But although, properly speaking, the land-tax is no debitum fundi, still it is a tax which accompanies the land. Whoever has the land is liable to the tax as it arises. Creditors, therefore, or a purchaser from them, are responsible for the tax; and this has the same effect in giving a preference for the tax falling due after bankruptcy, as if the tax were debitum fundi. There is no preference, however, for arrears. They are secured only by the remedies competent for crown debts against the personal estate.

2. REPAIRS OF CHURCHES, &c.—The expense of repairing churches, ministers' manses, &c. and the relief due to heritors from whose land a glebe has been designed to the minister of a parish, are also burdens which accompany the land, but are not properly debita fundi. Singular successors and creditors, or a purchaser from them, are not liable for the arrears of those burdens belonging to past years; but they are subject to them, if falling within the time of their being proprietors of the land.[1] Repairing Church, Manse, &c.

CHAPTER II.

OF JUDICIAL SECURITIES OVER LANDS AND HOUSES.

JUDICIAL securities are of two kinds:—One preventive, in the nature of a prohibition against voluntary conveyances, called INHIBITION: Another, in the nature of a real right in security, or burden, and depending for its preference in competition on a recorded sasine, or certain equivalents introduced by statute. This last sort of security is called ADJUDICATION, and forms the proper subject of this Chapter; the former will be more properly discussed hereafter. There is also another judicial security forming an anomalous sort of real burden in burgage subjects, called JEDGE and WARRANT.

SECTION I.

HISTORY NATURE OF THE SIMPLE ADJUDICATION FOR DEBT.

EXECUTION against property for debt, which, under the Roman law, extended to lands as well as to moveables, was, for a long time, both in England and Scotland, confined to moveables; and at last was extended to land in very different degrees in the two countries.

In England, a writ of execution, called ELLGIT, was, in the reign of Edward I. invented for the attachment of land; and this seems to be the only form of execution by individual creditors against land at this day. It gives to the creditor possession of one-half of the debtor's land, to be delivered over to him by apprizement; but in no shape authorizes either an absolute and irredeemable sale of the land, or even a redeemable transference of it.

It seems to have been prior to the beginning of the thirteenth century that the execution against land for debt was first introduced into the practice of Scotland. In the time of Alexander II., who began to reign in 1214, it was established by express statute, that, if there be no moveables, the Sheriff should give notice to the debtor to sell his land within fifteen days, failing of which they should be transferred to the creditor in satisfaction of his debt.[2] At this time, the sale for a price, or, failing a sale, the transference of History of Apprizing.

[1] BLAIR of Kinfauns against FOWLER, 6th July 1676; reported by Gosford as a leading case; Gosford, (10,168).

[2] Stat. Alex. II. c. 24. It has been well observed by Mr Ross, (vol. i. p. 408.) that 'the execution 'against land was thus both earlier and more complete 'in Scotland than in England.' Edward I. under whom the elegit was introduced, began to reign in 1272; Alexander II. about sixty years before.

the goods or land to the creditor, was absolute and irredeemable: But, in 1469, a statute was passed, which, by giving to the debtor a power of redemption within seven years, produced a most important alteration upon the execution against land.[1] While the execution against land was thus established in the alternative form of a sale for money, with which to pay the debt, or a transference of the lands themselves to the creditor, (but the sale and the transference qualified by a right of redemption), it was not to be expected that the sale should be very successful, or indeed any thing more than a name; and gradually the diligence came to be restricted to a redeemable transference of an apprized portion of land.

Apprizing or Comprizing.

Upon the change in the forms of judicial proceedings, which was occasioned by the institution of the College of Justice, the brieve, under which causes were formerly tried, fell into disuse; and, instead of it, a writ called a summons was introduced; which being followed by a judgment or decree, was put to execution, in virtue of letters issued in the name of the King, called Letters Executorial. Those directed against land had the special name of Letters of Apprizing. They were issued only upon judgments of the Court of Session. They were, at first, directed specially to the Sheriff within whose territory the lands to be apprized lay; and while it was so, the appreciation was conducted with that degree of attention and care which its importance required.[2] But, afterwards, those letters were directed to messengers-at-arms as Sheriffs in that part. They were men ignorant and irresponsible; and every thing went into disorder. The sale gradually vanished; the intimation to the public, which was, at first, most carefully made, fell into neglect; the appreciation itself was carelessly done; and the lands were assigned over to the creditor at great undervalue. At last, the whole ceremony was transferred to Edinburgh, where men of skill and impartiality might be procured, as a jury upon the rights of the parties. But in this stage of the declension of the diligence from its ancient purity, the expense of bringing up witnesses to prove the value of the lands gradually put an end to the appreciation; and the creditor was allowed to enter, without any inquiry, upon a general redeemable right, to the whole lands, of which, during the term of redemption, he drew the rents, without accounting. His right was completed, if the property was feudal, by charter and sasine;—if not feudal, by the execution of the apprizing.

In this barbarous state the execution against land continued for a century; and creditors who were first in the order of time, carried off the whole funds of their debtor.[3]

Introduction of Pari passu Preference.

The first step taken to remedy the grievance was in 1621, when Parliament declared, that the rents drawn by apprizers, above the value of the interest of their debts, should

[1] 1469, c. 3. in Acta Parl. vol. ii. p. 94.

[2] Balfour, (Comprizing, c. 3. p. 402.), and Sir George M'Kenzie, (Observ. 5th Parl. Ja. III. c. 37.) have preserved some notes of the rules of appreciation followed in those inquests.

[3] To the debtor the injustice and hardship were intolerable; for the possession being allowed to go for the interest of the money, inability to discharge the debt, within the years of redemption, was inevitably followed by the loss of the estate, however great the disproportion of its value above the debt; and many families in Scotland had to deplore the loss of their estates in this way. But to posterior creditors the injustice was equal. If, indeed, it happened, that a posterior creditor was able to pay off the first apprizer's debt, during the term of redemption, he was entitled to step into his place: but if he was unable to do so, he had nothing better to expect than the debtor himself had; and was forced tamely to see the property, which should have afforded him the means of payment, irredeemably transferred to a prior creditor, at an under value.

In form, the apprizing bore, hitherto, an alternative of a sale, and of a transference; but to give the full value of this alternative, it would have been necessary to restore the irredeemable sale, which both in the Roman law, and with us in early times, was the chief part of the execution against land for debt. This might have redressed at once all these evils; but to such a measure the Legislature had a strong repugnance. Commerce was not yet much advanced; the necessity was not so pressing as it afterwards became; and the strength of Parliament being with the landholders against the monied interest, no remedy was ever proposed which could shake the established right

be imputed, pro tanto, in discharge of the principal sum.[1] But this was not sufficient: Still the evils of a preference, by priority of apprizing, were great; and another remedy was adopted.—All apprizings led before, or after and within year and day of the first effectual apprizing, were placed upon an equal footing, or ranked 'pari passu,' as if one apprizing had been led for the whole. The first effectual apprizing was defined to be that upon which the first feudal right was completed by sasine, or by a charge to the superior to enter the adjudger as vassal: And the expense of the first effectual apprizing was made a common burden, to be defrayed by all who should claim the benefit of it.[2]

Introduction of Adjudications.

So far as creditors were concerned, this was, in some measure, a remedy for the evils against which it was directed; but something more was necessary to secure the debtor himself from injustice. With this view, an alteration on the form of the diligence was proposed by Lord Stair, President of the Court of Session; and the Legislature adopted his suggestion. Instead of letters of apprizing, execution against land was to proceed by ADJUDICATION; a new form of action before the Court of Session. This action was to be of the nature of an amicable suit, in which, dropping even the form of the alternative sale and apprizing, the debtor should appear as defender in the action; produce the title-deeds of his estate; concur in a fair trial for ascertaining the value of the land; and in setting off, to be adjudged to the creditor, subject to a power of redemption, a quantity of land precisely equivalent to the debt, and a fifth part more, in consideration of taking land for money. After all this was done, the debtor was to renounce the possession of the part thus adjudged to the creditor, and consent to the transference, under a power of redeeming within five years.

General and Special Adjudications.

As this new form was intended for a relief to the debtor, from the hardship of the universal right acquired by the old apprizing, and as it proceeded upon the idea of the debtor's concurrence in this measure for his own benefit, the Legislature thought it not unjust to leave those who did not choose to take the benefit of it to all the evils of the former law.[3] For this purpose it was ordered, that adjudications for debt should contain an alternative of a Special and a General Adjudication. The special adjudication was the diligence already explained. The general was in the nature of a penal alternative; in which no trial was to be taken of the respective values of the land, and of the debt, and no allotment of a precise portion to the creditor; but a general and indefinite adjudication was to be pronounced (as in the degenerated form of the apprizing) for the principal sum, interest, and penalty, without including, like the special adjudication, a fifth part more. The penal nature of this proceeding induced the Legislature, however, to lengthen the term of redemption, and make it equal to double the time allowed in the special adjudication.[4]

of redemption. The Legislature turned themselves a thousand ways rather than consent to the demolition of this right.'

[1] 1621, c. 6. and 7.

[2] See the statute 1661, c. 62. Acta Parliam. vol. vii.

[3] This was not, indeed, in the original plan of the statute; for Sir George M'Kenzie tells us, that 'this 'Act came into Parliament simply in these terms,' (viz. that adjudication for the principal, annualrents, and a fifth part more, should be substituted for apprizing); 'but it being strongly urged by the lawyers, burgesses, 'and other members who were monied men, that it 'was most unreasonable to force the creditor to take 'land, unless the debtor should produce to him a good 'progress and security; for both to be forced to take 'land, and yet to want a sufficient right thereto, was 'altogether unreasonable: Therefore the Parliament 'ordained, that if the debtor did not compear, and 'produce a sufficient progress, and renounce the pos-'session, the creditor might adjudge the whole estate, 'as formerly he comprized it.' Observations, 2d Parl. Cha. II. Sess. 3. c. 17.

[4] Act 1672, c. 19. Acta Parliam. vol. vii. It may, perhaps, at first sight appear strange, that almost from the first moment that this boon was granted to debtors, down to the present day, it has been neglected, and the penal and general adjudication preferred. But the explanation of this is, 1. That, even in the least involved case that can be supposed, the debtor has an advantage by the general adjudication; as the term of redemption is of double length, and as the general possession which it entitles the creditor to take of the

Nature of Adjudication.

Thus, instead of execution by apprizing, a proper action of adjudication was introduced, which, although in form an action, differs entirely from the action for debt. It is properly a form of execution; and cannot proceed unless the debt has been already constituted, and its precise amount ascertained by a judgment, or by a legal written voucher. The summons of adjudication, after stating the debt and the debtor's refusal to pay, libels on the statute of 1672, and concludes,—*First*, That as much of the debtor's estate as may be equivalent to the debt and interest, and a fifth part more, as accumulated into one principal sum at the date of the decree of adjudication, shall be adjudged to the creditor, redeemably, in security and payment of the debt; and that the debtor shall, for that purpose, appear, produce his title-deeds, consent to the adjudication, and renounce the possession: Or, *Secondly*, That a general adjudication of all and sundry the lands, &c. shall be made to the creditor, redeemable, on payment of the sums of money, penalty, and interest, but without any addition of a fifth part more. Upon this summons the debtor is cited to appear and defend himself; and the action proceeds with particular forms of intimation, &c. to decree.

Summons alternative.

The alternative conclusion is still preserved, but the only use ever made of it is to procure delay in the pronouncing of the decree of adjudication. For, although there are not on record more than two or three instances of the special adjudication, it still unquestionably is the privilege of the debtor to elect whether he shall not comply with the requisition to produce his title-deeds, and consent to a special adjudication.[1]

Decree and Abbreviate.

The decree pronounced by the Court adjudges the lands, &c. to the creditor redeemably, and orders the superior to receive him as vassal. It is accompanied by an ABBREVIATE, or abridged statement of the decree, containing the names of the creditor and of the debtor, the full enumeration of the subjects adjudged, and the words of the decree of adjudication. This is now (1. and 2. Geo. IV. c. 38. § 17.) signed by the extractor, and, within sixty days of its date, is recorded in a register appointed for the purpose.[2] If the recording have not been made in due time, the Ordinary has been allowed to pronounce a new decree before extract, so as to enable the adjudger to record within the sixty days.[3]

whole lands, is burdened with an obligation strictly to account for every farthing of the rental; while, in the special adjudication, the value of the land and of the debt being supposed equal, the creditor's possession goes for the interest. 2*dly*, It commonly happens, that the debtor's affairs are so much involved before adjudication is begun against him, that it is not easy for him to clear off the encumbrances, and give the adjudger an unexceptionable title. In the year 1681, it was proposed to overturn all this, and to restore apprizings, but without success. 'There was an Act (says Lord 'Fountainhall, vol. i. p. 156.) brought in to the Arti-'cles, at the mediation of the writers to the signet, for 'taking away the new Act of adjudications introduced 'in 1672, and bringing back the form and practice of 'comprizings again. This was opposed by the Presi-'dent of the Session, (Lord Stair), 1*mo*, Because he 'was author of the said Act anent adjudications. 2*do*, 'His son being a clerk of the Session, had much bene-'fit by these adjudications.—By the proroguing of this 'Parliament, this motion ceased.'

[1] A great contest arose between LESLY of Balquhain and the Administrators for IRVINE of Drum, wherein the latter endeavoured to have Lesly's adjudication restricted to a special one, by offering him a progress. Lesly objected to the titles, 1. As defective; 2. As encumbered. These objections were repelled. But Irvine being nearly an idiot, could not validly renounce; and his administrators had not the power of tutors and curators to renounce for him. And so the general adjudication proceeded. 23d December 1692, 1. Fount. 538.

So in a case where the creditor shewed considerable damage by the delay, the Court found the debtor entitled to a term to produce his titles. PEDIE, 13th December 1776.

[2] While apprizing was in use, an allowance or decree confirming the apprizing was written on the back of it, by authority of the Court of Session, and was the warrant for letters of horning against superiors, charging them to enter the apprizer. These 'allowances,' or 'decrees conform,' were ordered to be entered on record by 1661, c. 31. On the introduction of adjudications, it was first ordered that an allowance, and afterwards an abbreviate, in place of the allowance, should be entered on record. Reg. 1695, art. 24.; Additional Reg. 1696, art. 3. But it may be remarked, that these regulations are so far imperfect, that an adjudication which never has entered the record may be perfectly effectual in particular cases.

[3] SETON against GLASS, 3d January 1750; Kilk. 18. See also Tait's Rep. Brown, 373-4.

Completion of the Creditor's Right.

The decree of adjudication supplies, in law, the want of a voluntary conveyance from the debtor. Where the property, though of an heritable nature, does not require sasine to its transmission, it is fully vested in the adjudger (redeemably) by the decree of adjudication alone. Where the property is feudal, and sasine is requisite, the right of the adjudger is completed by sasine on a charter of adjudication from the superior; or is held, as in competition with other adjudgers, to be completed by certain steps against the superior refusing a charter.[1]

Adjudication gives a Redeemable Right.

The right acquired by the adjudger is redeemable: the time of redemption being five years in the special adjudication; ten years in the general. The debt may be extinguished by intromission with the rents of the estate, where the adjudger has entered to possess on a general adjudication. In the special adjudication, the rents go for the interest, and the debtor must pay the debt, with a fifth part more, before he can redeem his land.[2]

Declarator of Expiry makes it an Absolute Right.

The adjudger's right is converted from a redeemable security into an absolute and irredeemable right of property, by a decree of DECLARATOR OF EXPIRY OF THE LEGAL. The LEGAL is an elliptical expression for the 'Legal term of redemption:' and the declarator of EXPIRY is an action before the Court of Session, in which the adjudging creditor calls on the debtor to exercise his right of redemption, otherwise to have it judicially declared to be foreclosed. The debtor may, in this action, require the creditor to account for his intromissions with the rents, so as to have the balance ascertained, on payment of which the land may be redeemed.

Decree of Expiry in Absence.

Where the decree of declarator has been pronounced in absence, it has been thought doubtful whether it can be opened up again like a decree for an ordinary debt. At first sight, the cases are a little perplexing. But the following distinctions seem to explain and reconcile them:—1. An irregularity in the original diligence of adjudication will entitle the debtor to open up the decree of declarator; which is considered only as an accessary, partaking of the nature of its principal; 2. Irregularity in the proceedings, or decree of declarator, will entitle the debtor to relief; or, 3. If the debt was paid off or extinguished within the legal, the debtor will be relieved against the decree of declarator.[3]

The mere Expiry of the Legal not sufficient to Foreclose.

Formerly it was held, that, by the mere expiration of the term of redemption, the right of the creditor became absolute and irredeemable, except in cases where, on equitable grounds, the debtor should still be permitted to redeem. But an opposite doctrine was afterwards sanctioned by a determination of the Court of Session. On a very ample discussion it was solemnly held, that the debtor has a right to redeem at any time previous to a decree of declarator of expiry of the legal.[4] Since that time, the point has been considered as fixed.[5] It must not, however, be concealed, that doubts have been entertained respecting this doctrine by Judges, whose opinions are entitled to the greatest respect. In a case which occurred in 1811, the late Lord Meadowbank took occasion to say, that, even at the hazard of encountering a principle which ought to be sacred, namely, that uniformity should be preserved in decisions, it well deserved consideration, whether the

[1] See below, p. 718.

[2] BAILLIE against WATSON, 30th July 1737.

[3] In examining the cases it will be found, 1. That in LANDALES against CARMICHAEL, 25th November 1794, there was a pluris petitio in the adjudication. 2. That in the case of BRACKENRIDGE, in 1809, the proceedings in the declarator were objectionable, as against a minor, without calling his tutors. 3. That in M'LELLAN against M'RAE, 21st January 1806, the judgment may, in some degree, be ascribed to the declared purpose of the defender to oppose the declarator, which was defeated by a mistake known to the pursuer or his agent. And, 4. That in AITKEN against AITKEN, January 1809, the debtor was abroad, and, at least during part of the term which had elapsed after the decree of adjudication, a minor.

[4] CAMPBELL against SCOTLAND and JACK, 7th March 1794.

[5] ORMISTON against HILL, 7th November 1809; Fac. Coll. 155.

above rule did not shake one of still greater importance, undermining the security of the proprietors of land? He stated it as a fundamental rule of Scottish law, that property should stand secure against latent challenges; and that, on the whole, it were wiser and better to adhere to this great doctrine, with all its consequences, than to follow a determination which he considered as proceeding on unsound reasoning: That the right of the creditor is not in the nature of a penal foreclosure of the debtor, but a right of property under a power of redemption within a certain period. To this opinion Lord Newton assented. But, on the other hand, Lord Robertson, Lord Glenlee, Lord Justice-Clerk Boyle, and Lord Craigie, held that the rule had been well settled, and ought to be adhered to, both as a precedent and on principle: and that after the confirmation it had received in the case of Ormiston, decided under Lord President Blair, it was not to be questioned.'[1]

Adjudication with Sasine and Prescription.

But although it must now be held as law, that the mere expiration of the legal term of redemption will not be enough to foreclose the debtor, it remains as a very important question, whether something less than a decree of declarator may not be sufficient? And, 1. It is settled, that an adjudication, followed by charter and sasine, and forty years' possession subsequently to the expiration of the legal, makes a good irredeemable title to land. It must be admitted, that the point has not been settled by a series of solemn determinations; but a rule has long been established, uniformly assumed, and granted in all discussions, and incorporated with the practical jurisprudence and conveyancing of Scotland, that a charter of adjudication, with sasine and possession for forty years after expiration of the legal, has the full effect of an irredeemable right to land. This rule has for nearly half a century been understood as settled, and as such I well remember to have heard it laid down by the late Lord Justice-Clerk M'Queen, the greatest feudal lawyer of modern times. In the case of Gedd against Baker,[2] it seems to have been held, 1. That within the forty years it was competent to prove payment or satisfaction of the debt within the legal; 2. That the expiration of forty years after sasine, saved the creditor adjudger from any challenge on the ground of objection to the sasine; and, 3. That it would require the expiration of forty years from the end of the legal term, to secure the creditor adjudger from all challenge. The doctrine was, without contradiction, affirmed in a case in 1758.[3] In a case in 1791, judgment proceeded on the assumption, that a charter of adjudication, with infeftment and possession for forty years after expiration of the legal, would,

[1] STEWART against LINDSAY, 26th November 1811. This case is not reported: But it seems to be a great deal too important to be left unnoticed.

I do not know that Lord Chancellor Eldon was aware of this case when he decided the case of the Duke of Athole in 1815. But he took occasion then to say, that 'he could not perceive where, in what 'statute at least, is to be found prescribed the neces-'sity for a declarator of the expiry of the legal.' And speaking by analogy, he added,—'With reference to 'what passes in our own Courts, if you consider an 'adjudication as in the nature of a mortgage, the prac-'tice is familiar enough. By our mortgages, the money 'is to be paid within a given time; and if it be not 'paid within the time, the instrument upon the face 'of it declares that the title of the mortgager is gone. 'But we nevertheless hold, that the title of the mort-'gager is not gone, without a judgment of a court of 'equity that it is gone. And, accordingly, when a party 'wishes to have that title which, upon the face of it, 'is declared to be absolute, in substance and in fact 'absolute, he applies to a court of equity for (I may 'use the very words) a declarator of the expiry of the 'legal; that is, to have it declared, that if the other 'party does not pay the money in six months, he is 'totally foreclosed; and that which is described in the 'instrument as a legal title, shall be considered as an 'equitable title also. But where length of time is to 'form the title, although there be no such decree of 'foreclosure, no such declarator, if I may say so, of 'the expiry of the legal; yet if there is an adverse 'possession for twenty years, that shuts out all ques-'tion, and dispenses with any such decree or decla-'rator; and my present impression is, that it may be 'so in Scotland.' General ROBERTSON against the Duke of ATHOLE, 10th May 1815; 3. Dow's Rep. in House of Lords, 114.

[2] Kilk. 418. Elchies, *Adjudication*, No. 28.

[3] ANDERSON against NASMYTH, 3d March 1758.

without a decree of declarator, have been a perfectly good title.[1] In a still later case, in 1809, the same doctrine was delivered as law under Lord President Blair, a Judge eminently qualified to determine on matters of feudal law. The doctrine reported as delivered in that case was, 'That it must now be considered as settled law, that to convert an 'adjudication into an irredeemable right, and extinguish the right of the reverser, it is 'necessary that the adjudger shall either obtain decree in a declarator of expiry of the 'legal, or regularly invest himself with charter and sasine upon the adjudication, and 'possess thereon for forty years.'[2] But besides these cases, there are two in which the question was directly determined.[3]

Thus, during a long series of years, and in every case where the point had been stated in argument, or raised for decision, it has been assumed at the Bar, and on the Bench, or expressly decided by the Court, that the right of the debtor to redeem an adjudication is extinguished by the expiration of the legal, followed by forty years' possession on charter and sasine. This rule has accordingly been held by conveyancers as settled; and in many parts of the country, particularly in the north, but also in Mid-Lothian and in Ayrshire, many valuable estates rest upon titles no better than a charter of adjudication and sasine, confirmed by prescription; and finally, the doctrine has received the sanction of the House of Lords, after a careful inquiry on the part of Lord Chancellor Eldon; and may now be regarded as settled.[4]

[1] CAITCHEON against RAMSAY, 22d January 1791.

[2] ORMISTON against HILL, 7th February 1809; Fac. Coll. 155.

[3] JOHNSTON against BALFOUR, 7th June 1743; 1. Falconer, 94.; 4. Dict. 95. This is reported as a direct determination, that a charter of adjudication, with sasine, and forty years' possession after expiration of the legal term, is a good irredeemable title. But the report has been said to be incorrect; in proof of which reference was made to Lord Elchies. That eminent Judge, however, has reported it the same way in his Dictionary, voce *Prescription*, No. 26. It is only in his Notes that an account somewhat different is said to be given, of which, however, it is not easy to perceive the inconsistency. And on examining the papers I found, that on both sides the doctrine in law was held undeniable, the only doubt being whether the fact of possession, as under the charter of adjudication, was sufficiently proved.

SPENCE against BRUCE, 21st January 1807. The action was brought to recover an estate which had been adjudged, and where a charter of adjudication with sasine, in March 1747, had been followed by possession for forty years. The chief question was, Whether possession had in fact followed *on this title?* for the possession having been by a tenant, whose lease had been granted jointly by the person in the right of the adjudication, and by one holding a right of liferent, it was doubted whether it was to be held as the possession of the adjudger. The chief distinction, in short, between this case and that of Johnston and Balfour was, that the doctrine in law, which was taken for granted in that case on both sides of the Bar, was in this case discussed, and an attempt made to establish a distinction, on the ground of the decision in Scotland and Jack's case. The Judges held, 1. That the possession was sufficiently proved to have originated and continued under the adjudger; and, 2. That the positive prescription applied so as to complete the adjudger's right.

My note of this case I find confirmed by that of Baron Hume.

[4] General ROBERTSON against the Duke of ATHOLE, 10th May 1815. In this case, a decree of adjudication was obtained in 1677, against Robertson of Lude, comprehending the lands of Inchmagreenoch, and those of Clunes and Strathgroy. In the former, the adjudger was infeft on a charter of adjudication from the superior; in the latter, he was not infeft. In 1688 the adjudication and lands were conveyed to the Marquis of Athole, who was superior of Clunes and Strathgroy. Those lands were, in the subsequent progress of the titles, included in the crown charters of the earldom: Inchmagreenoch specially, as acquired by charter of adjudication; Clunes and Strathgroy only generally, under the description of the earldom. Such charters were passed in 1691 and 1725, and were followed by sasine and forty years' possession. The Court of Session decided, that the Duke had a good title by prescription.

In the House of Lords, judgment was suspended for further inquiries into the law of Scotland on two points, which I shall state in the words of a note drawn up by Mr Leach, now Master of the Rolls, to be transmitted to Scotland for information.—'1. As to Inchma-'greenoch:—If a creditor have adjudication against the 'land of his debtor, and afterwards obtain a charter of 'adjudication from the superior, and infeftment follow 'thereon, and the creditor continue in possession for 'forty years after the expiry of the legal, but without 'any declaration of that expiry, Does the creditor ac-'quire by prescription an irredeemable title by force of 'the Act 1617? The short argument against the irre-

If the right of the debtor is to be considered as grounded in equity merely, he should be barred, by personal exception, wherever he has consented to, or acquiesced in, any extraordinary improvements made by the creditor in possession after the legal. But this point cannot be considered as settled; nor is there, indeed, any authority to be found on the subject, on which reliance can be placed.

Adjudications for debt are either,—1. Adjudications for enforcing payment of debt: 2. Adjudications in security merely: Or, 3. Adjudications on debita fundi.

SECTION II.

ADJUDICATIONS FOR COMPELLING PAYMENT OF DEBT.

Common Adjudication.

THE common adjudication is that of which the history has been sketched in the preceding Section. It is the ordinary form by which a creditor, for a debt already due, attaches the land or other heritable property of his debtor, for operating payment of what actually is due to him.

Three cases may be distinguished, as leading to variations on the form and proceedings in common adjudications for payment of debt:—1. Where the debtor is alive, and the subject to be adjudged is his own proper estate: 2. Where the debtor has succeeded to an heritable estate, but has not hitherto completed his titles to it: And, 3. Where the debtor has died, leaving an estate.

§ 1. ADJUDICATION OF PROPERTY VESTED IN THE DEBTOR.

Adjudication of Property vested in the Debtor.

The adjudication of property feudally vested in the debtor himself, is the simplest species of the adjudication; and as it is the form which, in the preliminary sketch of this diligence, has been kept in view, no further explanation will be necessary.

It may, however, be observed, that no adjudication is competent of a spes successionis.[1]

' deemable title is, that the Act of 1617 is to confirm ' the title appearing upon the heritable infeftment by ' force of a possession of forty years, and not to con- ' vert, by force of that possession, an apparent redeem- ' able title into an irredeemable title. The Lord Chan- ' cellor asks, How is the case of an adjudication distin- ' guished from a wadset; where it is stipulated, that if ' the debt be not paid at a day certain, the right of re- ' version shall be irritated; in which latter case it is ' admitted, that if the creditor continued in possession ' for forty years from the expiration of the term of re- ' demption, without any previous declarator, the right ' of the reverser is cut off by prescription? The sup- ' posed answer is, that the difference is found in the ' stipulation for redemption at a particular day, &c. ' For if the money be not paid at the day, the title of ' the creditor, as it appears upon the heritable infeft- ' ment, is irredeemable, and therefore is within the pro- ' tection of the Act 1617.

' 2. As to Clunes and Strathgroy:—The superiority ' of land is part of an earldom. The superior obtains ' an adjudication against his vassal, and enters into ' possession of the land upon his adjudication. All sub- ' sequent infeftments are of the earldom generally, and ' no particular mention made of the adjudged lands, ' and no declarator of the expiry of the legal. Does ' the superior, by forty years' possession after the ex- ' piry of the legal, acquire, by the Act of 1617, an ' irredeemable title to these lands? It is objected, that ' the Act of 1617 gives no title by prescription, except ' after the land is enjoyed by virtue of an heritable ' infeftment; and that in this case there never was an ' infeftment of the property, or dominium utile, after ' the adjudication, but that the infeftments were of the ' superiority only.'

In Mr Dow's report of this case, the judgment seems to imply, that a charter of adjudication, without infeftment, is sufficient to constitute an irredeemable right. But that is a point which I do not understand to have been expressly determined, and which seems to demand a great deal of consideration: For while there is no authority for such a doctrine in the books of Scottish law, the simple question cannot be taken to have been determined in a case which, on that branch of the contest, admitted of so much reasoning on various points.

[1] BEATSON and M'ANDREW against M'DONALD,

§ 2. ADJUDICATION OF PROPERTY TO WHICH THE DEBTOR HAS SUCCEEDED.

Of Property to which the Debtor succeeds.

The difficulty of the second case arises from a peculiarity of the Scottish law of succession. The right of the heir, in Scotland, is not completed by the mere operation of law. Certain forms are necessary, both to enable the heir to convey, voluntarily, the property to which he succeeds, and to entitle his creditors to attach it.

The estate descendible to the heir consists of subjects vested feudally, or of subjects not feudally vested in the ancestor; and these are carried to the heir by different forms of investiture. If the property was vested by sasine in the ancestor, the heir either obtains an entry, voluntarily, from the feudal superior, by precept of clare constat; or he purchases a brieve, gets himself served heir in special as to that property; and, upon the retour of the verdict, proceeds to compel the superior to grant him a charter, and so to complete his right by infeftment. If the ancestor have neglected to take sasine, a general service puts the heir precisely in his place; and he proceeds to complete his title, by executing the procuratory of resignation, or precept of sasine,—the warrants under which a feudal investiture is bestowed; or, if the ancestor's title contained neither of these warrants, he proceeds to supply their place by adjudging in implement.

Debtor succeeding to Heritage and Entering.

A creditor, whose debtor has succeeded to heritable property, can have no difficulty in adjudging, if the debtor choose voluntarily to take up the succession: For,

1. When the debtor has served himself as heir in general, all the property unvested by sasine in the ancestor is open to adjudication by his creditors;—the personal title to the feudal subjects being carried by the adjudication; and the adjudger being equally well entitled, as the heir himself would have been, to complete his feudal investiture upon the unexecuted warrants for sasine.

2. When the debtor has served himself heir in special, and completed his feudal title by sasine, to lands in which his predecessor was vested, the case, as to the adjudger, is the same as if the debtor had been originally proprietor of the estate: nay, even where the heir has not been actually infeft, but, having served heir in special, has charged his superior to enter him, the creditor may proceed to adjudge, as if the title were complete.[1]

Debtor refusing to Enter.

But the difficulty was to find a remedy, where the debtor did not choose to enter to his ancestor's estate. There was a time when no remedy for such a case seems to have been known;—when the refusal, or non-compliance of the heir, with the request of his creditors, that he should take up the succession, and enable them to attach it, was irremediable by the creditors. But a statute in 1540, c. 106. which was passed with a view to the creditors of the ancestor only, was, by a declaratory Act in 1621, applied to this case of the heir refusing to do justice to his creditors by entering to his ancestor.[2] The mode in which this is accomplished is so fully described in the former statute, that a less minute explanation will be sufficient.

Charges to Enter.

Special Charge.

1. Where the land has been invested by infeftment in the ancestor, the creditor, upon production of his grounds of debt, obtains letters of special charge from the signet; which, proceeding upon a narrative of the debt, and of the heir's refusal to enter, to the dis-

7th June 1821; 1. Shaw and Ballantine, 49. This was an attempt to adjudge such parts of the lands, &c. with all right, title, &c. as Alexander M'Donald, younger, has, or may claim, as heir-apparent, or otherwise, of A. M'Donald, his father. The father was a lunatic, and in right of the lands. The adjudication was dismissed by Lord Alloway as incompetent, 'in respect that, 'although Alexander M'Donald is the eldest son of 'his father, there is no right vested in him as his heir-'apparent, the right not opening till the father's death; 'and in respect that this proceeding is altogether new, 'in so far as the Lord Ordinary knows, in the law of 'Scotland, in which there has been no previous attempt 'made to adjudge a spes successionis.'

[1] DICKSON, 25th November 1629; Durie, 469.

[2] See 1540, c. 106.; and 1681, c. 27.

appointment of the complainer's diligence, authorize a charge against the debtor to enter heir in special to the predecessor, and to complete his right within forty days, so that the complainer may obtain execution by adjudication. The penalty or certification, if he fail, is, that the complainer shall be allowed to proceed with his diligence, as if the debtor were actually entered.

General Special Charge.

2. Where the subject has not been feudally vested in the predecessor, the form is different; and a distinction, in name, accompanies it. As the former was called a *special* charge, so this is called a *general special* charge; the general special charge, although it points only to a general service, containing a specification of those subjects which are to be adjudged by the creditor, and which must be thus enumerated, in order to give effect to the certification.

Time to answer.

3. The heir is not obliged to answer to these charges before the expiration of the annus deliberandi: And, consequently, the statutory certification cannot till then take effect; unless it can be shewn, that the debtor has already assumed the character of heir, by possessing the estate, or granting conveyances of it.[1]

Adjudication.

4. After the days of the charge are expired, (provided the heir has not renounced the succession), the creditor is entitled to proceed with his adjudication as if the heir were entered. The adjudication differs neither in nature nor in proceeding from adjudication in the simple case; and the right of the creditor is to be completed in the same way as if the debtor had been served heir in special.

5. In the case (to be immediately considered) of an heir succeeding to one, whose debts expose the estate to the diligence of his creditors; the heir may wish to renounce the succession; and not to undertake even that implied and legal responsibility which the statute has declared to be the result of disobeying a special charge: But there is a manifest objection to such renunciation by a debtor who has succeeded to a valuable estate.[2] Between the case of an heir who is required to enter upon the succession of his ancestor, in order to facilitate the payment of that ancestor's creditors, and the case now under consideration, there is a marked distinction. No man can be forced to undertake, for the benefit of those to whom he owes no duty, a succession which implies burdens; but a person who is owing debts cannot renounce a succession which has opened to him, and which may supply the means of paying his debts, without unjustly bestowing upon the next heir property to which his own creditors are entitled. Another main distinction between the cases is this, that the *creditors of the ancestor* are not deprived of his estate by the refusal of the heir to enter, although compliance might have facilitated their operations; for, by law, they are entitled, in that case, to proceed directly against the hæreditas jacens, or unvested property itself, as coming in place of their debtor; whereas

[1] This long delay, although undoubtedly very inconvenient, is not so dangerous as it may at first sight appear to be; since there is a legal preference given to the creditors of the deceased using diligence against the estate any time within three years from his death, over the creditors of the heir, (see below, p. 727.); and since none other of the heir's creditors can get their diligence forward any faster. There, no doubt, is one danger, viz. that the heir may voluntarily grant a conveyance to some one of the creditors, to the prejudice of those of his own creditors who mean to adjudge, and whose hands are tied up by the law. But besides the diligence of inhibition, prohibiting all voluntary conveyances, not only of subjects vested in the debtor, but of those which shall afterwards be acquired by him, there is a special prohibition of such deeds within a year from the death. See below, p. 734.

[2] The doubt, whether renunciation be competent in this case, is as old as the time of Lord Durie. Six years after the passing of the statute of 1621, by which the law of special charge was declared applicable to the heir's own debt, as well as to the ancestor's, it was questioned, in a case between the laird of Carse and his brother, Whether a renunciation was, in such a case, competent? The debt being established by a registered obligation, the laird of Carse was charged, under the statute 1621, c. 27. to enter heir in special of his father to certain lands. The laird suspended, and gave in a renunciation, which was opposed. The Lords found, that he might lawfully renounce to be heir. 23d March 1627; Durie, 294.

the *creditors of the heir* can attach the succession only through the person of their debtor. A renunciation, in the former case, is therefore of little consequence; in the latter, it deprives the creditors of the fund which ought to be open to them.

§ 3. ADJUDICATION OF THE DEBTOR'S PROPERTY AFTER HIS DEATH.

Adjudication of the Debtor's property after Death.

In Scotland, the estate of a debtor is, in all situations, liable to the diligence of his creditors; both during his life and after his death: unless it be held by him under such restraints as deprive his creditors of their remedy against it. The natural method of recovering payment of debt, after the debtor is dead, is by an application to his heir. Should he refuse to pay, the next object of the creditor is to attach, in his hands, whatever property the ancestor may have left; or, if the heir's titles be not completed, to force him to his election, whether to take up the succession, or to leave it at the disposal of the law, for the benefit of the creditors.

This last object is accomplished, under the operation of the Act 1540, c. 106. already alluded to, by means of charges to enter heir. This method of calling upon the heir to enter, there could have been no hesitation in making absolute, without leaving to him a choice, had it not been for the principle, that an heir who enters to the succession of his ancestor becomes personally liable for all his debts.[1]

Where the Heir enters.

1. If the heir choose to enter to the estate of his ancestor, and to complete his titles to it, the creditors of the ancestor proceed, in the first place, to have their debts fixed against him, as representing their debtor; which is done either voluntarily, by bond, &c. on the part of the heir, or judicially, by the judgment or decree of a court. They then proceed to adjudge the estate, as if the heir had been originally their debtor and the proprietor of the estate; and they have this peculiar privilege over the creditors of the heir himself, that their adjudications, if completed within three years of their debtor's death, give them a preference upon the ancestor's estate.

Where he behaves as Heir.

2. If the heir, either tacitly or by express act, assume the general succession; if he behave as heir, and, taking the benefit, render himself liable, as representative, for his ancestor's debts; the creditors of the ancestor, founding upon that representation, bring their actions of debt against him without any previous charge; and, upon obtaining

[1] In the Roman law, and in that of all the nations of modern Europe, who have adopted the principles of the Roman jurisprudence, the entry to the succession of a person deceased, is equivalent to the assumption of his personal responsibility. The heir succeeds to all the rights, active and passive, of the predecessor; he is proprietor of all that belonged to him, and debtor in all his debts. The hardship of this universal representation, this liability to all the predecessor's debts, however much exceeding the amount of his estate, led, in the Roman law, to the establishment of some very important rules for the protection of the heir.—1. It was necessary that he should declare, either expressly, by 'additio hæreditatis,' or tacitly, by 'gestio pro 'hærede,' that he accepted of the succession. 2. He was not required to make this declaration till a year after his predecessor's death; being allowed this term to make his inquiries, and to deliberate upon the propriety of risking the representation. And, 3. If, at the end of that time, he should not be satisfied of his safety, he was entitled to enter heir 'cum beneficio inventarii;' to make up an inventory of the property to which he succeeded; and beyond the extent of this inventory, he was not liable.

In France, where the Roman law was much regarded, the provisions for this case were in essence the same. There was only this difference in form, that the right of the legal heir was held to be vested in him from the moment of his predecessor's death; so that a renunciation was necessary to clear him from the consequences of the succession, and relieve him from the debts of the ancestor. It was only the heir by institution who was required to declare his acceptance. Pothier, Traité des Successions, 230.; ibid. 126.

In Scotland, the law is the same with that of Rome and of France, in giving the heir a year to deliberate, and in subjecting him to an universal representation, unless where the entry is made by inventory; but it agrees with the Roman rather than with the French law in requiring a formal entry by the heir. Indeed it would appear, that, in Scotland, even more than in Rome, a formal entry as heir is necessary. The passive representation may, indeed, be incurred tacitly, as by 'gestio pro hærede;' but the heir has not a full active title without a formal entry.

decrees, transferring the ancestor's debts against him, they proceed, as already described, and force the heir to complete his titles, in order to validate their adjudication of the property. They charge him upon a special, or a general special charge, according to the state of the titles; and as he cannot, in such a case, be allowed to renounce the succession, having already assumed it in general representation, he must either enter, or the certification of the statute 1540, c. 106. will supply the place of an actual entry, and enable the creditors to proceed as if the heir were served in special.

Where he does not assume the representation.

3. If the heir have not assumed the representation, then the creditors of the ancestor are to take measures for obliging him to declare his election. This is done by means of a charge to serve himself heir in general to the debtor, otherwise to be held as heir. This charge cannot, however, be given with effect till the annus deliberandi be expired; the heir not being obliged sooner to declare what his resolution may be. The general charge gives the heir forty days for obedience; and it has been settled, that the charge may be given so that these forty days shall run along with the annus deliberandi.[1]

Action of Constitution.

4. Whether the heir choose to answer this charge or not, the creditors of the ancestor may, immediately after the expiration of the forty days, proceed with their action of constitution, for the purpose of transferring the ancestor's debt against the heir. The heir may, in this action, appear and answer the charge, by renouncing the succession; but if he do not, judgment is pronounced against him, as lawfully charged to enter heir to his ancestor. If he appear, and defend himself against the debt, upon any plea, as in right of the ancestor, this is an assumption of the passive title in respect to that particular debt; but it will not give a right to other creditors to make him universally liable.[2] Neither of these passive titles, in short, reach farther than the special debt in question; but, as to that debt, they subject the heir, in his person, and in his own estate, as well as in his right to the estate of his ancestor. If the decree on the general charge, however, be in absence, the heir will be allowed to suspend it, on producing a renunciation; at least to suspend it in so far as it subjects him or his estate for his ancestor's debts. The heir cannot be deprived of this right of suspension, unless some of his own creditors have attached the ancestor's estate; in which case the heir must clear off the debt before his renunciation will be admitted.[3]

We shall see hereafter that there may be a necessity for hurrying on the proceedings, in order to preserve to the creditors of the ancestor the preference which law has conferred on certain conditions. This will deserve attention in selecting the court in which the action of constitution is to be raised.[4]

Special Charge.

5. The debt being fixed against the heir by this decree, when he has not chosen to renounce the succession, the creditors, of course, proceed to charge him to enter in special, either by special, or general special charge. The special charge cannot be given till the decree of constitution be pronounced; because, 'the special charge is a part of, 'and preparation for the execution of a sentence, and so cannot precede the sentence.'[5] Yet it is no objection, that the special charge was executed before *extracting* the decree of constitution; it having been actually pronounced.[6] It is by the decree of constitution that the debt is fixed upon the heir; and therefore it is proper and regular to recite that

[1] M'Culloch, 19th June 1628; Durie, 376.

[2] Auchintoul, 10th December 1674; Dirleton, No. 199. 88. Carfrae, 20th January 1675; Dirl. No. 223. 104.

[3] Ersk. b. 3. tit. 8. § 93.

[4] See below, p. 731.

[5] On this ground, a comprizing following on a special charge, raised and executed before the decree of constitution, was found null. Earl of Cassillis, 15th February 1627; Durie, 274.

[6] Creditors of Catrine, 1st December 1738; Kilk. 119.

decree in the letters of special charge; but the omission of this founds no objection against an adjudication, provided the decree was actually obtained before raising the letters.[1]

Where the Heir renounces.

6. Where the heir chooses to renounce, the proceeding is somewhat different. The estate of the ancestor being then abandoned by him who has the right of succession, the creditors are entitled to attach it for their debt. Upon production of the renunciation, all personal conclusion against the heir is discharged, and the heir absolved from the action; and decree is pronounced simply to the effect of declaring the amount of the debt which is to be a burden on the succession. This is called a decree 'cognitionis causa contra hæreditatem 'jacentem et bona mobilia;' and after it has been pronounced, a summons of adjudication is raised, calling upon the heir, and all others having interest, to hear and see the lands, &c. adjudged to belong to the creditor, in payment of his debt. The decree of adjudication, thus pronounced, has the same effect with the adjudication for debt against the debtor's own estate. It entitles the creditor to complete his right by infeftment, and to enter into possession. This adjudication was by 1621, c. 7. first declared redeemable by posterior creditors, either of the ancestor or of the heir. Prior to that Act, it was doubted whether the heir himself could redeem; but it is thereby fixed that he cannot, unless minor at the date of the renunciation. The method of redeeming, if he wish to do so, is to grant a trust-bond, on which the trustee adjudging may redeem.[2]

7. It may be observed, before leaving this point, that by the Act 1540, c. 106. it is declared that the heir, in order to be subjected to this sort of coercion, shall 'be of perfect 'age.' But M'Kenzie remarks,[3] that minors may, notwithstanding, 'be validly charged 'to enter heir *de practica;*' and that, 'by our constant practice, they may be charged, 'since this is necessary for completing the creditor's diligence.' But, at least, if such charge be competent, no effectual proceedings can take place in the action of constitution, unless either tutors or curators have been cited; or, if there be none, the creditor take care to have a tutor ad litem appointed to watch over the interests of the pupil.

8. It may happen that the crown, as ultimus hæres, is the successor of the deceased debtor: and it seems doubtful how the crown can be subjected to the operation of the statutes under consideration. Both Craig[4] and Stair[5] hold, that the debt may be made effectual contra hæreditatem jacentem by adjudication, calling the officers of state and the king's donator. And, more recently, this question having been tried, the Court held a summons competent against the officers of state, concluding for a decree of cognition for constituting the debt, and adjudication of the estate of a bastard debtor.[6] It is not, therefore, by a charge against the officers of state that the creditor is to proceed; for the crown succeeds ipso jure coronæ; and the officers of state may at once be called in an action for constituting the debt, and fixing it as a debt on the succession.

Adjudication Contra hæreditatem jacentem before Sheriff.

Of the forms of attaching the estate of a deceased debtor, that in which the heir takes up the succession, and that in which he subjects himself to the diligence authorized by 1540, c. 106. were regular and known forms of diligence by apprizing in 1672; and when the Legislature, in that year, substituted adjudications before the Court of Session, instead of the old form of apprizing, the adjudications in these cases were, along with the simple adjudication for debt, included in the law. The third kind of diligence, 'contra 'hæreditatem jacentem,' never appeared in the form of an apprizing, but, from the first, in

[1] Sir THOMAS MAXWELL, 10th December 1751; 2. Falc. 301.

[2] 2. Ersk. 12. 49.

[3] Obs. James V. Parl. 7. Act 106.

[4] 2. Craig, 17. § 12. and 16.

[5] 3. Stair, 3. § 46.

[6] REID against OFFICERS OF STATE, 20th June 1747; 1. Falc. 256.

the shape of an action for adjudging the hæreditas jacens to belong to the creditor. When the Legislature then substituted adjudications in place of apprizings, and declared the Court of Session the only competent judicatory for those substituted adjudications, it did not mean (at least so it has been decided[1]) to include adjudications contra hæreditatem jacentem; and they, accordingly, have always been held competent before the Sheriff, as all apprizings formerly were. This is the first peculiarity that deserves notice in the adjudication contra hæreditatem jacentem. A second is, that in adjudications contra hæreditatem jacentem before the Sheriff, there is no absolute provision for recording or publishing. The abbreviate of the adjudication, which enters upon the record, is a mere substitute for the allowance of the apprizing. But there never was any decree conform, or allowance, pronounced upon adjudications contra hæreditatem jacentem.[2] When abbreviates, therefore, were introduced instead of allowances, by the regulations 1695, art. 24. adjudications contra hæreditatem jacentem were not included. This omission, in so far as regarded such adjudications, when led before the Court of Session, was supplied by the additional regulations 'concerning the Session,' 1696, art. 3.; but the remedy extended not to those which proceeded before the Sheriff. It has, indeed, been the practice to have abbreviates signed by the Sheriff, and to record them, like the abbreviates of the Court of Session, in the register of adjudications; but the Judges have thought themselves entitled to go no farther than to refuse issuing letters of horning against superiors when this has been omitted.[3]

SECTION III.

ADJUDICATION IN SECURITY.

BEFORE adjudications were substituted for apprizings, this process had been adopted by the Court of Session as an equitable remedy in cases where apprizing was not competent. The adjudication in security was thus introduced; and with the exception of the pari passu preference, none of the statutory provisions applicable to ordinary adjudications reach this diligence.

We have already seen, that, by the law of Scotland, creditors in future, and even in contingent debts, are entitled to take measures of security against the impending insolvency of their debtors, and to insist that a share of his inadequate fund shall at least be set apart for their satisfaction against their debt becoming due. The grounds and principles of this doctrine have already been explained.[4] The adjudication in security is the remedy by which the debt of a future or contingent creditor, or of a creditor who is not ready to adjudge for payment, is secured against the other creditors. The libel of adjudication states the nature of the debt; the impending insolvency of the debtor; the requisition for proper security; and so concludes, that 'in security of the sums mentioned, the lands

[1] KER against PRIMROSE, 4th January 1709; Forb. 297.

[2] They never had the form of apprizing, but were, from the first, proper actions of adjudication, in order to the execution of which against the superior, a separate and accompanying action was at first raised; though afterwards a conclusion for decree against the superior was thrown into the summons of adjudication contra hæreditatem jacentem itself.

[3] MURDOCH KING, petitioner, 14th December 1742; Kames' Rem. Dec. 34. 53. Kilk. 9. Elchies, Adjud. No. 35.

In GUTHRIE'S Children.—'Abbreviates are necessary now, by the regulations 1696, upon adjudications in implement on decrees cognitionis causa, as well as in adjudication introduced in place of apprizing by 1672; and, therefore, horning against superiors was refused on such an adjudication without an abbreviate; *me referente*.' 20th February 1741; Elchies, No. 29.

[4] See above, p. 315. et seq.

'should be adjudged from the said defender, and decerned and ordained to belong to the 'pursuer, heritably, in security and satisfaction of the said sums.'

1. The legal of this adjudication does not expire;[1] or rather there is no legal. It is from first to last a redeemable right.

2. As a Prætorian remedy in equity, adjudication in security may be applied for, where the debt is not yet due; or where it is contingent; or where the creditor has it not in his power to establish the amount of it; or perhaps, also, where the creditor has no proof of his debt instantaneously to produce.[2]

In such cases apprizings were incompetent;[3] and the lawfulness of adjudications was once doubted, on the analogy of apprizings: But, 1*st*, An adjudication by a cautioner, in security of his relief, was found to have the same effect with an infeftment in relief.[4] 2*d*, So, of an adjudication on a bond, payable on the granter's death.[5] And, 3*d*, An adjudication in security, 'for a daughter's bond of provision, was found entitled to proceed and 'compete with the other creditors, though the term of payment was not till her age of 'eighteen years,' and posterior to the competition.[6]

3. This remedy, however, will not be given in all cases; but only where there is a manifest call for it in justice, as on occasion of impending insolvency; or where other creditors have begun to adjudge, and there is danger of losing the pari passu preference.[7]

4. On principle it might seem doubtful whether, if the first adjudications be in security only, intimation be necessary; since this is a sort of adjudication which never can carry off the estate, and of which the legal does not expire. But still it will be remembered, that a preferable security may be constituted; and the words both of the Act 1661, c. 62. extending all the rules of that Act along with the pari passu preference to adjudications for debt as well as to comprizings, and the words of the recent statutes,[8] put this beyond all doubt.

5. The adjudication in security is to be completed like the ordinary adjudication for payment; the right, of course, being merely a right redeemable, and not capable of becoming absolute. There is no legal in such adjudications.

SECTION IV.

ADJUDICATIONS UPON DEBITA FUNDI.

Adjudication on Debita fundi.

THE adjudication of a feudal subject for personal debt, confers a real right only in consequence of the sasine which follows upon it. But adjudication may be led for debts

[1] STRACHAN against STRACHANS, 22d January 1752; Elchies, *voce* Adjudication. Sir T. WALLACE DUNLOP's Creditors against BROWN and COLLINSON, 14th November 1781; 7. Fac. Coll. 1. M'KINNEL's Creditors against GOLDIE, 9th June 1797.

[2] M'NIEL's Creditors against SADDLER, 7th March 1794.

[3] Earl of KINGHORN, 19th and 20th July 1631; Durie and Spottiswoode.

[4] BURNET, November 1685; Pres. Falc. p. 72.

[5] BLAIR, 12th July 1771; Forbes, 523.

[6] Mrs MARGARET LYON against the Creditors of EASTEROGLE, 24th January 1724. See also Creditors of Sir T. WALLACE DUNLOP, 14th November 1781.

[7] NISBET against STIRLING, 16th February 1759. This was an adjudication in security on a provision in favour of a daughter, payable at her mother's death, brought against the heir of the granter, a young man in trade, and so exposed to hazard. The Court held, that 'an adjudication in security before the term of 'payment of the sum adjudged for, is an extraordinary 'remedy, not allowed except when the creditor is in 'danger otherwise of losing his debt.' And as in this case there was no sufficient ground of hazard alleged, the Court assoilzied the heir. 2. Fac. Coll. 309.
See 1. Stair, 17. § 15.

[8] 54. Geo. III. c. 137. § 9.

which are already made real upon the estate, and which form, independently of any adjudication, preferable claims upon it. The purpose of leading an adjudication, in such a case, is not to give the debtor further security, or even to obtain payment of the real debt, but to accumulate the debt, with its interest, into a capital bearing interest. In so far as concerns the real debt, and interest due on it, these adjudications are said to be preferable to all others. But, to speak more correctly, the adjudication does not deprive them of their natural preference as real debts.[1] The adjudger has no preference over other adjudgers for the interest of the accumulated sum in his adjudication; since that is not a real, but merely a personal debt; being interest upon interest.

Debita fundi, which thus are entitled to a preference over all common adjudications, are such as form a real burden upon the lands; whether constituted by law or by agreement. Debts secured upon land by heritable bond, with the interest upon them; debts forming burdens by reservation; the duties due to the superior; all are real debts, entitling the holders of them to preference. But, in order to raise the interest due upon arrears into a real debt, or debitum fundi, so as to be the ground of a preferable adjudication, it is necessary to use the diligence of 'poinding the ground.' This, as already explained, is an action in which the proprietor of the ground, and tenants, are cited, and which concludes for decree and warrant to poind the moveables on the lands, and for adjudication of the ground-right, in payment of the arrears due; and it has the effect of converting the arrears into a principal sum, bearing interest, and really secured. An adjudication following on this, and accumulating the arrears which have been the subject of this diligence, bestows a preference for the interest of the accumulated sum, as being now converted into a real debt.[2] It does not seem to be necessary to have a decree of constitution against the heir, in order to found an adjudication on a debitum fundi; for letters of poinding of the ground proceed without any constitution, upon merely calling the apparent heir for his interest;[3] and the poinding of the ground is a direct warrant for the adjudication.

SECTION V.

COMMENTARY ON THE STATUTES FOR REGULATING PREFERENCES AMONG ADJUDGING CREDITORS.

Such being the nature of the diligence of adjudication when used by a single creditor; those regulations next demand attention by which the preferences among adjudging creditors are regulated. In this inquiry two cases are to be distinguished:—1. Where the adjudgers are all in one class as creditors of the same person; and, 2. Where there are two classes of creditors; the one of the ancestor, the other of the heir.

§ 1. ADJUDICATIONS BY CREDITORS OF THE SAME DEBTOR.

Where the adjudgers are all creditors originally of the same debtor, whether the property to be adjudged belong to that debtor, or descend to him from his ancestor, or be the proper estate of the debtor in hæreditate jacente; their diligence is subject to the operation of certain statutes introducing equality among them. Beyond the range of those statutes the adjudications take their station in the ranking like voluntary preferences, according to the dates of their completion.

[1] They are expressly excepted from 1661, c. 62.

[2] Ersk. b. 2. tit. 8. § 37.

[3] Oliphant, 2d January 1667; 1. Stair, 432.

1. PARI PASSU PREFERENCE WHILE THE DEBTOR IS ALIVE.

Nature of the Pari passu Preference.

The spirit of the law is, that every creditor who shall obtain decree of adjudication within year and day from the date of the decree pronounced in that adjudication which shall be first rendered complete, shall be entitled to share equally with the first adjudger. At its introduction this law was very imperfect. But by certain provisions for the publication of the first adjudication, so as to put other creditors on their guard, and by provisions also for enabling creditors, at less expense, to take the benefit of the law, it was improved into a useful, though still a very clumsy and cumbrous, remedy against inequality.

The equalization, or pari passu preference of diligence against land, was first introduced by the following section of the Act 1661, c. 62. :—' And because oftentimes creditors, in ' regard they live at distance, or upon other occasions, are prejudged and preveened by ' the more timeous diligence of other creditors, so that before they can know the condition ' of the common debitor, his estate is comprized, and the posterior comprizers have only ' right to the legal reversion, which may, and doth often prove ineffectual to them, not ' being able to satisfie and redeem the prior comprizings, (their means and money being ' in the hands of the common debitor); Therefore it is statute and ordained, that all com- ' prizings deduced since the first day of January one thousand six hundred and fifty-two ' years, *before* the first effectual comprizing, or *after*, but within year and day of the same, ' shall come in pari passu together, as if one comprizing had been deduced and obtained ' for the whole respective sums contained in the foresaids comprizings. And it is de- ' clared, that such comprizings as are preferable to all others, in respect of the first real ' right and infeftment following thereupon, or the first exact diligence for obtaining the ' same, are and shall be holden the first effectual comprizing, though there be others in ' date before and anterior to the same: and the foresaid benefit given and introduced ' hereby, in favours of those whose comprizings are led within the time, and in manner ' foresaid, is only granted and competent in the case of comprizings led since the first ' day of January one thousand six hundred and fifty-two years, and to be led after the ' date of thir presents, and for personal debt only, without prejudice alwayes of ground- ' annuals, annualrents due upon infeftment, and other real debts, and *debita fundi*, and of ' comprizings therefor of lands and others affected therewith, which shall be effectual and ' preferable, according to the laws and practick of this kingdom now standing. And it ' is also provided, that the creditors having right to the first comprizing, except as is above ' excepted, shall be satisfied by the posterior comprizers, claiming the benefit foresaid, of ' the whole expense disbursed by them in deducing and expeding the said first compriz- ' ing and infeftments thereupon.' The statute afterwards proceeds to enact, ' That the ' benefit foresaid introduced hereby anent comprizings, shall be extended to adjudications ' for debt; so that the creditors at whose instance the same are obtained, and those who ' have right to redeem the same, shall be in the same case as to the benefite foresaid, as ' if the said adjudications for debts were comprizings.'

This rule was continued as applicable to adjudication, when, by 1672, c. 19. that form of diligence was substituted for apprizing. In 1793 several provisions were made for diminishing the number of adjudications, and lessening the expense.[1] These are continued in the late Act.[2]

The law on this subject may be explained under these heads:—1. The description of the first effectual adjudication; 2. The term during which a subsequent adjudication may be led to the effect of conferring an equal right on the creditor; and, 3. The provisions

[1] 33. Geo. III. c. 74. § 10. and 11.

[2] 54. Geo. III. c. 137. § 8. and 9.

for rendering this remedy complete, by publishing the first adjudication, and facilitating the proceedings in posterior adjudications.

1. *DESCRIPTION OF THE FIRST EFFECTUAL ADJUDICATION.*

Where the Estate is Feudal.

As voluntary conveyances and securities can be completed only by sasine where the estate is feudal, so adjudications, in order to stand in competition against such conveyances, must also be completed by sasine. But sasine is not necessary as between one adjudger and another. In this case, the statute has declared it to be sufficient if the creditor shall have done diligence for forcing the superior to enter him.[1] The statute describes the first effectual adjudication to be, 'that upon which infeftment shall have 'followed, or the first exact diligence for obtaining the same.' But it was doubted what should be held as exact diligence for obtaining an infeftment. In the simple case, indeed, it was not questioned that a charge to the superior was sufficient; or the presenting of a signature in Exchequer, where the crown was superior. But in a great variety of cases the simplicity of this rule was disturbed; and although the Legislature, in 1793,[2] swept away all those perplexities, perhaps the spirit and effect of the statute cannot otherwise be so well understood as by a review of the questions which arose under the former law.

History of the perplexities in charging Superiors.

1. As, in admitting the charge to the superior to be a due completion of the diligence in all questions with co-adjudgers, the law proceeded merely on the ground, that the creditor could do no better, and that such a regulation was necessary to prevent the rights of creditors from being exposed to the caprice or injustice of the superior; it followed, that wherever the creditor could complete his adjudication without applying to the superior, the reason of the law did not apply, and the charge should not be held as an effectual adjudication. Thus, if the debtor's right be still personal, the creditor adjudging may complete his title by taking sasine on the unexecuted precept: the adjudication carrying right to it, and also entitling the adjudger to enforce exhibition of it, for the purpose of completing his infeftment.[3]

Where charge unnecessary.

[1] This it may be proper shortly to explain. It has already been stated, that a decree of adjudication is equivalent to a conveyance from the debtor, with procuratory of resignation in favorem creditoris; and that the adjudger is entitled, under his decree of adjudication, to apply to the superior for a charter, upon which sasine may follow. Long before superiors were bound to receive voluntary purchasers, creditors were entitled to demand an entry. Even so early as the time of Alexander II. the superior had his choice of taking the land himself, or entering the creditor as vassal, (Stat. Alex. c. 24. § 5. and 7). By statute 1469, c. 37. it was expressly enacted,—'That the overlord sall re-'ceive the creditor, or ony other buyer, tenant till him, 'payand to the overlord a zieres male, as the land is 'sett for the time; and failzing thereof, that he tak 'the land till himselfe, and undergang the debt.' This legal obligation upon the superior to enter the apprizer, was, in ancient times, enforced by diligence, proceeding against the superior, upon the decree conform, or allowance of the apprizing, the predecessor of the abbreviate. At that period the common diligence for enforcing performance of obligations ad factum præstandum, was by letters of four forms. They consisted of four different charges, given by officers of the law, under the authority of four warrants successively issued; and increasing, in severity of requisition, to the last. In the common case of an obligation ad factum præstandum, the last of these charges denounced against the debtor, in case of disobedience, all the penalties which the law had appointed for the punishment of rebellion. In the diligence upon the apprizing the penalty was not so formidable: it was merely that if the superior should not, in compliance with the requisition, enter the adjudger, the creditor should be allowed to go to the next superior, and receive an entry from him; and so successively up to the crown, who never refuses to enter a vassal. To prevent superiors from unjustly granting an entry to one adjudger, and refusing it to another, that statute, which established the communion among adjudgers, declared, that diligence against the superiors should be sufficient to complete the adjudication, in so far as respected that competition.

[2] Statute 33. Geo. III. c. 74. § 11. continued by 54. Geo. III. c. 137. § 11.

[3] PIERCE against LIMOND, 22d June 1791; Fac. Coll. App. No. 2. Here several creditors of Ross of Kerse led adjudications. Limond, to complete his ad-

2. Many difficulties arose where the titles of the superior were incomplete. As a superior unentered has, in the eye of law, no feudal character, a charge against him to enter a vassal was nugatory; and our best lawyers required, to the completion of the adjudication, a charge to the superior to get himself also entered in the superiority, that he might be in a capacity to receive the vassal.[1] This question, of the necessity of charging the superior to enter, came several years ago to be discussed,[2] when it was said by one of the Judges, that a charge given to the proper superior to enter the adjudger, would be held to make an effectual adjudication, although his titles were not complete: But a different opinion prevailed, viz. that where the superior is unentered, it is necessary first to charge him to enter, and then to charge him to receive the adjudger; that the creditor is bound, before going to the crown, who refuses none, to take every proper measure for forcing the superior to complete his titles. This opinion not only rests upon the solid ground, that a charge against the unentered superior to enter the creditor is inept, since the person charged is not the feudal superior; but it is supported, as we have seen, by the authority of one of our oldest and best lawyers, and sanctioned by the practice which the other lawyers of his time approved of and directed. Where Superior unentered.

3. Another class of difficulties arose respecting the completion of adjudication, where the creditor adjudging was himself the superior. Lord Stair thought that, in such a case, no sasine was necessary, the original sasine of the superior recovering its full force when the right is brought back by apprizing;[3] but Mr Erskine shortly and ably refutes this doctrine, and shews it to have proceeded upon a mistaken notion with regard to the nature of the feudal consolidation.[4] The superior must therefore be infeft upon his own Where the Creditor Superior.

judication, charged the superior to enter him. Pierce, observing that the debtor, Ross, had never been infeft on the disposition in his favour, although it contained precept and procuratory, got possession of the disposition, and took infeftment, by executing the precept in his own favour as adjudger. This having been done beyond year and day, the question arose, Whether Limond's adjudication was the first effectual; or whether Pierce's was not to be considered as the only effectual adjudication? The Court unanimously held, that the adjudication at the instance of Henry Pierce was the first effectual one.

See also DEWAR against FRENCH, 6th December 1695; 1. Fount. 684.

[1] By 1474, c. 58. in order to remedy the fraudulent lying out of superiors unentered, to the prejudice of their vassals, the superior was to lose his superiority during his life, where he did not enter within forty days after requisition to that effect. Sir Thomas Hope, in his Minor Practicks, explains the proceeding under this Act to have been by a special charge issued from the Court of Session, upon disobedience to which a summons was issued against the superior and his successors, for declaring the right of superiority to be lost, and ordering the next superior to infeft the vassal; a similar process being followed upwards to the crown. Tit. 4. § 26, 27. The process was similar in the case of apprizers. Sir Thomas Hope says,—'If the superior be not himself infeft in the superiority, in that case 'the superior must be charged to enter to the superiority within forty days, conform to the order before 'expressed, in the form introduced in favour of vassals 'by Act of Parliament of King James III.' Tit. 9. § 20. Dallas of St Martin details the practice in his System of Styles, part i. p. 94.

[2] Ranking of KERSE, Bell's Cases, p. 3. There arose here a competition respecting the lands of Little-Mill, between Mr Pierce and Mr Ross. Both parties mistook the state of the titles, and made up their adjudications erroneously. These lands had been held feu of Lord Cathcart by Mrs Crawford. She had conveyed them to William Ross, and he infeft himself base upon his disposition. After his death, his brother, Hugh Ross, paid his debts, and took steps for vesting his right in himself, as creditor; but he never was infeft. Thus, it will be observed, that there was a superior remaining interjected between Lord Cathcart and William and Hugh Ross, viz. Mrs Crawford; for William Ross's disposition was base. But Hugh Ross, overlooking this circumstance, obtained a disposition from Lord Cathcart; and upon the procuratory resigned in the hands of the crown, and upon the crown-charter infeft himself and his son. Now, two of the creditors followed different plans in adjudging. Mr Ross having adjudged, applied for a crown-charter of adjudication; and was thereupon infeft. Mr Pierce thought he had taken effectual means for attaching the property, by charging Mr Ross, as superior under his crown-holding, to enter him as adjudger. But the Court found, that neither of these creditors had effectually adjudged the property; since the charge ought to have been given to the heirs of Mrs Crawford, the interjected superior.

[3] 3. Stair's Inst. 2. 23.

[4] 2. Ersk. 12. 29.

precept; and after the right becomes, by expiry of the legal and declarator, irredeemable, he may consolidate by resignation ad remanentiam.

Where Base Rights exist.

4. Difficulties multiplied, in a most distressing degree, where base rights had been constituted, and the titles and connexions of parties were not clear. Thus, a question occurred respecting the proper method of making an adjudication of a base right effectual where the disponee was dead. One being infeft as a crown vassal, disponed to his son, with procuratory and precept, and died. The son was infeft base, and never made his right public by confirmation or resignation. His creditors did diligence by adjudication against the superiority, as in hæreditate jacente, and against the property; and a competition arose among them for the quality of first effectual. The superiority clearly was in hæreditate jacente of the father; the property in his son. There were three ways in which it was conceived that the adjudications ought to be made effectual:—1. By the adjudgers obtaining, in Exchequer, a charter of adjudication of the superiority, and then, as superiors, giving infeftment to themselves in the property: 2. By throwing into the signature of adjudication a clause of confirmation of the base right, so as to enable the creditors to take sasine on the adjudication, as if the right were consolidated: 3. By charging the heirs of the father to enter, and infeft the adjudger in the property. The last of these methods would no doubt have been effectual, upon the principles stated above in Kerse's case; but it was excluded here by the second method, which had been taken before, and which all agreed was good. As to the first, it was universally thought that it gave no right to the property; and the only question was, Whether, as it preceded the second, it did not serve as a mid-impediment to the confirmation? But the Court found it did not; and that although it made the first effectual adjudication quoad the superiority, it precluded not the confirmation, as making the first effectual against the property.[1]

Thus, even in the most simple cases, where the vassal had not taken sasine on the disposition, the adjudger could not complete his adjudication without possession of the disposition; and this he might find great difficulty in recovering; while, in the more complicated, it was necessary for the creditor-adjudger, in order to proceed with safety, to have the most masterly assistance to direct him what step to follow, in the peculiar situation of the feudal titles of his vassal, or of the superior; and even the materials for such deliberation he could not be expected to have at command.[2]

New Rule as to First Effectual.

The same strictness is still required where the adjudication is to come into competition with other real rights; with heritable securities or dispositions, completed by infeftment. But, in competitions among adjudgers themselves, it was necessary to have a method of completing the diligence more within the reach of a creditor, and less exposed to the collusion and fraud of the debtor, or of his superiors. Therefore, by the 33. Geo. III. continued by 54. Geo. III. c. 137. § 11. and subsequent statutes, 'the presenting of a 'signature in Exchequer, when the holding is of the crown; or the executing of a gene-'ral charge of horning against superiors at the market-cross of Edinburgh, and pier and 'shore of Leith, when the holding is of a subject; and recording an abstract of the said 'signature, or the said charge, in the register of abbreviates of adjudications, shall be held, 'in all time coming, as the proper diligence for the purpose aforesaid.'

In burgage subjects, (as to which there might otherwise be difficulty), this general charge is sufficient.

[1] M'KENZIE against ROSS and OGILVIE, 1st June 1791; Fac. Coll. 371.

[2] Of this distressing uncertainty, the case of MURDOCH against CHESLIE may be taken as an illustration; where the debtor appeared to be fully vested in the feudal right, and several creditors proceeded in completing their adjudications upon that idea; but a strict investigation having shewn that there was an essential flaw in his title, other creditors took steps for forcing him to complete a proper title, and were preferred. 20th January 1766, Fac. Coll. 56.

In the interpretation of this law a difficulty may be stated, Whether it can be held to apply to the case of a superior adjudging the property of his vassal? On the one hand, there does seem to be a sort of absurdity in a person charging himself by horning to do an act which is within his own power; but, on the other, the view of the law evidently was to form a general rule for all cases; and, without regarding the peculiarities of situation, or the person or state of the superior, to make a general charge recorded sufficient for supplying all deficiencies. There is a possibility, at least, that a superior may be mistaken as to the titles of his debtor; and that, in giving an entry to himself, he may be as far from the true line as if he had no connexion with the property: there may be interjected superiors, of whom he knows nothing; and therefore the general remedy should be open to him as to others.

Superior Adjudger of Vassal's Right.

The first effectual adjudication, once constituted, is the criterion of the pari passu preference. It becomes, from that moment, not merely a private diligence, belonging exclusively to the individual who uses it, but a general diligence, in which every creditor who afterwards adjudges has an interest. In this view, it is not entirely at the disposal of the individual; its quality of 'effectual' remains to complete the other adjudications, although the debt upon which it proceeds may have been paid off, and the adjudication, of course, extinguished as an individual diligence.[1]

First Effectual belongs to all the Creditors.

2. *TERM DURING WHICH ALL ADJUDGERS MAY PARTAKE OF THE PREFERENCE OF THE FIRST EFFECTUAL.*

All adjudications which are prior to the first effectual, and all those which, being posterior to it, are dated within year and day of the pronouncing of the decree, are to be brought in equally, or pari passu. The expression of the Act, to this effect, seems to be clear; and yet it has given rise to doubts.[2]

Period of Communion.

1. The year and day within which it is necessary for every adjudger to obtain his decree of adjudication, in order to entitle him to rank pari passu, begins to run, not from the moment of completion of the sasine, or of the diligence by which the first effectual adjudication is completed, but from the date of the decree of adjudication.[3]

2. In computing the term, the year and day is to be reckoned, 'not by the number of 'days which go to make up a year, but by the return of the day of the next year that 'bears the same denomination.'[4] In general, it would seem, that when a term is

[1] STREET against the Earl of NORTHESK, 13th December 1672; 2. Stair, 133. See also STRAITON against BELL, 28th January 1676; 2. Stair, 407.; and 7th November 1679, 2. Stair, 704.

[2] The statute bears,—'That all apprizings, &c. 'BEFORE the first effectual apprizing, or AFTER, but 'within year and day of the same, shall be brought in 'pari passu.' Lord Kames, in his Dictionary, states a case where an attempt was unsuccessfully made to limit the pari passu ranking, even as to prior adjudgers, to the term of a year and day. '21st December '1630, Forbes;' 1. Dict. 17. Morr. 265.

[3] 2. Ersk. 12. § 30. BALFOUR against DOUGLAS, 4th July 1671; 1. Stair, 747. (M. 238.) This is the first and leading case in which the Court 'found, that 'the year is to be reckoned from the date of the first 'effectual apprizing.' The expression should have been, 'from the date of the first apprizing that is 'rendered effectual, and not from that of the diligence 'whereby it becomes effectual.'

See also 27th July 1678, 1. Fount. 12. where the rule is correctly laid down:—'The Lords found the 'coming in of posterior apprizings pari passu with the 'first, must be calculated year and day from the date 'of the first apprizing, and not from the date of the 'infeftment.'

[4] Lady BANGOUR against HAMILTON, 26th January 1681; 2. Stair, 842. (M. 248.) Here one adjudication was dated 30th July 1679, another 31st July 1680. The Lords found, 'that the year is 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 creditor's adjudging 'being upon the 30th July 1679, and the lady's ad'judication on the 31st July 1680, it was within year 'and day of the rest, and came in pari passu therewith.'

appointed, within which a thing must be done, the maxim,—'Dies incœptus pro completo 'habetur,' is properly applicable to the commencing day of the term: and where, on the contrary, a term is appointed, beyond which things must have continued in a particular state, the maxim properly applies to the concluding day of the term. In the former case, it makes the term begin to run on the day following that upon which the act takes place; whereas, in the latter, the term begins instantly to run; and the commencement of the day after the completion of the term indicates the expiration of it. This distinction seems to be necessary, in order to give, in either case, the fair benefit of the assigned term.[1]

3. *OF THE PUBLICATION OF THE FIRST EFFECTUAL, AND OF THE PROVISIONS FOR LESSENING THE NUMBER AND EXPENSE OF ADJUDICATIONS.*

Publication of the First Effectual.

To give full effect to the equalizing law, it is necessary that the first effectual adjudication should be published. This is done by means of the record of adjudications; and of the minute-book and rolls of the Court of Session, which are printed and distributed.

Recording of Abbreviate.

1. The recording of the abbreviates of adjudications is not required under the pain of nullity; and, therefore, there is no absolute security that the first adjudication shall be recorded.[2] 1. Where infeftment can be obtained without a charge to the superior, the adjudication may be the first effectual, without having been recorded; and it will be remembered, that the year begins to run, not from the completing of the real right, but from the date of the decree. 2. An adjudger is entitled to the benefit of the pari passu preference, although his diligence has not entered the record. 3. The adjudication contra hæreditatem jacentem before the Sheriff, has regularly no abbreviate, and, consequently, is not null, though unregistered.[3]

Minute-Book of Court.

2. But the publication of the proceedings in the Court of Session, affords an additional security against the chance of the year and day expiring without notice. *First*, The printed rolls of Court form a record of every action which comes into Court. *Secondly*, A minute-book is kept by the clerks of Court, in which all the important proceedings in every cause are daily entered; which book is also printed and distributed weekly, for the use of the practitioners, and forms another record easily consulted, in which an adjudication must appear. *Thirdly*, It was provided by the 33. Geo. III. c. 74. § 10.—'That the 'Lord Ordinary officiating in the Court of Session, before whom the first process of adju- 'dication against any estate for payment or security of debt is called, shall ordain intima- 'tion thereof to be made in the minute-book, and on the wall, in order that any other 'creditor of the common debtor, &c. may be conjoined in the decree of adjudication.' This was sanctioned by a declaration of absolute nullity if the intimation should be

Intimation.

[1] Sir G. M'Kenzie says, that in this question, as in all others where a day is adjected to a larger term,—'Dies incœptus pro completo habetur.' (Observ. 1. Parl. Charles II. c. 62.) If the meaning of this be, that the expiration of the year excludes an adjudication from the pari passu ranking, so that, if dated on the day after the expiration of the year, the adjudication must be postponed; it may be observed, that the only decision upon the point contradicts this; for, in the above quoted case, the first effectual was dated 30th July 1679, and the one in question on the 31st July 1680.

[2] The statute 1661, c. 31. which first ordered the recording of the allowance of the apprizing, did not require it under the sanction of nullity. On the contrary, it was held, 1. That a comprizing, though not recorded, was still entitled to the benefit of the pari passu preference under the subsequent law, c. 62. of the same year. STUART against MURRAY, 17th July 1668; M'Kenz. Observ. 2. Parl. Cha. II. c. 31. And, 2. That infeftment fully supplied the want of the recording of the comprizing. M'Kenz. loc. cit. 3. Stair's Inst. 2. 25. 2. Ersk. 12. 26.

The statute 1672, c. 19. introducing adjudication, ordered the allowance to be registered, in the same manner, 'and under the same certification, with the 'allowance of apprizings.'

And the 24th art. of the regulations 1695, appointing abbreviates instead of allowances, requires their registration, 'conform to the Act of Parliament anent 'the recording of apprizings.'

[3] KING, 4th December 1742, Kilk. 9.

omitted; saving only the validity and order of ranking of posterior adjudgers. But in 54. Geo. III. c. 137. an exception is very properly introduced, allowing the adjudication to be brought forward again in more unexceptionable form; or to be conjoined with any subsequent adjudication.[1] The publication of the first adjudication by this intimation in the minute-book and on the wall, is a warning to the other creditors to secure to themselves the benefit of the equalizing law, by having their adjudications led within the year. But, at the same time, a great evil attends this arrangement. Every creditor takes the alarm, in consequence of the appearance of an adjudication; and by the accumulating expense of many adjudications, a debtor whose circumstances are in no degree desperate is plunged into irretrievable insolvency. How far the law has hitherto afforded a remedy for this evil, shall be inquired into hereafter: At present it may be sufficient to observe, that the irretrievable injury which may attend a notice of this sort, makes the Court unwilling to authorize intimation, if a case can be made out by the debtor to bar the intimation. The rules are,—1. That where by a discharge, by instantly verifying a claim of retention or compensation, or in any other way instanter shewing there are no grounds for adjudging, the order for intimation will be refused. But, 2. That where investigation and discussion are necessary, or where the adjudication is opposed only by a trust-deed, to which the adjudger has not acceded; or where, although the adjudger has acceded, the trust is neglected and inoperative; the intimation must proceed.[2]

Bad Effects of the present Law.

It is a natural part of the provision for equalizing adjudications, that the publication of the first adjudication should be accompanied by some method of diminishing the number, and lessening the expense, of concurring adjudications. It has, with this view, been provided, that posterior adjudgers may be conjoined in the first adjudger's decree, instead of each leading a separate adjudication. By the statute of 1783,[3] it was ordered, 1. That the Lord Ordinary, before whom *any* process of adjudication was called, should order intimation of it; and, 2. That after a reasonable time for creditors to come in, decree should be pronounced, in which any creditor ready to adjudge might insist to be conjoined.[4] By

Conjunction of Adjudications.

Of Conjunction of Adjudications.

[1] 54. Geo. III. c. 137. § 9.

It may be observed, however, that this section of the Act is not correctly printed; the clause, 'And without 'prejudice to the validity and order of ranking of pos- 'terior adjudications according to the rules of law,' being improperly disjoined from the previous, and confounded with the succeeding part of the section. Perhaps the error is of no material consequence.

[2] Duke of QUEENSBERRY's Executors against TAIT, 11th July 1817; Fac. Coll. 375. Here the Court held, 1. That where investigation and discussion are necessary, intimation must proceed. 2. That where a right of retention is instantly established, warrant for intimation ought not to be granted.

HARROWER's Trustees against COUPER's, 16th February 1827; 5. Shaw and Dunlop, 374. Here the execution of a trust-deed by the debtors for behoof of creditors, on which infeftment was taken, was held no bar to an order for intimation at the instance of a non-acceding creditor.

Earl of BREADALBANE against M'DONALD, 16th January 1824. Here the adjudger had acceded, but he was held entitled to insist for intimation, as the trustees had taken no steps to realize the trust funds.

[3] 23. Geo. III. c. 18.

[4] 22. Geo. III. c. 18. § 5. The object of the Legislature, in this enactment, seems to have been, that every adjudication brought into Court should be intimated, (where there was no danger from delay, and of which the Lord Ordinary was to judge), that each might, in its turn, be the means of contributing to the general design of lessening the number of separate diligences. But the practice, under this statute, was extremely loose, and gave occasion to several questions. The intimation, in posterior adjudications, was generally omitted; and when the counsel came to the bar, and stated, that 'this was a posterior adjudica- 'tion,' the Lord Ordinary pronounced decree of adjudication at once, without ordering intimation. But as the appearance of an adjudication in the weekly rolls was a kind of intimation, other creditors frequently came to the bar, with their grounds of debt prepared, and were conjoined with the adjudger, at the first calling of the cause, and where no intimation had been made. In the Ranking of REDCASTLE, objections were taken to both these practices. Several adjudications within year and day of the first, had been led without any intimation; and with some of them were conjoined creditors who had produced their

the Act passed in 1793, the law was considerably altered in two essential points:—1. Intimation was made necessary only in the first adjudication; and, 2. It was required, that a creditor applying to be conjoined, should not only have his grounds of debt ready for adjudging, but that he should also have his summons of adjudication libelled and signeted. But it was left ambiguous whether conjunction was to be allowed in any other adjudication than the first.[1]

Adjudications conjoined with Posterior Decrees.

Although, under this statute, there certainly was no authority for conjoining, with *posterior* adjudications, creditors producing summonses of adjudication, with the grounds thereof; yet as the spirit and intention of the law was to lessen, by means of conjunctions, the number of separate diligences, the practice, which began under the old statute, was continued under the new one, of conjoining creditors, whether the adjudication in dependence was a first or a posterior one. Upon the words of the statute objections were taken, in several rankings, to the claims of creditors thus adjudging by conjunction with posterior adjudications; and the Court held such adjudications to be ineffectual.[2] This judgment was unavoidable, under the imperative words of the Act. It appeared to be expedient, that, in reviving this law, conjunction ought to have been permitted with posterior as well as with first adjudications: but the statute has not in this respect been altered; though it is not obvious what possible harm could have resulted from following out thus far the true principle of the doctrine.

What is the first Adjudication.

It was questioned under the Act 33. of the King, whether the first adjudication, having been ordered to be intimated, and another creditor having in the mean time adjudged, this last, if good at all, was not properly the first adjudication in the sense of the law. It was held, that this adjudication was not ineffectual, but that the other still continued to be the first, with which, in terms of the Act, other creditors were to be conjoined.[3]

Consequence of Defects in first Adjudication.

Nullities, in the first effectual adjudication, may be fatal to it, considered as the criterion of the pari passu preference. But where a creditor comes forward under the late statute, in consequence of the first adjudger's intimation, and is conjoined in the decree, he cannot be hurt by any defect in the first adjudger's diligence. The completion of the combined decree, by a charge against superiors, will make any one of the conjoined adjudications an effectual diligence, though all the rest that are conjoined with it should be null. To give any other interpretation to the statute, would not only defeat the very object of the Legislature, since no creditor would risk his debt upon the diligence

grounds of debt at the bar. Three points were questioned:—1. Whether the want of intimation, in the posterior adjudication, was not a nullity under the statute? 2. Whether the conjoined creditors were to be considered as having legally adjudged? And, 3. Whether some relief was not to be afforded to postponed creditors, who, if intimation of each adjudication had been made, would have been apprized of the necessity and opportunity of producing their grounds of debt? These questions were very fully discussed. On the first of them, the Court found the want of intimation no good objection to the posterior adjudications; and that the Lord Ordinary having power to dispense, must, in all cases, be supposed to have virtually dispensed with the form. On the second question, the objecting creditors endeavoured to shew, that the great view of the Legislature, in appointing intimation, was, that the intimation might supply the place of citations, &c. by the creditors who should apply to be conjoined; and that no conjunction could, therefore, be lawful, which was not preceded by intimation. But this view of the matter the Court did not regard. They held the conjunction by the Lord Ordinary, under the powers given him in the statute, to be effectual, as an adjudication to the creditors who were conjoined. And, as to the third point, the Court had no difficulty in deciding that no relief was to be given, since these creditors ought to have come in before. DE ROVERAY and Others against MACKENZIE and Others, March 1793.

[1] 33. Geo. III. c. 74. § 10.

[2] CAMPBELL, &c. against Creditors of KINLOCHIN, 24th November 1801.

[3] ALISONS against BALLANTYNE, 19th December 1805.

of another; but it would have the further effect of converting the second adjudication into the first, and subjecting it to a fatal objection, as not being intimated in terms of the statute.

Equitable interposition of the Court of Session;

The legislative provisions for promoting equality among adjudgers, have been aided by the equitable facilities given to posterior creditors by the Court of Session. But although the establishment of equality is an object of much favour, the term allowed for creditors to come in is very long; while ample provision is made for intimating the first adjudication to the public. The Court, therefore, in giving every proper aid to posterior adjudgers, in order to bring them within the term, have regulated themselves, in all such questions, by the rules of a sound discretion. The following points may be stated:—

In the Action of Constitution.

1. In the action of CONSTITUTION, the Court has interfered,—to dispense with the ordinary term for the debtor's appearance in Court; to prevent the debtor from delaying the decree, by the discussion of his defences; and to dispense with the usual intimations subsequent to decree.—1. It is essential to the very existence of an action, and the validity of any order or decree to be pronounced by the Judge, that proper intimation should be given to the defender to appear in Court. The Judges have never held themselves entitled to dispense with this essential part of the action, nor conceived that any decree pronounced, where this was omitted, could be legal or effectual. But there are cases in which equity has permitted the Court to dispense with a part of this form. Thus the second diet of appearance was dispensed with in a case where the debt against the ancestor of the defender was constituted by writing, and where the defender, having given in a written renunciation to be heir, decree cognitionis causa was pronounced.[1] 2. The Court pronounces decree where delay is hazardous, reserving to the defender the full effect of all his defences, as objections contra executionem.[2] 3. By Act of Sederunt, 20th January 1671, it is provided, 'That no act or decree done, either in the Inner or 'Outer-House, shall be extracted until twenty-four hours elapse after the same is read in 'the minute-book.' It may sometimes be of importance to dispense with the reading in the minute-book, especially as the Act of Sederunt, 5th June 1725, appoints the reading of the minute-book to begin on the sixth sederunt or court-day of each session: and the Court, in particular cases, grant dispensations, permitting the decree to be instantly extracted. Such dispensation seems justifiable in all cases where the decree is merely for constitution of a debt, on the same principle on which the Court reserves the consideration of defences.[3]

2. In the ADJUDICATION itself, the Court also interferes to abridge the unessential forms.—1. The Court interfered to dispense with the second diet of compearance in a

[1] CANNAN against GREIG, 16th November 1794; Fac. Coll. 302. The common form of citation in all actions, was to the debtor to appear at two different days; formerly, by two citations upon separate summonses,—the act for the second citation being pronounced under the jurisdiction which attached to the debtor, upon the expiration of the first term. But, while matters continued on this footing, a second citation was held to be essential, only where the debt was not established by written evidence, and where a proof by witnesses was necessary. After the union of the two summonses, the double diet of appearance was still kept up; but, as formerly, the second was not held essential, where the debt was established by writing; and this rule was held strictly to apply to the modern form of proceedings.

[2] Sir JOHN SINCLAIR against SINCLAIR, 26th January 1792.

[3] Thus, in the above-mentioned case of Sir JOHN SINCLAIR, the Court remitted to the Lord Ordinary to pronounce a decree in the action of constitution; *to dispense with reading in the minute-book;* and to call the action of adjudication, and pronounce decree in it; reserving all defences. See also Common Agent in the Ranking of POLQUHAIRN against CORRIE, 24th February 1795; Fac. Coll. 366.

At the same time it should be observed, that the Judges were much moved by the consideration, that here the only person interested in the judgment had renounced, and that no one could have appeared to bring it under review.

posterior adjudication.[1] Now, by 50. Geo. III. c. 112. § 27. there is only one diet where the defender is in Scotland. 2. The defences against adjudication are reserved to be stated as objections, wherever prejudice can arise from delay; and this even in a first adjudication.[2] The privilege of the special alternative cannot be *reserved;* and the debtor has been thought entitled to take a day for producing his titles in a first adjudication, even where the adjudication was by a creditor of the ancestor, and where there was danger of losing the preference of the Act 1661.[3] But this seems to deserve consideration: for although it is seldom that there can be any interest for hastening on a FIRST adjudication, it may by possibility happen; as where the adjudger is a creditor of the ancestor, and the three years of preference are nearly expired. But the privilege of demanding the alternative is forfeited by having already allowed a general adjudication to pass.

2. PARI PASSU PREFERENCE WHERE THE DEBTOR IS DEAD.

The doctrine of equality among adjudgers, as applicable to the case of an adjudication after the death of the debtor, will not require much explanation.

Where Creditors of the deceased Debtor alone can Adjudge.

1. Where the creditors of the deceased debtor alone are in the field, some of them having adjudged during his life, and others not till after his death, the adjudications against the heir, for the ancestor's debt, or proceeding upon his renunciation of the succession, are entitled, if within year and day of the first effectual adjudication against the ancestor, to be placed on an equal footing with that adjudication.[4]

Where Heir Deliberates.

2. But the heir may refuse to answer the charge to enter, till the expiration of the annus deliberandi; and so, where creditors have adjudged during the ancestor's life, the term of the pari passu preference may expire, before posterior adjudgers can obtain their decrees, and get the benefit of the equalizing rule. The remedy is an equitable one. The Court will allow those adjudications to proceed as if the heirs had renounced.[5]

3. PREFERENCE OF ADJUDICATIONS AFTER YEAR AND DAY.

1. The statutes already commented on, confer on all comprizings and adjudications within year and day of the first effectual, the same right 'as if one comprizing had been

[1] HAMILTON against BLACKWOOD, 17th July 1761; Fac. Coll. 101. This was decided on the principle, that the debt being established by writing, (which must always, of course, be the case in adjudications), and the benefit of the alternative of a special adjudication, which alone could have required a proof, being forfeited to the debtor by his having allowed a first adjudication to pass against him, it was not an action which required, according to the old rule, a second diet. See PEDIE's case below, Note [3].

[2] M'KENZIE's Representatives against LIDDEL, 26th February 1741; Kilk. 8.

[3] PEDIE, petitioner, 13th December 1776; 4. Dict. 149. This case did not present the point pure for decision; for the induciæ had not expired. They expired on 11th January, which being within the Christmas recess, and the three years expiring three days after, a petition was presented to the Court, praying a warrant to a Lord Ordinary to decern in the adjudication, without allowing the defenders to take a day to produce. This petition was refused.

[4] SINCLAIR against the Earl of CAITHNESS, 8th December 1781; Fac. Coll. 21.

[5] This difficulty was stated in the above case, and thus answered:—'Such an inconvenience and injus-'tice might be rectified, by allowing the diligence of 'the other creditors to proceed within the year, in the 'same manner as when the heir, in favour of particular 'creditors, has renounced the benefit of the annus de-'liberandi.' (3. Ersk. 8. 55.) And the reporter adds this note to the case:—'*N.B.* All the Judges who 'spoke, declared their opinion, that a creditor, in dan-'ger of losing his preference by the death of his debtor, 'after an effectual adjudication had been led by another 'creditor, would obtain relief in the way suggested by 'the respondents.'

'deduced and obtained for the whole respective sums contained in the foresaid compriz-'ings.' But adjudications which are subsequent to that term derive no aid from those statutes, and must therefore be completed as if no rule to this effect had been introduced. Hence arose a question, Whether, after a year from an adjudication, made effectual by sasine, it was necessary to complete new adjudications by sasine? This again was held to depend on the question, Whether there remained with the debtor, after adjudications completed by sasine, any thing more than a personal estate of reversion? And at the time when the question occurred, adjudications having been regarded as sales under reversion, the Court held, that without sasine an adjudication, subsequent to the year, was good to carry the personal right.[1] It may be fairly questioned, now that a different view of adjudication has been adopted, (namely, that for which Lord Kilkerran and the minority in that case argued[2]), whether the rule would not now be reversed. Mr Erskine's doctrine (2. Ersk. 12. § 28. and 33.) proceeds on the same principle which guided the Court in the case quoted below; and it was not till long after his time that the doctrine was abandoned, and an adjudication held to be a pignus prætorium.[3]

2. The old rule holds, that preference is according to priority in all adjudications beyond the year and day from the date of the first effectual decree.

§ 2. PREFERENCES AMONG ADJUDGING CREDITORS OF DIFFERENT CLASSES; VIZ. OF THE ANCESTOR AND OF THE HEIR.

The ordinary rules of preference among adjudgers will not regulate every case of competition. Where the adjudging creditors of the ancestor, to whom the estate formerly belonged, come into competition with those of the heir, the former are in justice entitled to a preference, on the principle, that every man's estate should be liable, in the first place, to his own debts. This principle has been admitted to controul the pari passu preference of adjudications, as established in ordinary cases, but with such modifications as have seemed to the Legislature necessary for doing justice also to the creditors of the heir. And perhaps this is the fittest occasion on which to enter upon a commentary on the statute by which the relative rights of the creditor of the ancestor, and of those of the heir, are settled.

COMMENTARY ON THE STATUTE CONFERRING A PREFERENCE ON THE ANCESTOR'S CREDITORS.

The estate of which a man is possessed, and which he has an uncontrolled power to alienate to his creditors, or to make the subject of securities to them, naturally becomes a source of credit on which he may obtain money or goods. Such credit is readily given by dealers and money lenders, without taking specific security over the estate or effects,

[1] MONRO against M'KENZIE, in Ranking of TULLOCH, 27th January 1756; Fac. Coll. 180. (M. 250.) and Kilk. in 5. Brown's Sup. 310. This was a competition, after the expiration of the year and day, between certain adjudgers, who had done nothing to complete their adjudging, and a subsequent adjudger, who had obtained charter of adjudication and sasine. 'The 'Court preferred the decrees of adjudication according 'to their dates to the adjudication with infeftment, 'upon the single medium,' (says Lord Kilkerran, who 'had reported the cause to the Inner-House), 'that 'nothing was left with the common debtor but a per-'sonal reversion.'

[2] CAMPBELL against SCOTLAND and JACK, 7th March 1794; Fac. Coll. 246.
BUCHANAN against PURDON GREY, 10th July 1809.

[3] The rule was laid down too absolutely in the former edition of this Work, (vol. i. p. 623.) that the sasine on the first effectual saves the necessity of completing posterior adjudication beyond year and day.

and trusting only to that right of attaching the property which they know can at any time be exercised for their payment. This right of attachment ought not at once to cease on the death of the debtor. If his heir is unwilling to undertake the debts, he ought to leave the property untouched for the creditors: if he take up the succession, he should reckon on being liable for the debt which belongs to it: And the creditors of the heir can in justice take no better right than he himself has; that is to say, the reversion of the ancestor's estate, after his debts are paid. This is so natural a consequence of the credit acquired in reliance on the uncontrolled power of a proprietor, that it has found admission into every system of jurisprudence, where no peculiar territorial policy has interfered with it. The principles of the feudal law opposed it while that system was in its strength; for they admitted not of a free exercise of the power of alienation or of execution against land. And in some countries this effect of the feudal system remains after the rest of the structure is gone. In ENGLAND, this has been the case. The heir in the real estate is freed from simple contract debts, on the feudal principle, that he takes the land, not from the ancestor, but under the original feudal contract: that the executor alone, therefore, is answerable, so far as he has assets; but the heir not at all, in respect of the lands descended. And although the introduction of the power of alienation made some invasion on this doctrine; still the distinction has been kept up, that the assets in the executor's hands are liable universally. Those in the hands of the heir are answerable only to debts of record, in respect of the lien created by the judgment on the lands themselves; or to debts by specialty in which the heir is named: while simple contract debts do not bind the heir. It is to be regretted, that the exertions of the late Sir Samuel Romilly, who devoted much of his attention to the improvement of the law, had before his death made so little progress in dispelling the prejudices which guarded this ancient error. In SCOTLAND, while the feudal forms are maintained in their simplicity and purity as a system of mere conveyancing, these absurd effects of it have been entirely dismissed.

But the HEIR, in his turn, acquires credit in reliance on the lands and effects to which he succeeds; whether his titles and possession be completed; or he be seen as apparent heir to possess, for a course of time, in undisturbed tranquillity.[1] It is just, therefore, to his creditors, that the preference should not be continued, in point of time, to the creditors of the ancestor, without limitation.

Out of these two opposite views has resulted, in Scotland, a system of rules for regulating the preference of the creditors of the ancestor in competition with those of the heir. The law, as it has been established in Scotland, has been moulded on the Prætorian doctrine of the Roman law, which permitted to the creditors of the ancestor the privilege of demanding a SEPARATIO of his estate from the estate of the heir, provided it was done within five years after the death.[2] The first statute in Scotland relative to this matter, was passed in the middle of the seventeenth century, 1661, c. 24.; and was intended to regulate, in respect to the real or heritable estate, the competition of diligences raised by the creditors of the ancestor, where they came to clash with those raised by the creditors of the heir; or to guard the ancestor's creditors from the danger of being excluded by the heir's voluntary conveyance to his own creditors. Towards the close of that century, also, a remedy on the same principle was applied in relation to the moveable succession. It had

[1] It is upon this principle, that by the statute 1695, c. 24. the debts of those who have possessed for a certain term as apparent heirs, are made to affect the estate. See above, p. 664. And it may be observed, that the term of three years, adopted in that Act, appears to have been suggested by the space allowed for the preference of ancestor's creditors in the statute now to be considered.

[2] See Dig. de Separationibus, lib. 42. tit. 6. Voet, h. t. vol. ii. p. 811. § 2.

first been administered by the Court of Session in decisions and Acts of Sederunt, proceeding on grounds of equity. Afterwards, a law was passed by the Legislature, in which the term of indulgence to the creditors of the ancestor was very justly limited to a much shorter period than in the case of the real estate.[1]

The statute relative to heritage, after a preamble, 'That appearand heirs, immediately 'after their predecessor's death, do frequently dispone their estate, in whole or in part, in 'prejudice of their predecessor's lawful creditors, before their death come to their know-'ledge, or before they can do lawful diligence against the said appearand heirs; and 'which dispositions the saids appearand heirs do often make before they be served heirs 'and infeft; or otherwise, by collusion they suffer their predecessor's estates to be com-'prized or adjudged from them for payment of their own proper debts, real or simulate, 'without respect to their predecessor's creditors; and how just it is, that every man's 'own estate should be first liable to his own debt, before the debts contracted by the 'appearand heirs,' proceeds, 1. To 'declare, that the creditors of the defunct shall be 'preferred to the creditors of the appearand heir in time coming, as to the defunct's 'estate: Providing alwayes, that the defunct's creditors do diligence against the ap-'pearand heir, and the real estate belonging to the defunct, within the space of three 'years after the defunct's death.' 2. The Act further proceeds on a preamble, that 'it were most unreasonable that the appearand heir, when he is served and retoured 'heir, and infeft *respective*, should, for the full space of three years, be bound up from 'making rights and alienations of his predecessor's estate; and yet it being as unreasonable 'that he should dispone thereupon immediately or shortly after his predecessor's death, 'in prejudice of his predecessor's creditors, he having year and day to advise whether he 'will enter heir or not; therefore it is hereby declared, that no right or disposition made 'by the said appearand heir, in so far as may prejudge his predecessor's creditors, shall 'be valid, unless it be made and granted a full year after the defunct's death.'

In commenting on this statute, these two provisions may be explained in their order: 1. The provisions for enabling the creditors of the ancestor, as adjudgers of his estate, to secure to themselves a preference over the adjudging creditors of the apparent heir; and, 2. The provisions for preventing the heir from interfering, by voluntary conveyance or deed, with the just rights of his ancestor's creditors.

1. *COMPETITION OF DILIGENCE BY CREDITORS OF THE ANCESTOR AND OF THE HEIR.*

Supposing the rights of the respective creditors to be left undisturbed by any attempt of the heir to confer on his own creditors preferences by voluntary conveyance, it is requisite on the part of the ancestor's creditors, if they mean to claim preference over those of the heir, that they shall do diligence against the apparent heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.

Heritable Estate only under this Law.

This law applies only to the heritable or real estate. The preamble speaks of comprizing and adjudication; the enacting clause, of the appearand heir and real estate. But in the real or heritable estate is comprehended, not only land and houses, but all heritage descending to the heir, or requiring adjudication; and whether the subject be heritable by mere destination, or sua natura.[2] The Court of Session, says Lord

[1] See a Commentary on this law under Preferences on the Moveable Estate, vol. ii.

[2] M'Kay against M'Kay's Representatives, 5th February 1783; Fac. Coll. 144. (3137). Here the Court 'were clearly of opinion, that the statute 1661 'applies to heritable subjects indiscriminately, whether 'they be such destinatione, or sua natura.'

Kames, extended the principle of this Act to moveables, and so 'completed the remedy,' which he holds the Court, as a court of equity, well authorized to do.[1] But in the cases to which he refers there seems to have been no intention on the part of the Court thus to extend the law or complete the remedy; and all our lawyers agree in reprobating Forbes, the reporter of one of the cases referred to by Lord Kames, for so representing the case.[2] The moveable estate is regulated by other statutes already alluded to, of which hereafter.

Meaning of Apparent Heirs in the Act.

The Act, in speaking of apparent heirs, as those whose creditors are to be postponed to the creditors of the ancestor, is not to be held as confining the remedy strictly to the case where the heir is still in apparency. The Act itself shews, that the term 'apparent heir' is not meant to be applied to the exclusion of an heir served and retoured; while the principle of the remedy applies equally to a case in which the heir has completed his titles, as to the case of a mere apparent heir. The Act seems equally to include the case of an heir succeeding by the settlement or disposition of the ancestor.[3] But where the heir is infeft during his predecessor's life, the Act has been held not to apply.[4]

What Diligence requisite.

One great difficulty in the construction of this part of the Act is to settle what diligence is requisite. The words of the Act are very vague:—Provided always, 'that 'the defunct's creditors do diligence against the appearand heir, and the real estate 'belonging to the defunct, within the space of three years after the defunct's death.' In the construction of these words it is to be observed, 1. That there is no express requisition that the diligence shall be *completed*. 2. That it seems a fair construction of the Act, that merely to *commence* diligence should not be held a due compliance with the condition; otherwise, instead of a space of three years, during which the heir's creditors should be barred from effectually attaching the estate, nothing short of the long prescription would have limited the privilege; which certainly was not the meaning of the Legislature.[5] But, 3. This construction of the Act seems to admit of limitation, in so far as the operations of the ancestor's creditors are barred either by the act of the heir, or the prohibition of the law itself. This leads to a question of very considerable practical importance.

1. The creditors of the ancestor are not held, by acceptance of bills or bonds of corroboration from the heir, to renounce this privilege, as against the creditors of the heir.[6] But neither would this probably be held as fulfilling the requisite of the Act, which is to vindicate the privilege by diligence done within three years.

2. It seems to be settled, that where there has been no obstruction or impediment to the diligence, it must be rendered complete; and that, to make it so, the adjudication must be followed by infeftment, or by a charge within the three years.[7] Inhibition would perhaps be held complete diligence in the sense of the Act.

[1] 1. Princ. of Equity, 371. This seems exceedingly doubtful as a general proposition.

[2] 3. Ersk. 8. § 102. 4. Bank. 43. § 3. KERR of Chatto, against SCOTT of Harden, 17th June 1712; Forb. 595. (609).

[3] GRAHAM against M'QUEEN and DRUMMOND, 9th February 1711; Forb. 494. (3128).

[4] Laird of ARNISTON, against Lord BALLENDEN, November 1685; Harcus, p. 29.

[5] 2. Stair, 12. § 29. 'Albeit the being complete 'be not expressed in the statute, yet by the design 'thereof it must be so understood: for if diligences 'inchoated in these three years, though perfected there-'after, would be sufficient, the preference would not 'be for three years, but might come to be for forty 'years.'

[6] Ranking of the Creditors of CULT, 2d August 1781; Fac. Coll. 134. (3137).

[7] 2. Stair, 12. § 29. 3. Ersk. 8. § 101. Lord BALLENDEN against MONRO, March 1685; Harcus, p. 219. 'The Lords found, that the defunct's

3. It may often happen, without any fault or undue delay on the part of the ancestor's creditors, that unless they are enabled to proceed with greater rapidity than the ordinary course of the law allows, they cannot get the diligence completed within the term. In such cases, the creditor will be allowed to urge forward his diligence without the impediment of discussing his debt in the action of constitution, or abiding all the forms of the ordinary process: And such objections as may lie against his debt will, on the principle already explained, be reserved contra executionem. Among the delays which would thus be dispensed with, the Court would probably allow a first adjudication to proceed without abiding the expiration of the term of intimation.[1]

4. But it may happen, that, by vacations of the Court, it may be impracticable to have the debt constituted in the Court of Session, and the diligence completed in due time.[2] And where it is so, without any undue delay previously, or any fault imputable to the ancestor's creditor, it is a very serious question, Whether the construction to be put upon the Act shall be so strict, that the ancestor's creditors, without fault of theirs, shall suffer a loss of their preference? This would be a harsh effect, scarcely to be inferred by mere construction, where the words do not unequivocally import as much, which the spirit of the law so clearly applies with favour to the creditor. A creditor of the ancestor, for example, intending to do diligence, is stopt during the annus deliberandi from proceeding with his adjudication: And in the progress of his proceedings the heir dies, and the proceedings must be revived. It seems not consistent with the spirit of the Act, that this should forfeit to the creditor his preference as a creditor of the ancestor. Accordingly, to a certain extent, indulgence has been given. Where the creditor is obstructed by the heir himself, or by the creditors of the heir, in those proceedings which he is carrying on in compliance with the Act; or where there has been a surcease of justice, (an evil not belonging to these times, though not unfrequent in the confusions of our early history), the benefit of the preference is not lost.[3] The conclusion to which this would seem to lead is, that, unless the creditor were chargeable with MORA, as in other cases of competition, he should not be held to forfeit the benefit of his preference. And mora never is chargeable in diligence, where the creditor has used all due exertion which circumstances or judicial rules permit. On this principle a decision of the Court of Session seems questionable, where it was held absolutely, as reported by Lord Stair, that '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:' And again, as reported

'creditors ought to do exact and complete diligence 'against his estate within three years after his death, 'unless they could make it appear that their diligence 'was retarded without any fault of theirs, by opposi-'tion from the heir or other creditors, or the surcease 'of justice, or the like.' This doctrine was cited with approbation in TAYLOR against Lord BRACO, 26th November 1747; Kilk. 150. But the doctrine has not always been received without objection. See M'LACHLAN's case, below, p. 734. Note [1].

[1] See above, Of Adjudication, p. 725.

[2] In such cases, it may be possible, in the inferior jurisdictions, or in Admiralty, if the debts be mercantile, to get decree of constitution more quickly than in the Court of Session. Even the adjudication itself may be led contra hæreditatem jacentem, before the Sheriff. MARSHALL's Creditors against PENCAITLAND, 23d December 1709; Forb. 373. GRAHAM's Creditors against HYSLOP, 6th February 1753; Elchies, *Adjud.* No. 45. But not only is that not a method likely to be attainable in such competitions, since it is necessary to adjudications contra hæreditatem jacentem that the heir should have renounced the succession; but it is also to be observed, that an entry cannot be forced on that sort of adjudication. MURDOCH KING, December 1742; Kilk. 9.

It also would appear that such adjudication, if the first, could not now proceed before the Sheriff; since the Act of Parliament requires intimation in the first adjudication, and there is no intimation possible before the Sheriff.

[3] See Lord BALLENDEN's case, supra, p. 730. Note [7].

by Lord Fountainhall, that 'the Act is not to be understood of anni *utiles* but *continui*.'[1] In a case fit for raising the question, the Court would probably hold themselves bound to consider whether the impediment were not such as to entitle the diligence of the creditor to the character of due diligence used within the three years.

Entry cum beneficio inventarii is not to be held as diligence for the benefit of the ancestor's creditors.[2]

5. The chief difficulty arises from the laws intended to abridge the expensive proceedings of creditors adjudging, and to introduce an economical and effectual system of sale and distribution in cases of insolvency. It will be recollected, that in 1661, when the ancestor's creditors were required to do diligence within three years, in order to preserve their preference over the creditors of the heir, there was not only no general process of judicial sale or sequestration for selling and dividing the estate among the creditors, but the law of pari passu preference was not yet introduced: And on the introduction of those several remedies to the existing evils of distracted and expensive proceedings by creditors, the rules of preference or ranking (which by this time were established) were expressly saved. It is of importance, then, to observe how the policy of those several laws may best be preserved in the administration of justice under them.

First, In regard to the PARI PASSU PREFERENCE, the ancestor's estate being open to both classes of creditors, the creditors of the ancestor being entitled to charge the heir to enter and make up a title, and so to adjudge on an actual or presumed compliance, and those of the heir to charge him to enter and take up the succession for their benefit; both sets of creditors may be proceeding at the same time. It never has been doubted, that the laws of pari passu preference were intended to apply to such a case, and to prevent the necessity of more than one creditor proceeding to complete his adjudication, as first effectual, for the benefit of all the rest. But several cases require to be distinguished. And,—

First Effectual by Creditor of Ancestor.

(1.) The first effectual adjudication by a creditor of the ancestor, will entitle all the other creditors of the ancestor to the benefit of the pari passu preference, without the necessity of their severally completing their adjudications: But it will not follow, that the first effectual being thus completed within the three years, it will have the effect of bringing under the privilege of the Act 1661 those whose adjudications, though led within year and day of it, are not led till after the three years have expired. On the contrary, in such a case, the ancestor's creditor who had adjudged within the three years would enjoy his preference; the other creditors of the ancestor adjudging within year and day, but beyond the three years, would have nothing but the pari passu preference along with the other adjudgers of both classes adjudging within year and day.[3]

(2). If, on the other hand, the first effectual adjudication be led by a creditor of the heir, it seems to be sufficient compliance with the Act 1661 that a creditor of the ancestor shall have adjudged within year and day, so as to take the benefit of the completion of the first effectual, provided his adjudication be also within the three years. If the heir have

[1] PATERSON against BRUCE, 19th December 1678; 2. Starkie, 659. Fount. (3126-7). In this case, the impediment pleaded by the ancestor's creditor, was merely that his debt was *future*. But that was truly no impediment, since he might have done diligence in security. The doubt, therefore, which seems to arise on the construction of the Act, extends not to the decision of that particular case, but to the gratuitous decision of a point not necessarily included, that not only *this* but *no* impediment can continue the three years.

[2] See above, p. 663. Note [1].

[3] The practical solution of this difficulty is more proper for consideration afterwards. It will proceed thus. All the adjudgers, including the first effectual, will be ranked in the first place pari passu; and by a subsequent operation of arithmetic, there will be deducted rateably from each adjudger after the first effectual, what is required to make up to him full payment of his debt in virtue of his preference under the Act 1661.

completed his titles by infeftment in his ancestor's estate, the creditors of both classes adjudge from him; and the first adjudication, whether by a creditor of the one class or of the other, will be the first effectual to both. If, instead of having completed his titles, the heir is still in apparency, the creditors of the ancestor, as well as his own, must proceed to adjudge by means of a charge to enter heir; and if the heir enter, the adjudication must, of course, proceed as in the case already mentioned: while, if he should neither enter nor renounce, but allow the statutory presumption to take place, the adjudication proceeding on the charge will serve as the first effectual to both classes of creditors. That adjudication by a creditor of the heir must be available to the creditors of the ancestor, so as to make it unnecessary for them to complete their diligence separately, cannot be doubted, where the three years have expired, and all distinction between the creditors of the ancestor and those of the heir has vanished; and there seems to be no ground for admitting any other rule where the three years have not expired.

Secondly, In the case of a JUDICIAL SALE or SEQUESTRATION, it should seem, on the same principles, that the requisites of the Act 1661 are sufficiently complied with by the creditors of the ancestor, provided they claim their preference within the three years, the ancestor's estate being duly carried by the sequestration, or included in the sale.

(1). A JUDICIAL SALE, whether at the instance of a creditor, or at the instance of an apparent heir, is declared to be equivalent to an adjudication as of the date of the first deliverance, for all the creditors who shall afterwards be included in the decree of division, and no adjudications are allowed to proceed during the dependence of a judicial sale.[1] When such action of judicial sale has been commenced, whether by the apparent heir, or by a creditor of the ancestor, or by a creditor of the heir himself charging him to enter; it is competent for every other creditor, both of the ancestor and of the heir, to appear and claim a share in the division; and every creditor of either class is forbid to adjudge. It cannot be doubted that it is quite sufficient to preserve the preference to a creditor of the ancestor, if he should enter his claim in the ranking and sale within the three years; and that his diligence will, in the sense of the Act of Parliament, be held complete. Judicial Sale.

(2.) Much more ought this to be held where a SEQUESTRATION under the 54. Geo. III. has been awarded, and the estate of the ancestor has been adjudged or conveyed to the trustee. This is the most complete of all diligence, and supersedes and bars every other;[2] whether awarded on the application of the heir himself; or of a creditor of the ancestor; or of a creditor of the heir. It should be observed, however, that it is necessary, in order to give effect to the sequestration as an adjudication of the ancestor's estate, that, in confirming the trustee, that estate should be specially adjudged or conveyed in terms of the 29th and 30th sections of the Act; and that such adjudication has, by the 42d section, preference over every other led or made effectual subsequent to the date of the first deliverance. The creditors of the ancestor entering their claims in such a sequestration within the three years, as preferable creditors, have their preference completely preserved to them. The doctrine now laid down was at one time held doubtful,[3] but may now be

[1] 54. Geo. III. c. 137. § 10.

[2] See 54. Geo. III. c. 137. § 42.

[3] BENNET, Trustee for CRAWFORD'S Creditors, against His FATHER'S Creditors adjudging, 25th May 1820. On 1st February 1816, the estate of James Crawford was sequestrated. He was feudally infeft as heir of his father, John Crawford, in an heritable debt due by Blair of Blair. The trustee got from the bankrupt, on the 30th March, a general disposition, which he completed by adjudication in implement and charge against the superior, Blair. The father, John Crawford, was owing large debts, and died 3d August 1813. Subsequently to the sequestration and title in the person of the trustee, those creditors of the ancestor raised constitutions, and adjudged within three years of the ancestor's death. The trustee in the sequestration of the son's estate opposed these adjudications as incompetent subsequent to sequestration. Decreet of adjudication was pronounced, reserving all objections contra

considered as settled;[1] and the creditors of the ancestor, provided the trustee has been confirmed, and provided they shall lodge their claims within the three years, are entitled to the full privilege of the Act 1661, c. 24. Many difficulties had suggested themselves as the inevitable consequence of the principle adopted in the first of the cases quoted below; namely, that the preference given by the statute 1661, c. 24. rests on the ground of a separatio of the estates of the ancestor and of the heir as in the Roman Law, instead of holding it to be a mere privilege. But the principle which ruled the last of these cases went to remove those difficulties;—to prevent the possibility of the ancestor's creditors, or any part of them, starting aside in the course of a sequestration to adjudge the ancestor's estate as separate; and to secure the fair course of administration, and the operation of the true spirit of those laws, which have been so wisely made for restraining the diligence of individual creditors, and introducing pari passu preference.

2. *INEFFICACY OF THE HEIR'S VOLUNTARY CONVEYANCE TO DEFEAT THE CREDITORS OF THE ANCESTOR.*

The second part of the Act is directed against the attempts of the heir to disappoint the creditors of the ancestor, by granting voluntary dispositions to their prejudice.

In commenting on this part of the Act, it is proper to recollect,—1. That the heir has the privilege of deliberating for a year whether he will enter as heir, during which time no adjudication is available against him, or against the estate: 2. That the heir may, notwithstanding, enter to the estate, and complete his right by infeftment, immediately after his predecessor's death: And, 3. That the creditors of the ancestor, at common law, had no remedy but by inhibition to prevent the heir from conveying away the estate to their prejudice. It seems to have occurred to the Legislature, that a remedy was requisite for the protection of the creditors of the ancestor, who might be ignorant of their debtor's death, and could not, therefore, use inhibition; but that, in justice to those who might deal with the heir, entered or not entered, this implied inhibition should not continue longer than the prohibition to adjudge should, as a privilege to the heir, endure. It was on this view of the matter that the second provision of the Act 1661, c. 24. seems to have been framed, relative to voluntary deeds by the heir.

The preamble of this part of the Act has in contemplation, as the evil to be remedied, those conveyances frequently made by heirs in prejudice of the ancestor's creditors, before the ancestor's death is known; whether made during apparency, or after the title as heir is completed by sasine. And the enacting words are, 'that no right or disposition made

executionem; and the adjudications were completed on 2d August 1816. The debtor in the heritable bond raised an action of multiplepoinding. Lord Alloway preferred the creditors of the father adjudging, and the Court adhered, holding the effect of the Act 1661 to be to separate the two estates, and reserve the ancestor's for the diligence of his own creditors.

[1] M'LACHLAN against BENNET, 15th June 1826; Fac. Coll. 4. Shaw and Dunlop, 712. This question arose in the same competition of John and James Crawford's creditors. Besides the subjects in which adjudication had, as in the above case, been completed within the three years, there were other estates of John Crawford to which no title had been made up. They were included in the sequestration of James Crawford, and the trustee was confirmed with a general adjudication only. Creditors of the ancestor, John, proceeded to adjudge; but the summons having been taken out to see by the trustee, the diligence was not completed till after the expiration of the three years: but claims by the ancestor's creditors were lodged in the sequestration within the three years, and a preference was demanded under the Act 1661. The Court held, that the Bankrupt Acts have the effect of making the trustee in the sequestration the sole and exclusive organ of diligence for completely attaching the estate for both sets of creditors, and with full reservation to each of all their privileges; and that, in this case, the general adjudication in his favour was sufficient in the competition to bestow on all the creditors of the ancestor, who had lodged their claims within the three years, the privilege of the Act 1661. An appeal has been entered.

'by the said apparent heir, in so far as may prejudice his predecessor's creditors, shall be 'valid, unless it be made and granted a full year after the defunct's death.'

1. The prohibition in this Act extends to all conveyances or securities whatever; as, a sale for a full price, or an heritable bond for money lent to the heir; and not merely to such deeds as are granted in favour of the creditors of the heir. The title of the Act, 'Concerning apparent heirs, their payment of their predecessor's, and their own debts,' seems, indeed, to indicate an intention only to exclude voluntary deeds in favour of the heir's creditors; and with this seems to accord that part of the preamble which declares the great principle of the Act to be a consideration, 'how just it is that every man's own 'estate should be first liable to his own debt before the debts contracted by the apparent 'heir.' Our authorities also, in speaking of this Act, say, that the only view of the Legislature was to favour the creditors of the ancestor before those of the heir.[1] But while this remedy would be very imperfect in preserving to the creditors of the ancestor the estate on which their credit may have rested, if it did not act as a prohibition of all conveyances whatever; since an heir, willing to disappoint his predecessor's creditors, would only need to sell or borrow money on the land, and distribute the price or loan among his creditors; the enacting words are perfectly general, and apply, without qualification, to such a case. Accordingly, not only is there a recorded opinion of the Court, delivered recently after the Act, very strongly inferring that a disposition to a stranger, for onerous cause, is objectionable within the year, since the Court there held that a conveyance to the heir's creditors is bad, though beyond the year:[2] But the question has been frequently determined, and sales made by heirs reduced at the instance of the creditors of the ancestor.[3] The effect of this prohibition in the statute is similar to that of the diligence of inhibition. The conveyance is not void; but only not valid 'in so far as may prejudge the predeces- 'sor's creditors.' Therefore, 1. If the price were a fair and full price, and unpaid, there seems to be no doubt that the sale would stand, the ancestor's creditors having right to their payment out of the price. 2. If the price were inadequate, or, being adequate, if it had been paid over to the heir, the ancestor's creditors would be entitled to insist either for a new sale of the lands, or that, to the extent of their debts, the purchaser shall make up the price, or pay a second time.

2. To give to the creditors of the ancestor, where there is no competition with those of the heir, a right to avail themselves of the objection to the deed, it is not necessary that

[1] 3. Ersk. 8. § 102.

[2] Harcus, No. 144. p. 31. Note. The defunct's creditors doing diligence within three years are preferable, even where the heir dispones after the year; otherwise the heir's creditors would have more advantage by a voluntary disposition than they could have by legal diligence, which were absurd.

[3] TAYLOR against Lord BRACO, 26th November 1747; Kames' Rem. Dec. 142. Kilk. 150. (M. 3128. 3133). Geddes of Essel died in August 1697. His son and heir, within a year from the father's death, sold the estate to Duff of Dipple, and in his disposition gave a procuratory for making up titles and procuring him infeft, which was afterwards done, and the purchaser's title completed. Taylor was creditor of the father and son. The debt consisted of a loan to the son, and was constituted by a bond of borrowed money, in which the father had joined; and this debt having lain over for more than forty years, (prescription having been saved by minorities), an action was brought by Taylor's representatives against Lord Braco, as Duff of Dipple's representative, for reduction of the right to the lands, on the Act 1661, c. 24. The defence was grounded on the want of diligence within the three years: But the Court held, that though this would be a good defence against creditors if the disposition were after the year, it is no defence at all where the disposition is granted within the year, the creditors being entitled to plead the statutory nullity though they have done no diligence; and they found the reason of reduction relevant and proven.

MAGISTRATES of AYR against M'ADAM, 14th June 1780; Fac. Coll. 206. Here Campbell, proprietor of a land estate, died indebted to the town of Ayr. His son made up titles and sold the lands within the year; and more than three years afterwards the Magistrates of Ayr brought a reduction against M'Adam, the purchaser, for setting aside the sale on the statute. The Lords reduced the sale.

they shall have done diligence within the three years. The inhibition of the Act has been held available against the purchaser, *first*, Where the creditors have done no diligence by adjudication or otherwise; and, *secondly*, Where the challenge has not been made till after the expiration of the three years.[1] But,

3. Where there is a competition between the creditors of the ancestor and those of the heir, and the ancestor's creditors have not done diligence within the three years, it may be questioned whether the ancestor's creditors can reduce a conveyance granted within the year, to the effect of having their debts paid preferably out of the proceeds. Mr Erskine seems to think that the prohibition to alienate was introduced purposely into the latter part of the Act, that it might remain unaffected by the limitation which confines the privilege by diligence within three years, and serve as a general inhibition in favour of the ancestor's creditors, to which they should in all circumstances be entitled to trust. In that view, a disposition to a purchaser not being available against the creditors of the ancestor, they would be entitled to demand payment if the price were adequate, or, if not, reduction of the sale, as an inhibitor would, without being under the necessity of communicating the benefit to the creditors of the heir, who have no right to avail themselves of the statutory inhibition: But, on the other hand, if the price were adequate and still unpaid, the creditors of the heir might attach it, and so gain a preference, unless within the three years the ancestor's creditors should do diligence in terms of the Act.

4. A conveyance by the heir in favour of the creditors of the ancestor, has been held not objectionable under the Act.[2] In so far as the heir thus interferes to aid *all* the creditors of the ancestor, no objection can be stated to his proceeding. But it seems very doubtful whether Erskine has not too indiscriminately extended the doctrine of the Court, as laid down by Harcus, when he says that a conveyance to *a creditor* of the ancestor is unexceptionable.[3] If such a conveyance to a single creditor were challenged by the body of creditors of the ancestor, the Act would unquestionably entitle the rest to challenge the deed: If, on the other hand, there were no other creditor of the ancestor to object, the conveyance would be effectual.

5. A conveyance by the heir to one of his own creditors is not challengeable by the rest of his creditors.[4]

6. A disposition to one of the heir's own creditors, executed beyond the year, is ineffectual to defeat the diligence of the ancestor's creditors within three years of the death of the ancestor. This is laid down by Harcus as held by the Court soon after the date of the Act.[5] It is an extension of the Act for which there is no warrant in the express words of the law: But it seems to be supported by its spirit and intendment; since the heir would otherwise have it in his power, by a private deed, to destroy that preference which the Legislature had been at so much pains to establish. The doctrine is, accordingly, approved by Erskine, and all our other authors.[6]

[1] See Castlehill's Practics, No. 81. title *Alienation*. This case is founded on by Harcarse as law in the following passage:—'A disposition within the year would 'be postponed to the defunct's creditors, though they 'do no diligence within the three years; such disposi-'tions being prohibited, in so far as they prejudge the 'defunct's creditors, where no diligence or time is 'limited or required.' No. 144. Note, p. 31.

See also the case of TAYLOR against Lord BRACO, supra, p. 735. Note [3]. as to which Lord Elchies (8vo. MS. 26th November 1747) says,—'The question was, 'Whether a disposition by an heir, or apparent heir, 'intra annum, is, upon 1661, c. 24. void in competi-'tion with a creditor of the defunct's, though he has not 'done diligence within the three years. The Lords 'unanimously found the disposition void and null, 'though no diligence was done within the three years, 'agreeable to a decision in Harcus, subjoined to Decis. '144. (see above, p. 735. Note [2]). Dec. 9. adhered, and 'refused a reclaiming bill as to this point.'

[2] Harcus, p. 219.

[3] 3. Ersk. 8. § 102.

[4] Lord BALLENDEN against MURRAY, March 1685; Harcus, No. 773.

[5] See above.

[6] 3. Ersk. 8. § 102.

SECTION VI.

GENERAL REVIEW OF THE OBJECTIONS THAT MAY BE TAKEN AGAINST ADJUDICATION FOR DEBT.

Objections to Adjudications distinguished as in a Ranking, or against the Debtor.

OBJECTIONS may be stated to an adjudication, either by the debtor himself for the purpose of preventing the adjudication from being converted into an irredeemable right of property; or by creditors, the debtor being bankrupt: But, in a competition of creditors, objections which have not a stronger effect than this, are comparatively of little value, since the diligence will still be sufficient to maintain the adjudger in his place among the competitors.[1]

Distinctions.

The objections which are available to creditors are,—1. Those which destroy and annul the whole adjudication; or, 2. Those which restrict the extent of the claim that might otherwise be made under cover of the heritable security.

In distinguishing between these two classes of objections, it may not be incorrect perhaps to say, that wherever the defect is in mere form and on a point not essential to the efficacy of the diligence; or where there is a trifling error or innocent omission respecting the amount of the debt; or an error in the calculation and accumulation of the sum; the objection has only a restrictive effect, converting the diligence into a security: While every objection to the debt upon which the diligence stands,—every essential defect in the evidence of its existence,—every exorbitant and wilful overcharge,—every defect in the essential parts of the diligence, as in the citation, destroys the adjudication, and either entirely annuls it, or restricts the extent of the claim.

§ 1. OF THE NATURE AND DESCRIPTION OF AN ARTICULATE ADJUDICATION.

Of Articulate Adjudications.

Where more than one debt is included in an adjudication, care is taken to discriminate clearly between the several debts, so that instead of one complex diligence for a sum composed of the amount of the several debts, it shall present several separate adjudications and distinct decrees, each complete in itself, and capable of standing alone, whatever exceptions may be competent against the others which are combined with it. The articulate adjudication is thus strictly a congeries of single adjudications carried on as one action to avoid expense. The writers of systems, who study the greatest possible simplicity, in order to reach the principle upon which the institution they mean to illustrate proceeds, and who have their minds so frequently abstracted altogether from the difficulties and perplexities of practice, have considered adjudications in the simple shape of diligence for a single debt; while, in practice, the compound form of the diligence is well known and established. This omission has sometimes led to doubts, whether there really be such a distinction in adjudications: But it is now fully established.[2]

Where several Creditors have conjoined.

1. The most distinct example of articulate adjudication is that in which several creditors conjoin their adjudications under the legislative provisions already explained.[3] In such conjoined decrees of adjudication, the debtors are quite separate and independent; the

[1] This is well illustrated by the case of SINCLAIR and DOULL against Earl of CAITHNESS and INNES, 8th December 1781; 7. Fac. Coll. 21.; where an adjudication, reduced to a security on account of an objection, was found still the first effectual in a competition, regulating the preference of all the rest.

[2] LANDALES against CARMICHAEL, and CAMELFORD's Trustees against MAXWELL, below, p. 738. Note [3].

[3] See above, p. 620.

summonses are distinct; and the decree is made specifically applicable to so many different articles, as if each were entirely independent of the rest.

Where one adjudges as Trustee for others.

2. Another example of articulate adjudication, is that in which a person adjudges as trustee for several creditors, and perhaps also for himself, and distinctly details the respective debts in the summons, and has them separately accumulated in the decree.

Where one adjudges for several Debts.

3. Where the adjudication proceeds at the instance of a single individual, for several debts of his own, standing upon different grounds, and these are distinctly detailed and articulately decerned for, the parts of the adjudication are as capable of separation as where there are several creditors concerned.

There must be a separate Accumulation.

In the doctrine relative to articulate adjudication these points seem to be fixed:—1. In order to make an effectual articulate adjudication in the person of one who is the creditor in all the debts, it is necessary that the debts should be accumulated separately; and, accordingly, the Court found an adjudication, including several debts not so accumulated, null as to the whole, in consequence of an objection applicable only to one of them; the creditor having illegally adjudged for a fifth part more of the sum contained in the bill by which that debt was constituted.[1] 2. A different rule prevails where the adjudger acts only as trustee for others: The adjudication is held as articulate for each debt so adjudged for.[2] 3. The conclusions of the libel regularly ought to bear the articulate nature of the decree which is intended to follow; and when the Judge in such case 'decerns in terms 'of the libel,' the extractor has full authority to extract the decree of adjudication articulately. But it does not seem competent, under any other form of conclusion, to extract an articulate decree. 4. Sometimes the conclusion is alternative,—'as the said 'debts shall be jointly or separately accumulated:' Under such a summons, a decree of adjudication, either cumulative or articulate, is competent; but the Judge must pronounce decree in an articulate form in order to give it effect as such; the extractor cannot make out the decree in an articulate form, where the interlocutor of the Judge merely 'decerns 'in terms of the libel.'[3]

[1] Creditors of CATRINE against BAIRD of Cowdan, 1st December 1738; Kilk. p. 3. It was much urged by some of the Lords, 'that where an adjudication 'proceeded upon different debts, notwithstanding its 'having been found null as to one debt, it ought to be 'sustained at least as a security for the other debts, 'with respect to which there lay no objection to the 'diligence.'

[2] 'An adjudication, proceeding among other debts 'upon a bill which bore penalty and annualrent, was 'found null and void only quoad that bill, and sus-'tained as to the other debts, in respect the indorsa-'tion to the adjudger bore that it was indorsed, in 'trust, for behoof of the indorser.' Kilk. p. 2.

[3] LANDALES against CARMICHAEL, 25th November 1794; Fac. Coll. 299. (305.) Here, in the summons of adjudication, the conclusions were alternative: the Lord Ordinary decerned in terms of the libel; and the extractor extracted the decree articulately. On this adjudication, which was duly completed, the creditor entered into possession of a considerable estate for a small debt; and in absence obtained, on expiration of the term, a decree of expiry of the legal. In a reduction by the heir of the reverser, the adjudication was objected to as null, in consequence of a pluris petitio in one of the claims; and the question was, Whether the decree was legitimate by an articulate decree of adjudication, or to be restricted to a security for the sums truly due on an accounting? The Court held, 'that this is not an articulate adjudication, 'and proceeds on a pluris petitio, and can only be 'sustained as a security for the principal sums truly 'due, and interest thereon.'

Lord CAMELFORD'S Trustees against MAXWELL, 28th July 1789; Fac. Coll. (M. 309.) Here the several sums claimed arose out of one debt, and the conclusions of the sums were not articulately set forth. The Lord Ordinary 'adjudged, &c. in terms of the 'libel;' and the decree was, by the operation of the extractor, extracted articulately. In a competition the adjudication was objected to, on account of a pluris petitio in one of the sums of interest; and the question was, Whether the objection should affect that sum only, or reduce the adjudication as an accumulating diligence, and restrict it to a mere security for principal and interest of the whole debt? The Court found the adjudication not articulate; and the objection was applied to the whole.

§ 2. OBJECTIONS TO THE GROUNDS AND WARRANTS OF ADJUDICATION.

Objections to the ground of the Adjudication.

Documents of debt, bonds, bills, contracts, assignations, and decrees of constitution, &c. are called GROUNDS of the decree of adjudication: General and special charges, and other preliminary steps of proceeding, are called WARRANTS of the decree. Objections to adjudications may be considered, 1. As affecting the constitution of the debt; or, 2. As affecting the preliminary steps and warrants of the adjudication.

1. GROUNDS OF THE DECREE OF ADJUDICATION.—CONSTITUTION OF THE DEBT.

Although adjudication be in form an action, it is strictly and properly a diligence. It is an action of execution merely; in which the Court cannot try the amount of the debt, or admit it to proof. The debt must previously have been constituted, and its exact amount fixed, either by a legal written document or voucher; or by the judgment of a competent Court. And it must be precisely liquidated; not merely a rule or principle fixed by which it may be reckoned.

Liquid Document.

I. ADJUDICATION ON LIQUID DOCUMENT.—By a liquid document is to be understood a bond, or bill, or other obligation in writing.[1] It is not necessary that a bill should be protested or registered. The document is sufficient liquidation of the debt.[2] If it bear a clause of interest, or if interest be due *ex lege*, the adjudication may proceed for arrears of interest, without constitution.[3] Of course, every objection to the debt itself; want of authenticity of the voucher; want of a stamp, &c. are available against an adjudication. As to the stamp, (required only for the purposes of revenue), the want of it may, in most cases, be supplied in the course of an action of constitution, though, in the case of bills and policies of insurance, (supra, p. 320–1.) the stamp cannot afterwards be affixed. It seems very doubtful on principle, whether, in answer to an objection to an adjudication extracted, it be competent to have the stamp supplied. But this has been decided in favour of the adjudger in a ranking, where an adjudication was held to be validated by the proper stamp being affixed.[4]

Future and Contingent Debts must be unextinguished.

2. The debt adjudged for must be still a subsisting debt at the date of the adjudication. 1. If the debt was discharged or paid off at that time, the adjudication will be annulled, in whose hands soever it may now be. Nay, if the evidence produced be so imperfect as to lead to a presumption or suspicion that the debt may have been paid, the adjudication seems to be objectionable.[5] 2. But it is no sufficient objection that the debt is com-

[1] PORTEOUS against Sir J. NAESMITH, 4th February 1784; affirmed on appeal, 4th April 1785. The obligation of a tenant to pay rent, as constituted in a contract of lease, was here held a good ground of adjudication for arrears, without any previous decree of constitution.

Here the distinction was taken between arrears under a lease and rents on tacit relocation; which, as not established by written voucher, were held to require constitution by decree.

[2] FERGUSON against ROBERTSON, 20th February 1816; Fac. Coll. 99.

[3] This seems to have been taken for granted in PORTEOUS's case. See above, Note [1].

[4] LAMONT against LAMONT's Creditors, 4th December 1789; Fac. Coll. 174. (5494.) The Court, in a ranking, found the objection, that the document of the debt on which adjudication had proceeded was not stamped, capable of being supplied at any time. A remit was made to the Lord Ordinary to sist proceedings till the deed was stamped; and on its having been stamped accordingly, the objection to the adjudication was repelled.

In an election case it was held, that a title to vote, which at the time of enrolment was defective, sasine being taken on a disposition having a wrong stamp, was rendered unexceptionable by the subsequent affixing of the proper stamp. 16th February 1819.

[5] In HAY against FLEMING, (below, p. 741. Note [1].) the Judges seem to have held, (when the point was accidentally started), that a decree of registration is not sufficient to support an adjudication, unless accom-

pensated by another debt due to the adjudger; for compensation takes not effect ipso jure; nor does it operate as an extinction of a claim unless when pleaded.[1] It is sometimes difficult, however, to draw the line between a claim of compensation and the extinction of the debt.[2] 3. If prescription have run against the debt before the adjudication, it will be a fatal objection to the adjudication: A bond, for example, against which the negative prescription of forty years has run without interruption, will not sustain an adjudication led after that term had expired; although no objection has been stated to the passing of the decree of adjudication. In the same way, if the ground of debt on which the adjudication has proceeded be a bill on which the sexennial prescription has run, a good objection will lie to an adjudication led upon it; for the law declares such bill 'to be of no force to 'produce any diligence or action:' and although it might have been competent to prove the debt by the oath or writ of the debtor in an action of constitution, it will not be a sufficient answer to an objection against an adjudication, that the debtor is now ready to acknowledge the debt. Nor will it even be sufficient that the debtor has appeared in the action of adjudication, and judicially admitted the debt; for this is an essential part of the constitution of the debt, which must precede the adjudication. And although there are some objections which may be cured at any time, no objection can be included under this description, which goes to the essential evidence of the debt.

Debt Prescribed.

English Bond.

3. An adjudication may proceed on an English penal bond, without any previous decree of constitution;[3] but a penalty cannot be adjudged for besides the principal and interest.[4]

Wife's Bond.

4. An adjudication cannot proceed on a personal obligation by a wife; and although an heritable bond by a wife is a good security to affect her estate, an adjudication cannot be led on it; for that diligence, where it proceeds on an heritable bond, rests on the personal obligation, which is null when granted by a married woman.[5]

II. Decree of Constitution.—1. A decree of constitution is necessary as the ground of an adjudication in all cases where the debt is not liquid;[6] where there is no written document of the debt; where it is ambiguous, or dependent on a condition; or where the

panied by production also of the bill; and upon this ground, that the evidence of the debt being still unpaid is not complete; the want of the bill tending much to weaken the legal presumption of its subsistence.

On the same principle seems to rest the decision in the case of M'Guffock against Edgar, 25th February 1762, in which a bond, payable on requisition, was found no good ground of adjudication, as there was no evidence of requisition. Fac. Coll. 180. (131.)

[1] Grant against Grant, 22d June 1680; 1. Stair, 773. (100.) Wright against Earl of Annandale, January 1683; Harcus, *Comprizing*, 66.

[2] Creditors of Alison against Auchinlecks, 13th January 1759. It is not marked distinctly in the report, that the rents which the creditors said ought to have been allowed, were the rents of certain lands to the possession of which the adjudger had entered, on a lease, before the existence of the debt on which the adjudication was led. The adjudication was held to subsist only as a security for principal, annualrents, and necessary expenses, accumulated at the date of the adjudication.

[3] Ranking of York Building Company's Creditors, 21st January 1783; Fac. Coll. 134. (228.); and 31st January 1783; Fac. Coll. 135. (229.) The adjudication in these cases was held good, without any previous decree of constitution, for an accumulated sum, not exceeding the penal sum in the bond; and for the interest of such accumulated sum.

[4] Forbes and Attorney against York Building Company, 5th February 1800; Fac. Coll. 369. (M. *Adjud.* App. 23.)

[5] Robertson against Watson, 10th December 1772; Fac. Coll. 107. (5976.) 1. Hailes, 508. Lord Pitfour says,—'The maxim of law is, that an adjudi-'cation proceeds on this, that the debtor had become 'bound to pay, and had neglected to fulfil his personal 'obligation: There was no personal obligation on the 'wife; and therefore an adjudication cannot proceed 'against her lands.' The Court held, 'that adjudica-'tion cannot proceed on the personal obligation of the 'wife.'

[6] The Court has held a decree of constitution to be necessary, even in a ranking and sale. Scott Moncreiff against Innes, 15th June 1821; 1. Shaw and Ball. 73. This will deserve notice afterwards in speaking of ranking and sale. It will also require very grave consideration should the question occur again.

written document, though existing, does not appear; or where it has been lost.[1] A decree of registration will be a sufficient constitution; but as it affords no evidence of the debt being still subsisting, unless accompanied by the bill or other document of debt, it may be necessary, in answer to any objection of this sort, to produce the document, or to raise an action of constitution.[2] The summons of adjudication is not issued at the signet, without a warrant from the Lord Ordinary on the Bills; and this warrant is applied for by a short petition or bill, along with which must be produced the written voucher of the debt, or the extracted decree by which it is constituted. When the adjudication is called in Court, the grounds of debt must be produced along with it, to give an opportunity to the debtor of seeing and objecting to them; and where the decree has passed, and is produced in a ranking, those objections may still be stated as nullities, which formerly might have been pleaded in bar of the action.

Jurisdiction.

2. The action of constitution must be regular and correct; and, 1. The Court must be competent by which the decree is pronounced.[3] And although an action may be unexceptionable if the jurisdiction be prorogated, this must be done by one entitled so to act.[4] 2. Where no citation was given to the tutors and curators of a minor, the decree of constitution was held inept, and the adjudication set aside entirely.[5]

Decree for Random Sum ineffectual.

3. Where the creditor is uncertain of the amount of his claim, (*e. g.* where it depends upon a settlement of accounts not yet balanced), it will not validate his adjudication that he has raised an action of constitution, and obtained decree for a random sum, reserving all objections: Or, at least, he must, in competition, support the adjudication to the full extent of the sum adjudged for. In such a case there seem to be two remedies:—One is to adjudge articulately for such sum as certainly is due, with a random conclusion for the uncertain sum; which will be available, if it can be justified to the full amount. Another is to adjudge in security, and to obtain decree, reserving objections contra executionem.[6]

Adjudication in Security.

4. Where the debt, though proved by written voucher or decree, is future or contingent; or where the sum is not ascertained, the proper proceeding is to adjudge in security, the legal of which adjudication never expires.[7] An apprizing in such a case would unquestionably have been illegal under the old law;[8] and the lawfulness of adjudications in security was once doubted on this analogy of apprizings: But, 1*st*, An adjudication by a cautioner, in security of his relief, was found to have the same effect with an infeftment

[1] HAY'S Creditors against FLEMING, 17th June 1794; Fac. Coll. 282. Bell's Cases, 49. (280). Here a bill had been sent abroad to procure payment, and there was produced to ground the adjudication only a copy of the bill, with a protest on it, taken in London, but without any decree of constitution. Decree was obtained in a conjoined adjudication, reserving objections contra executionem. The bill was afterwards produced in the ranking. The Court sustained an objection to the claim. It was said on the Bench, that an adjudication 'can proceed only on a decree of constitution or a liquid document. The copy and protest shew that the bill once existed; but not that it is 'resting owing.'

[2] See Note [5]. p. 739. supra.

[3] RANKIN against RANKIN, 31st May 1821; 1. Shaw and Ball. 43. A decree in absence, proceeding on a decree of constitution pronounced by the Commissary of Glasgow for a debt of L.250, was held null and void. See cases of PATERSON against Ross, 1st July 1696; 1. Fount. 721. (M. 7579.) KEIR against CALDERWOOD, 14th February 1706; Forbes, 100. (7556).

[4] See the case in the preceding note, a pupil without tutor, or a curator bonis for a pupil, not held able to prorogate.

[5] M'TURK and Curator against MARSHALL, 7th February 1815; Fac. Coll. 212.

[6] M'NIEL'S Creditors against SADLER, 7th March 1794; Fac. Coll. 250. (122).

[7] STRACHAN against STRACHANS, 22d January 1752; Elchies, *voce* Adjudication. Sir T. WALLACE DUNLOP'S Creditors against BROWN and COLLINSON, 14th November 1781; 7. Fac. Coll. 1. M'KINNEL'S Creditors against GOLDIE, 9th June 1797.

[8] Earl of KINGHORN, 19th and 20th July 1631; Durie and Spottiswoode.

in relief.[1] *2d*, An adjudication on a bond, payable on the granter's death, was also held competent.[2] And, *3d*, An adjudication in security, 'for a daughter's bond of provision, 'was found entitled to proceed and compete with the other creditors, though the term of 'payment was not till her age of eighteen years,' and posterior to the competition.[3] The Court generally sustains an adjudication of this kind as a security, where there is no objection of pluris petitio; giving it the same force as if originally it had been restricted to that species of diligence.[4]

Debt not vested in Adjudger.

5. Where the debt is due, but is not at the time of adjudging vested in the adjudger, a distinction appears to be made between the case of a person succeeding to the debt, and whose titles are not completed till after the adjudication, and that of one who acquires right to the debt by assignation. In the latter of these cases, the completion of the right is not held to validate the preceding diligence.[5] Nay, it has been held not enough that the adjudger was at the time in treaty for the debt.[6] But, in the former case, where the right of the adjudger comes to him by succession, a more indulgent rule is followed.[7]

Defects in the Adjudger's Right to the Debt.

Decree reserving Objection.

6. Where the creditor, though his debt be constituted by written voucher, has not that voucher at hand to produce as the ground of his adjudication, and has, in order to supply the defect, raised an action for constituting his debt, decree will be allowed to pass, reserving all objections to the debt when produced in the ranking. The production of the evidence in the ranking will, in consequence of this reservation, be admitted; but the adjudication will stand only if the precise amount of the debt has been decerned and adjudged for.[8]

7. Where the decree of constitution has been passed, reserving objections, the adjudger must, in supplying the defects in competition, support his action of constitution as libelled.[9]

Title to pursue.

8. If the person adjudging be not himself the original creditor, he must connect himself by a proper title. 1. If the creditor be dead, the adjudger must be duly confirmed executor.[10] Partial confirmation is not enough; although it may be sufficient to make it safe for the debtor to pay the debt. 2. It is a good objection to an adjudication, that the adjudger has right only by a testament; and that the subject or claim is not testable. But

[1] BURNET, November 1685; Pres. Falc. p. 72.

[2] BLAIR, 12th July 1771; Forbes, 523.

[3] Mrs MARGARET LYON against the Creditors of EASTEROGLE, 24th January 1724. See also Creditors of Sir T. WALLACE DUNLOP, 14th November 1781.

[4] Sir PATRICK HEPBURN against BRUCE, 2d January 1684; 1. Fount. 256.

[5] KENNEDY, 15th November 1666; Dirl. No. 47. Creditors of FORBES of Brux, 12th June 1724. Ranking of Creditors of HOME of Eccles, 11th February 1703.

[6] Apparent Heir of PORTEOUS against Sir JAMES NAESMITH, 4th February 1784; affirmed in the House of Lords, 4th April 1785.

[7] —— against ——, 19th February 1611; Had. See also particularly GUN against SINCLAIR, 30th July 1678; Fount. as quoted in the Dictionary, vol. ii. p. 303.

[8] This is the course which ought to have been followed in HAY's case, supra, p. 741. Note [1].

[9] Creditors of MAXWELL against BROWN, 22d July 1737. A decree of constitution was pronounced, reserving objections, in order to admit the creditor within year and day, but without any proof of passive titles. The adjudication being objected to, because the passive titles were not proved, and the creditor producing a general charge prior to the decree, the Lords would not sustain that general charge as a passive title, because it was not libelled in the process of constitution: But they allowed the creditor to support his decree, by proving the other passive titles, though the defender in that decree is now dead, (8th June 1737); and the creditor having passed from any farther proof of the passive titles, the Lords reduced the adjudication entirely.

[10] PARK's Creditors against MAXWELL, 28th June 1785; Fac. Coll. 344. (14,382). Here an adjudication was objected to in competition led by a general disponee of the original creditor unconfirmed. The Court reduced the adjudication.

ARBUTHNOT against COCKBURN, 27th February 1789; Fac. Coll. 169. (M. 14,383).

See BLACK against SHAND's Creditors, 16th January 1823; 2. Shaw and Dunlop, 118.

to such an objection it is a sufficient answer, that the conveying words are strong enough to assign.[1]

2. WARRANTS OF DECREE OF ADJUDICATION.—PRELIMINARY PROCEEDINGS.

Many objections are incident to the various steps preliminary to adjudication.[2]

Defects in Charge.

1. The special charge affords the only means by which, where the debtor succeeds to property without having made up titles, the adjudger connects his debtor with the land to be adjudged. It must therefore charge the debtor to enter to the person last infeft, and in that particular character in which the person charged is entitled to enter; otherwise it will not avail the creditor. Thus, a charge to enter heir to a grandfather, when the fee was truly vested in the father by the last infeftment, is null.[3] While the creditor is not perfectly acquainted with the state of the titles, the charge ought to be kept general in its terms, to avoid objections on account of a mistake in the character of heir.

2. Where the debtor is a minor, it is a good objection that his tutors and curators were not charged on the special charge.[4]

3. It is also a good objection, that the special charge was blank in the name of the lands.[5]

4. If no special charge has been given, it cannot afterwards be supplied.[6]

5. The immediate warrant of an adjudication is a bill presented to the Lord Ordinary on the Bills, and which lies deposited in the signet office. Errors or defects in this warrant will be fatal to the adjudication; as misnomers of the debtor, errors or defects in narrating the debt, &c.

Between GROUNDS and WARRANTS there is this distinction, that it is not necessary to produce the WARRANTS of an adjudication after the expiration of twenty years from the date of the decree of adjudication:[7] The GROUNDS of the adjudication, that is to say, the decree of constitution, or bill, bond, or other document of debt, must be produced, if called for, any time within the years of the long prescription.

[1] LAMONT against LAMONT'S Creditors, 4th December 1789; 8. Fac. Coll. 174. (10,230).

[2] Supra, p. 701. et seq. 708. et seq.

[3] M'NIEL against BUCHANAN, 7th February 1770; Fac. Coll. 41. 331.; 1. Hailes 331.; where a person who lived a short time was not known to have been infeft, and the charge should have been to enter as heir to her.
ROBERTSON against Creditors of ROBERTSON, 31st January 1805.

[4] In the above case of MAXWELL against BROWN, 8th June 1737; Elchies, *voce* Adjudication; this objection was sustained after the elapse of thirty years. The Court, however, did not annul the adjudication, but only restricted it to a security.

[5] HUNTER against HUNTERS, 20th July 1742; Elchies, *Adjudication*, No. 34. Notes, p. 14. This was sustained as a good defence against declarator of expiry of the legal, after possession for twenty years.
This also was sustained to annul an adjudication in competition. Creditors of Sir G. HAMILTON against BOYS, 5th June 1752; Elchies, voce *Adjudication*, No. 42. Notes, p. 15.

[6] CUNNINGHAM against REID, 30th June 1789.

[7] IRVINE of Drum against Earl of ABERDEEN, 28th February 1771; Fac. Coll. 247. Here letters of general and special charge, being warrants, were found not necessary to be produced after twenty years.
Mr Tait adds, 'Adhered to, 24th July 1771, in 'respect that general and special charges are not 'parts of the pursuer's title, but produced as evidence 'of the passive title against the defender; and also in 'respect of the former decisions of the Court, and 'acquiescence of the nation therein.' Tait's Cases, 5. Brown's Sup. 465.

§ 3. OBJECTIONS TO THE ADJUDICATION.

Libel of Adjudication.

1. LIBEL OF ADJUDICATION.—1. The libel must bear the alternative of a general and special adjudication,[1] unless it be an adjudication in security. An overcharge, or pluris petitio, in the libel, furnishes no good ground of objection, provided the error has been corrected in the course of the proceedings, and the sum is correctly stated in the decree.

2. Compensation or retention will avail the debtor against adjudication, where instantly verified; and will entitle the debtor to oppose even the motion for intimation in a first adjudication.[3] But if no objection is stated in the course of the proceedings, the objection will avail, not by injuring the adjudication as incorrectly led, but by restraining its operation.

3. Where the creditor has adjudged for payment, in a case where he ought to have adjudged only in security, his adjudication will not be available. Thus, if the debt be illiquid, or future, or contingent, he cannot adjudge for payment.[4]

4. If, however, the constitution have been laid for a sum, for which, though it cannot be instantly proved, the creditor takes decree, reserving all objection contra executionem, the adjudication will be good, provided in the ranking the debt can be supported to that extent.[5]

Trust Property.

5. No lands can be adjudged which are not the property of the debtor: but his property may stand in so peculiar a situation as to suggest difficulties respecting the form of adjudging. Where, for example, the debtor has conveyed his property in trust for certain uses and purposes, it may be doubted whether the adjudication should proceed against the debtor, against the trustee, or against both. In one case upon the election statutes the opinion of the Court seemed to be, that the truster was utterly divested of his estate.[6] But this error was corrected in another election case.[7] And in a ranking it was decided, that the radical right of a trust-estate is in the truster, and may be affected by adjudication against him, or against his heir, as if the trust never had been granted.[8]

[1] Lord Elchies reports the following case, respecting special adjudication:—

'Strichan reported a question of adjudication, whether it was a good answer to the offer of a progress, that there were inhibitions against the debtor, though those inhibitions were after the pursuer's debt. The President, Royston, and Arniston, thought that the estate must be unencumbered; and that the creditor is not obliged to dispute the validity of that encumbrance, or his preference to it, because the inhibition is not in the field; and upon the question it carried to sustain the objection to the progress: *sed multi in contraria fuerunt opinione; inter quos ego.* 10th November 1737.'

[2] 'If, when the decree comes to be pronounced,' (says Lord Kilkerran), 'the error of pluris petitio be rectified, and decree only sought and obtained for the sums truly due, the error in the libel will be no nullity.' MAXWELL and RIDDELL against MAXWELL, 5th February 1743; Kilk. p. 10.

[3] Duke of QUEENSBERRY's Executors against TAIT, 11th July 1817; Fac. Coll. 375. See above, p. 723.

[4] M'NIEL's Creditors against SADLER, 7th March 1794; Fac. Coll. 250.; where the constitution and adjudication were for a random sum, which was not proved by any voucher, and afterwards established to a small extent. Found null.

[5] See the above case.

[6] MUIR against M'ADAM, 7th March 1781; Wight, p. 282.

[7] Sir A. CAMPBELL against SPIERS, 14th December 1790; Fac. Coll.; affirmed in the House of Lords, 5th March 1791.

[8] Ranking of EDDERLINE, CAMPBELL'S Trustees against his Creditors, 14th January 1801. Campbell of Edderline became insolvent, and conveyed his estate to trustees absolutely, for behoof of his creditors, with power to them to sell, &c. 1. For payment of debt; 2. For provision to younger children; and, 3. For entailing the remainder. The trustees were infeft, and in possession; Edderline died; an action of sale was brought; most of the creditors adjudging in the common way, by charge against the heir. One creditor, conceiving Edderline

Decree of Adjudication. Pluris Petitio.

2. DECERNITURE.—If the accumulated sum include more than is justly due, the diligence is objectionable on the ground of a pluris petitio. But the decisions of the Court have not been uniform respecting the effect to be given to a pluris petitio. Lord Kilkerran, in reporting the case of the Creditors of Easterfearn, gives a history of the opinions of the Court on this subject, gradually relaxing from the rigid notions applicable to apprizings; and admitting adjudications, containing pluris petitio, as securities, unless where the pluris petitio was gross and fraudulent.[1] The Court went afterwards even farther than this, and found an adjudication, containing a pluris petitio 'plainly mala fide,' good as a security.[2] The doctrine seems at last to have settled at this point—that in cases of material pluris petitio, or culpable neglect, the adjudication is annulled;[3] but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest, without expenses or penalties.[4]

Effect of Pluris Petitio.

The pluris petitio is judged of by the accumulated sum, as it appears in the decree of adjudication. Though this part of the decree, however, seems thus to be rendered so

to have been divested by the trust-deed, constituted his debt against the trustee, and thereon adjudged. He adjudged also, by way of precaution, against the heir of Edderline and the trustees jointly, but beyond the year and day. Lord Eskgrove, Ordinary, decided, —'That Edderline was not completely divested of 'the real right and property of his estate by the trust-'right and infeftment thereon, the same having been a 'trust for the granter's behoof, though it contained a 'power to the trustees of selling the lands for the pur-'pose 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 acced-'ing 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 objection to the adjudi-'cation led by the other creditors against the son and 'apparent heir of their debtor, after his decease: Found, 'that neither the decree of constitution, obtained in 'absence, at the objector's instance, against the said 'trustees, nor the adjudication following thereon, can 'afford ground for preferring the objectors to the cre-'ditors who had before obtained adjudication against 'the heir of their debtor on special charges; the objec-'tor's adjudication against the trustees being an inhabile 'diligence, the trustee not being the real proprietor of 'the lands adjudged, nor the proper debtors in the 'debt adjudged for.' To this judgment the Court unanimously adhered, without an answer to the petition; holding it to be fixed, that, notwithstanding a trust-deed, the radical right remains with the truster, and may be adjudged from him, or his heirs, by creditors; and that the law of M'Adam's case is quite exploded.

[1] ROSS, and other Creditors of EASTERFEARN, against BALNAGOWN, 6th November 1747; Kilk. 17.

Lord Elchies has the following note of this decision:—'The Lords, nemine contradicente, adhered to 'Drum's interlocutor, sustaining an adjudication as a 'security for the sums truly due, even in a ranking 'of creditors, though led for near eight times as much 'as was due, viz. L.9540; though there was a fitted 'account before, making the sum due only L.1284. 'My reasons were, that reducing it in toto was penal 'and contrary to equity; that a decree of constitution 'would be so restricted and sustained; and I saw no 'difference now betwixt a decree of constitution and 'adjudication; that when no more was apprized than 'lands equal to the sum, and that by a sworn inquest, 'a pluris petitio behoved to be a total nullity, because 'not only the sum must be restricted, but some of the 'lands struck off, which could only be done by a new 'inquest; that, by regulation 1695, decrees were only 'to be reduced on nullities, to restore against the 'injury done, and no farther; and that this adjudica-'tion was a decree in foro contentioso, where every 'objection was either competent and omitted, or pro-'poned and repelled; and we could repone against it 'only in equity; and that equity could not annul it 'altogether. Arniston added, that special adjudica-'tions must, as to this point, be in the same case with 'apprizings of old; and that he always was against 'annulling such adjudications altogether, and against 'sustaining them for accumulations.'

[2] After this, says Lord Kames, 'there can scarce 'be any prospect of cutting down an adjudication in 'toto for a pluris petitio.' Rem. Dec. 271. A similar decision was pronounced in the Competition of DUNJOP's Creditors, 13th January 1759; Fac. Coll. 285. But see Ranking of CAIRNTON, 16th December 1760; Fac. Coll. 480.; and RUTHERFORD, 7th March 1769; Fac. Coll. 173.

[3] Common Agent in M'KINNEL's Ranking against GOLDIE, 9th June 1797. M'NIEL against SADLER, 7th March 1794. M'WHINNIE against BURTON, 4th February 1796. EDIE and LAIRD, 20th June 1797. Common Agent in EDDERLINE, 17th June 1801.

[4] PARK against CRAIG, 15th November 1771; Fac. Coll. HART against NASMITHS, 27th July 1775.

important, yet (inconsistent as it may appear) it seems not to be held essential to the subsistence of the adjudication, that the sum should be filled up in the decree.[1]

Omissions in the Extract.

Material omissions in the extract will annul the adjudication; as where several steps of procedure were omitted, and the decree was made as in absence, though there had been a debate, the Court held it to be a nullity.[2]

Recording of Abbreviates.

3. ABBREVIATE AND RECORDING.—1. The recording of the abbreviate of adjudication is prescribed by the regulations 1695, art. 24. and additional regulations 1696, art. 3. in substitution of the recording of allowances of comprizings, ordered by the statute 1661, c. 31. It must be recorded within sixty days after the decree has been pronounced. Where this has been omitted, the Court have granted warrant for recording after the sixty days.[3]

2. The effect of omitting to record was, by 1664, c. 31. declared to be the postponement of the apprizing to any other apprizing duly recorded. But such omission does not affect the pari passu preference.[4]

3. Where all the adjudications in competition are recorded in due time after their date, the preference (unless where the rule of pari passu preference applies) is according to the priority of registration.

4. Where sasine is taken and duly recorded, the omission to record the adjudication is of no consequence in a question with creditors posterior to the sasine.[5]

§ 4. EFFECT OF DILIGENCE BY THE CROWN.

In the adoption of the English revenue laws at the Union, an express exception was

[1] The only case in which this question seems ever to have occurred, is the Ranking of the Creditors of ALISON of Dunjop, where the judgment pronounced by the Court was, that 'the accumulate sum not being 'filled up, is no nullity in the adjudication.' 13th January 1759; 2. Fac. Coll. 285.

Though the judgment is there stated only in the way of narrative, it is quite correct. In a preceding part of the same volume of the Faculty Collection, this case is very incorrectly reported, (as of date 18th November 1757); for it is there made to appear, that the Court restricted the adjudication on account of this objection. In the papers, I find that the Lord Ordinary, Woodhall, had found the objection 'relevant to 'restrict the decree to a security for principal, interest, 'and expenses of deducing the adjudication.' But when the question came into the Court, they pronounced this judgment:—'The Lords found, that the accumu-'lated sum not being filled up, is no nullity in the ad-'judication; and that the adjudication can only subsist 'as a security for the principal sum, annualrents, and 'necessary expenses accumulate at the date of the 'same, and the interest thereafter, *in respect that no 'allowance is given for the rents possessed before the date 'of the adjudication*, and in respect it is proved,' &c.

It is to be observed, that the error of the first report has been transcribed into the Dictionary, vol. iii. p. 9. and the second report is represented as another judgment to the same effect.

[2] Creditors of FALLAHILL, 28th January 1736, competing. In this case the Court, by consent, admitted the adjudication to rank; but, without consent, it would have been held null. Lord Elchies reports it thus:—'Adjudication, if at all sustained, ought to be 'ranked according to known rules of preference of 'adjudgers; and therefore, a nullity being objected 'against an adjudication, and sustained by the Ordi-'nary ad effectum to restrict the adjudication, (which 'had the first infeftment, and was year and day before 'all the rest), and the creditors' preference thereon, to 'a pari passu preference with the other adjudgers. 'The Lords adhered; but added the reason, viz. be-'cause the creditors did not insist to annul the adjudi-'cation, but only to be preferred pari passu with it.' *Voce* Adjudication.

In the 8vo. MS. this note is entered:—'The Lords 'adhered, but added the reason, &c.; otherwise I and 'many others thought it would have been very danger-'ous to make it an arbitrary question, whether ad-'judgers should be preferred pari passu or not? and 'that, if it had not been the creditors' omission, the 'adjudication must either have been found totally void 'and null, or otherwise it must have been allowed the 'preference the Act of Parliament gives it.' Notes, p. 2.

[3] SMELLOME, petitioner, 22d November 1774; Fac. Coll. 366. (206).

[4] See above, p. 722.

[5] See saving clause of 1661, c. 31. 2. Ersk. 12. § 26.

introduced respecting the operation of the crown's diligence, so far as concerned the real estate. As to such estates, the law of Scotland is left on its original footing.[1]

Exception of Real Estates in Scotland.

1. The term 'real estate' is English, not Scottish. The Scottish term which is the most nearly analogous to it, is 'heritable.' The real estate includes not only lands, but all tenements and hereditaments, and every thing which is not strictly moveable or personal, as following the person wherever he goes.[2] Even the statute of Queen Anne itself speaks of 'honours, manors, lands, tenements, or hereditaments,' as to be regulated and tried, in respect to the crown's right, by the Court of Session, and the law and practice of Scotland. There is, therefore, no doubt, that the crown's preference is restrained from operating, not only against lands, but against all the proper heritable estate,—rents, annuities, and so forth, which, by the law of Scotland, are adjudgeable. There are no cases settling this point, the only one in which the exception came to be questioned being relative to lands.[3]

2. The peculiar conception of one part of the statute left it doubtful, whether the exception was not meant only to exclude the operation of *the English forms*, as not being equivalent to our sasine, &c. in heritable property; with the reservation to the crown of a preference, where the crown should be as far advanced as the subject in the legal diligence of the Scottish law. In deciding this question, however, the provision already alluded to, that the validity of the crown's preference should be tried by the Court of Session, according to the laws of Scotland, and no otherwise, was held conclusive.[4] And, therefore, it is now settled,—1. That the crown can attain no preference over the heritable estate by any sort of diligence, more than a subject: 2. That the crown will be excluded from ranking on the heritable estate altogether, unless the Scottish diligence for attaching that estate be used: And, 3. That the crown will come in pari passu with other adjudgers, without any preference.

[1] 'And her Majesty shall be preferred in all suits in 'the said Court, according to the said statute, and the 'practice of the Court of Exchequer in England; and 'as well the bodies, as the lands and tenements, debts, 'credits, and specialties, goods, and personal estates, 'of all debtors or accountants to the crown, or their 'debtors in Scotland, shall be liable by extent, inqui-'sition, and seizures, or by any other process, to the 'payment of such debts to the crown, in the same 'manner as hath been used in the Court of Exchequer 'in England; provided that no debt to the crown in 'Scotland shall affect any real estate in Scotland, 'further or otherwise than such real estate may be 'subject thereto by the laws of Scotland; and that the 'laws of Scotland shall in all such cases hold place.' 6. Anne, c. 26. § 7. and 8. And in a subsequent section it is provided, that 'the validity and preference of 'the title of the crown to any honours, manors, lands, 'or hereditaments, or to casualties belonging to the 'crown, shall continue to be tried in the Court of 'Session by the law and practice of Scotland, and not 'otherwise.' 6. Anne, c. 25. § 22.

[2] See 2. Blackst. Comm. 16. et seq. and 384. et seq.

[3] See the case quoted in the next Note; but the report is vague in respect to the point now in question, speaking only of an *adjudication of the real estate*.

[4] Creditors of BURNET against MURRAY, 17th July 1754; 1. Fac. Coll. 164. The receiver-general of the customs *adjudged* for the King the land estate of Burnet, on account of duties on tobacco. The other creditors followed with adjudications within year and day of the King, and claimed pari passu preference, as if the King's adjudication had been for a common debt. The Court 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 that by the Act 6. Anne, the laws of 'Scotland are saved and declared to hold place and be 'observed; and, therefore, that his Majesty is prefer-'able only pari passu with the adjudgers within year 'and day of his adjudication.'

See Lord Elchies' note of this case, Notes, p. 16. and also p. 400.

SECTION VII.

OF ADJUDICATION IN IMPLEMENT.

Adjudication in Implement.

WHILE apprizing was the diligence by which land was attached for debt, there were two cases in which that method of proceeding was not deemed competent, and for which the Court of Session introduced a new form of judgment; interposing as a court of equity their authority to provide a remedy which the ordinary course of law did not supply. One of these cases was the renunciation of the heir after the ancestor's death, for which the remedy has already been described: The other was the case of an imperfect conveyance, or an obligation ad factum præstandum, for which the form of adjudication in implement was invented.[1] The principle upon which this last was introduced, is well explained by Lord Stair. He says, B. iv. tit. 51. § 9. 'It is an adjudication for perfecting 'dispositions of rights of the ground which require infeftment, whether in fee or liferent, 'and whether in property or annualrent; where the disponer is either expressly or impliedly 'bound to infeft the acquirer, and oftimes to infeft himself for that effect, yet hath not 'performed the same. Justice requiring some legal remedy to make such dispositions and 'obligements effectual, which would have been very tedious and expensive, if the acquirer 'had no other remedy but first to use personal diligence against him to liquidate the 'damage, and then to apprize thereupon, (whereby the acquirer having a real right, if not 'complete, might easily be prevented by any creditor who had only a personal right); 'therefore the Lords, &c. did sustain process at the acquirer's instance against the disponer 'to fulfil, and against his superior to supply his place, and remove the acquirer in the same 'way as he might have done upon his vassal's charter of confirmation, or procuratory of 'resignation.'

Adjudication in implement differs from an adjudication for debt, 1. In being directed against a particular subject, in order to have an imperfect conveyance of it completed; 2. In having no alternative conclusion or reversion, unless such be the nature of the obligation to be implemented; and, 3. In being, in its nature, exclusive of other creditors, admitting of no pari passu preference:[2] And yet there may occur a competition of imperfect rights, of which it is not possible to dispose justly otherwise than by dividing the subject between the competitors.

Adjudication in implement may be defined a form of legal diligence, by which the want of a complete voluntary title to land, or other heritage, is judicially supplied to those who hold a disposition, or other conveyance, without a precept or procuratory; or who hold an obligation entitling them to demand a full conveyance of any particular subject.[3] It is merely the completion of the *form* of a transference already constituted in part, and which the proprietor had bound himself to complete. And, like a voluntary transference,

[1] Adjudication hath place in two cases:—The first 'and most ordinary is, where the heir renounces to be 'heir, in which case adjudication is competent whether 'the debt to be satisfied be liquidate or not. The 'other is where the obligement to be satisfied con-'sisteth in facto, and relateth to a disposition of par-'ticular things; which disposition or obligement not 'being fulfilled by the debtor or disponer, though all 'ordinary diligence be done, then adjudication taketh 'place to make the same effectual.' 3. Stair, 2. § 45. See also 2. Ersk. 12. § 47.

[2] WRIGHT against MURRAY, 29th June 1821.

[3] Mr Erskine seems to confine this remedy to the case of one holding a *disposition*. But he means to speak only of the prominent case, not restrictively. One who has bought a house by missive of sale, is entitled to a decree of adjudication in implement, as well as if the disposition had been granted. 2. Ersk. 12. § 50. Dallas, 231.

when followed by sasine, it bestows a real and preferable right from the date of the sasine.[1]

1. Adjudication in implement is led against the granter of the imperfect title himself, if alive, in the same manner as a common adjudication for debt.[2] The summons recites the disposition or contract, or obligation to transfer, of which implement is demanded; and concludes for decree of the Court, adjudging the lands, &c. to the pursuer in implement. The decree adjudges the lands from the debtor, and declares, decerns, and ordains the same to belong to the pursuer; and decerns and ordains the superior to enter him accordingly.

2. If the adjudication is to be led against the heir, the previous forms of a general charge,[3] action of constitution, and either special charge, or decree contra hæreditatem jacentem, must be observed, according as the heir shall renounce or be silent. The adjudication requires no intimation.

3. This adjudication is to be completed by an abbreviate recorded, and a charter from the superior, followed by sasine. It was once doubted whether the superior was obliged to enter such an adjudger; but these doubts are now at an end. The effect of a charge to the superior, in a common adjudication for debt, depends entirely upon the force of the statute; and it has no effect as a preference except against co-adjudgers. It seems, therefore, extremely doubtful, whether any effect should be given to a mere charge upon an adjudication in implement. It has, indeed, been found, that where no step was taken to complete the first adjudication in implement, a second, with a charge against the superior, was entitled to a preference;[4] but this has always been held a doubtful judgment, and is not to be taken implicitly, as settling that a charge gives security to such an adjudger. It seems indisputable, that, in competitions with voluntary securities, such a charge could be no bar to sasine, and would not entitle the adjudger to a preference. Neither could such a charge stand against an adjudication for debt, completed by infeftment subsequently to its date. Neither does there seem to be any ground for holding, that the second adjudger in implement, with the first infeftment, would not be preferable to the first, who had only charged the superior.

Of Competing Adjudications in Implement.

In its nature this sort of adjudication is not subject to pari passu preference. That belongs properly to adjudications for debt; each forming only a burden, of which many may subsist together without incongruity. But adjudication in implement being equivalent to a conveyance of the property itself, without reversion or alternative, is inconsistent with any similar right in another. At the same time it must be remembered, that among the many dishonest methods of raising money, it is not unfrequent to procure money on the faith of sales to be afterwards completed. It may thus happen that two innocent persons may be deceived into a situation where equal hardship may be pleaded by both: both may be ready to adjudge in implement; the adjudications of both may stand in the roll together. Shall it then be held, that the Lord Ordinary must adjudge to each, leaving them to run against each other in the race to obtain sasine, and making the preference depend on the many accidents by which they may be retarded or advanced? This plainly is a case which should be ruled by the principles of bankrupt law.[5]

[1] Sir George M'Kenzie, Observ. 1. Parl. Cha. II. c. 62. Lady Fraser, 12th December 1677; 2. Stair, 577.

[2] It is not now necessary (as once it seems to have been) that adjudication in implement should be preceded by personal diligence to enforce performance. 2. Ersk. 12. § 50. See 4. Stair, 5. § 9.

[3] No annus deliberandi seems in these adjudications to be necessary. Ersk. b. 2. tit. 12. § 50.

[4] Sinclair, 21st June 1704; Dalr. 49. 62.

[5] See Wright's case, supra, p. 748.

1. It seems to be consistent with that equity which first introduced the remedy of adjudication in implement, that two or more persons having equal pretensions to demand a complete transference, should be conjoined in one complex adjudication; and the subject either sold or divided for their benefit. Truly they are nothing more than creditors; —for while no real right or jus in re has been constituted, the jus ad rem that each enjoys, rsolving into a mere action, makes them proper personal creditors.

2. As there is in bankruptcy no true distinction among creditors who hitherto hold nothing but a mere personal obligation, whether that obligation be to pay money, or to convey land, or to perform any other specific act; a creditor for a money debt being just as well entitled to have direct execution against the debtor's land, as one who holds an obligation from the debtor to convey his land to him: So a creditor obtaining an adjudication in implement, will not have preference over a creditor for debt, who, with a decree of adjudication in payment, has previously completed his security by sasine. Neither ought the adjudger in implement to prevail over the other money creditors who come within year and day of a prior adjudication for debt, completed by infeftment, though subsequently to his adjudication in implement, and sasine: The subject is already attached preferably for the benefit of all who come within the year, and the adjudger in implement may still adjudge as a common creditor for damages.

SECTION VIII.

OF THE JUDICIAL BURDEN BY JEDGE AND WARRANT.

It is doubtful whether an adjudger or creditor in possession of subjects, and repairing them without judicial authority, has, in accounting with other creditors adjudging, a claim for the expense so laid out: But whatever might be the determination in such a question, the judicial process of Jedge and Warrant creates a real burden on a burgage tenement, which will be effectual against creditors and purchasers.

This process begins by an application to the dean of guild, at the instance of any one having interest, in order to have the tenement examined and repaired. The dean of guild, after a citation of all parties interested, summons a jury to examine the subject; and their verdict on the necessity of the operation of rebuilding or repairing, authorizes the dean of guild to grant a warrant for having it done.

1. Where the subject is possessed by a creditor-adjudger, or otherwise, and the person having right to the reversion or property either cannot be found, or takes no charge of the property, the possessor is safe to make the repairs required, the dean of guild 'pro-'nouncing a decree,' cognoscing and declaring the amount of repairs, and costs of the proceedings, with interest, to 'be a real and preferable debt affecting the said tenement,' and granting a warrant to the applicant 'to set or possess the tenement until the sums 'expended, with interest, be repaid.' The extract of the decree is the ground and voucher of the debt and of the preference; and the recording of it in the dean of guild's books is held legal notice of the burden.

2. Where the tenement is ruinous, and has on that account been uninhabited for three years, a judicial procedure is authorized by statute,[1] in which the magistrates or dean of guild summon all concerned to repair or rebuild the house; and, failing their doing so, the house or area may be valued by sworn valuators, and sold. If the persons having

[1] 1663, c. 6.

right to the subjects are known, the price is paid to them; if not, it is deposited or consigned with the magistrates, for the benefit of all having interest: and the purchaser gets a title from the magistrates, which is declared to be a perfect security to him and his successors. If no one buy the area or ruined tenement, the magistrates may order it to be rebuilt, and then sold; the price being disposed of as before, and the title declared perfectly secure to the purchaser.

Besides the proper diligence by which lands may be attached for debt, there is another judicial proceeding which may be productive of important consequences in competitions—I mean a Decree of Declarator and Adjudication.

Declarator is one of those remedies unknown in England, in which the good sense and adaptation of the Scottish law to the occasions and business of life is distinguishable. Without intending to shew the various uses to which this form of proceeding may be applied, it is obvious, that on many occasions it is necessary, for the purposes of justice, that a form of action should be provided, by which the true interest of a party in heritable property may be ascertained, so as to prevent the creditors of one who has the apparent property from carrying it off. Thus, where a person has granted a security over his estate, by means of an absolute disposition, trusting to the honour of the disponee: or where a company has purchased property which, in compliance with feudal rules, is disponed to one of the partners, or a third person, for behoof of the partnership, but without including the declaration of trust in the disposition: the creditors of the apparent proprietor, if there were no remedy, might, by adjudication, judicial sale, or sequestration, carry off this as a fund of division among them, leaving the party to whom truly the right belongs as a mere creditor personally for the value. The remedy, in such a case, is by an action wherein a solemn judicial declaration can be made of the pursuer's right.

This action is brought into the Court of Session by a summons, stating the circumstances, and concluding, that it should be found and declared that the property truly belongs to the pursuer. This is a Real action, in which the object is not to have a decree against the defender as for a debt, but a judgment against the land or other property. And after the commencement of it, no voluntary act of the apparent proprietor is suffered to interfere with or defeat the right to be declared. This action may also admit a conclusion of adjudication for having the land declared and adjudged to belong to the pursuer, and the superior decerned and ordained to receive the pursuer as vassal, and grant to him a charter on which he may be infeft.

The effect of such a decree, followed by infeftment in the lands, will be to vest in the pursuer a right which, like that of an adjudication in implement, will not be subject to the pari passu preference.

There are certain other securities over the feudal estate which are referable to another principle,—not real rights, but personal prohibitions or embargoes on the power of alienation. These shall be considered hereafter under the title of Securities by Exclusion.

CONCLUSION.

OF ACCESSORIES TO LAND, AND OTHER HERITABLE SECURITIES.

Machinery of Mills.

In concluding concerning Securities on the Feudal Estate, it seems not unfit to consider the accessory effect of such securities on those parts of the subject which are in their own nature moveable. This is a question which has frequently occurred of late, in consequence of heritable bonds and other securities granted by the proprietors of cotton-mills and other valuable machinery. In such cases the general creditors contend, that while the land may be effectually burdened, although the possession of the owner be continued, provided sasine on the security have passed and been recorded; the moveable parts of the machinery, (which are rather the dead stock in trade than by annexation a part of the heritage), ought to accompany the apparent ownership inferred from possession. The holder of the security, on the other hand, maintains, that by accession the whole of a machine or mill, of which part is attached to the soil, must be held as a fixture comprehended within the security.

If the intention of parties were sufficient to determine the point, this would not probably be a frequent question; but it is necessary, in order to complete the security, that there should be an effectual tradition; and unless comprehended within the infeftment, as a part of the subject, things which are moveable cannot be conveyed in security; for there is no effectual transfer of moveables retenta possessione. The machinery of every mill, whether a common corn-mill; a thrashing-machine; a cotton-mill; or even a steam-engine—may, without hazard of injury to the building or to the machinery, be removed. That of a cotton-mill may, without the least detriment: it is, indeed, intentionally made removable; so that the great moving power, whether a water-wheel or a steam-engine, is all that remains fixed to its place.

Where a man dies and leaves an heir and an executor, the former takes the land and heritable property; the latter gets the moveables: If a contest arise between them, Whether, by annexation to land, or by accession as part of an heritable subject, the heir is to have right to that which, taken apart, is properly moveable? it may not unreasonably be held, that the whole machinery ought to go together, a point of succession being chiefly a quæstio voluntatis. In cases also of temporary occupation, as where a lessee or liferenter has, for his own conveniency, made additions to the subject of his temporary possession; and the question is raised between tenant and landlord, or between the fiar and the executors of the liferenter, on expiration of the term of possession, Whether the additions are to remain permanently annexed to the land, or to be subject to removal? the same criterion may seem fair and reasonable. But there is considerable difficulty in admitting the same rule to govern cases in which the contest is between the general creditors of a trader, possessed apparently of a valuable stock of machinery, as at once the instrument of his trade, and in part, at least, the foundation of his credit, and a particular lender of money, who takes his security over the ground or house in which the trader has fixed his establishment.

1. There is one point in which the several cases seem to coincide, and where the same determination must be given in all. If an addition has been made to land or houses, which cannot be dissevered without destruction or injury to the principal or to the accessory, things so added, though in themselves moveable, become, as fixtures, part of the land. As such they descend to the heir; or, on the expiration of a temporary contract of

possession, they accompany the land: and they will also, as part of the subject of security, be available to the holder of an heritable bond.[1]

2. Houses, walls, &c., or what is so affixed to them for permanent use, that it cannot, without injury or destruction to the edifice or to the addition, be removed, accompany the property of the land, according to the rule, Inædificatum solo cedit solo.[2]

3. But it is not mere physical annexation which alone deserves to be considered in such questions. That sort of annexation which depends on the principle of accession, is frequently as strong a bond of connexion, as the mortar or iron by which a fixture is attached. Thus, the water-wheel and stationary parts of a mill are useless without the moveable machinery by which the working power produces its effect in manufacture. This sort of accession seems, as already observed, to afford a rational ground for carrying the whole parts of an engine, by implied will, to the heir who takes the land whereon it is erected. And, accordingly, this seems to have been settled as law in questions of succession.[3]

4. But lastly comes the great consideration, whether the above, which may be considered as the general rule, ought not to suffer exceptions from the various employments of stock in trade and manufactures. Engines and machinery have come in the mercantile world to be regarded, in many cases, rather as accessories to the trade in which they are used, than as accessories to the land: And in questions at least of temporary occupation, as between landlord and tenant, this consideration seems sufficient to controul the ordinary rules of mere physical annexation, so as to entitle the tenant on expiration of his term to remove them; or his creditors on his bankruptcy to make them a subject of distribution. The machinery of a steam-engine or cotton-mill is undoubtedly moveable before it is put up. It cannot be used for the purposes of manufacture without being fixed in its place; probably built into the wall, or sunk in the ground, or connected by buildings of various forms with the ground on which it stands. But the engine is generally the principal subject; the ground, whereon it stands, of comparatively little worth. The engine is not erected for the purpose of enjoying the produce of the land; but the ground is taken merely to be a station for the engine, as employed in a separate manufactory. It in no shape can be supposed to have been intended to pass with the land, but to accompany the manufactory, if there should be occasion for removal to another station.

Cases of this sort have not occurred frequently in Scotland, which may proceed from the attention naturally bestowed, in the arranging of contracts of temporary occupation, to have this matter well settled by agreement. In England, there have been several cases on the question, as untouched by special contract. The separation of machinery from the freehold, when first contended for in England, seems to have been held extremely questionable: Afterwards it was admitted, that a dyer making vats for the purposes of his occupation during the time of his possession might remove them. The same was held as to a baker. After some intermediate doubts, Lord Holt laid it down, that a soap-boiler might remove the vats he had set up during the term for the purposes of carrying on his

[1] NIVEN against PITCAIRN, 6th March 1823; Fac. Coll. 2. Shaw and Dunlop, 270.

[2] HYSLOP'S Trustees against HYSLOP, 18th January 1811; 2. Stair, 2. § 4. Ersk. 1. § 4. The great telescope erected by Short on the Calton-Hill, Edinburgh, although it was affixed to the ground, and to a building erected to contain it, was held subject to poinding.

[3] Dirleton and Stewart have carried this so far as even to make the horse and other instrumenta mobilia of a horse-mill descend to the heir. Voce *Mill*.

So the buckets, chains, and instruments of a coal-work go to the heir. Dirleton and Stewart, voce *Executry*.

A similar view seems to have been taken in England. LAWTON v. SALMON, 1. Hy. Blackstone, 259. *Notes*.

trade.[1] Here it was held, that the machinery was, in all questions between landlord and tenant, to be considered as real or personal, as it happened to be an accessory to the trade,[2] or to the possession and use of a particular subject.[3]

These are distinctions which equity and public expediency, as well as mercantile understanding, ought perhaps to recommend to adoption, even in the case of succession ab intestato: and they do not seem to be inconsistent with the common law of Scotland, in regulating the interests of the parties to a contract of temporary possession.

There is another point of view in which the question is of great importance. By the Scottish law, the crown's process of extent gives no preference over heritable property. How, then, is a sheriff to conduct himself in executing a writ of extent over the property of a great manufacturer? Or how is the line to be drawn by the Court of Exchequer between the crown and the general creditors?

Lastly, In determining on the extent and effect of a security specially constituted over heritable subjects, on which an engine or machinery has been erected, it will deserve very grave consideration, whether the rule by which the entire machine is held, by accession, to accompany the land or fixed part of the establishment, should not yield to that now so generally prevailing in the mercantile world, by which machinery is held to accompany the trade as an accessory. If this were to be considered as the rule, a cotton-machine or steam-engine may not be more capable of becoming the subject of a separate security for debt retenta possessione, than any other part of the stock in trade; and an infeftment in the ground whereon the buildings stand, would have no effect in securing the creditor over the machinery of a cotton-mill or steam-engine. This question does not seem to be at all settled in England. I am not, indeed, aware of any cases on this point: but in a case which occurred in Scotland, the opinions of two eminent English counsel were taken, and they were directly opposite to each other.[4]

[1] POOLE's case, Salk. 368.

[2] In LAWTON *v.* LAWTON, 3. Atkins, 13. a fire-engine to work a colliery was held by Lord Hardwicke to be an accessory to the trade of getting and vending coals, which was a matter of a personal nature.

In another case determined by Lord Hardwicke, Lord DUDLEY *v.* Lord WARD, Ambler, 113. a fire-engine to work a colliery was held an accessory of the trade.

So Lord Chief-Baron Comyns considered a cider-mill as accessory to the making of cider; cited 3. Atk. 13. 16.

[3] In the case of LAWTON *v.* SALMON in 1792, 1. Hy. Blackstone, 259.; Lord Mansfield held salt-pans to be accessory to the salt spring, 'as the inheritance 'could not be enjoyed without them;' and therefore, in a case of succession, 'on the reason of the thing, 'and the intention of the testators, he held that they 'must go to the heir.' But he explained at large the distinction taken in questions between landlord and tenant, as being a case in which, for the benefit of trade, there has been a relaxation of the strict rule, by which whatever is connected with the freehold goes to the heir. He admitted, that, in this very case of salt-pans, the question would have been very different if the springs had been let, and the tenant had been at the expense of erecting these salt-works.

In ELWES *v.* MAW, the Court of King's Bench (the judgment being delivered by Lord Ellenborough) held certain houses erected by a tenant for the more convenient possession of an agricultural farm, as accessory to the reality, being for the mere purpose of better reaping the profits of the land, and as such not to be removable at the end of the lease. 3. East, 38.

[4] In a case submitted to Mr MONCREIFF, Dean of Faculty, as arbiter, an inquiry into the English law was directed by him, and cases were laid before Sir Samuel Romilly and the present Master of the Rolls, Mr Leach. The case put to Sir Samuel Romilly was this:—'1*st*, Whether, by the law of England, a mort-'gage regularly executed over a piece of ground, upon 'which is erected a cotton-mill or factory, with a steam-'engine and spinning machinery, would be effectual to 'the mortgagee, to the exclusion of the assignees of 'the granter of the mortgage, in the event of his be-'coming bankrupt; or to what extent such mortgage 'could be set aside?

2*d*, In the case of the proprietor of a cotton-mill or 'factory, with a steam-engine and machinery attached, 'devising his whole real estate generally, to one person, 'and his personal estate to another, Under which of 'these descriptions of property could the steam-engine 'and machinery be considered as included?

The answer of that eminent lawyer was:—

'1*st*, That, by the law of England, a mortgage of a

In one case, the Court of Session in some measure proceeded on the principle of accession of the machinery to the land, as a part of an engine of which the great moving power was a fixture. The security of an heritable bond was there held to cover, not merely the ground and house, and great moving power, or steam-engine, but also the whole of the smaller machinery essential to the completeness of the mill.[1] But this ground of the decision did not satisfy the bar at the time; and it has been in some measure disclaimed by the Judges, in a subsequent case, so as to leave the question entirely open.[2]

CHAPTER III.

OF REAL SECURITIES OVER PROPERTY SIMPLY HERITABLE.

THIS subject divides, of course, like that of real securities over the feudal estate, into two heads,—Voluntary Securities, and Legal Diligence.

SECTION I.

VOLUNTARY SECURITIES.

Completion of Voluntary Securities.

THE completion of voluntary conveyances and securities, where the subject is simply heritable not feudal, is either by actual possession or by intimation: unless where the right conveyed is a portion, or mere accessory of a feudal subject transferred by sasine as an accompanying right.

Leases.

1. LEASES OF LANDS OR OF HOUSES are completed by possession.[3] They may be transferred by assignation, (where there is no excluding clause), completed in like manner by possession.[4] Where lands are under sublease, so that the right to be transferred truly is

'piece of ground on which a cotton-mill or factory was 'erected, and of a steam-engine and machinery upon 'it, would be valid as against the assignees, as a mort-'gage not only of the land, but of the steam-engine, 'and of all the machinery which was affixed to the 'freehold; but it would not be valid with respect to 'utensils and machinery not affixed to the freehold, 'but used in the manufactory.

'2*d*, That this is a question of considerable diffi-'culty; but the validity of the mortgage cannot, in 'any degree, by the law of England, depend upon 'the answer to be given to it. Whether the steam-'engine and machinery affixed to the freehold, would, 'as between heir and executor, or devisee and resi-'duary legatee, be considered as real or personal estate, 'it is perfectly clear that a mortgage of them would 'be good, as against the general creditors of a bank-'rupt.'

The case put to Mr Leach was in these terms:— 'A granted an heritable security or mortgage to B on 'a subject belonging to him, consisting of the build-'ings occupied as a cotton-mill, with the steam-engine 'thereto belonging, and the cotton-machinery. In-'feftment in the heritable subjects followed on the 'mortgage. A continued in possession of the whole 'premises. Having become bankrupt, a question has 'arisen between B and the trustee for A's creditors, 'upon which your opinion is requested, viz.

'Whether, in these circumstances, the security ex-'tends over the steam-engine and machinery?'

The answer was this:— 'I am of opinion that the security will not extend 'to the steam-engine and machinery; but I speak alto-'gether upon the principle of the law of England.'

[1] ARKWRIGHT against BILLINGE, 3d December 1819; Fac. Coll.

[2] See the case of NIVEN, supra, p. 753. Note [1]

[3] 1449, c. 17. See above, p. 65. et seq. 3. Stair, 2. § 6.

[4] It has been laid down by Erskine, 2. Ersk. 6. § 27. that possession is not good to complete a lease of an urban tenement, as a real right effectual against singu-

that of levying the surplus rents, intimation to the subtenant seems the legitimate completion.[1] Whether intimation to the landlord is, in the ordinary case of a lease assigned, an effectual transfer of the tenant's right, is a question already discussed.[2]

Woods. 2. A right to STANDING TIMBER, by a conveyance in satisfaction or security of debt, requires actual possession by the creditor, or his workmen, in cutting down the timber; or, at least, constructive delivery, by marking out the trees as sold. Whether this be sufficient, as actual delivery, to bar the privilege of stopping the purchaser's operations on his insolvency, is another question. But a creditor who receives in satisfaction, or security, right to his debtor's woods, is to be considered as having paid the price; so that if his right is not challengeable on the Bankrupt Acts, constructive delivery will be enough.

Stone-quarry, Coal, &c. 3. A right to a QUARRY, COAL-WORK, or other MINE, when not transferred by sasine as a feudal subject, must be completed by possession, in order to constitute a preference in favour of the purchaser or creditor. Such right is in the nature of a lease, and can be effectually constituted only on the principles of that contract.

Assignation of Liferent. 4. A LIFERENT RIGHT in lands is constituted by sasine, but it cannot be so transmitted; for the liferenter cannot infeft another. 'There can,' (as Lord Stair says), 'be no sub-'altern or renewed infeftment of a liferent, which is only personal to the liferenter; the 'right is incommunicable.'[3] The use or right to the rents is transmitted, or assigned in security, by assignation followed by actual possession;[4] or by intimation to the tenants; or by legal process against them in the character of assignee.[5]

The benefit of the legal liferents of terce or courtesy may be assigned; and the right of the assignee will be completed by possession, or by intimation to the tenants.

The right of an heir of entail, under strict prohibitions, is similar in effect to a liferent; but it is in its nature a fee under restraint. The conveyance of the right therefore is not, like that of liferent, by assignation and possession, but by disposition and sasine.[6]

Surplus of Lands sold for Land-tax. 5. Under the statute for redeeming the land-tax,[7] provision is made for the sale of entire farms of entailed estates in Scotland, when they exceed in value the sum required to be raised, under the condition,—1. That the surplus shall be bestowed in the purchase of land to be entailed on the same heirs, and under the same limitations; and, 2. That in the meanwhile the surplus shall be lodged in one of the public banks for reinvestment, either permanently on the purchase of lands to be entailed, or in the meanwhile on good security upon interest, 'such clauses to be inserted in the bond, or other security to be taken for 'the money, as shall be effectual to secure the person who would for the time being have 'been entitled to the rents and profits of the said lands, &c. in case such sale, &c. had not 'been made; and to the succeeding heirs, &c. the enjoyment of the interest of the said 'money; and to preserve the capital until the money shall be employed as aforesaid.'

lar successors. But the question was tried lately, and the lease sustained. WADDEL against BROWN, 10th December 1794; 9. Fac. Coll. 326. In this case, a lease having been constituted by missive, for seventeen years, of a dwelling-house and shop in Glasgow, of which the tenant took possession; the Court held that the missive of lease being clothed with possession, was effectual against a purchaser.

[1] See below, Of Assignation of Rents, next page.

[2] Lord Stair lays down very strongly the necessity of possession to complete the transference of a lease; 3. Stair, 2. § 6. p. 400.
See this subject discussed above, p. 66, 67.

[3] 2. Stair, 6. § 7. p. 285. B. 3. tit. 1. § 16. p. 385. B. 3. tit. 2. § 6. p. 400. B. 3. tit. 3. § 15. p. 431.

[4] 'Though liferents be more properly real rights, 'because constitute by infeftment, yet, seeing a life-'renter cannot infeft another as a fiar can, assigna-'tion or disposition is sufficient; but it must be clad 'with possession.' 3. Stair, 2. § 6. p. 400. See also 2. Ersk. 9. § 41.

[5] STEVENSON against CRAIGMILLAR, 21st January 1624; 1. Dict. 65.

[6] See above, p. 52.

[7] 42. Geo. III. c. 116. § 63. 65. 101.

The right which is in such cases vested in the heir of entail for the time, is an heritable estate in the nature of an annuity. It is assignable, and the conveyance seems to be by assignation intimated to the trustees, where such money is taken payable to them; or to the proprietors and tenants of the land, if ever in such a case the interest be taken directly payable to the heir in possession. Whether such a right may be effectually assigned by a deed executed abroad, and according to the forms of the country where it is made, is a question on which doubts have been entertained, but which will form a subject of inquiry more properly in the last book of these Commentaries.

Value of Improvements.

6. By the entail improving Act of 10. Geo. III. c. 51. § 9. et seq. provision is made for assigning to executors or others, a claim by the heir of entail in possession, who shall make improvements, for a proportion of the expense defrayed. This claim is in the nature of a personal debt against the succeeding heir, but accompanied by a declaration, that the claimant shall have a preference for the rents of the entailed estate over all the other creditors of the heir of entail. This right is completed by the forms laid down in the Act of Parliament.

Servitude.

7. SERVITUDES, when of a positive nature, require possession to complete them; but negative servitudes are effectual without possession or registration.[1]

Incorporeal rights.

8. A RIGHT OF REVERSION, or a DEBT HERITABLE, either by destination or by the use of diligence, &c. may be transferred, and the conveyance completed by intimation; and this is indeed necessary to the completion.

Rents conveyed by Assignation;

9. RENTS payable by tenants or by subtenants, are frequently assigned in security, either by a simple assignation, or by disposition or heritable bond, containing assignation to rents. 1. Where the assignation is by personal deed, possession must be taken either by intimation or by decree of maills and duties; which proceeds on an action against the tenant, founding on the assignation, and concluding for decree adjudging the rents to be paid to the assignee. Erskine denies that such assignations have effect against singular successors,[2] and his doctrine seems to be law. 2. Where the conveyance is by disposition or heritable bond, the sasine is a sufficient completion of the creditor's right to the rents,[3] upon this principle, that the rents are an accessory of the real right to the lands. The same principle leads to this consequence, that personal assignations of rents, although effectual while the feudal right continues in the cedent, or common debtor, lose their force when the real right is transferred to another. The purchaser of lands, therefore, or an heritable creditor, completing a real right to the lands, carries the rents in competition with assignations, however completed.[4] The only security

by Heritable Bond.

[1] GRAY against FERGUSON, 31st January 1792. OGILVIE against OGILVIE, December 1681; 1. Dict. 65.; Fac. Coll. 424. MUTRIE, 26th June 1810; Fac. Coll. 725.

[2] 3. Ersk. 5. § 5. The decisions by which assignation to sub-leases have been sustained, on intimation to subtenants, touches not Erskine's doctrine.

[3] Lady KELHEAD against WALLACE, 2d November 1748; Kames' Rem. Dec. 165. In a competition between a widow, holding an infeftment in security of an annualrent or annuity of 2000 merks, and an arrestor of the rents, the latter contended, that possession, or a decree of poinding the ground, were necessary to complete the right to the rents; but the Court preferred the annuitant.

WEBSTER against DONALDSON, 13th July 1780; Fac. Coll. 213. Here, in competition between an arrestor of rents, and a creditor by heritable bond, on which infeftment followed, but neither possession of rents, nor even intimation to the tenants, the 'Court considered 'the infeftment on the heritable bond as equal to an 'intimation of the assignation to the maills and duties; 'and that the heritable creditor was preferable to the 'arrestor, not only for the annualrents but for his prin-'cipal sum also.'

[4] 3. Ersk. 5. 5. HUNTLY against HUME, 13th December 1628; Durie, 408. The above was found against an assignee to rents in competition with an apprizer infeft, although the former had, in consequence of his assignation to the rents, been some years in possession.

MORRISON against TENANTS of Orchardson, 28th November 1635; Durie, 780. It was found also against creditors named expressly in the lease, as the persons to whom the rent was to be paid.

MACTAVISH against MACLACHLIN, 11th February

over rent, effectual against sasine in the lands, is one which is not confined to the rents themselves, but takes them as an accessory to the feudal right.

SECTION II.

JUDICIAL SECURITIES.

RIGHTS which are heritable, but not feudal, may be attached judicially by decree of adjudication duly recorded, without any farther completion. Adjudication in implement is also a competent form of diligence, where subjects of this description have been imperfectly conveyed; or where an obligation to convey has been granted, which has not yet been fulfilled. The difference of the remedies lies in the former being subject to pari passu preference; while the latter confers at once a preference on the creditor entitled to it.

In general it may be observed, relative to adjudications of the estate simply heritable,—1. That a decree of adjudication, of which the abbreviate has been duly recorded within the sixty days, as prescribed by the statute,[1] is effectual and preferable upon the estate simply heritable.[2] 2. That by the rule of pari passu preference, (as applicable to these adjudications, as well as to the adjudications of feudal subjects), all adjudgers share in the preference of the first effectual adjudication, whose decrees of adjudication are prior, or posterior, and within year and day of the decree; and that under this rule the crown comes without any preference.[3] Although the intention of the Legislature in passing the statute of 1661 was to prevent, by a general law, any individual creditor from acquiring, by the mere accident of better information, or by collusion, an unfair preference over his fellow creditors; so unhappily is the statute expressed, that serious doubts were entertained whether it did not apply exclusively to apprizings of complete feudal rights, leaving those estates which were not feudally vested to the unequal rule of the old common law. But it has long been settled, that the rule applies to all cases of apprizing and adjudication for debt.[4] 3. That the rules for abridging proceedings,—the intimation of the first adjudication, the power of demanding a conjunction, &c. are applicable to these adjudications, as well as to those against the feudal property. 4. That the creditors of the ancestor are entitled to preference over those of the heir, if they have used the proper diligence within the three years.

In adjudging particular subjects, it is to be considered whether the adjudication proceeds on an imperfect conveyance, or obligation to convey a subject; or on a debt: and whether, in consequence of the death of the debtor, or of his successors, the proceedings are to be regulated by the statutes relative to the charges to enter, and by the law introducing a preference to creditors of the ancestor. In the former case, adjudication in implement is as competent as in the case of feudal subjects. In the latter, the following observations, applicable to different subjects, may be attended to:—

1748; 1. Falc. 325. Where the tack contains a power of retention in payment of debt due by the landlord, it is held ineffectual against singular successors.

Lady BORTHWICK against TENANTS of Catkine, 17th July 1632; Spottiswoode, 126. A factory granted to a creditor to uplift rents for his payment, is not effectual against singular successors.

[1] 1661, c. 31.

[2] 2. Ersk. 12. § 30.

[3] See above, p. 717.

[4] STEWART of Pardovan against STEWART, 26th June 1705; 2. Fount. 278.; Dalr. 3. Sir T. MONCREIFF against MONCREIFF's Creditors, 16th December 1625. FALCONER's Widow against Creditors, 27th June 1734. JACKSON against DRUMMOND, 19th November 1734, as correctory of Sir J. SINCLAIR against GIBSON, February 1729; 2. Ersk. 12. § 30.

1. That to subjects in their nature heritable, but not feudal, as well as to feudal subjects of which the right to be carried is merely personal, the completion of the heir's title is by general service,—and the charge to be given a general special charge.[1] 2. That leases and other rights which run out by the course of time, vest in the heir ipso jure, and so may be directly adjudged without a charge.[2] 3. That in rights which, though moveable as to succession, are adjudgeable, as BANK-STOCK,[3] it would seem that the adjudication must be preceded by a charge, in terms of the Act 1695, c. 41. to confirm executors within twenty days;[4] and that the certification of the Act 1540, c. 106. would take place on such a charge. 4. That in rights having a tract of future time, as ANNUITIES, a general special charge is to be given, and general service carries the right. 5. In the adjudication of LIFERENTS, it is to be remembered, that it is not the liferent itself which is to be attached, but the beneficial use or possession merely; and that, therefore, no sasine or charge is necessary or competent, the diligence being completed by the recorded decree of adjudication.[5] 6. In the attachment of RENTS and INTERESTS, a competition frequently arises between creditors by heritable bond, or disposition; adjudgers with sasine, or a charge; simple adjudgers; and arrestors. The rules for determining those cases seem to be,—*First*, That where the feudal property has been adjudged, and the adjudication completed into a real right, it carries, as accessories, the rents of the subjects either in arrear or in future; or the interests of heritable bonds from the date of the infeftment or charge; although they should have been assigned, and the assignee's right completed by intimation and possession; or although they should have been arrested currente termino, and before the adjudication.[6] *Secondly*, That a decree of adjudication, even without a sasine or charge, carries, as a judicial or legal disposition, a right to the rents falling due after the date of the decree; and, as a legal conveyance, it requires no intimation to complete the right. The rents are thus carried to the adjudger, preferably to posterior arrestees or assignees.[7] *Thirdly*, That, in the common case, adjudication carries no arrears of rent due prior to its date; but an adjudication for the debt of the ancestor, contra hæreditatem jacentem, carries all rents from the ancestor's death, as being the only diligence that can be used by the ancestor's creditors; and this rule, which had long been fixed, was in 1740 found applicable also to the case of an adjudication on a special charge;[8] and in 1760 it was extended to the case of arrears of interest on an heritable bond, posterior to the death of the person last infeft.[9] But, *Fourthly*, If a competition arise between the creditors of the ancestor adjudging the hæreditas jacens, and those of the apparent heir attaching the arrears of rent as part of their debtor's moveable estate, it would seem that the creditors of the heir would be preferable on their arrestments, on the principles adopted in the decision of the cases of Lord Banff, and Hamilton against Hamilton.[10]

[1] See above, p. 712.

[2] 3. Stair, 5. § 6. 3. Ersk. 8. § 77. BOYD against SINCLAIR, 17th June 1671; 1. Stair's Dec. 735. RULE against HUME, 19th June 1635; Durie, 767.

[3] See above, p. 106. et seq.

[4] See below, Of Diligence against Moveables after Death.

[5] See above, p. 756.

[6] HUNTLY against HUME, 13th December 1628; Durie, 408.

[7] 2. Ersk. 12. § 17., and 3. Ersk. 5. § 7.

[8] DOOLY against DICKSON, 14th February 1740; Kilk. 4. See below, Vol. II.

[9] ANDERSON and Others, 23d July 1760, claimants on the forfeited estate of Strowan.

[10] See above, p. 99.

END OF THE FIRST VOLUME.

Printed by Walker & Greig,
Edinburgh.