found such a repayment. 2do, A *negotiorum gestio* must be necessarily and profitably done, otherwise the negotiator hath his labour for his pains, and he that set him on work must pay him his expenses. And if a man undertake what is *insolitum* or unusual, he runs the risk thereof himself if it miscarry, negotiations of this nature requiring the most exact diligence that can be proposed ; so that, if Sir Walter had no other errand but to give an account how matters stood, this might have been done to as good purpose by a letter.

Replied for the defenders ; That they did not contend there was any express man-

date, but a *negotium utiliter gestum* for the Earl, and that not undertaken by Bailie Smith at random, but with concurrence of the friends of the family; and therefore (in answer to the 2d), this advance of money was both necessary and profitable, as well in the effect as in the design, the design having been to give his Lordship a particular account of his circumstances, and to solicit his home-coming. And the effect (though it did not immediately follow, yet) that the friends, by Sir Walter's journey, got knowledge where his Lordship was, so as to communicate with him by letters, and send him bills, which effectuated his return. And as to this *negotium*, its being *insolitum*, answered, That when a person absent falls to a considerable heritage, and it not being known where he is, and he keeping no correspondence, his affairs going to confusion without orders, that those interested should take rational methods to prevent these inconveniencies, which may turn to the ruin of the absent's affairs, is not at all *negotium insolitum*, though it may rarely fall out; but it is a necessary procedure, when fallen out, for the right administration; for *insolitum* is not what rarely falls out, but the undertaking of a new sort of business, not in the way of usual administration.

[9276] The Lords found the Earl liable to refund the £100 Sterling advanced by Bailie Smith to Sir Walter Seton.

Act. FALCONER.—Alt. HORN.—Clerk, GIBSON.

Fol. Dic. v. 2, p. 4. Bruce, v. 1, No. 11, p. 17.

No. 17. [9300] MAGISTRATES of INVERNESS v. WILLIAM DUFF, and Others.
January 23, 1771.

Mode of computing non-entry duties, and legal deductions therefrom.

The Magistrates of Inverness having brought a declarator of non-entry against the vassals in certain lands and fishings, a question arose, Whether the defenders, who were singular successors, were liable in a year's rent, or in payment of double the feu-duty? The clause founded on by the vassals was the following in the reddendo; "Nec non duplicando dictam feudi firnam primo anno introitus ejuslibet hæredis, aut assignati, &c."; and the Court (Fac. Col. February 2d, 1769, *voce* SUPERIOR and VASSAL), found the defenders liable in a full year's rent upon getting an entry.

This general point being settled, some others required to be adjusted—As to which, the defenders, in a reclaiming petition, maintained;

1mo, That the pursuers were not authorised to exact a full year's rent; for in the year 1739, an act of council had been passed, whereby it was ordained that no charter should be granted in favour of singular successors, "till such time as the person entering, if he is a burges residing within this burgh, bearing Scot, lot, &c., shall pay the half of a year's free rent of the subject; or if the person entering be not a burges, &c., that such person shall pay before signing of his charter a full year's free rent, or three-fourths thereof, as the Magistrates shall think proper." That the practice accordingly had fixed this composition at one half or two-thirds of the year's rent, and that they had a *jus quæsitum* to be received upon these terms.

2do, The defenders had been found liable by the Lord Ordinary in the full mails and duties of the subjects from the period of citation in the action, which [9301] was erroneous; for though it might be a rule mentioned by ancient writers upon the feudal law, that these were due from that date to the superior in a general declarator of non-entry, yet that only took place where decret was afterwards obtained, and the non-entry declared by a judgment of the Court. In this case no declarator had followed, and the vassals had appeared and professed themselves willing to enter, but differed only upon the terms. Full mails and duties were never due from citation where there was any colourable excuse (*vide infra*, h. t.); and hence, in the present case, nothing more could be demanded than such bygone feu-duties as might be unpaid.

2tio, That in fixing the *quantum* of the composition, they were entitled to deduction, 1st, Of the feu-duty payable to the superior; it being only a year's absolute produce of the vassal's estate or interest that was liable for an entry, Dict. *voce* SUPERIOR and VASSAL; 2d, Of a fifth part of the rent as the legal value of the tithes;

the vassals, in the present instance, having a right to these by a progress different from that of the lands ; 3d, Of the cess, upon the ground, that if the superior should carry the idea of the law into practice, and dispossess the vassal, he would in like manner be liable in public burdens.

4to, That the victual rent should be converted, not at the rate the defenders sometimes drew it from their tenants, but according to the stated conversion in that part of the country ; which was the rule established in all cases, and in particular in the valuation of a bankrupt's estate previous to a judicial sale.

5to, That in computing the value of the salmon-fishings and grass, the period of seven years, which the Lord Ordinary had fixed, was too short ; and that they should be taken for 20 years bygone, and fixed at a medium of that period.

The pursuers answered ;

1mo, The act of council in 1739 was passed to prevent an abuse that had crept in, of granting an indulgence to vassals who were connected with the Magistrates ; but though nothing less than a half or two-thirds of the year's rent could in any case be received, it did not from thence follow, that a full year's rent was not the rule which the Magistrates were authorised, if they should think proper, to exact it. No *jus quæsitum*, therefore, was either granted or intended ; it would have been an act of mal-administration to have done so ; and no practice, such as the defenders maintained, had ever followed.

2do, That the pursuers had no other means to force an entry, but by taking decret of mails and duties, which was the ordinary remedy ; but they had no objection that these, should be restricted as the Court should think fit.

3tio, With regard to the deductions claimed, 1st, Of the feu-duty ; the statute 1469 positively declared, that the overlord, in accepting of the change of a vassal, should receive a year's mail as the land was set for the time. All the law authorities considered a full year's rent of the lands without any deduction, to be the standard of this casualty, and any abatement that might be given [9302] was merely *ex gratia*. 2d, Teinds were only a burden upon the property ; and the rule had been, that vassals of subjects superior should pay a full year's rent without any deduction being specified on that account. 3d, As to the cess, the same answer applied as had been given with regard to the feu-duties.

4to, With regard to the victual ; as this casualty was established to be a full year's rent of the lands as they then stood, the superior must take his chance whether the current prices were high or low. If the defenders chose to deliver the *ipsa corpora*, they would receive them ; but if they rather inclined to pay the value, they could not complain, when both that and the quantity were referred to their oaths.

5to, A retrospect of seven years, as to the rent of the salmon-fishings and grass-grounds, was an indulgence, the current rent being the standard ; and if the defenders were entitled to go back 20 years, they might, with the same reason, go back 40, or any period whatever.

The Court pronounced the following judgment : " Find there is no claim for the full mails and duties since the citation in this case ; repel the defence founded on the act of council 1739, with respect to the *quantum* of the composition ; but in ascertaining the extent of the year's rent, find that one-fifth part must be deducted from the rent of the lands, exclusive of the salmon-fishing, on account of tithes, in respect the pursuers are not superiors, nor have they right to the tithes : Find the cess to be no proper deduction ; and that in converting the victual, the same must be rated according to the current prices of the markets in that part of the country ; as to feu-duties, parties to give in mutual condescendences as to the practice ; and as to the two last points (the salmon-fishings and grass), adhere. Thereafter, of consent of the pursuers, the feu-duties, in striking the composition, to be deducted from the rental."

Lord Ordinary, BARJARG.—For the Magistrates of Inverness, LOCKHART.—Clerk, CAMPBELL.—For Duff, and Others, COSMO GORDON.

No. 24. [9306] DOUGLAS of Kelhead v. The VASSALS of the Barony of Kelhead, and Others. January 29, 1671.

Found in conformity with Harper v. Hamilton, No. 23.

In the action of declarator (see No. 12, p. 9292), at Kelhead's instance against his Vassals, it was alleged, That the special declarator for the mails and duties could not be sustained, but from the date of the act of litiscontestation ; seeing there was no decret of general declarator, and that it was found that the pursuer had no right as superior, but as assignee, to the bygone non-entries. The Lords, notwithstanding, did sustain the special declarator for mails and duties, from the date of citation upon the summons libelled, which was both a general and a special declarator ; and found, that the vassals lying out to enter, and thereby having the benefit to be liable only for the retoured duties, ought to be decerned for the mails and duties after the citation, where the summons is a special declarator, or where the summons is both special and general.

Gosford, MS. No. 325.

No. 41. [9330] Captain CHALMER v. His VASSALS. June 29, 1745.

A person having made up singular titles to his predecessor's estate, the vassals were found not liable in non-entry duties preceding the date of his charter, the superior having been uncertain, in respect the estate was affected by many transactions and diligences.

Captain Chalmer of Gadgirth pursued his vassals for non-entry duties, who answered, They could only be liable from the time he was infeft himself, because the affairs of the family of Gadgirth had been in such confusion, and the [9331] rights to the estate so perplexed with diligence and transactions, that it was impossible to know who was superior ; and so the vassals were not *in mora* of taking infeftment.

The Lord Ordinary, 9th June 1744, " found that, in this special case, the defenders were not liable for either retoured or non-entry duties, preceding the date of the pursuer's charter."

Pleaded in a reclaiming bill, The retoured duties payable on non-entry, ought not to be considered as penal ; but as the vassal without infeftment has no right to the estate, the profits of course belong to the superior, which our law has mildly restricted to the retoured duties as the presumed value of the land ; and therefore to make them due, it is not necessary to consider the vassal as in any fault, or *mora*. Stair, b. 2, t. 4, § 23, admits of many exceptions to excuse from the full rents, but reckons the claim for the retoured duties as favourable, where he also says, " That it is not the negligence of the vassal, but "the nature of the right that infers non-entry." And Craig l. 2, dieg. 19, speaking of the entire forfeiture of the subject, which was the sanction of the feudal law, and saying that *mitiores pœnæ nobis placuerunt*, means the claim, when extended to the whole rents, which alone he considers as a penalty.

These duties are due to the superior's heir, though not entered himself, unless the vassal obtain infeftments, by taking the course the law prescribes.

It is affected, to pretend the superior could not be known. It was easy to find out the heir of the family, who could invest them, notwithstanding there might be adjudications against him, or if there were infeftments on any adjudications, the heir could do it, during the legal, and when that was expired, the adjudger.

Answered, If this question were to be determined by the feudal law in its utmost severity, the claim must be excluded, since *bona fides* is the foundation of the bond between superior and vassal, and a just cause of delay will excuse ; and this is mentioned as one, *Si domini heres incertus sit, et si controversia sit de hereditate*, l. 2, Feud. t. 2. Craig, l. 2, d. 12, §§ 3 et 7. Cujacius in lib. 5, juris feudalis ; Struvius in jus feudale, c. 1, § 8 ; and Craig's expression of *mitior pœna*, means as well the small duties, which are a penalty, though milder, as the whole mails.

The pursuer himself holds his lands blench of the Prince, to whom therefore his

non-entry belonged ; and he having obtained a charter without any composition, cannot extend it against the respondents.

He has not made up his title as heir to his predecessors, but possesses as a singular successor ; and as the superior was absolutely unknown, it was impossible to run precepts ; besides, the competency of this method of getting infeftment can be of no influence in a question concerning the non-entry duties, as it was introduced by act 57th Parl. 7, Ja. III. before which this question might have occurred ; and then it must either have been admitted as a defence, that [9332] the vassal was not *in mora*, or vassals would have been in a miserable case, who could not get infeftment when they applied for it.

The Lords, 20th June 1745, “ found, that whereas the petitioner did not claim the superiority as heir to his predecessor, but as a singular successor ; therefore adhered to the Lord Ordinary’s interlocutor.”

Pleaded further in another bill ; That casualties of superiority, before they are divided from it by declarator, go along therewith ; and therefore the Captain having, whether as heir or singular successor, acquired right to the superiority, has right to the casualties thereof incurred and never separated ; Dirleton, word, CASUALTIES OF SUPERIORITY, Stewart’s Answers, and a decision 11th July 1673, Robert Faa v. Lord Balmerino and Powrie, No. 20, p. 5449, *voce* HERITABLE and MOVEABLE. See No. 25, p. 9307.

Observed on the Bench, That the former interlocutor adhering to the Lord Ordinary’s, went on the specialties of the case in the uncertainty of the superior, not solely on the pursuer’s being a singular successor.

“ The Lords adhered.”

Act. A. MACDOUAL, W. GRANT *et* LOCKHART.—Alt. ALEX. BOSWELL.—Clerk, FORBES.

Fol. Dic. v. 4, p. 19. D. Falconer, v. 1, p. 111.

No. 1. [9339] SCOT v. The ARCHBISHOP of GLASGOW. February 29, 1680.

A charter of resignation containing a *novodamus*, with an express right of patronage of a parish, was preferred to a posterior grant of the said patronage from the same author, although it was pleaded, that a *novodamus nihil novi juris tribuit*, and the patronage was not resigned, nor did belong to the resigner *ab ante* ; in respect it was answered, that a *novodamus* infers a new grant as well as a renovation, and every thing expressed is understood to be habilely disposed whether there was an antecedent title in the resigner’s person or not.

The Archbishop of Glasgow having, upon the 25th instant, insisted in his reduction, which he raised with the suspension, the cause was fully debated, but upon hopes of agreement, the Lords delayed the interlocutor till this day. The reason of reduction insisted on was, that by the King’s gift and disposition, in anno 1608, produced, the King disposed the Archbishoprick of Glasgow, with all the privileges and emoluments thereto belonging, with a *novodamus*, repeating the same words, and adding, “ *præsertim jus Patronatus Ecclesiæ de Ancrum et Stobo, &c., ad dictum Archiepiscopatum pertinens, una cum omni alio jure ad dictum Archiepiscopatum aut beneficia superscripta respective aut ullo modo habemus aut habere poterimus,*” &c. ; by which the King was fully denuded, and this patronage in the person of the Archbishop and his successors, and therefore it is a prior and better right than the disposition of the same patronage by the King to the Earl of Lothian, 1625, to which Ancrum has right. It was answered for Ancrum, That the King’s charter to the Archbishop, in anno 1608, can give no right to the patronage of Ancrum ; Imo, Because it proceeded upon the Archbishop’s own resignation, and so could carry no more right than the resigner had then ; for it cannot be pretended, that the then bishop had right to the patronage of Ancrum, which was never an ecclesiastick patronage, but in all taxations was lifted amongst the laick patronages in the taxation rolls ; and there are produced three

presentations by the King for the year 1608, and one after the year 1608, to Mr. William Bennet, who was the only entrant after 1608, except Mr. John Livingston, who entered when the power of presentation by patronage was abolished ; but after the King's return, the King's right being revived, Mr. James Scot had a presentation, both from the one party and the other ; and now the question is of his successor ; so that the enumerating of this patronage amongst the benefices [9340] pertaining to the Bishoprick of Glasgow, was by unwarrantable suggestion and obreption. 2do, Albeit there be in the said charter a *novodamus*, it alters not the case, seeing the design and import of a *novodamus* is only to supply the defects of prior titles, resigned or confirmed ; but it is not equivalent to an original right ; and therefore, unless the Archbishop could show that his predecessors had some title, valid or invalid, the *novodamus* cannot give him an original right, where he had no pretence before ; for it is known and ordinary, that a *novodamus*, though it bears *pro omni alio jure*, yet that is but still, and hath its limitation from custom, as to such clauses granted by the King, who is secured against the neglect of his officers ; and therefore it will not exclude the King from the casualties of ward, marriage, liferent escheat, nor non-entry, as to years preceding, as was found in the case of the Lord Treasurer Depute v. the Earl of Northesk, No. 70, p. 6506, whose *novodamus* bore expressly ward, yet was not found to exclude the King's donatar from the marriage. 3tio, The conception of this *novodamus* is qualified and restricted to the benefices, *quæ ad prædictum Archiepiscopatum pertinuerunt vel pertinere poterint*, which is expressed in the dispositive clause, and repeated in the *novodamus* before the enumeration, and is repeated again after the enumeration ; and therefore the subsequent clause *pro omni alio jure* can only be understood for all right the King had to the bishoprick, and all benefices which had pertained thereto, of which Ancrum was none. It was replied for the Archbishop, That the King's charter appeareth clearly to have proceeded of certain knowledge as to the parsonage of Ancrum, for it gives a special reason of the concession thereof, because that kirk was erected upon the lands and baronies belonging to the said archbishoprick ; and it is notour, that Nether Ancrum, which is the most considerable barony in the parish, pertains to the see of Glasgow, and is holden feu thereof. And as for the presentations by the King to the kirk of Ancrum produced, the three preceding the year 1608 cannot be respected, because archbishops and bishops were then suppressed, and though they were then titular or tulchal bishops, which were then thought necessary for conveying the rights of churchmen, yet they had not the power of trial, or admission of ministers, but were ordinarily laicks, as there were then titular abbots, who were laicks, and both these and the laick bishops sat in Parliament, but the King alone had the presentation of all ecclesiastick patronages, till the year 1606, when archbishops and bishops were restored as ecclesiastick officers, and had expressly restored to them the ecclesiastick patronages ; and as to the King's presentation after the year 1608, the King is presumed universal patron of all kirks, and where no other shows a right, it is ordinary to grant presentations upon that account *periculo petentis* ; but it is evident that the archbishop did not collate upon the King's presentation, but Bennet's collation produced is a year after the King's presentation, but not upon it, but upon the bishop's own presentation. And as to the second allegiance of the import of a *novodamus*, it is groundless, and were destructive of the security of the whole lieges, who rest upon charters with a *novodamus* as a ground of right, [9341] and do not look after anterior rights ; and if a *novodamus* imported not but where a prior title could be shown, the whole lieges would be surprised, and the most part ruined, all resting secure upon a *novodamus* ; yea, a single precept of *clare constat* is a good title without shewing any right anterior, and is preferable to all rights posterior to the precept ; and it is beyond controversy, that a precept of *clare constat*, yea a charter upon resignation disposing baronies or tenements, with an enumeration of particulars granted by subjects, was never controverted upon pretence that the particulars enumerated were not before comprehended, but adjected as parts and pertinents of before, which was never interpreted as a limitation, obliging the vassal to instruct an anterior title to any part enumerated. It is true *novodamusses* by the King, passing in Exchequer of course, have this limitation by custom, that they extend not to the King's ordinary casualties, which uses to pass by distinct gifts, such as ward, marriage, non-entry, and liferent escheat. But that was never pretended as to any interest in the King to the property of the right disposed by the *novodamus*, and so was never limited, but ever extended against not only defects in vassal's titles, but against

forefaulture, recognition, disclamation, purpresture, nullity, reduction, improbation, &c., though none of these were expressed, because the property is still understood to be given by the *novodamus*, whether there was any title to it before or not, but with the burden of these ordinary casualties, except in so far as they are particularly expressed in the *novodamus*. And as to the third, the words *que pertinuerunt*, permitted or subjoined to the enumeration *præsertim* is no more a limitation than the ordinary clause, Comprehending, &c.; whereby the lands comprehended are given as part and pertinent; which is an extension and not a limitation, and yet would give as good ground to allege that that enumeration, which is ordinary in all charters even where there is no *novodamus*, were by obreption and false suggestion, unless it would be instructed by prior rights, that the lands enumerated were parts before of the barony or tenement disposed; and if this were law, the lieges were in a very brave condition of all their rights; but even in this *novodamus*, the words *quæ pertinuerunt*, &c., are not repeated after the clause *pro omni alio jure*, that the king had to the archbishoprick or benefices respective above written, or any part thereof, wherein the chief moment of the *novodamus* is, and wherein there is no shadow of limitation.

The Lords found the *novodamus* in the King's charter to the Bishop, in anno 1608, sufficient to give him and his successors right to the parsonage of Ancrum, and therefore reduced Ancrum's posterior right in anno 1625, and his decret of declarator founded thereon. In this process, the Archbishop objected against Ancrum's right, upon the 169th act, Parl. 13, King James VI., whereby all rights of patronages of benefices granted by the King, without consent of the present incumbent, are declared *ipso jure* null without declarator; but the same being alleged against the Archbishop's right, so that both were in *pari casu*, the Lords did intimate to the King's Advocate, and he not [9342] having insisted, the Lords considered the rights as they were *in campo*, and preferred the prior right as aforesaid.

Fol. Dic. v. 2, p. 8. Stair, v. 2, p. 765.

No. 2. BRUCE of Poufoulis v. RASHIEHILL, NEWMILN, and Lady KINNAIRD.
November 25, 1714.

A charter of *novodamus* on the obtainer's resignation containing words not in the former charter, viz. *cum terris* hail sea-greens, was found to give no new right to sea-greens, nothing having been understood given but use and wont.

Poufoulis pursues a declarator of property of certain sea-greens lying opposite to his lands and barony of Poufoulis, libelling upon a charter in the year 1612, containing a *novodamus*, and especially these words therein inserted, viz. *una cum terris vulgo* hail sea-greens, &c.; to which charter the pursuer has right by progress, and thereupon alleges, that sea-greens being generally, at least at every high tide, overflowed by the sea, the same fall under the description of *littus maris quatenus maximus hibernus fluctus excurrit*, and consequently can belong to no heritor, as part and pertinent of his lands and barony, but are *inter regalia* belonging to the Crown, and cannot be conveyed without a special right, such as the pursuer produces, and none of the defenders do pretend to.

It was alleged for the defenders, 1mo, That the charter libelled, proceeding upon resignation, is no further to be extended than the right of the resigner, with a *novodamus* of the subject resigned from the Crown, as will appear by [9343] the full clause, viz. *Cum turribus, fortalicis, pendiculis, pertinentiis, &c., dictarum terrarum, una cum terris vulgo* hail sea-greens, *communibus passagiis, viis dictarum terrarum usitatis et consuetis*, which words *usitatis et consuetis* influences the whole preceding clause; so that nothing was given but use and wont. 2do, Hail sea-greens is a very unlimited donative, unless qualified by use and wont. 3tio, The position that sea-greens are *inter regalia* as comprehended in *littore maris*, is groundless; for 1mo, The definition of *littus maris* by the civil law cannot be adapted to this country, nor many countries else, where the tides rise very high, and overflow great fields of

ground, which never were at any time claimed by the Crown ; but the heritors of the neighbouring lands do possess the same as part and pertinent without any special grant ; and if it were found otherwise, there are many heritors in Scotland, that might come to find the effect of that decision. It is not needful to debate how far *littus maris* was public, whether for navigation, or other public convenience and uses only by the civil law ; but with us it is certain, that heritors may enjoy any profit or benefit that can in *littore* consistent with public use, as if stone, or coal, or other minerals, were found within the sea-mark, a neighbouring heritor might reap the benefit thereof ; and as to the possession, there is a clear probation as far as the memory of man can reach, which instructs how far these sea-greens have been possessed, and some part inclosed, and how far there has been promiscuous pasturage ; in which possession and community according to probation the defenders rest satisfied.

It was replied, The hail sea-greens are naturally limited to the extent of the pursuer's barony, to the exclusion only of such parts of the defender's lands as are interjected running within that bounds. 2do, The words *usitatis et consuetis* are not applicable to the whole clause, but only to the last words, *communibus passagiis, et viis dictarum terrarum*, but cannot naturally be conjoined with the words in the first part of the clause, viz. *una cum terris vulgo* hail sea-greens. 3tio, As to the possession, it is proved, that the pursuer's grandfather was killed at Dunbar, leaving his father, an infant of a year old, and his father left the pursuer of thirteen years of age, so that a possession of sixty-seven years must be proved to infer prescription.

As to the prescription, it was answered, That the possession being uniformly proved during the memory of man, *presumitur retro*, especially seeing the pursuer has proved no exclusive possession further than the defender's own.

"The Lords found that sea-greens are not *inter regalia*, and that no new right or feu was constituted by the charter 1612, and that the sea-greens might belong to the neighbouring heritors as part and pertinent without a special right ; and assoilzied from the declarator, in so far as the defenders' exclusive possession of property by pasturage, or casting feal and divot, was proved."

Fol. Dic. v. 2, p. 8. Dalrymple, No. 118, p. 165.

No. 3. [9346] RIDDEL of Newhouse v. OFFICERS OF STATE. December 21, 1757.

Nature and effect of a *novodamus*.

The parish of Kirkpatrick-Irongray being vacant, the right of patronage was claimed by the Crown against Walter Riddel of Newhouse, deriving right by progress from the family of Herries ; and he founded upon a charter from the Crown *anno* 1510, in favour of Andrew Lord Herries, of the barony of Terregles, with the patronage of the said kirk, containing a *novodamus* in ample form. It was objected against this title, that it was a charter of resignation only ; that a *novodamus* in a charter of resignation will not infer any more but a renovation of the vassal's former right, unless expressed clearly as an original grant, which is not the present case ; and, therefore, that this charter will not avail till it be made out, that the Lord Herries the resigner was *ab ante* vested in this patronage.

It was yielded, That in the present case the *novodamus* imported no more but a renovation of the former right ; and, consequently is no good title to the patronage, supposing Lord Herries to have had no right *ab ante*. But then, the charter following upon the instrument of resignation, in which the patronage is resigned as well as the barony, is an acknowledgment by the Crown, that the patronage *ab ante* belonged to Lord Herries ; and consequently is legal evidence of the fact ; especially *in re tam antiqua*. Hence it follows, that this charter is a good title to the patronage, unless it be instructed for the Crown, that at that period Lord Herries had no right, and that the resignation of the patronage was an imposition upon the Crown.

"The charter was sustained as a good title, and Mr. Riddel was preferred."

Fol. Dic. v. 4, p. 20. Sel. Dec. No. 138, p. 194.

No. 8. [9359] JARDINE v. Lady MELGUM. March 20, 1573.

Robert Jardine of Badderdy pursued the Lady Melgum for spoliation of certain corns from him by her, which were referred to his probation; but in the advising, the Lords found, That the witnesses had proved spoliation of oats only, and of no other corns, albeit there were other corns libelled, such as bear, wheat, pease; yet notwithstanding, the Lords found a part of the libel sufficiently proved; being proved, to give the whole libel to the pursuer's oath; albeit others thought that *absolvitor* should have been given from the rest of the corns; for it is sufficient if any part of the libel be proved, to give the whole libel to the pursuer's oath, as said is, and *condemnator* pronounced upon the hail libel, conform to the pursuer's oath.

Fol. Dic. v. 2, p. 10. Colvil, MS. p. 236.

No. 11. [9361] BROWN v. MURRAY. March 8, 1628.

Found in conformity with Jardine v. Melgum, No. 8, p. 9359.

In a spuilzie betwixt Brown and Murray, there being sundry particulars libelled of diverse natures, contained in the summons libelled to be spuilzied, as insight and plenishing of an house and goods, viz. oxen and horse off the field, and corns out of the barns; and the witnesses having proved spuilziation of some corns out of the barns and no further; the Lords found that the pursuer's oath should be taken, and that he might swear upon all the particulars of the summons, albeit they were of diverse natures, and that no particular was proved but only one; and the pursuer having sworn upon the spuilzie of the insight of the house, which was not proved; the Lords allowed of the oath deponed thereon, and found he might so depone upon all, where any one thing within the summons was proved; but the Lords taxed the prices deponed on by the pursuer in his oath, no party compearing here for the defender.

Clerk, SCOT.

Fol. Dic. v. 2, p. 10. Durie, p. 356.

* * * Spottiswood reports this case :

There was an action of spuilzie and ejection pursued by Brown v. Charles Murray, wherein ejection was proved, and the spuilzieing and taking away of twelve bolls of oats only, and not of oxen and household plenishing [9362] which was libelled; yet the pursuer got *juramentum in litem* upon all that he had libelled, and having deponed upon plenishing and plough-graith, albeit it was *heterogeneum* from the oats that was proved, it was sustained; but his oath was taxed to a lesser quantity than he had sworn.

Spottiswood (EJECTION), p. 94.

No. 18. [9367] FEA v. ELPHISTON. January 2, 1697.

In an action of spuilzie, the Lords found that in an oath *in litem*, the party may depone also upon the quantity when the witnesses are not positive, how many of each kind were taken away; but if there be a concurring probation agreeing on the quantity, the oath *in litem* ceases.

The spuilzie pursued by Fea of Whitelaw, in the island of Stronza in Orkney v. Robert Elphiston of Lopness, was advised, and his defence of law-[9368]-fully pointed was repelled, in regard the pointing was within the term of law; for by the

act of Parl. 1669, poinding cannot proceed upon decreets till the fifteen days of the charge be expired ; yet the Admiralty Courts execute their sentences within three tides, especially if it be for a fine. But the Lords considered here, the charge was given upon forty-eight hours, and the poinding was begun within that time ; and therefore they repelled the defence of lawfully poinded, and found it a spuilzie. Then alleged, this poinding was not at all perfected at once, but was intermitted for several days, and then consummated ; so however there might be a spuilzie *quoad* what was intro-mitted with before the time of the charge was elapsed, yet the poinding was warrantable, at least excusable, *quoad* what was poinded after the days of the charge were past ; *et quivis titulus etiam coloratus excusat a spolio*. Answered, The *initium* of this *processus executivus* being illegal, it vitiated the whole ; it being but *unicus actus individuus et continuatus*, though done in the interval of several days ; for if a poinding were begun before sun-rising, and ended when the sun was up, or began before sun setting, but a part of it continued in the night time, the whole would be unlawful, even so here. The Lords having read the execution of poinding, found it proceeded on more precepts and sentences than one, and that the species of the goods poinded were different, and could not all be apprised in one day, some of them being bestial, others corn, which required some days to thresh out ; and therefore found that part of the poinding, after the days of the charge, was so far lawful, as to infer only restitution, and the ordinary profits, but not to amount to a spuilzie, though they continued in the house with armed men for several days. In the same process, the Lords found not only Lopness liable, but all who assisted him in executing this poinding, in so far as any of them was proved to have acted and concurred in meddling ; but that their naked presence was not relevant to make them art and part, seeing he had a commission of lieutenancy to convocate the country upon emergencies, and was Admiral.

January 16.—The Lords advised Fea of Whitelaw's oath in the spuilzie, mentioned 2d current, and decerned for the whole number of horse, nolt, and other goods he deponed on, and also for the prices he valued them at ; for in an oath *in litem* the party may also depone anent the quantity when the witnesses are not positive how many of each kind were taken away ; but if there be a concurring probation agreeing on the quantity, his oath in supplement ceases in that case ; and instead of the violent profits, the Lords modified annualrent of the sum, to which the price of the goods conform to his oath extends, from the time of the spuilzie, and that in name of damage. Some were for double interest. But in regard they had taxed it moderately, the Lords declared it was for the whole goods, whether of their own nature or by law they produced violent profits, as kye, sheep, swine, &c., or had none due, as household plenishing, or the like. *Fol. Dic. v. 2, p. 10. Fountainhall, v. 1, pp. 750, 757.*

No. 25.

[9416] CALLANDER v. WALLACE. July 10, 1717.

A party was required to depone specially on the way and manner in which he had paid.

John Callander of Craigforth pursues Hugh Wallace of Ingliston, for an account of iron-work, chimneys, &c., furnished to him in 1685, and referring the libel to his oath, he depones, he owed him nothing upon that account ; and being urged to be more special, refused to say any more. Whereupon Callander gives in a bill, craving he might be re-examined, and ordained to condescend more particularly, if or not he received the goods libelled, and how he paid it ; for *in generalibus latet dolus*.—The Lords thought there might be an error in the interrogatories ; for, where the question is, are you resting owing such a debt ? the special interrogatories for expiscating the matter of fact must be premised, before you come to the general, else one may be ensnared in a contradiction. But the Lords suspected the case here was, that Ingliston got these goods furnished to him when he was cash-keeper to King Charles, and so capable to get Callander payment of what the public owed him ; and that Ingliston looked upon them as freely gifted, and therefore thought he had freedom to

swear he owed him nothing ; and that Callander finding he can be no more serviceable to him, craves payment thereof.—The Lords ordained Ingliston to be re-examined, seeing parties ought not to depone upon law, but only *super facto* ; not whether they think them themselves obliged in law, but whether they received such goods, or sums, and on what account, and in what terms, or how they paid, or can exoner themselves of it, as gifted, or otherwise ? And the Lords, at advising, will consider how far the qualities adjected are proper and pertinent, and prove themselves without any further yea or not.

Fol. Dic. v. 2, p. 14. Fountainhall, v. 2, p. 380.

No. 32. [9421] MOWAT v. The Earl of SOUTHESK. July 29, 1673.

In a process the defender had condescended on payment by a servant, who deponed *non memini*. Afterwards, a written acknowledgement of the servant was found. He was ordered to be re-examined.

The Earl of Southesk having obtained a decret against James Mowat, for payment of a sum which Mowat was obliged to advance to the Earl in France, Mowat alleged, That he had advanced the same to Mr. James Maitland, then the Earl's servant, and keeper of his money ; Mr. James Maitland being examined upon oath, remembered not of the same ; whereupon Mowat was decerned. He now gives in a bill of suspension, and alleges, That he had then produced in process a count written by Maitland's own hand, and a letter relative thereto, bearing the payment of this sum, which was not produced or [9422] shown to Maitland when he gave his oath by inadvertence in the close of the last session ; therefore craving that Maitland might be examined upon the sight of the count written by his own hand, in respect that he had now seen the account, and was thereby brought to remembrance. The Earl opposed his decret *in foro*, and that Maitland had deponed, and that it was competent to Mowat to have craved his re-examination before sentence.

The Lords ordained the matter to be discust upon the bill, and ordained Maitland yet to be re-examined upon the sight of the account, which would not clash with his former oath, being only as to his remembrance. Likeas, they found that Maitland never compeared to depone, but gave in his oath in writ, without inspection of the account.

Fol. Dic. v. 2, p. 14. Stair, v. 2, p. 224.

No. 33. CAMPBELL v. TAIT. June 8, 1677.

The libel being referred to the defender's oath, and he having declared, upon a general interrogatory, that he was not owing the sum acclaimed, it was urged, the time of the advising of the oath, That the defender should declare, whether or not he had gotten a parcel of lint, and what way he had paid the price of the same.—The Lords found, that he should not be urged to declare upon that interrogatory, in respect it was not desired he should be interrogated upon the same when he did declare ; and having denied that he was any ways debtor, he would be involved in perjury, if, upon a special interrogatory, he should acknowledge that he was debtor upon the account therein mentioned.

* Advocates, STEWART & SWINTON.—Clerk, MR. THOMAS HAY.

Fol. Dic. v. 2, p. 14. Dirleton, No. 453, p. 220.

No. 34. HUSBAND v. BLAIR. November 30, 1678.

An oath having been taken in general terms, the party was not allowed to be re-examined on special interrogatories. Special interrogatories ought to be put first ; then general.

In a competition betwixt Blair of Ardblair and Husband, there being two bonds of the same sum granted by Ardblair within some few months of each other, Husband alleged, That both bonds were for one cause, and the one being satisfied, satisfied both, which the Lords would not sustain upon presumption, that the bonds were for one sum, and near one time ; and therefore Husband has referred the verity thereof to Ardblair's oath, who deponed negative ; and thereafter Husband desired him to be re-examined, What was the cause of these bonds ? It was answered, That if that question had been put to him before he deponed generally negative, it had been pertinent, but now it is not competent ; for thereby the deponent might be brought to prevaricate and [9423] deny the truth, least his oath should clash, or, by confession, acknowledge his perjury in his first oath ; and therefore it was against charity and humanity to ensnare men, by first asking the general interrogatory, and then proposing special ones, though at the same time, much more *ex intervallo*. It is true, where a party adjects a quality, not being referred to his oath, he cannot thereby exclude the other party from expiscating the truth by special interrogatories ; but it is not so when a matter is referred by the party to oath. It was answered, That Ardblair was examined when Husband was not present, and did depone, upon the point in the act referred generally to his oath, that the cause of both bonds was the same. It was replied, That there was here no collusion or clandestine course, but Ardblair came publicly to the Bar and made faith ; and, in the afternoon, did depone upon the act as it stood ; neither are special interrogatories necessary, though the party may use them if he please, and therefore not having offered them before the oath was given, in due time, he cannot be heard thereafter.

The Lords found, that, after the party had deponed in general, either upon the act or general interrogatory, he could not thereafter be examined upon any special interrogatory, that it might infer any contradiction to his oath on the general, and did resolve to keep that method in examination, to examine first upon the special interrogatories, if any were, and last upon the general.

Fol. Dic. v. 2, p. 15. Stair, v. 2, p. 651.

No. 35. DAVID AITKEN v. JAMES FINLAY. November 10, 1702.

A defender, to whose oath a libel had been referred, acknowledged he had received the money, but that it was in payment of a sum due by the pursuer. The pursuer offered to prove, by the defender's oath, that he owed him no sum, unless on a bargain which never took effect. Found incompetent to re-examine.

In a concluded cause, David Aitken *contra* James Finlay in Balchrystie, the pursuer had offered to prove, by the defender's oath, that he owed him 300 merks, which he had given him on his promise to repay it ; as also, had intromitted with thirty sheep, the value whereof he libelled, with £100 as their profits since. Finlay depones, and confesses he received the money ; but adds, that it was in payment and satisfaction to him of as much due to him by Aitken, and that he never promised to repay it ; and as to the sheep, acknowledges he took nine ewes of the pursuer's, but it was by virtue of an order and [9424] warrant from the Laird of Ardrross, as his proportion of a militia horse, to the outputting whereof he contributed as a fraction. At advising, it was agitated among the Lords, whether the quality adjected to the oath, that what he got was in payment of a debt owing to him, was intrinsic, or if he behoved to condescend on the particular debt owing to him, and prove it.—The Lords did think he was not fully interrogated as he ought to have been, yet found the

quality intrinsic, and would not burden him now with any further probation ; but, as to the sheep, found the taking them by Ardross's order extrinsic, unless he produced it ; though the summary execution for the proportions of the militia used seldom to be in writ. Then the pursuer offered yet to prove, by the defender's oath, that any ground of debt, to which he could ascribe his receiving of the money confessed, was only due upon a minute of tack betwixt them, which was never delivered, but deposited upon conditions, which never existing, the tack expired and fell.—The Lords considered this might involve the man in contradicting his former oath ; for, if he should acknowledge the interrogatory as it is conceived, it would be plainly inconsistent with his former oath, bearing, he took it in payment and satisfaction of a debt owing him, and so might infer perjury ; and being omitted, they refused now to re-examine him thereupon, and decerned ; modifying the price of the nine sheep, with their bygone profits, to £50 Scots for all. See QUALIFIED OATH.

Fol. Dic. v. 2, p. 15. *Fountainhall*, v. 2, p. 159.