BOOK IV.

OF PREFERENCES BY SECURITIES, VOLUNTARY OR JUDICIAL, OVER THE HERITABLE ESTATE.

PREFERENCES arise either, 1. From SECURITIES constituted by voluntary grant, or by legal diligence; or resulting from possession; or resting on some right of exclusion: Or, 2. From PRIVILEGES conferred on particular claims from motives of humanity; or by special statute. Preferences of the former and chief class depend on the principle, that the creditor holds a real right in the property over which his security extends. This real right arises by express constitution, or by tacit implication; savouring of the nature of property on the one hand, or of a right of mere possession and retention on the other; but being, in either case, defeasible by payment of the debt in security of which it is held. And this real right of property, or of possession, forms the 'jus in re,' in contradistinction to the 'jus ad rem,' held by personal creditors.

Property is, in Scotland, divided into HERITABLE and MOVEABLE, corresponding nearly with the distinction of property, in English law, into REAL and PERSONAL. The former comprehends lands, and all rights and profits arising from or annexed to land, which are of a permanent and immoveable nature; the latter comprehends moveables.

There is a subdivision of heritable property into Feudal property, and property simply Heritable. The former is constituted, transferred, and burdened by the forms of the feudal law: The latter, by forms in almost all respects similar to those by which moveables are transferred.

In this fourth Book it may be proper to consider,—1. SECURITIES constituted over the FEUDAL ESTATE; and, 2. SECURITIES over the estate simply HERITABLE.

In the fifth Book will be discussed, 1. SECURITIES over the MOVEABLE estate; 2. SECURITIES by way of EXCLUSION; and, 3. PRIVILEGED DEBTS.

The conveyancing of Land still Feudal.

ALTHOUGH the severities of the feudal system, its oppressive casualties, and its forfeitures, have now scarcely a place in the law of Scotland, the system of conveyancing respecting land remains as completely and strictly feudal, as if that peculiar institution still existed in all its original strength.

Dominium Directum and Utile.

The superior is regarded by the law as the proprietor of the land, from whom the vassal holds his right: But the right of the vassal is the great and truly valuable interest in the land. The former is called DOMINIUM DIRECTUM; the latter, DOMINIUM UTILE.

Voluntary Conveyance.

1. In transferring the dominium utile, the owner of land must either substitute the acquirer in his own place, as vassal of his superior; or constitute an inferior vassalage to be holden of himself; reserving an intermediate superiority in his own person. Every conveyance of land must be completed by sasine, which is the only badge of real right in feudal subjects by the law of Scotland; and that sasine must be recorded in a public register within a certain number of days, that it may be seen and examined by all persons interested.

Such sasine proceeds on the warrant or precept of the feudal proprietor,—either when a proprietor conveys his land to be held of himself as superior; or when he resigns his lands into his superior's hands by resignation in favorem, for the purpose of being given out anew to the purchaser. He may also convey his land with a precept to be held of his own superior, provided that superior shall confirm his charter and sasine. Where the superior himself is the purchaser, the real right is conveyed, not by a proper sasine, but by what is held as such, namely, by resigning the lands into the superior's own hands. This (called resignation ad remanentiam) operates as a discharge of the dominium utile, by which the superior's right under his paramount sasine stood limited; and so is equivalent to a sasine in favour of the superior of the dominium utile.

Sasine is thus, in all cases, the only legitimate method of completing voluntary conveyances to feudal subjects. And all burdens and securities on such subjects, having the nature of real rights, are nothing else than partial, temporary, or conditional transferences. It may generally, therefore, be said, that the whole law respecting the completion of real VOLUNTARY securities on land, is expressed in this one proposition, That the security requires to its completion a sasine duly recorded.

Judicial.

2. This rule, as applicable to JUDICIAL securities, must be taken with a certain qualification. In consideration of the difficulty which creditors sometimes experience in forcing the debtor, or his superior, to give sasine voluntarily; and of the risk of the exclusion of some creditors by the more rapid or more favoured proceedings of others; the Legislature was induced to indulge creditors in this situation, so far as to hold a charge against the superior to be equivalent to sasine in questions with other creditors doing diligence. But still, although such charge is sufficient to establish a preference over the personal creditors, and creditors adjudging, it has no effect in competition with sasine on a voluntary security. To that case the rule above laid down still applies.

CHAPTER I.

OF VOLUNTARY SECURITIES ON THE FEUDAL ESTATE.

THE principles on which all voluntary securities upon land, for debt, depend are,—1. That the real right of the creditor, or jus in re, is constituted by the feudal form of sasine: 2. That the security or burden must precisely appear in the record. Before proceeding to examine the several grounds of preference by voluntary security, a short view of the history of the several securities may be useful.

Wadset.

1. The WADSET, in its original form, was a conveyance of land in impignoration to the

creditor for payment of money lent. The right of the creditor was secured by sasine: he entered into possession, or drew the rents; and his right was at an end only when the total sum of advance was repaid. This form of security, though little in use now, was once the most common of all; for, amidst all its inconveniencies, it had this advantage, that under cover of it, more easily than under that of any other security, the canonical prohibitions against the taking of interest could be eluded. At first, the right of the wadsetter, or creditor, was that of a proprietor, qualified by a condition of redemption declared in the deed. Afterwards, the conveyance to the creditor, and the condition of reversion to the debtor, were expressed in separate deeds; and then the creditor became, in appearance, an absolute proprietor of the debtor's lands, but liable to a personal right of redemption in favour of the debtor. This personal right, when conceived in favour of the debtor, and his assignees, could be assigned by the debtor; and the right of the assignee was completed by intimation to the creditor: Or the right of redemption could be renounced in favour of the creditor himself, and then his right became absolute:[1] Or if the debtor required a farther advance, and if the creditor was willing to make it, a partial renunciation to that extent, of the right of reversion, (which obtained the strange name of an eik, or addition to the reversion), enlarged the creditor's security, so as to include the new debt. But as in the wadset the creditor's right was ex facie absolute, and the right of reversion merely personal; it became necessary to secure the reversers, or proprietors, and their heirs, assignees, and creditors, against the possibility of a bad use being made of the apparently absolute right which was held by the wadsetter or lender; and to secure strangers against the secret claims of the reversers or borrowers. These two objects were accomplished by the statutes 1469, c. 27. and 1617, c. 16. declaring reversions to be real rights, effectual against singular successors, and ordering them to be recorded for publication. Gradually, from this time, the wadset came again to be expressed in one deed; and when this security is used at the present day, it is executed in the form of a contract.

2. INFEFTMENT OF ANNUALRENT.—This was another very ancient mode of borrowing money upon land. It gave the security of a right to an irredeemable annuity payable from the land. Neither this form of security, nor the RENT-CHARGE, (which was little else than this, deprived of its feudal form of sasine), were, strictly speaking, securities for debt; since they were proper purchases of an irredeemable and annual payment from land. But they were, with the wadset, the only forms once in use for this purpose. Approaches were gradually made, however, to the modern form of heritable security. Even prior to the abolition of the canon law, conveyancers ventured to introduce into their annualrent rights a clause of redemption; which converted them into impignorations of a rent, as the wadset was an impignoration of the land itself. And, after the Reformation, the deed was furnished with a counterpart to this clause of redemption, viz. a power of requisition by the lender. The next step of the progress was to introduce, instead of the power of redemption and requisition, a proper personal bond to accompany the annualrent right, and by operation of which the principal sum might be recovered.

3. HERITABLE BOND.—By degrees the infeftment of annualrent was converted into the form of an heritable bond; in which the debtor not only bound himself personally to repay the money, as in a common bond—and in farther security sold, alienated, and disponed to the creditors an annualrent corresponding to the legal interest of the debt, payable forth of the lands; but also the lands themselves in security of the principal sum,

[1] So at least Hope held, (Minor Practics, tit. 6. § 2.)—though Stair held otherwise, and that resignation was necessary, 2. Stair, 10. § 13.

interest, and penalty; and accompanied and completed those rights by sasine. By this form the creditor holds a real security for the sum of debt actually due at the date of infeftment, and for the interest as it arises; and he has a power of entering into possession, or recovering the rents. If he do enter to the possession, he is obliged to account for the sums which he receives; and his security is extinguished in proportion to the amount of his intromissions or payments; subsisting only for the balance.

4. Heritable Bond and Disposition in Security.—An improvement was made in the above form of security, by adding a clause of disposition under reversion; selling, alienating, and disponing the lands, heritably, but redeemably, and under reversion. And the sasine by which this was completed is accompanied by a power or mandate, authorizing the creditor to sell the lands by public auction after certain notices and precautions.

5. Absolute Disposition with Back-bond.—The application of the above forms of security to loans of money, or to debts formerly subsisting, is obvious. But occasions arose when something else was necessary. Men in need of occasional supplies of cash, and who at the same time preferred the borrowing of money to the sale of their land, required a form of security, under which one, having the command of money, should engage to make occasional advances, or to relieve a debtor from such pressing debts as he might at any time be called upon to pay. Of the above forms of security, none seemed fit to be applied on such an occasion except the wadset: But, in its proper shape of a mutual contract, or even of an absolute conveyance, qualified by a bond of reversion, made real under the statutes 1469 and 1617, even this form of security was ill adapted for such an occasion; for the wadset can become a cover for a future debt only by an 'eik to the reversion,' recorded, and made real, in terms of law. But the separation of the disposition and right of reversion shewed the possibility of using the form of an absolute disposition, qualified by a personal back-bond; the absolute right being thus established in the creditor, so that no one deriving right through the debtor could have a claim for restitution, until the debt should be paid up to the creditor. But it will not appear surprising that such a security should not have been adopted into common use, when it is considered how unwilling any proprietor must be to grant an absolute conveyance of his estate, by which he must cease to appear in the world as proprietor of it, and (being unprotected by the Acts 1469 and 1617) must leave it in his creditor's power to convey his estate away from him for ever.

6. Securities for Relief of Sums and Engagements.—In this difficulty, lawyers and conveyancers set themselves to accommodate the old forms of security to the wishes of their employers. 1. They made the wadset to cover future debts, by taking it at once for sums 'advanced, or to be advanced.' 2. The annualrent right, being the purchase of a rent redeemable on payment of the purchase money, was not so easily converted into a security for future debt; but it was made to serve the purpose, by a declaration, (as Dallas informs us), that all other debts and engagements should be settled by the debtor, before the power of redemption should be open to him. 3. To bend the form of the heritable bond to this new use, for which it was not originally calculated, other means were taken. As a security for a precise sum, this form is limited by the actual extent of what is due at the giving of the sasine, since there can be no security where there is no debt. It must, of course, be extinguished, by payment or intromission, and cannot be tacitly revived. But as such a security was always thought competent for a cautionary engagement, or obligation of relief, the heritable right was given in security, and for relief of all sums, debts, engagements, and 'cautionaries.' This appears to have

been a common security towards the end of the seventeenth century.[1] These securities in relief were stopt in their effect as covers to future debts, by the intervention of infeftment in favour of another creditor.[2] But even with this qualification, such securities were pregnant with mischief, as instruments of fraud. By means of them a debtor could evade the provisions of the Act 1621, enacted for providing against conveyances to the prejudice of the diligence of creditors. He had only to grant a deed, such as either of those now described, while yet diligence had not begun against him; and when diligence began, his disponee paid off favourite creditors; neither the debtor himself, nor the creditors, being entitled to have the land restored, without accounting to him for all the money he had paid on account of the debtor. As it was obvious also, that in all cases, under a deed of this kind, for security of the relief of all sums and engagements, the favourite creditors of bankrupts might receive payment of their debts with perfect safety to the trustee employed, it was, in order to avoid this, enacted by the Legislature, (1696, c. 5.) that 'because infeftments for relief, not only of debts already contracted, 'but of debts to be contracted for hereafter, are often found to be the occasion and cover 'of fraud; all dispositions or other rights that shall be granted for hereafter, for relief or 'security of debts to be contracted for the future, shall be of no force as to any such 'debts that shall be found to be contracted after the sasine or infeftment following on the 'said disposition or right; but prejudice to the validity of the said disposition or right as 'to other points, as accords.'

Security for Cash-accounts.

7. SECURITIES FOR CASH-CREDITS.—The necessity of devising some means by which it might be possible to give security for future advances and cash-credits, led to a provision in the statute of 33. Geo. III. c. 74. and in the late Sequestration Act, 54. Geo III. c. 137. permitting securities of this sort under certain conditions. The preamble of this part of the statute, after reciting the clause of the Act 1696, c. 5. relative to securities for future debts, proceeds thus:—'But it would tend not only to the benefit of commerce, but also 'of agriculture and manufactures, if securities by infeftment, for the payment or relief of 'future balances arising upon cash-accounts or credits, or of sums paid on such cash-'accounts or credits, were made an exception from the rule laid down in the said recited 'clause.' On this statement of the views of the Legislature, it is enacted, 1. That persons possessed of lands or other heritable subjects, and desirous to pledge them in security of sums paid or balances arising upon cash-accounts or credits, although posterior to the date of the infeftment, may grant heritable securities accordingly on their lands or other heritable estate, with procuratory and precept, for infefting any bank or banker, or other person, who shall agree to give them such cash-accounts or credits: And, 2. That securities may, in the same way, be granted by way of relief to any person who may become bound with the granter for payment of such sums or balances. But it is made an absolute condition, on which the efficacy of the security is to depend, that the principal and interest which may become due upon the said cash-accounts or credits, shall be limited to a certain definite sum, to be specified in the security; the said definite sum not exceeding the amount of the principal sum, and three years' interest thereon at the rate of five per cent.[3]

[1] See Lord Stair's report of the case of INGLIS; 2. Stair's Dec. 557.

[2] M'DOWAL of French against Sir JOHN RUTHERFORD, 19th January 1715; Bruce, 39. (M. 1153).

[3] See below, Commentary on the Act 1696, c. 5.

SECTION I.

OF THE COMPLETION OF HERITABLE SECURITIES BY RECORDED SASINE.

Of Sasine as the criterion of Preference.

No real right in security, constituted by act of the debtor over his feudal estate, is effectual, unless completed by sasine duly recorded.[1] The recorded instrument is thus the badge and criterion of preference among creditors. This doctrine may be considered,—1. In relation to ordinary estates in land; 2. In relation to burgage property.

§ 1. OF THE INSTRUMENT OF SASINE.

Requisites of Sasine.

Sasine is the symbolical tradition of the land, or other feudal subject, by the granter's bailie to the attorney of the grantee, in fulfilment of a conveyance by charter, disposition, heritable bond, &c.

It must be given on the ground itself;[2] on any part of the estate conveyed, if it all lie contiguous and is contained in one charter. If not contiguous, or if held by different tenures, or if the titles be from different superiors, or if the subjects be represented by different symbols, sasine must be given by successive deliveries on the several parcels respectively and successively; unless by a charter from the crown the subjects have been combined in a clause of union; or unless they make part of a barony.[3]

The only proof of the sasine is a written instrument narrating the act—stating the reading and publishing of the precept; the ceremony of delivering the symbols to the attorney, in perfect consistency with the warrant or precept; enumerating and describing the subjects, with the evidence on which they are included in the sasine; naming the person to whom sasine is given, and deducing the title by which he acquires right to the precept, if he should not be the person in whose favour it was originally granted. The ceremony takes place in presence of a notary and two witnesses, who all sign the instrument, in testimony of the facts narrated in it.[4]

Discontiguous.

Lands specified.

A few of the important points in the law of sasine, as affected by recent decisions, may here be stated:—1. The sasine must, in discontiguous or separate subjects, be taken successively on each parcel: But it does not seem to be fatal to the sasine should this not be stated in the instrument, provided the expression be not inconsistent with the requisite acts, and provided there is not evidence of the successive acts having been neglected.[5] 2. The lands must be described and identified as those referred to in the precept. Sometimes the

[1] Under the term sasine, in the proposition stated thus generally, I include an instrument of resignation ad remanentiam in the special case of a conveyance in favour of the feudal superior. The act of resignation is truly the sasine or redelivery of the land to the superior; the instrument is the sole evidence of it; and it requires to be recorded precisely as an instrument of sasine is recorded.

[2] Resignation ad remanentiam is a personal act of reinvestment, and may be made any where in the personal presence of the superior, or of a commissioner appointed to act for him.

[3] DENNISTON against CAMPBELL, 7th July 1824.

[4] See, for this doctrine of the text, 2. Stair, 3. § 16. et seq. 2. Ersk. 3. § 33. et seq. Treatise on the Conveyance of Land to a Purchaser, p. 172—229.

[5] GORDON against BRODIE, 20th July 1773; Tait's Rep. 5. Brown's Sup. 587.; 1. Hailes, 535.; Bell's Election Law, 254. Note. The words of the instrument were 'Sasinam, &c. omnium et singularum prædict. 'terrarum, &c. tradidit, &c. per terræ et lapidis pro 'dict. terris traditionem.' The usual terms are a compearance on the lands respectively and successively; and that these things were so done 'on the grounds 'of the said lands respectively and successively.' The objection was taken, that there was no special and successive delivery of sasine proved by the instrument; but it was repelled.

precept is conceived in terms so general as to convey no distinct evidence of authority to give sasine in any particular subject; and in such a case the instrument must prove, that the notary produced and read the evidence which identified the lands.[1] 3. The sasine must be given to a person named and designed;[2] either the person named in the precept, or one who, by production and publication of the proper titles, is proved to be in the right of the precept.[3] 4. The notary's holograph docquet must not only bear his attestation, by the words 'vidi, scivi, et audivi,' of the several facts set forth, but specially state his personal presence at the ceremony.[4] It must also describe the instrument correctly; and so, when the instrument consists of more than one sheet, the pages must be correctly stated.[5] But when it is on one sheet, the number of the pages in the docquet is not necessary to be stated.[6] 5. The instrument must truly describe, so as to identify it, the warrant on which it proceeds.[7] 6. Errors in the sasine, if manifestly mere mistakes, and innocent, are not held fatal.[8] 7. Erasures of the name of the lands are fatal.[9]

To whom Sasine given.

Presence of Notary.

Number of Pages.

Warrant.

The subject may be concluded with this observation, that it has been laid down as a principle ruling such cases, 'That where it appears ex facie of the instrument that the 'thing was done, and that sasine was in reality given, blunders or mistakes in extending 'the instrument ought not to annul the sasine.'[10] But this doctrine is not to be too much relied on. An instrument required as a solemnity is not within the reach of that constructive power which a court of justice is called upon to exercise in questions upon contracts or wills, where the granter's intention must, if possible, be discovered and made effectual. If Judges are allowed to supply the defects of solemnities and instruments, it unfixes the whole system, and renders property uncertain.[11]

[1] WALLACE against DALRYMPLE, 23d June 1742; Kilk. 504. (6919). This was an heritable bond, with a precept for sasine in certain lands, and forth of all other lands of the granter in the shire of Ayr. Sasine was given in lands not specially mentioned 'as con-'tained in the granter's infeftments,' but without expressing those infeftments to have been produced: The objection was sustained.

HEPBURN BELCHES against STEWART, 21st January 1815; Fac. Coll. 165. confirming the above.

Lord Kames reports an opinion of the Court, (implied in both the above cases), 'That a precept to 'give infeftment in lands described in general to belong 'to the granter of the precept, is a sufficient warrant to 'give infeftment in every particular thereof, which, by 'production of the granter's infeftment, is vouched to 'come under the general description.' Trustees of GRAHAM'S Creditors against HYSLOP, Sel. Dec. 65. (M. 50).

[2] DENNISTON and Company against M'FARLAN, 16th February 1808. Sasine here was given to John Gillies, manager, and one of the partners of the Dalnotter Iron Works, belonging to Murdoch, Gordon, Gillies and Company, and the other members of the said Company. It was held a good sasine to Gillies, but not to the other partners.

[3] 1693, 35.

[4] M'INTOSH against INGLIS and WEIR, 17th November 1825; Fac. Coll.; 4. Shaw and Dunlop, 190. The objection was sustained on the omission of the words 'Dum sic ut præmittitur dicerentur agerentur et fierent 'una cum prænominatis testibus præsens personaliter 'interfui,' although the docquet bore, 'Sic fieri et dici 'vidi scivi et audivi ac in notam cepi.' The Court, in this case, denied the authority of the case of Maxwell.

[5] See Duke of ROXBURGH against HALL, 4th June 1741; Kilk. 503. (14,332.); and CLARK against WADDEL, 7th February 1752; Kilk. 507. Fac. Coll. 3. (14,333). Act of Sederunt, 17th January 1756.

[6] M'LEAN against Duke of ARGYLL, 2d July 1777; Tait's Cases, 5. Brown's Sup. 590.

MORRISON against RAMSAY, 16th December 1826; 5. Shaw and Dunlop, 150.

[7] GORDON against Earl of FIFE, 22d December 1826; 5. Shaw and Dunlop. Here a doubt occurred as to the construction, whether it implied a charter of one king or of another; and the objection was repelled.

[8] HENDERSON against DALRYMPLE, 8th May 1776; Tait, 5. Brown's Sup. 586. LIVINGSTONE against Lord NAPIER, 3d May 1762; Tait, 5. Brown's Sup. 587. Monboddo, ib. 888. Duke of DOUGLAS against CHALMERS, Tait's Rep. 5. Brown's Sup. 587. BOYD against HUNTER, 23d February 1822; 1. Shaw and Dunlop, 351.

[9] INNES against Earl of FIFE, 10th March 1827; 5. Shaw and Dunlop, 559.

[10] Tait's Cases, voce *Sasine*, 5. Brown's Sup. 588.

[11] See below, for objections to sasine as not duly authorized by the warrant, as an exhausted precept.

§ 2. OF THE RECORDING OF THE SASINE.

Recording of the Sasine.

Sasine has no effect in competition with third parties holding an unexceptionable right to the land, unless it shall have been recorded in a register appointed for the purpose, within sixty days from the date of the instrument. And by the Act of 54. Geo. III. c. 137. § 12. the date of the registration is held in all questions on the bankrupt statute of 1696, c. 5. to be the date of the security. Recording is thus an important point in the law of securities, and on the laws relating to it depends that publication by which the credit of landed men in Scotland may be estimated with great correctness.

Without entering upon any disquisition concerning the advantages and evils of this system, it may be observed, 1. That the records do not present a complete view of every imperfection that may exist in the debtor's right: 2. That they have become intricate and difficult to be consulted, so as much to augment the danger of relying on the information which they supply: And, 3. That this difficulty is daily increasing, by the splitting down of estates into portions in the creation of securities over particular farms; for one who borrows money, and foresees the chance of a future necessity to borrow more, aware that it is not easy to procure a loan on a secondary security over his lands, confines the first transaction to a portion of his estate, so as to leave him at liberty to make a similar transaction on another portion. If the sasines of any county in Scotland for the last ten years be compared with the number of sasines in the same county for a similar period half a century ago, the increasing complexity of the records will very strikingly appear.

History of Register.

The registers were first instituted by unprinted statutes, which had for their object the prevention of forgery, more than publication to third parties, and which do not seem to have been much in observance.[1] A statute which was passed in 1617 gave them their permanent constitution, as publications of burdens on land, and of conveyances. By that statute it was required, that every sasine, in order to have effect against third parties, should be recorded within sixty days of its date.[2]

Minute-book of Entries of Deeds to be recorded.

Prior to these Acts, the preference depended on the infeftment being either public, from the superior; or completed by actual possession, till which it was held latent. The natural effect of the Act 1617, c. 16. should have been to take away all those distinctions, by affording the means of knowing at once from the record what sasines existed. But the Act did not at first produce its full effect, and the distinction of public and private infeft-

[1] See the statute 1599 in the Books of Sederunt, 3d November 1599. This was adopted by Parliament, 1609, c. 36.; Acta Parliam. vol. iii. p. 237. See also Act of Sederunt, 6th January 1604; Tait's Acts of Sederunt, p. 34.

[2] 1617, c. 16. Acta Parliam. vol. iii. p. 545. This statute proceeds upon a preamble 'of the gryet hurt 'sustened by his Majestie's liegis, by the fraudulent 'dealing of pairties, who having annaliet (sold) their 'lands, and reseavit gryet soums of money thairfor; 'yet, by their unjust concealing of sum privat right 'formerly made by them, rendereth subsequent alien-'ation done for gryet soums of money altogidder un-'profitable; whiche cannot be avoyded, unless the 'saidis privat rights be maid publick and patent to his 'lieges;' and provides,—*1st*, That there shall be a public register for all sasines, &c. *2d*, That the sasines, &c. shall be recorded within threescore days after their date. *3d*, That, if not thus duly registered, they are to make no faith in judgment by way of action or exception, 'in prejudice of a third party, who hath 'acquired a perfect and lawful right to the said lands 'and heritages, without prejudice always to them to use 'the said writs against the party maker thereof, his heirs 'and successors.' *4th*, That the clerks, &c. shall be ready to receive sasines, &c. and shall record them within forty-eight hours, delivering them back with the day of registration, and the place of the record, marked. And, *lastly*, For the accomplishment of this national scheme of a record, besides a general register at Edinburgh, in which sasines of lands, in any part of the country, may be entered, the whole of Scotland is divided into districts, for each of which a particular register is appointed to be kept.

Similar regulations were, by 1681, c. 11. introduced in the case of sasines of burgage tenements; only, instead of the county records, the town clerks are ordered to keep records on purpose. See below, p. 681.

ments still subsisted. The system of registration, however, was gradually improving; and the first check on the partiality or negligence of keepers of records was imposed by the regulations 1672, c. 16. which ordered a minute-book to be kept of the presentment of sasines for registration, to be compared quarterly with the record.[1] But a better remedy was proposed by Lord Stair, and embodied in the Act of Sederunt 15th July 1692, viz. that the presenter of the sasine should see the minute immediately written out and signed by himself and the keeper. This was offered, as Lord Stair says, by the Lords to the Legislature, and adopted by 1693, c. 14.[2] These improvements having corrected most of the evils attending the imperfect state of the registers, the Legislature now thought it safe to alter expressly the former law as to public and base infeftments, and to place the preference of sasines entirely on the priority of their registration. This was done by 1693, c. 13.[3]

Registration the criterion.

By 1686, c. 19. the certificate of the clerk on the back of the sasine had been declared sufficient for the security of the party, in evidence of the registration. But this was, on the suggestion of Lord Stair,[4] corrected by 1696, c. 18. which declares the whole effect of sasines, as against third parties, to depend upon their being 'duly booked, and insert in 'the register.'[5]

Requisites.

Under these statutes, the requisite of registration includes three particulars:—1. The entry in the minute-book of the presentment, with a general description of the sasine and of the lands, and a reference to the part of the record where the copy of the sasine is to be found; 2. The transcript in the record; and, 3. The certificate on the back of the sasine, containing also reference to the pages of the record where the sasine is to be found.

[1] 1672, c. 16. 'There was,' says Fountainhall, 'a 'proposal and overture made to this Parliament, (1681), 'anent the minute-books of hornings, inhibitions, in- 'feftments, &c. that they should be printed and sold 'off, and be authentic; that a man, for twelve pence, 'might know, from year to year, what encumbrances 'any land or estate were under; and if they were not 'to be found in that minute, then they were not to 'make faith. But this was propaling, denuding, and 'discovering too much the weakness of the nobility and 'some of the gentry's estates, and so was found incon- 'venient.' 1. Fount. 156.

[2] 1693, c. 14. 'Our sovereign lord and lady, the 'king and queen's majesties, considering, that the 'many good acts appointing registers of seisins, re- 'versions, hornings, inhibitions, interdictions, allowan- 'ces of apprysings or adjudications, that purchasers and 'creditors might know with whom they might safely 'contract, have been much frustrated, by the keepers of 'the registers not inserting the same in the registers at 'the time and in the order they were presented to them, 'whereby none could know by inspection of the regis- 'ters, what writs, appointed to be registrate, were in 'the hands of the keepers of the registers, and there- 'by could not securely bargain: for remedy whereof, 'their majesties, with advice and consent of the estates 'of Parliament, do statute and ordain, that all the keep- 'ers of the said registers shall keep minute-books of 'all writs presented to them, to be registrate in their 'several registers, expressing the day and hour when, 'and the names and designations of the persons by 'whom the said writs shall be presented; and that the 'said minute be immediately signed by the presenter 'of the writ, and also by the keeper, and patent to all 'the lieges, who shall desire inspection of it, *gratis*: 'and that the writs shall be registrate exactly conform 'to the order of the said minute-book, all under the 'pain of deprivation of the keeper of the register. And 'further, their majesties, with consent foresaid, declare 'the said keepers, not observing the premises, liable to 'the damage of the parties prejudged by the not due 'observing of this present Act.'

[3] This Act is entitled,—'Act establishing the pre- 'ference of real rights;' and 'for the better clearing 'and determining of competitions and preferences of 'real rights and infeftments,' enacts, &c. 'that all in- 'feftments, whether of property, of annualrents, or 'other real rights whereupon sasines for hereafter shall 'be taken, shall, in all competitions, be preferable and 'preferred according to the date and priority of the 'registration of the sasines; without respect to the 'distinction of base and public infeftments, or of being 'clad with possession, or not clad with possession, in all 'time coming.' 1693, c. 13.

[4] See 2. Stair, 3. § 22.

[5] 1696, c. 18. proceeds on the preamble, 'That un- 'less seisins and other writs and diligences appointed to 'be registrate, be booked, and insert in the respective 'registers appointed for that effect, the lieges cannot 'be certiorate thereof, which is the great use and effect 'of their registration.' Therefore, 'no seisin, or other 'writ or diligence appointed to be registrate, shall be 'of any force or effect against any but the granters, 'and their heirs, unless it be duly booked and insert 'in the register.'

Date of recording.

The minute-book ascertains precisely the day on which the sasine is presented for recording: And that is ordered to be the date also on which the sasine is to be actually recorded; or rather, sasines are required to be recorded according to the order of the entry in that book. If this had been enforced by declaring the entry in the minute-book to be the criterion of preference, provided the sasine itself were either in the hands of the keeper of the record, or transcribed in the register, the system would have answered its purpose. But it is enforced only by penalties directed against the keeper, namely, deprivation, and a declaration that he shall be responsible for damages. It may happen, however, that either the sasine may not be recorded within the sixty days; or it may not be recorded at all; or it may be postponed to a sasine presented subsequently. The rules are,—

Whether within sixty days.

1. The date of presentment, according to the minute-book, is to be held the date of recording, in a question whether the sasine has been recorded within the sixty days: And in such case it affords no objection, that the actual transcription has not taken place within the sixty days.[1] The certificate of registration on the back of the sasine correctly bears the date of presentment, and by that certificate, if truly bearing the date of presenting as in the minute-book, questions on the Act 1696, c. 5. will, under the late statute,[2] probably be determined, provided the sasine be in the hands of the keeper of the record, or transcribed in the register.[3]

Transcribed in the Register.

2. In order to have effect against third parties, the sasine must be actually transcribed into the register. It would have been in all respects better had the instrument been deposited in the Register House, and a transcript given out to the party; and many questions would thus have been avoided of a very distressing kind. The rules respecting this the actual recording of the instrument are,—1. That it must be fully transcribed; not entered by abbreviation and reference, but verbatim;[4] and particularly it is required by Act of Sederunt that the notary's docquet shall be verbatim transcribed.[5] 2. That clerical errors in transcribing essential parts of the instrument are fatal.[6] 3. That although the

[1] See Stair, Appendix, p. 790.

Sir A. M'Kenzie against M'Leod, 7th February 1768; Fac. Coll. (8800). In consequence of a very clear proof of the general practice and understanding, the minute of presentment was in these cases held to be the true date of the registration. These were election cases, and by 16. Geo. II. c. 11. § 10. it is enacted, that no person can be enrolled as a freeholder in a county, unless his sasine has been recorded a year before the enrolment. Votes were objected to on this clause; the minute of presentment being beyond the year, but the sasine having been recorded within it. The Court held the minute of presentment to be sufficient.

Earl of Fife against Gordon, 8th July 1774; Fac. Coll. (8850). See same case, Tait's Rep. 5. Brown, 589.

[2] 54. Geo. II. c. 137. § 12.

[3] Dunbar against Sutherland, 10th March 1790, (8799). This was an election question. A sasine had been duly marked by the keeper as recorded of a date beyond the year; but it was not actually transcribed in the record for a few days, which brought that act within the year. No minute-book was kept in that county (Caithness), and the Court, moved by the evil which otherwise would be produced to the whole county, held the registration as of the date of the certificate.

[4] 1696, c. 18.

Gray against Hope, 23d February 1790; Fac. Coll. 229. (8796.); where in a sasine, as transcribed in the record itself, the lands of Drumbowie having been omitted, the sasine was, in an election case, held null as to those lands.

Stewart against Earl of Fife, 20th February 1827, 5. Shaw and Dunlop, 383. was an election question, in which the objection was similar to the above. Part of the lands in the qualification were omitted in recording the sasine, and it was held ineffectual.

[5] Act of Sederunt, 17th January 1756.

[6] M'Queen against Nairne, 23d January 1823; Fac. Coll.; 2. Shaw and Dunlop, 637. The omission of 'primo' in the date, made the sasine bear date in 1820, instead of 1821. It was held fatal, although the date was correctly entered in the minute-book.

Denniston against Spiers, 16th November 1824; Fac. Coll.; 3. Shaw and Dunlop, 285. The error here was only in the year of the King's reign; but it was held fatal, although the year of our Lord was correctly transcribed.

record may be allowed to be corrected within the sixty days, this cannot be done after the expiration of that term.[1]

Criterion of priority.

3. A competition may arise between a sasine first transcribed, though last presented, and a sasine which, by the minute-book, is proved to have been first presented, though last transcribed. A question has occurred in election law, which has some influence on such a contest; namely, Whether a sasine, transcribed into the register out of the order which it bore in the minute-book, be duly recorded? The two Divisions of the Court pronounced different judgments.[2] The determination in the latter case, quoted below, seems preferable. Both the date of presenting, indeed, and the order of recording, are best ascertained by the minute of presentation; which, as bearing a distinct reference to the place of the volume in which the transcript is to be found, admits not in any degree of the danger supposed to exist, that, on examining the record, one might not be able to find the sasine, and so be entitled to hold none to be in the record. The Judges were careful, however, to reserve the question entire as in a competition; and were such a question to arise, the point must be held as unsettled. It might be of some importance in the argument to observe, that there is one case in which the minute-book is unquestionably the criterion, namely, where neither of the sasines is yet entered in the register. The sasine first in date, but last presented, would by this criterion be preferred. It is a matter which well deserves to be settled by the Legislature. And there seems to be little doubt, that, according to the true spirit of the law, it ought to be enacted, that the entry in the minute-book should be the date of the registration, provided the sasine be actually inserted in the record before the principal sasine is redelivered to the party, with an entry in the minute-book of the page of the record on returning the sasine to the party. In this way, those who search the record would find either the sasine itself in the hands of the keeper, or the record of it in the book. In absence of any legislative remedy, it may be observed, 1. That the declared intention of the Legislature was to secure the recording of sasines in the precise order of their presentment, 'that purchasers and creditors might know with whom they might safely con-'tract:' 2. That they declare the negligence of keepers to be detrimental, in so far as, by not inserting sasines in the 'order of their being presented, none could know, by inspec-'tion of the registers, what writs appointed to be registered were in the hands of the 'keepers of the registers, and thereby could not securely bargain:' And, 3. That it is to remedy those evils, and afford the means of 'securely bargaining,' that the minute-book, expressing not only the day but the hour, is appointed; and that it is ordered 'that the 'writs shall be registered exactly conform to the order of the said minute-book.' There can be no doubt, therefore, that the Legislature intended the minute-book to be the regulator of the order of preference by priority. At the same time it must be admitted, that

[1] DUNDAS against DENNISTON, 15th December 1824; 3. Shaw and Dunlop, 400.

N. B.—The case of TAIT, 17th January 1822, 1. Shaw and Bal. 241. was held to have been decided per incuriam, and it was declared not to be a precedent hereafter.

[2] In the case of DRUMMOND against Sir A. RAMSAY, 24th June 1809, the sasine was presented on 25th September; omitted to be entered of that date in the minute-book, but immediately entered in the record. On 4th October the omission in the minute-book was observed, and an entry made of that date, and the date of the record and certificate erased to correspond. The great question was, Whether it was duly recorded, as it stood out of its order in the record? The Court (Second Division) judging on the election statute, held that the inserting of the sasine in the record, out of the order of the minute-book, was fatal to the claim of enrolment. The present Lord President Hope, Lord Glenlee, and Lord Newton, concurred in this opinion. It was opposed by the late Lord Meadowbank.

In the case of ADAM against DUTHIE, 19th June 1810, the same question was determined the other way by the First Division; the late Lord President Blair, and a majority of the Judges, holding the minute-book to give the true date of recording, and the transcription into the record book to be of no importance, provided it was duly referred to in the minute of presentation, so as to be found in the record by those wishing to examine it.

there are no legislative words on which to ground a judgment in favour of a sasine last registered, though first in the minute-book. If the Act 1693, c. 14. had declared a sasine recorded out of the order of the minute-book to be null in competition, this might have authorized judgment in favour of the sasine recorded last, if first presented. But there neither are such words, nor any thing equivalent to them;[1] and courts of law are left to determine the question on the construction of the statute 1693, c. 13. which declares the priority of *registration* to be the criterion of preference.

4. When the competition has arisen prior to the presenting of any of the sasines for registration, the preference is determined by the priority of date of the sasine.

5. A sasine not recorded within the sixty days, is, by the statute 1617, declared to make no faith in judgment, by way of action or exception, in prejudice of a third party who has acquired a perfect and lawful right to the lands and heritages; but (without) prejudice to use the said writs against the party maker thereof, and his heirs and successors.[2] It follows,—1. That the sasine is effectual against the granter and his heirs,[3] and ineffectual only in competition with a perfect and lawful right. And, 2. That it is good against all having only personal rights to the lands.[4]

How far that will affect the power of taking a second sasine on the precept, shall be discussed hereafter.[5]

§ 3. OF SASINES IN BURGAGE SUBJECTS.

Conveyances or securities of burgage subjects must be completed by a recorded sasine. The burgh itself, as a corporation, holds of the crown by a tenure which requires no renewal;[6] and each tenement in the burgh also holds in burgage of the crown, the magistrates being by the charter merely the crown's commissioners, in receiving resignations and renewing the burgage holdings of the proprietors.[7]

1. SASINE.—The right is conveyed, or a security granted, only by a deed containing a procuratory of resignation, on which the subject being resigned in the hands of the magistrates, 'as in those of his Majesty, immediate lawful superiors thereof,' sasine is forthwith

[1] In the case of DRUMMOND against Sir A. RAMSAY, Lord Newton seems to have inferred an intention to annul the sasine recorded out of the order of the minute-book, from the responsibility of the keeper for damages. But that responsibility may be for the damages suffered by the person whose sasine is postponed in the register. See preceding page, Note [2].

[2] See above, p. 676. Note [2].

[3] Sir WILLIAM KEITH against SINCLAIR, 17th December 1703; where this rule was held to regulate a competition between a purchaser deriving right from an heir whose sasine was never registered, and a purchaser from the next heir making up titles by clare constat and infeftment regularly recorded. Dalrymple, 54.

[4] GRAY against TENANTS, 24th March 1626. This was a competition for rents between an arrestor and a disponee from the common debtor, but whose sasine was not recorded within the sixty days. The Lords held the right sufficient as to the granter to denude him of the lands; and neither he nor his creditor, holding a personal right by his diligence, could plead the exception of nullity—that being by the statute given only to those having a perfect and full right. Durie, 197. See also Durie, 61. and the cases there referred to.

Another example of the rule is given in ROWAN against COLVIL, 21st July 1638; where a competition arose between an unrecorded infeftment in a mill, cum astrictis multuris, and a posterior infeftment in land, with a clause cum molendinis et multuris. The Court sustained the unrecorded infeftment against the disponee who had no right to the mill. Durie, 859.

[5] See below, p. 696.

[6] The magistrates, as administrators of the burgh property, have been held entitled to feu out the property of the burgh. DEAN against Magistrates of IRVINE, 3d July 1752; 1. Fac. Coll. 40.

[7] URQUHART against CLUNES, 17th January 1758; Fac. Coll. 162. Here a burgh having been suppressed, and a resignation ad remanentiam accepted by the king, the burgage proprietors were held crown vassals.

given by the magistrates. The symbol is staff and baton, and not earth and stone.[1] The resignation must be renewed, and sasine given by a magistrate;[2] and the instrument is extended by the clerk of the burgh.

2. RECORDING.—Clerks of burghs acting as notaries in the infeftments of heirs, disponees, and creditors, in burgage subjects, had, by the regularity with which they entered the sasines in their books, given so much credit to their records, that in the Act 1617, c. 16. establishing the recording of sasines in the records of the shire, an exception was made of burgage subjects. But errors and omissions crept in, which, after an attempt to correct them by Act of Sederunt, 22d February 1681, the Legislature, by 1681, c. 11. provided against, by requiring, that sasines on subjects holding burgage should be recorded within sixty days from their date, in books to be kept by the town-clerk, under the penalty of the conveyance being held null.[3]

If the subject is to be held burgage, the sasine must be recorded in the books of the burgh.[4] But where the holding is in feu, the registration ought to be in the county record.[5] The difficulty in these cases is, to determine whether the holding be burgage or feu. In the two cases first above quoted, the subject was to be held for payment of a feu-duty, but bearing the common burdens of scot and lot, personal suit and presence in the courts of the burgh. In the last, the lands did not hold burgage. In constituting securities over burgage subjects, sometimes an heritable bond is granted, to be held, not in burgage, but in feu of the granter. Such a security, it would seem, must be recorded in the register of the county, not in the burgh record. But in the doubt which still hangs over this subject, it would be advisable to record the sasine in both ways.

§ 4. OF THE PREFERENCE OF SASINES AS DEPENDING ON THE NATURE OF THE PRECEPT, THE STATE OF THE TITLES, &c.

The right created may be either under a precept for holding base; or under a precept for a public holding; or under an alternative precept.

Base Infeftment.

1. Where the right proceeds on a conveyance, in sale or in security, granted directly by the debtor, to be held BASE of himself, and completed by sasine duly recorded; the warrant of infeftment is a precept of sasine to be held de me. And what has already been said is sufficient to explain the criterion of preference.

Public holding à me.

2. Where the claimant's right proceeds on a conveyance to be held of the granter's superior only, it is called a PUBLIC holding. The warrant for infeftment is a procuratory of resignation; or a precept for sasine to be held à me de superiore meo: generally the deed contains both. And the grantee may proceed in one of two ways: Either,—1. He may, on the procuratory of resignation, have the lands resigned into the hands of the granter's superior, in order that a new charter may be granted to the disponee. Such charter is called a Charter of Resignation, and is completed by a sasine duly recorded.

Resignation.

[1] See Act of Sederunt, 11th February 1708. See also DUNCAN against Earl of ABERDEEN, 25th June 1742; Kilk. 504.

[2] 1567, c. 27. It has been doubted whether this requires the clerk to be notary to the sasine.

[3] 1681, c. 11.

[4] BURNET against DRUMMOND, 5th July 1711; Forb. 517. Here Burnet was infeft in an annualrent out of some tenements and burgh acres in Culross, on a precept of sasine in an heritable bond, to be held of Sands, the proprietor of the subjects. The sasine was recorded in the town court books. Sands became bankrupt; and, in a competition of his creditors, this infeftment was objected to as null. But the Lords sustained the infeftment.

DIXON against LOWTHER, 1st February 1823; 2. Shaw and Dunlop, 176.

[5] DAVIE against DENNY, 2d June 1814; Fac. Coll. 628.

Confirmation.

Preference here depends on the registration of the sasine.[1] Or, 2. The grantee may take sasine on the precept à me, and apply for a Charter of Confirmation, which ratifies that sasine, and makes it equally effectual as if taken on a legitimate precept. This effect takes place not merely as from the date of the charter, but as from the date of the sasine itself: And so the registration of the sasine, thus taken, will regulate the preference of the right.[2] It will, however, be observed, that the sasine in this case is ineffectual till confirmed; since it proceeds on a precept for a public holding merely, which the superior alone can effectually authorize.[3] It follows from this, *First*, That if any thing occur, between the date of the sasine and the charter of confirmation, to prevent the superior from exercising his power of confirming, the sasine will remain ineffectual. This is called a Mid-impediment. As, for example, if the former proprietor have granted to another person a conveyance, on the procuratory of which that person has resigned, and obtained a charter of resignation, on which sasine has followed; the right will be completely transferred, and the superior's confirmation of the other conveyance will be unavailing. Or, if two public rights have been granted to different persons, and sasines have been taken on each, the sasine first confirmed is preferable, because the superior's power is thereby exhausted; and so, as between those two sasines, the criterion of preference is not the registration of the sasines, but the date of the confirmation. *Secondly*, If the former proprietor, after a conveyance on which public infeftment is taken, but before confirmation, shall grant a base right on which sasine shall be taken; the confirmation will render valid the public sasine, but under burden of the base right constituted in the meanwhile.[4] But it is no mid-impediment, that the person who obtains confirmation is made aware (even by the warrandice in his own conveyance) of the existence of a prior security.[5]

Mid-impediments.

Alternative holding.

3. Where the right is granted with an alternative holding, à me vel de me, and sasine follows; it is held to be in the first instance a base right, effectual from the date of the sasine; and afterwards, on confirmation, it becomes a public right.[6] This is the common form of conveyances and securities. Of old, a double conveyance was granted; one for the purpose of holding base, the other for the purpose of holding public; and two precepts accompanied them. The two conveyances were afterwards combined, presenting, in the clause containing an obligation to infeft by two manners of holding, the vestige of the ancient form. And in the progress of improvement, instead of two precepts, one expressed in terms indefinite was introduced; fit to be used as the warrant either of sasine to be held base, or of a sasine to be held of the superior. But it is carefully to be observed, that a sasine taken on this indefinite precept is not always capable of the alternative construction above explained. 1. However indefinite the expression of the precept, a sasine taken on it will be only a public sasine, and utterly ineffectual till

[1] It was formerly a subject of much controversy, Whether, by mere resignation, the vassal was so entirely divested of his right, that no future right, granted by him, could be available, though first completed by infeftment? See Leges Burg. c. 117. Balfour's Practicks, p. 158. Dirleton, in his Latin tract on Resignation, which he discusses in five questions, contends strenuously for the total extinction of the resigner's power. Craig, Hope, Stair, and Stewart, give to the opposite opinion the weight of their great authority; and, at last, it was settled by a solemn decision, that the resignation has no such effect. Sir W. PURVES against STRACHAN, 14th November 1677; 2. Stair, 558. (6890).

[2] See Hope, Min. Pract. tit. 5. 2. Stair, 3. § 28. et seq. 2. Ersk. tit. 7.

[3] STRUTHERS against LANG, 2d February 1826; Fac. Coll. 307. 4. Shaw and Dunlop, 418. See Hope, Min. Pract. tit. 5. § 1. and 3. 2. Stair, 3. § 28. 2. Ersk. 3. § 13.

[4] 2. Ersk. 7. § 15.
See HENDERSON against CAMPBELL, 5th July 1821.

[5] LESLIES against M'INDOE'S Trustee, 21st May 1824; 3. Shaw and Dunlop, 48.

[6] Bishop of ABERDEEN against Lord KENMORE, 15th July 1680; (3011).

confirmation, if the deed contain no alternative holding.[1] And, 2. The alternative nature of the precept is to be judged of by the obligation to infeft.[2]

In case of Resignation ad remanentiam.

4. Where the conveyance is from a vassal to his superior, it is accomplished by resignation ad remanentiam. The resignation operates as a restoration of the superior's sasine to its full original extent, as before the vassal's right was constituted. There is no occasion, therefore, for a new sasine. The instrument of resignation completes the superior's right; but as there is no sasine, and the records must be satisfied, this instrument of resignation must be recorded, as the sasine is in ordinary cases; and it is by the date of registration of the instrument of resignation that the preference is fixed.[3]

SECTION II.

OF SECURITIES AND CONVEYANCES IN COMPETITION.

RIGHTS in security may be reduced to two classes:—One, comprehending those in which the real right depends on a sasine in the claimant's person: The other, comprehending those in which the real right depends on a sasine in the person of another.

§ 1. RIGHTS IN SECURITY, DEPENDING ON SASINE IN THE CLAIMANT.

Superior for Feu-duties.

I. SUPERIOR FOR HIS DUTIES AND CASUALTIES.—The superior is secured in his duties and casualties by his own charter and sasine; and the vassal's right is held under condition of payment of the feudal duties contained in the reddendo.

1. The DUTIES form a debitum fundi preferable to all the vassal's creditors; and may, by POINDING OF THE GROUND, be made effectual against the vassal and all singular successors in the land.[4] They are entitled to a preference over all rights granted by the vassal; and this secures the arrears of feu-duty due at the time of the competition. In bankruptcy, the preference is given in the course of judicial sale or sequestration, on the

[1] STRUTHERS against LANG, supra, p. 682. Note [3].

[2] ROWAND against CAMPBELL, 30th June 1824; Fac. Coll. 558.; 3. Shaw and Dunlop, 198. Here the obligation to infeft was only to be held 'from me, of 'and under my lawful superiors,' &c. There was a procuratory of resignation and also a precept of sasine indefinite, and commencing thus, 'attour to the end the 'said H. W. may *be immediately infeft*,' *&c.* At first there was some doubt, whether this intention of an immediate infeftment, which could be effectual only if base, was not enough to characterize the precept as alternative. But the Court at last held the obligation to infeft as conclusive.

PEEBLES against WATSON, 9th December 1825; Fac. Coll. 111.; 4. Shaw and Dunlop, 290. Here there was no obligation to infeft de me, but 'to infeft 'by two infeftments and manners of holding, and that 'either by resignation or confirmation.' The want of the obligation to infeft to hold de me, and the distinguishing words 'confirmation or resignation,' applicable only to public holding, were held to characterize the sasine as only public, and ineffectual till confirmation.

M'NAIR against M'NAIR and BRUNTON, 16th February 1827; 5. Shaw and Dunlop, 372. Here the same characteristic expressions of the manner of completing the right by confirmation or resignation, were again held conclusive of the character of a public right.

[3] The statute 1669, c. 3. which orders the registration of instruments of resignation ad remanentiam, enacts it under the pain of nullity. It is observable, that there is no enactment that this registration shall be the criterion of preference; yet it seems very clear, that the whole statutes of registration would be deemed applicable to this case, since it is adopted into the system; and, though not expressly mentioned in the statute 1693, resignation must be held as included.

[4] The summons of poinding the ground concludes,—1. For letters to poind and apprize the goods, &c. under the restriction that the goods of tenants shall not be taken to the value of more than a term's rent: and, 2. For apprizing of the ground-right and property of the lands to the value of the remainder, to the effect of extinguishing the vassal's right, and vesting the same in the superior by consolidation, but redeemably. 4. Stair, 23. § 5. 4. Ersk. 1. § 11. et seq.

footing, that the title of the purchaser cannot be completed without complying with this condition.[1]

Superior's Preference.

2. But it is not merely for the arrears and current feu-duties that the superior has a preference. His non-entry, and relief duties, and composition for singular successors, as already explained,[2] sometimes constitute claims of great importance; and for these his security is equally complete.

II. SECURITIES FOR DEBT ON FEUDAL AND BURGAGE SUBJECTS.—These have been already enumerated, and it will not be necessary to add much to what has been said.

Effects of absolute Disposition on further advances.

An indirect effect is produced by one of the securities stated above, which ought to be taken notice of. The security by disposition absolute, but subject to redemption, either in terms of a back-bond or other form of acknowledgment, or according to the confidential understanding of the parties, is the proper form of security for covering future advances, (unless under the late statutes respecting securities for cash-accounts), and for securing obligations in relief. And it is, accordingly, the form in which banks generally take their securities for cash-credits. But the point to be now marked is, the effect of this security as going beyond the extent of the original transaction, to cover subsequent advances or engagements. It once was matter of controversy, whether the creditor was entitled to withhold a reconveyance till payment, not only of the original loan, but of all subsequent advances. But this is now settled in favour of the creditor. The doctrine, indeed, may be laid down generally, that, in all cases where one holds an absolute conveyance of property, whether heritable or moveable, under a personal obligation to restore it on payment of certain debts, it will subsist as a good security, not only to cover a specific debt, but, under a general stipulation in the back-bond to restore on payment of all advances, it will be effectual to cover every sum advanced previous to the demand of a reconveyance: and this not only against creditors, but against purchasers also. Against general creditors the demand of a reconveyance may effectually be resisted, even without any such general stipulation, till they or the debtor shall have paid every debt which shall have arisen subsequently. The holder is not bound to denude till he is satisfied and relieved of those debts.[3] In particular, a security, by absolute conveyance to land, where not restricted by a back-bond recorded or produced in judgment, has been sustained to cover all debts due to the disponee.[4] After such recording or production in judgment, the security is held to lose all power of farther extension, and to remain stationary as at that moment.[5]

Retention of absolute right under Back-Bond.

[1] The superior has a personal claim for his feu-duties on the contract, as well as a real right as for a debitum fundi.

[2] See above, p. 22. et seq.

[3] BROUGH's Creditors against JOLLY, 26th November 1793; Fac. Coll. 166.; where a disposition of heritable subjects was in question.

ROBE's Creditors against HENRY RAEBURN and Company, 7th June 1808; Fac. Coll. 182.; where the doctrine was applied to a conveyance of a ship.

DOUGAL against GORDON, 17th November 1795; Bell's Fol. Cases, 42. Here the doctrine was laid down in general terms, with relation to an absolute assignation of a moveable bond.

[4] RIDDEL against Creditors of NIBLIE, 16th February 1782; Fac. Coll. 55. (1154). Here Jamieson had disponed his lands absolutely to Niblie, who granted a back-bond, declaring the infeftment to be in security of certain debts of Jamieson, in the person of Niblie, and for such debts as Niblie should afterwards transact with Jamieson's creditors. An objection was taken on 1696, c. 5. to the infeftment, as for relief or security of debts to be contracted. The Court repelled this objection, in respect that the disposition was absolute; and the great doctrine was laid down, that the disponee having become creditor on the faith of his absolute right, could not be called on by the disponer or his creditors to denude, unless upon satisfaction for all the debts standing in his person.

KEITH against MAXWELL of Terraughty, (below, Note [5].) Lord Justice-Clerk MacQueen and Lord President Campbell both said in this case, that to impeach the decision in Niblie's case would be an injury to the country.

BARTLET against BUCHANAN, 27th November 1812. On the above principle, debts by personal bond were sustained as comprehended under the absolute infeftment to the effect of diminishing the terce.

[5] KEITH against MAXWELL, 8th July 1795; Bell's

It is a more difficult question, What shall be the effect of a disposition in security, conceived in terms of full conveyance, but expressly in security of a certain transaction, where the precise amount cannot be ascertained; as, for example, in relief of what may be deficient and requisite to be paid of a composition? It is a rule in all rights in security, that the debt for which they are granted shall be specific in amount, and in the name of the creditor.[1] And the question here is, Whether the words of absolute conveyance have the effect of raising an exception to that rule, as in the case of an absolute disposition? The most unchallengeable security in such a case, undoubtedly, is an absolute conveyance, with a back-bond recorded. But it does not appear to be hurtful to the effect of the absolute conveyance, that the deed should also set forth the nature of the transaction. The right conferred is universal; the condition is a fair one, though the amount of the burden is necessarily indefinite.[2]

§ 2. RIGHTS IN SECURITY, DEPENDING ON SASINE IN ANOTHER PERSON.

In sales, conveyances, and settlements of land, it is frequent to reserve burdens on the right of the disponee; or powers to raise debts against the estate. The former are called RESERVED BURDENS: The latter are known by the name of FACULTIES TO BURDEN; and have already been sufficiently discussed.[3]

In entering on the modes of constituting securities by reservation, and their effect in competition with other real rights, it may be observed, that if the question arise before the right of the disponee is completed by infeftment, the burden and claim of preference, constituted or reserved, will be equally effectual against the disponee and his creditors as if both rights were completed by sasine. A personal right to lands is qualified by the conditions which it contains; and the creditors of the disponee never can complete the feudal right, as coming in place of the disponee, without also completing at the same time the real burden.[4]

Cases, 234. Sym conveyed his lands to Maxwell, who granted a back-bond, declaring this to be a security for a debt of L.6000, due to Constable, for whom Maxwell was trustee. This back-bond was not recorded, but a reduction of the security was brought on Sym becoming bankrupt, and the back-bond was produced in that action. The security was not reduced. Then Maxwell, the disponee, became cautioner for Sym in a cash-account with Sir William Forbes and Company, and Sym gave a bond of relief, with a declaration, that the infeftment should subsist as a security for his relief, and that he should not be bound to denude till fully relieved. A challenge of this new security was raised by Sym's creditors; and Lord Justice-Clerk MacQueen at first sustained the security, holding, that the original conveyance, being an absolute disposition, which did not fall under the Act 1696, (respecting securities for future debts), subsists till Maxwell is relieved of his engagements for Mr Sym, whether prior or posterior to the date of the infeftment. He thus applied the general rule of Niblie's case, without discrimination. But afterwards he, as well as the rest of the Court, concurred in a distinction pointed out by Lord President Campbell, grounded on the production in judgment of the back-bond by Maxwell to Sym, whereby the absolute conveyance came to be restricted to a mere security for the L.6000, and stood so restricted on the records of the Court. But, in making this distinction, both these eminent Judges expressed their full approbation of the rule adopted in Niblie's case as law.

[1] See below, p. 689.

[2] OUTRAM, trustee for EVAN'S Creditors, against DRYDEN, 16th May 1816. The deed there narrated a composition which Evans had engaged to pay; the engagement of the disponees as cautioners for the deficiency, whatever it might be; and on this narrative a shop in Leith was disponed in simple terms, with a power to sell it, qualified by an obligation to account, and, after relieving themselves, to pay the balance to Evans. This form of security was objected to as for an indefinite debt, and on that point reported to the Court by Lord Reston on memorials: But the Court did not listen to the objection.

[3] See above, p. 40.

[4] LAMONT against LAMONT'S Creditors, 4th December 1789; Fac. Coll. 172. This report, however, seems to be inaccurate, so far as it appears to apply to the creditors of the *disponer;* for the feudal right never was taken out of his person, and Mrs Lamont was an adjudger, entitled to come in only pari passu with *his* creditors, though preferable to those of the

Burdens by reservation are conceived either in favour of the disponer, or person who grants the conveyance; or in favour of a third party. The former may be more strictly, perhaps, called RESERVED BURDENS: But both sorts of burdens are designated by this term, without discrimination; the debt in both being reserved, or excepted, from the right to be acquired by the disponee.

1. MODE OF CONSTITUTING A RESERVED BURDEN.

A real burden is created by reservation, when, in terms appropriate, a specific sum is declared, in a disposition or settlement, to be a burden on the right of the disponee, and when this condition enters the infeftment and is recorded. The ordinary case is of a conveyance to be completed by *infeftment*, either on a precept de me for holding base; or on a procuratory for resignation in favour and for new infeftment to the disponee; or on a precept à me de superiore meo, with confirmation: and in those cases no doubt has ever been moved, except in relation to the expression of the condition. But it is also competent to create a real burden where the conveyance is by a vassal to a superior, and the transference is completed, not by sasine, but by *resignation ad remanentiam;* for although resignation ad remanentiam be in one sense a mode of extinguishing, not of creating a feudal right, yet where it is an act of conveyance consented to by the superior, it is truly, in the sense of law, an infeftment qualified by its conditions.[1]

In constituting, in favour either of the disponer or of a third party, a burden on the right of the disponee, so as to give to the security the force of a real right, these rules must be observed:—

Real Burden.

I. *The Reserved Burden must be conceived as a Real not as a Personal Debt.*—It must be expressly declared a burden on the infeftment or lands themselves: the strongest expressions, directed to the disponee merely, not being sufficient;[2] and the law rather inclining to freedom from such burdens.

1. Where the *disponee* is declared liable for, or burdened with the debt, it is held, that although the conveyance be declared 'to be granted and accepted of under that condi-'tion;' or although the deed be expressed to be 'under the conditions following, appoint-'ed to be engrossed in the infeftments,' the debts will form no real burden. The older decisions had rather tended to give to the expression of such condition and declaration the effect of real burdens: But the later determinations have denied to them this effect, and fixed, that 'in a clause by which singular successors are to be affected, there must 'be no room for ambiguity; the inclination to impose a burden on the land by reservation 'must be expressed in the most explicit, precise, and perspicuous manner.'[3]

disponee. On examining the papers, I do not find that any question was stirred as to the creditors of Lachlan, the disponer.

[1] WILSON against FRAZER, 13th February 1822; 1. Shaw and Ball. 316. Here, in the procuratory of resignation ad remanentiam, it was declared, 'that the 'lands were resigned with and under the real lien and 'burden of L.11,000, &c. and with and under the 'several provisions and declarations before-written.' The procuratory was executed, and the instrument of resignation recorded, and the burden was held good. Affirmed 15th April 1824.

[2] 3. Stair, 2. § 53. 1. Bank. 519. 3. Ersk. 2. 49.

[3] MARTIN against PATERSON, 22d June 1808, Fac. Coll. where the above rule is laid down.

M'INTYRE against MASTERTON, 3d February 1824; Fac. Coll.; 2. Shaw and Dunlop, 664. Here the words were similar to those used in Martin's case, and the Court decided on that precedent; and 'in respect 'that, although the lands in question are conveyed 'under the burden of the payment of the sum of money 'therein mentioned, and now claimed by the pursuers, 'yet the same are not distinctly and expressly declared 'a real burden on the lands.'

The previous cases also are worthy of notice.

BALLANTYNE, November 1685; Pres. Falc. No. 101. Countess of ROTHES against FRENCH, 14th December 1698; 2. Fount. 25. ALLAN against CAMERON'S Creditors, 19th July 1780; Fac. Coll. 218.

STEWART against HOME, 18th May 1792; Fac. Coll. 440. Here the Court delivered a clear opinion, that the obligation, conceived personally, was not

2. It does not seem to be enough to constitute a real burden, that the lands are disponed in trust, and that one of the purposes is the payment of debt.[1] There is no established phraseology, no *voces signatæ*, for constituting such a burden. It is sufficient that the words declaring the burden shall be directed against the lands themselves, and so as to leave no room for doubt. In settling this point, it has not been held that there is any good distinction between a conveyance of lands 'under the burden of debt,' and 'under 'the burden of payment of debt.' Either of the expressions is sufficient, provided, in other respects, the burden be well constituted.[2]

3. Where in a disposition and infeftment a burden is imposed, by providing that a sum

changed by its being engrossed in the sasine. In this case, the entail was granted to and in favour of Dr George Stewart, &c. with and under the provisions, conditions, &c. that the said George Stewart, and his foresaids, shall be burdened with and obliged to pay the whole just and lawful debts, &c.—The Lord Ordinary held, that 'whatever annuities or debts are 'mentioned in the entail, as a burden on the estate 'entailed, must restrict the claim of terce.' Lord Justice-Clerk MacQueen agreed to this principle, but it did not apply to the case. The heir is burdened with the debts, but the *lands* are not. A purchaser or adjudger would take the lands free. The burden is laid on the disponee and his heirs. The engrossing in the infeftment will not alter the words, or their legal import. Decisions have settled this doctrine. Lord Dreghorn said, that it is not a mere quæstio voluntatis whether a burden be real. It must be imposed in a certain way, and by the use of fixed terms. The disponer seems here to have intended to burden the lands, but he has not done it. The case of Cameron affords an example of a burden intended, but held ineffectual, in a very hard case. Lord President Campbell agreed to that doctrine. All that is engrossed in the infeftment is, that Dr Stewart shall be burdened. An adjudger would take these lands free from any burden. It was also observed, that, in so far as the debts were indefinite, there was another objection to the security. Baron Hume's Session Papers, and Notes.

It may be observed, that, in some of these cases, there were debts, both of an indefinite and general description, and of a specific nature. We shall immediately see, that the indefinite nature of the debt affords an effectual bar to its being considered as real; but the above cases, as applicable to the definite burdens imposed on the disponee, establish that something more than a personal obligation on the disponee is necessary.

In the case of FORRESTERS, 28th January 1798, a settlement was made, 'with and under the burden of 'payment of the legacies and provisions following; '*which I bind and oblige my heirs and said disponees* '*and executors to pay.*' This was held to make no real burden.

In the case of COLQUHOUN, 28th February 1797, the deed burdened *the disponer with the payment of the following sums of money.* It was held no real burden.

See also Lord GALLOWAY against STEWART, 24th January 1804.

[1] In the RANKING OF REDCASTLE, a question arose on the effect of a trust-deed executed for the purpose of discharging debts contained in a signed list, which was ordered to be recorded along with the infeftment. To the case, as it decided the effect of such a list so recorded in removing the objection of indefinite security, we shall attend hereafter, (see below, p. 689.) But eminent Judges took occasion to say, that supposing the security in other respects unobjectionable, the words did not seem sufficient to constitute a real burden. The conveyance was to Sir Hector M'Kenzie and John Tait, and their assignees, in trust, in order that they might levy the rents, &c. and sell, &c. for the uses and purposes, &c. for payment of the debts in the list. Lord President Campbell held these clauses not to be fitly framed for making the debts real. Lord Eskgrove concurred with this opinion. CHALMERS, &c. against Creditors of M'KENZIE of Redcastle, 15th February 1791; Baron Hume's Session Papers.

[2] This is a distinction which appears to have been much, but unsuccessfully, insisted on by Lord Arniston, as reported by Lord Elchies, in the case of the Creditors of SMITH in 1738, and of the Children of Sir R. MURRAY against the Earl of MARCH in 1739. Elchies' Notes, p. 329.

In the following cases, touching the above distinction, there were other points involved, which were corrected by the course of decisions in the Note, p. 686. Note [3].

INNES of Coxton's Creditors against DUFF of Dipple, 2d December 1719. 'A disposition was granted to Innes of Coxton, *with and under the bur-* '*den of the payment of the disponer's debts,* cum et 'sub onere solutionis omnium legitimorum debitorum.' The disponee expede a charter, containing all these burdens thus expressed; but, without being infeft, he sold the lands; and the purchaser was infeft upon the assigned precept. The debts were found real burdens.

Creditors of PRESTONHALL against the Donator of FRASERDALE's Escheat. Lord Prestonhall, in his entail, provided and declared, that Hugh, Master of Lovat's fee of the entailed lands, and Alexander M'Kenzie's liferent, 'shall be affected and stand bur-'dened with *the payment of all the tailzier's lawful* '*debts.*' This was found a real burden.

In both these cases the decision was overturned in the House of Lords, on another principle, viz. the inefficacy

shall be paid by the disponee, and that 'in case it should not be paid the right shall be 'void,' it is held a real burden.[1]

4. As personal conditions, however strongly expressed, are ineffectual to make a real burden, much less can the strongest declaration in a back-bond, the disposition being ex facie absolute, constitute such a right.[2]

II. *The Debt must, in the Dispositive Clause of the Deed, be properly expressed as a Burden on the Lands.* The Court held in one case the burden to be real, although, in the dispositive clause, it was clearly expressed as a personal debt only:[3] But the general rule, which regulates the construction and effect of conveyances mainly by the dispositive, is not to be considered as shaken by that decision, which has always been held questionable. It may be laid down, 1. That if the dispositive clause be perfectly clear in its expression, it will regulate the nature of the right; and scarcely can be controlled or qualified by any other clause or indication in the deed.[4] 2. That if there be ambiguity in the dispositive, but nothing inconsistent with the indication from the other clauses, the burden may be held real or otherwise, as the general strain of the deed and words of the precept of sasine point out.

III. *The Burden must also be so expressed and incorporated in the Sasine*, in order to be effectual as a real security against the creditors of the disponee infeft.[5] In one case already referred to,[6] the Court decided, that the burdening clause affected the lands in preference to the creditors of the disponer's son, although the condition did not enter into the sasine, 'otherwise than by a general reference to the provisions in the disposition, its 'warrant.' In this decision the creditors acquiesced: but Mr Erskine justly remarks,[7]

of all indefinite burdens on land. 1st April 1721. In the Dict. vol. ii. p. 67. there is no notice of the reversal. The judgments on appeal have been published in Robertson's Reports of Cases on appeal from Scotland, 355. and 372.

Creditors of SMITH against his BROTHERS and SISTERS, 10th January 1738; Dict. vol. ii. p. 67. The disposition here bore,—'As also, these presents are 'granted with the express burden *of the payment of* '8000 *merks Scots*, which the said James Smith, by ac-'ceptation hereof, binds and obliges him, &c. thank-'fully to content and pay to John, Gilbert, &c. my 'younger children equally among them.' The Court decided, that the above clause makes the provision real. Lord Elchies says,—'The Lords found, that, 'by the conception of the clause, the debt was a real 'burden, albeit expressed with *the burden of the pay-'ment*. Arniston was much against this part, but it 'carried by a great majority.' Elchies' Notes, p. 329.

The same in the case of Sir R. MURRAY's Children against Earl of MARCH; Notes, p. 329. *Voce* in MS. Real Burden. Mr Morrison has classed it under Personal and Real.

Mr Erskine's conclusion from these cases, so far as regards the expression of the burden, is,—'That 'where a deed is expressly granted, (1.) With the 'burden of a determinate sum therein mentioned, or '(2.) *With the burden of the payment of that sum*, or '(3.) Where there is a clause *declaring the right void*, '*if payment be not made against a precise day therein* '*specified*, the burden is accounted real.' 2. Ersk. 3. '§ 49.

[1] CUMMING against JOHNSTON, 7th November 1666; Dirleton, No. 42.

[2] FLEMING, 15th June 1795.

[3] GEDDES against YOUNGER, 18th February 1729; 2. Dict. 67. The dispositive clause bore only a personal obligation; the precept of sasine, 'with the 'burden of my lawful debts.' The debts were held to form a real burden good against singular successors.

[4] ALLAN against CAMERON's Creditors, 19th July 1780; affirmed in the House of Lords, 15th May 1781. Here, in the dispositive clause, the condition was merely personal, though in the clause of warrandice and precept of sasine, as well as in a separate deed, the plainest intention was shown of making it a real burden, the condition being ordered to be engrossed in the infeftment, under the pain of nullity. The debt was held personal, not a real burden.

[5] It will be remembered, however, that while the disponee continues uninfeft, the burden is ineffectual against him and his creditors, as a qualification of the personal right. See above, p. 685, 686.

[6] Creditors of SMITH. See above, p. 687. Note [2].

[7] 3. Ersk. 3. § 51.

that this is a doctrine not only contrary to some former decisions, but also irreconcilable with the rule, that all burdens must be discoverable by creditors and purchasers. In later cases,[1] accordingly, the question has been settled the other way.

IV. *Both in the Disposition and in the Sasine the Burden must be* SPECIFIC, *in the amount, and in the creditor's name.* This requisite has two objects:—1. That creditors may know the precise amount of the burden; and, 2. That they may know whether it be

[1] STENHOUSE against INNES and BLACK, 21st February 1765; Fac. Coll. 18. Stenhouse disponed lands to his son, with the burden of all his debts; and referring to an heritable bond granted to him by the son, of the same date, mentioning the names of the creditors but not the sums due. A competition arose between two heritable creditors; one of the disponee, and another of the disponer. The Lords found, that the clause in the disposition granted by John Stenhouse, in favour of his son, by which the disponee is burdened with the whole just and lawful debts then due by the father, without mentioning either the names or the sums due to them, did not create a real burden upon the lands disponed quoad these debts; and found that the defect was not supplied by the heritable bond granted of the same date, nor by the infeftment following.

This report is not quite so satisfactory as it might have been, since the distinction is not properly marked between the question respecting the indefinite amount of the debts, (which the strictest scrutiny, even into the heritable bonds, could not have removed), and the question respecting the vagueness of the reference in the sasine.

BROUGHTON against GORDON, 20th June 1739; Elchies, *Personal and Real*, No. 2. Kames' Rem. Dec. 23. Kilk. 383. Monboddo, 5. Brown's Sup. 665. 'A father having disponed his estate to his 'eldest son in his contract of marriage, with the bur-'den of his debts in general, as contained in a list 'or inventory therein referred to, the general burden-'ing clause was also engrossed in the procuratory of 'resignation, and the list registered in the books of 'Council and Session. It was notwithstanding found, 'that the particular debts not being expressed in the 'contract, nor the list registered in the register of 'sasines and reversions, the said clauses in the contract 'and procuratory of resignation did not render these 'debts real burdens upon the lands conveyed by the 'father to the son.'

Lord Elchies says,—'The Lords found the chil-'dren's provisions, though contained in that list, were 'not real burdens, chiefly because the list of debts and 'provisions was neither inserted in the disposition, nor 'registered in the register of sasines, but only in the 'books of Session.'

Lord Elchies, in his Notes, says,—'I was in the 'Outer-House when the cause was advised; and, I am 'told, the Lords pretty unanimously found the chil-'dren's provisions not real burdens. I am also told 'the grounds were two:—1*st*, That the disposition was 'not with burden of these debts, but with the burden 'of the payment of debt; and this was Arniston's opi-'nion; but the majority were not of that opinion. 'The 2*d* was, That the list of debts was not insert in 'græmio of the disposition, nor registered in the re-'gister of sasines, but only in the books of Session. 'This deserves to be well considered.' Notes, p. 329.

The ratio decidendi given in this case seems to imply, that if the list had been recorded in the register of sasines, even separately, the debts would have been held real burdens. The reverse, however, was decided in the case of CHALMERS against the Creditors of M'KENZIE of Redcastle. See below, in this Note.

DOUGLAS of Dornock, 1765. A trust-deed was granted, but there was no list of debts recorded. Lord Kennet held, that as the trust-disposition and infeftment does not mention the names of the creditors, nor the sums, nor the total amount, but only dispones to the trustee, for behoof of the disponer and his creditors, with directions to apply rents and prices to debts in a list subscribed, this did not create any real lien. On a hearing in presence, the Court found, that the creditors had no preference on the disposition. Stated in the Sess. Paper in case of Chalmers against Creditors of Redcastle.

CHALMERS against Creditors of REDCASTLE, 27th January 1791; Baron Hume's Sess. Pap. M'Kenzie of Redcastle conveyed his estate, in trust, for the payment of his debts, as enumerated in a separate list subscribed by him, relative to the disposition, which was ordered by the deed to be *registered along with the infeftment*; and which was *entered on record accordingly*. The trustees accepted and acted, but afterwards they divested themselves, and redisponed with and under burden of the debts for payment of which the trust was made. Lord Justice-Clerk M'Queen, 'in respect the 'trust-right contains a power to the trustees to give 'up the same; and as they did not carry the trust into 'execution, but gave it up, and that the lands have 'been sold by authority of this Court, sustains the 'objection to the trust-disposition, and finds that the 'trust creditors have no right to claim under the 'same.' When the case came before the Court, it was held, that the creditors in the list had no real security, and were not in a situation different from the general body; on the ground, that the list made no part of the sasine itself, but was only referred to in that instrument; and that the separate registration was no sufficient incorporation of the burden, so as to qualify the feudal right with the debts in the list. The judgment was in these words:—'In respect that the 'debts were not rendered real burdens on the lands by 'the trust-right, and in respect that the trust-right has 'been given up and abandoned.'

PLACE against Trustees of M'NAB, 24th February

paid or extinguished. In the case of Coxton, and in that of Lord Prestonhall's creditors,[1] the burdens were at first found to be real, although indefinite: But those decisions were both reversed in the House of Lords, on the principle, that no perpetual unknown encumbrance can be admitted upon lands.[2] In 1730, the question occurred again in the Court of Session, for the first time after the reversal of the former decision, and was argued by our ablest lawyers; but the Court avoided a decision of the general point;[3] and it was not till 1734 that the matter was held to be settled in the Court of Session. This was in a case mentioned shortly by Mr Erskine;[4] where it was held, that no indefinite or unknown burden can be created on land. And this doctrine has, in many cases since that time, been held as a settled rule of law.[5] But admitting the general principle, it was much doubted whether a conveyance, creating a burden of the granter's debts, as contained in a particular list, was effectual to constitute a real burden; and in two remarkable cases, in one of which the amount was stated in the sasine, it has been held that there is no real burden in such a case.[6]

In creating reserved burdens, it is the common practice, besides a reservation in the conveyance, to take a separate bond from the disponee, mentioning in the disposition that it has been granted.[7] It has been held, that the assignee of such a bond, although the real burden was not mentioned in the bond or in the assignation, has the legitimate title to discharge the burden.[8] On such bond adjudication may be raised; and it may contain a power of sale, to give to the holder of the reserved burden a more active species of security than the real burden confers.

1821. This case is not reported. The circumstances were these—M'Nab of M'Nab disponed his estate, under 'burden of the payment of the whole just and lawful 'debts, both heritable and moveable, due by me at the 'date hereof, of which debts, so far as known, &c. a 'list has been made up and subscribed by me as re-'lative hereto, amounting to L.30,922. 13s. 8d.' Then they are declared to be a real burden, and appointed to be engrossed in the infeftment. Subjoined to the disposition, and recorded along with it, was the list containing the names and sums. The sasine bore, 'under 'the burdens, provisions, and declarations, faculty and 'reservation before specified, and no otherwise.' M'Nab afterwards executed a trust-deed, under which his trustees sold his land, and the purchaser, in order to clear his title, suspended the payment of the price, until it should be decided whether the debts in the list were made real burdens. The case was, at the desire of the parties, reported to the Inner-House; and the Court held the debts not effectually constituted as a real burden on the estate, and refused the bill.

[1] See above, p. 687. Note [2].

[2] 1st April 1721, Robertson's Cases on Appeal, 355. and 372.

[3] Ranking of the Creditors of CALDERWOOD of Piteddie. The competition arose between the trustee for the creditors of Lowes of Merchiston, a creditor of the disponer, and Elizabeth Moyes, &c. creditors of the disponee. The case is mentioned in a short note in the Dictionary, vol. iv. p. 67.

[4] Creditors of M'LELLAN, July 1734; Ersk. b. 2. tit. 3. § 50. M'Lellan settled his estate upon Samuel M'Lellan, his younger brother, &c. 'under the burdens 'after-mentioned,' &c. The burdening clause declares, —'That these presents are granted by me, with the 'burden of *all my just and lawful debts, contracted, or to 'be hereafter contracted, by me.*' The affairs of Samuel M'Lellan having gone into disorder, a competition arose between his creditors and those of the disponer, (both sets of creditors having led adjudications against the estate). The creditors of the disponer contended for a preference under the above clause of burden, but the Court found the burden not real upon the lands, and preferred the creditors of the disponee.

[5] STEIN's Creditors against NEWNHAM, EVERET and Company, 14th November 1789; affirmed in House of Lords 25th February 1791.

And also, same case, 1st February 1793; affirmed 10th March 1794.

[6] GORDON against Creditors of BROUGHTON, and PLACE against M'NAB's Trustees, supra, p. 689. Note [1].

[7] See Juridical Styles, vol. i.

[8] BAILLIE against LAIDLAW, 7th July 1821; 1. Shaw and Ballantine, 113.

2. NATURE AND EFFECT OF THE RIGHT.

1. The security depends on the disponee's sasine. There may seem to be some room for a distinction in this respect between burdens reserved in conveyances, where the burden is in favour of the disponer himself, and where it is in favour of a third person. Where a person selling land allows a part of the price to remain a debt in the hands of the purchaser, secured as a burden in favour of the seller; or where, in a settlement or other conveyance, the maker of the deed reserves his own liferent, or an annuity to himself, it has sometimes been held that the original infeftment constitutes the security.[1] But there is no true distinction to be taken between reserved burdens in favour of the disponer, and in favour of a third party. The principle on which the preference in either case depends is the same, and the forms of assignation and modes of rendering the security available for payment similar.[2] A burden constituted according to the requisites already fully explained, forms a condition of the disponee's right, and so qualifies it, that in all questions with purchasers, or creditors, deriving their titles from the disponee, the debt thus secured is preferable. The transference of the real security to a new creditor is not (as in the common heritable bond) completed by sasine. A simple assignation intimated to the holder of the burdened infeftment is sufficient to transfer the right of the debt, and is followed by the real lien as an accessary. Lord Stair considers an infeftment so burdened as a wadset, only differing as to the effect of the right held by the creditor, in so far as relates to the active right of possession.[3] But he, at the same time, holds the right of the creditor transmissible by assignation, either voluntary or judicial, by arrestment and decree of forthcoming. In practice, a simple assignation, intimated to the debtor, is held sufficient, though frequently the assignation is registered in the register of sasines and reversions.[4] The registration

Of the right acquired by Creditors.

[1] Bell's Conveyance of Land to a Purchaser, 83. A new edition of this very useful work is about to be published by Mr William Bell, Advocate.

[2] In this argument, the analogy of a liferent reserved, taken as an illustration of the right of the granter of a reserved burden, is apt to mislead. The liferenter's sasine may well subsist without incongruity along with that of the fiar: for it is the very same right which the liferenter originally held; to be exercised in the same way; and limited only as to endurance, and as to those powers of which the exercise might evacuate the fee. But the right of a creditor is quite different in nature from that enjoyed under the original infeftment: It is a mere pledge or right in security, depending for its existence on the debt: A general service has been held a sufficient title to authorize a discharge of such a burden. CUTHBERTSON against BARR, 7th March 1806.

[3] 2. Stair, 10. § 1. 4. Stair, 35. § 24.
See below, p. 692. Notes [2]. and [4].

[4] MILLER against BROWN, 7th March 1820. Robert Lyle disponed to his son, John Lyle, certain heritable subjects, under the burden, *inter alia*, of paying to his sister, Margaret Lyle, L.100. By the disposition this sum was declared to be a real burden on the property; and it was engrossed in John Lyle's infeftment accordingly. Margaret Lyle, in 1801, assigned the L.100 to James Cameron, in security of a debt due by her, and Cameron intimated the assignation to John, the debtor, and also recorded the assignation in the register of sasines. In 1804, Mr Brown purchased from John Lyle part of the subjects, Margaret Lyle having previously granted a discharge and renunciation of the real burden, without taking any notice of the previous transference to Cameron. Brown paid the full price, and there seemed no reason to doubt that he was ignorant of Cameron's right. Miller, after some intermediate transactions, which are here immaterial, acquired Cameron's right, upon which a decree of adjudication in absence against Brown had been taken; and brought a process of maills and duties in the Sheriff Court against Brown's tenants, with the view of recovering the amount of Margaret's provision. The cause was advocated by Brown, who, at the same time, brought a reduction of the decree of adjudication in absence. Lord Gillies found, that the assignation by Margaret to Cameron, though effectual to convey the personal right to the debt, was not effectual to convey the heritable right; and that this right was effectually discharged by Margaret's subsequent discharge and renunciation. He therefore reduced the decree of adjudication in absence, and dismissed the action of maills and duties. But on advising a reclaiming petition, (in which the principles established in the case of Cuthbertson were founded on), and answers, the Court *unanimously* found, 'that the real burden or security created over the subject in question in the person of Margaret Lyle, not being clothed by infeftment in her person, *nor capable*

does not, however, appear to be necessary in order to complete the right. Were a competition to arise between the first assignation intimated, and a second subsequently recorded, there does not appear to be any ground for holding that the latter would be preferred. A general service transmits the burden to the heir of the creditor.[1]

2. To make the security effectual in producing payment, the creditor in the reserved burden has no means of entering into possession, or title to raise action of maills and duties.[2] But he has these remedies:—1. Poinding of the ground, the nature of which has already been explained:[3] And, 2. Adjudication, not subject to the law of pari passu preference.[4] The lands burdened, when sold to another, continue still charged with the debt. The purchaser is not personally a debtor to the creditor in the burden; the lands may be adjudged for the debt.

Ranking of Reserved Burdens.

3. As to the ranking of debts secured by real burdens, these points seem to be fixed:—1. That in competition with the creditors of the *disponee*, the creditor whose debt is reserved as a real burden is preferable, whether the disponee be infeft or not.[5] Before sasine, his debt is a condition of the personal right; after sasine, it is a charge on the feudal right. 2. That where the creditor is a third party, he is preferable to all posterior debts of the disponer, from the date of the sasine in the disponee's favour, although the disponer may have given heritable securities to the posterior creditors.[6] 3. That it is

'*of it*, could be validly transferred by her and her husband, by the disposition and assignation in favour of James Cameron, duly intimated and recorded in the register of sasines; and that such disposition and assignation is effectual, and preferable to the discharge and renunciation founded on by the respondent; and therefore alter the interlocutor of the Lord Ordinary reclaimed against,' &c. A reclaiming petition was refused, with answers.

Although the *recording* of the assignation is taken notice of in this judgment, it does not appear to have been relied on as making an essential part of the case. It is mentioned only as the fact of the case happened to be so.

[1] CUTHBERTSON against BARR, 7th March 1806.

[2] Lord Stair draws this distinction between the right acquired by infeftment in security, and that which arises from such a burden as that in question;—'That the infeftment for satisfaction of sums is immediately effectual for maills and duties, or for recovering, or for maintaining possession of the profits till the sums be paid; but sums wherewith a real right is burdened have not those effects, until adjudication be used upon the sums, and infeftment, or a charge thereupon, which is drawn back to the date of the security bur-dened, and is preferable to prior adjudications upon personal debts, in the same way as adjudications upon infeftments of annualrent have effect from the date of the infeftment of annualrent.' 2. Stair, 10. § 1. See also, 2. Stair, 3. § 58.

[3] See above, p. 683. Note [4]. 4. Stair, 23. § 5. 4. Ersk. 1. § 11. Lord Kilkerran says, where a disposition is granted with the burden of this or that particular debt, although the creditor in that debt has an infeftment, yet the practice is for poinding of the ground to proceed in such debts. Kilk. 445.

[4] 2. Stair, 3. § 58. 'Generally, all real burdens of lands contained in infeftments, though they give no present right to those in whose favour they are conceived, nor cannot give them any fee of the lands, yet they are real burdens, passing with the lands to singular successors, though they bind them not personally, but the ground of the land, by apprizing or adjudication: as, if lands be disponed, with the burden of an annualrent furth thereof, to such a person and his heirs, this will not constitute the annualrent, but may be a ground of adjudging an annualrent out of the lands.' And again, b. 4. tit. 35. § 24. he says,—'If an infeftment be granted, with the burden of a sum, it makes that sum a real burden, whereupon the fee may be apprized or adjudged; and the apprizing or adjudication thereon will be preferred, as of the same date with the infeftment burdened,' &c. See also Hope's Min. Prac. tit. 11. § 1. and 3. 2. Ersk. 3. § 49.

[5] Creditors of Ross competing, 30th June 1714; Forbes, MS. cited in 2. Dict. 68. See also above, p. 685. as to the effect of the burden on the personal right.

[6] BARCLAY against GEMMILL, 12th February 1731; 1. Dict. 68. Here, a father having disponed his estate, with the burden of 5000 merks to his creditors, conform to bonds in their favour, after sasine in the disponee's favour he granted infeftment of annualrent, upon the lands disponed, to several of his creditors, and a competition arose between them and a creditor under the real burden. The two points were pleaded, 1*st*, That the disponer being completely denuded by the disponee's infeftment, could do nothing in burdening the estate anew: 2*d*, That whatever his power might be, in so far as the amount stipulated was not exhausted, the debts existing before the disposition were made real burdens, and consequently preferable

probable this difference would be made between the creditors of the disponer and those of the disponee—That in a competition with the former, the preference of the creditor whose debt was declared real, would depend on the date of the disponee's sasine; since the disponer is not divested, and his estate, therefore, is still liable to the diligence of his creditors till infeftment in favour of the disponee: In a competition with the latter, the preference might be held complete, although no sasine were taken; on the principle already explained, that the debt is a qualification of the disponee's right, whether still personal or made real by infeftment. 4. That, among themselves, creditors, whose debts are made real burdens, are preferable according to the diligences which stand in their person,[1] if the fund reserved turn out inadequate. And the proper diligence for affecting the debt seems to be adjudication, notwithstanding what Lord Stair has said in a passage already quoted.[2] Faculty to Burden.

§ 3. PREFERENCES DEPENDING ON CONDITIONS IN REAL OR IN PERSONAL RIGHTS TO LAND.

One very important example of this kind of security has just been considered in Burdens by Reservation. But others occur in practice, the nature and operation of which it is of importance to mark.

1. In contracts of feu for the purpose of building, it is no unfrequent transaction by the proprietor of the land, desirous of encouraging builders, to advance money for enabling them to carry on their operations, and to look for reimbursement on the sale of the property. To make such a transaction safe, it is stipulated in the contract, that the feuar shall not be entitled to demand a charter until he shall have paid up the money advanced. And, 1. There can be no doubt of the efficacy of this stipulation to secure the creditor, both against creditors and against purchasers: those who come into the feuar's place, in either character, acquire only the right to take the subject as a personal fee, not without the burden of the condition stipulated. 2. It would seem, that even for advances made from time to time subsequently to the feu-contract, though the amount should not be stated in the contract, there will be an effectual right to withhold the charter, on the general stipulation that the charter shall not be demanded till all advances shall be paid up. And, 3. Against the general creditors of the feuar, it would seem, that the charter may be retained until all advances shall have been paid up, although there shall not be any stipulation to that effect in the feu-contract.[3] Contracts of Feu.

2. Conditions in conveyances to land effectually qualify the right while it remains personal, and whether in the hands of the original disponee, or of a creditor, or of a purchaser. The right to the subject will be effectually restrained by the operation of the condition. But the moment that the conveyance is made real by sasine, it stands effectual, purged of all conditions as against purchasers or creditors, unless care has been taken to make the condition a real burden. Conditions in Personal Right.

3. Lands may be burdened, either expressly or by implication, in warrandice of the conveyance of other lands. When lands are exchanged, or, in the language of the Real Warrandice and Excambion.

to all posterior debts, even when followed by infeftment. The Court found, that no debt, posterior to the disposition, could come in competition with the debts prior to the same.

[1] In the above-cited case of Ross's Creditors, the Court having preferred the creditors with whose debts the disposition was burdened to the disponee's creditors, 'preferred them among themselves according to their respective diligences; and those upon which adjudication had been obtained, to such as were not adjudged for.' 2. Dict. 68.

[2] See above, p. 692. and correct Stair's doctrine by the decision in the preceding Note.

[3] See above, Of Absolute Disposition, p. 684.

law, reciprocally conveyed in Excambion, it is an implied condition of the conveyance, that on eviction the person who is deprived of the land recurs to his former right, and may recover his own land. When lands are conveyed by one whose title seems questionable, the purchaser sometimes receives a conveyance to other lands in Real Warrandice, and to indemnify him against the eventual challenge. There is an important difference in the nature of these two rights, which ought to be observed. The security in the former rests on the original sasine, which was in the person of him who is deprived of the lands given in exchange for his own: The security in the latter depends on a new sasine in the disponee's person. The right transferred in excambion is conditional; and if the condition appear on the face of the titles, it is effectual against singular successors:[1] The right conferred by an infeftment in real warrandice is a right in security.[2] The consequences of this are,—1. That there arises an immediate right in the person suffering eviction in excambion, to enter again into possession of his own land, and to have direct action of maills and duties, &c.; whereas the real warrandice gives the disponee no right but that of an heritable creditor. 2. That a liquidation of the damage is requisite on the part of the disponee in real warrandice; and the disponer, by paying that damage, frees his land: whereas, in excambion, the condition being purified by eviction, the excambed lands return to their former proprietor. 3. That, in case of partial eviction, the matter may easily be extricated under real warrandice; while under excambion much difficulty may arise.

Excambion. 1. EXCAMBION.—The more correct way of making excambion of lands is by a contract; though it is sometimes done by separate unilateral deeds. The procuratory and precept are commonly for sasine to both reciprocally, and so bear in græmio the nature of the correlative right. The sasine therefore, as it appears on the record, stands burdened with the condition. But sometimes there are two separate procuratories and precepts, even where the form of a contract is used: and where the parties dispone in separate deeds, the sasine may be extremely defective in conveying information of the limited nature of the right. And as it is a general rule, that no real burden can affect land without appearing on the record, it is extremely doubtful whether the implied condition of excambion would be effectual against singular successors.[3]

Real Warrandice. 2. REAL WARRANDICE.—The conveyance in warrandice must be completed by sasine duly recorded. But although the burden must thus appear on the record, there is one danger to which the purchase and transmission of all land is exposed, namely, that beyond the years of prescription the land may have been disponed in real warrandice, and may still be effectually bound in case of eviction; for it is only from the time of the eviction that the prescription for freedom from a disposition in real warrandice begins to run. The Court, however, has held, that the fear of this liability, where set up as a pretence for not paying the price of lands over which an infeftment in real warrandice extends, is in equity subject to a reasonable limitation.[4]

[1] E. MELROSE against KERR, 25th November 1623; Durie, 83. (3677).
WARDS against BALCOMBIE, 14th July 1629; Durie, 461. (3678).

[2] BLAIR against HUNTER, 6th November 1741; Kilk. 592. Elchies, *Warrandice*, No. 5. This report, however, is erroneous, and should be corrected by the Note. Notes, p. 505. See also MENZIES against CAMPBELL, 22d July 1675; Gosf. 494. Morr. 10,652.

[3] See BALFOUR against MONCREIFF, 14th January 1788; Fac. Coll. 23. (10,267).

[4] CALDERWOOD DURHAM'S Trustees against GRAHAM, 9th July 1800; Fac. Coll. 438. (16,641.); where lands had been sold which a purchaser discovered to have been disponed in real warrandice more than a century before, he refused to pay the price; but the Court held him to be too scrupulous.
See also LAWRIE against DRUMMOND, 1st February 1676; Gosford. (3215).

§ 4. GENERAL REVIEW OF THE CHIEF OBJECTIONS THAT MAY BE TAKEN AGAINST THESE SECURITIES.

Objections to Voluntary Securities.

The chief objections to securities may be reduced to three classes:—1. Objections which affect the debt secured; 2. Objections which rest upon some defect in the constitution of the security; or, 3. Objections grounded on the laws relative to insolvency.

1. OBJECTIONS TO THE DEBT.

Objections to the Debt. Pactum illicitum.

If the debt itself be objectionable, the security will be ineffectual; as, 1. Where the debt is of a nature which the law does not sanction, as a smuggling contract; or a game debt.[1] These exceptions against personal debts we had formerly occasion to consider.[2] 2. Where the debt is tainted by usurious stipulations, the security will, in the same way, be rendered ineffectual.[3] It was held in one case,[4] that this statutory nullity is effectual against assignees; and, in England, it had been held effectual against the indorsee of a bill of exchange for value, and without notice of the usury:[5] But this, as already observed, was altered by statute.[6] 3. The debt may be objectionable on the footing of the negative prescription.[7] 4. A security granted by a cautioner may be liable to a fatal objection, on the ground of the limitation of cautionary engagements, by the statute 1695, c. 5. already explained.[8] It is fixed, that when the proper diligence has been used, the effect is only to prolong the claim to the extent of the principal sum, and seven years' interest.[9]

2. OBJECTIONS TO THE SECURITY.

The objections which attach to the deeds of security themselves, are objections to the execution of the bond, conveyance, or other deed of security; or on account of vitiations; or breach of the Stamp Laws; or radical defects in the sasine, as proceeding on an illegal

[1] JOHNSON, trustee on Nisbet's sequestrated estate, against ROBERTSON, January 1791. An heritable bond was here objected to, as a ground of preference to Robertson. Nisbet, the granter, was a merchant in Eyemouth, and had entered into a contraband trade with Pillans, who not only furnished him with goods, but advanced him money for repairing the vessel in which the goods were smuggled into this country. For the debt which thus arose to Pillans, the heritable bond was granted over the estate of Gunsgreen, and Robertson had bought it from Pillans for full value. An objection was stated on the ground of illegality of the original debt; and first Lord Justice-Clerk M'Queen, afterwards the whole Court, found the security not entitled to a place in the ranking.

[2] See above, p. 298. et seq.

[3] See above, p. 308.

[4] CLELAND against HAMILTON, 17th July 1730; Kilk. p. 591. Under the old statutes 1597, c. 24. it was otherwise; the nullity was not effectual against assignees. CAMPBELL against CHALMERS, 17th July 1739; Kilk. 591.

[5] LOW *v.* WALLER, 1781; Douglas, 708. See also PARR *v.* ELIASON, 1. East's Rep. 92.

[6] 58. Geo. III. c. 93. See above, p. 313.

[7] 1469, c. 29.; Acta Parl. vol. ii. p. 95. c. 4. 1474, c. 55.; *ib.* vol. ii. p. 107. c. 9.; *ib.* 1617, c. 12. vol. iv. p. 543.

[8] See above, p. 356, &c.

[9] So strongly did the opinion formerly prevail, that the cautioner became liable for all arrears and interest till payment, that Erskine lays down this doctrine. But the Court, contrary to the judgment of Lord Justice-Clerk M'Queen, in the case of REID against MAXWELL, 17th February 1780, on a hearing in presence, solemnly found 'the cautioners liable for no more than 'the principal, and seven years' interest.' See an interesting discussion on the Bench, 2. Hailes, 850.

This was confirmed in the case of DOUGLAS, HERON and Company, against REDDOCH, 22d November 1792.

and defective warrant; as being improperly given; as being defective in the statement of the ceremony, &c. Some of these objections have been touched on already; but one or two points may find a place here.

1. *Want of Stamp.*—Objections on the Stamp Laws are fatal to certain instruments beyond remedy; as in bills, and policies of insurance. But in other cases, the stamp, if annulled or wrong, may be supplied after the instrument is produced in judgment. Nay, it has been held suppliable even after adjudication has been led.[1] By analogy it would seem, that after a competition begun on a deed of security not stamped, the objection may be removed by having the stamp supplied.

2. *Exhausting of Precept of Sasine.*—It is a rule, that a precept of sasine, when once duly executed, is exhausted, and cannot authorize sasine to be taken again. Where the precept is not duly executed, the remedy is by a new act of sasine on the precept as unexhausted. And, 1. This seems to be competent where there is a fatal error in the act of sasine, as not rightly taken; as not on the lands; or not by the proper symbols; or not to the right party; and so forth. 2. It seems also to be competent where there is a defect in the instrument; and so there is not full and legitimate evidence of the execution in due form, and in all points. But, 3. Where the act of sasine is correctly performed, and the instrument in all points unexceptionable, except in not having been recorded in due time, it has been greatly doubted whether the precept is exhausted; whether a new sasine may be taken, and a new instrument recorded; or whether recourse must not be had to other means of remedy. The difficulty here rests on the words of the statute. Had it been declared that a sasine not duly recorded should be *null*, there could have been no doubt that the precept must have been held as unexhausted, and capable of authorizing a new sasine.[2] But the Act only declares the instrument, if not duly registered, 'to 'make no faith in judgment, &c. in prejudice of a third party;' adding, 'but prejudice 'always to them to use the said writ against the party maker thereof, his heirs and suc-'cessors;' 1617, 16. The main argument against the competency of a new sasine, and the principle on which a precept is held to be exhausted, is, 'that where sasine is once 'taken, the fee is full: and that the fee is full though sasine be not recorded; as appears 'in a question with the granter or his heirs.' But it cannot be correctly said that the fee is full where the sasine is not in all respects perfect and effectual. If the fee were full, no creditor of the granter could adjudge the estate. But that is competent, for this reason, that there is no infeftment, and so no constitution of a fee as to third parties. But if to any one effect the sasine is null, the precept cannot justly be held exhausted; the whole mandate has not been complied with so as to convey the fee; there is no sasine, or effectual execution of the precept, so as to exclude third parties: And so, when a creditor comes to adjudge and to execute the precept in his charter of adjudication, the former infeftment cannot be opposed to him. The statute says it bears no faith; and so the fee is not full.[3] But it is said, 'The sasine is good, and to all intents and purposes

[1] LAMONT against LAMONT's Creditors, 4th December 1789; Fac. Coll. 174. (5494). An objection was here stated to an adjudication in a ranking, that the decree of constitution proceeded on a Will not stamped. 'The objection arising from the writing 'not being stamped, was considered as one that could 'be removed at any time.'

[2] So it is with regard to one species of sasine, the resignation ad remanentiam, by which a superior is reinvested. By the Act 1669, 3. it is declared, that the resignation shall be null and void if the instrument be not duly recorded.

[3] Perhaps the particular turn of expression in the Act may be accounted for by looking back to 1599, (4. Acta Parl. 184. Acts of Sederunt, p. 29, 30.) 1600, 36. There was, by that old Act, an absolute nullity declared by way of exception: if the instrument was not registered within forty days, 'none of the said

'effectual, during the sixty days, or till the moment when it is erroneously entered in the 'record; and that it cannot, as in relation to the precept, be converted at once from a 'good execution of the mandate into a bad.' This, however, is a mere subtilty. Until the instrument is recorded, the execution of the mandate may be considered as a mere faculty in the hands of the disponee, to be completed into a perfect right or not as he pleases. He may burn it, or annihilate it by withholding it from the record: And if he do record it, and an error is committed that is fatal to it, the fair construction is, that the act intended to perfect the right is not done, in not being rightly done; and so may be abandoned and commenced of new, if no mid-impediment or jus quæsitum stand as a bar. Unfortunately there is no case which, in all respects, can be considered as a precedent to settle this important point; but the weight of authority and of judicial opinion seem to authorize the conclusion, that the precept, in such a case, is unexhausted.[1]

3. *Special Precept.*—A precept, of a special nature or extent, cannot authorize a sasine different in character. Thus, *1st*, A precept to give sasine in trust, or in security, cannot be the warrant of a sasine in fee or property. But the converse does not hold. A precept for sasine in fee or property may be assigned to the minor effect of taking a sasine in liferent, or in security.[2] In practice it is so held; and this practice has been sanctioned by the Court.[3] *2d*, A precept of clare constat is given only to the heir, and cannot be assigned

Precept in security.

Clare.

'evidents to be of force, strength, or effect to any in-'tent, but to be null, and of nane avail.' The correctness which an adherence to this severe rule would have produced, yielded so far to the equitable view, that, as between the parties themselves, it should not be applied; and to introduce this relaxation appears to have been the sole object of the Legislature in altering the phraseology as in 1617, 16.

[1] In a MS. collection of Lord Pitfour's opinions I find this consultation: 'Where any mistake has hap-'pened in such registrations, it is proper to take a new 'sasine, and put it on the proper record. But it is 'said, you cannot execute the precept a second time, 'as it is exhausted. The answer is, This would be 'good if it were properly recorded—but where not, I 'think it may be done.'

This accords with an opinion of Sir James Stewart. 'A sasine not duly registered is null by Act of Parlia-'ment, except against the heir of the granter, as to 'whom only it is good, because he cannot quarrel his 'author's deed. But it will not hold as to a successor 'in that benefice, because he does not represent his 'predecessor.' Ans. to Dirl. 275.

The late Lord Meadowbank said correctly on this point: 'Lawyers have held those unregistered sasines 'may be of some avail to the person infeft. But it is 'certain they do not stand in the way of a person get-'ting a proper right. The lawyers have not stated 'their opinion correctly; for the true view of the thing 'is, that the sasine is absolutely null and void, though 'some persons may not be entitled to plead the nullity. 'But this is of no consequence. Take it either way, 'and supposing that it is not absolutely null and void, 'but only quoad the interest of onerous third parties, 'it will be the same thing to this argument.' KIBBLE against STEWART and SPIERS, 16th June 1814; Fac. Coll. In that case, a purchaser of land was infeft on the precept in his disposition, and it was confirmed; but the instrument was wrongly recorded, there being a fatal error in the name. To cure the defect he resigned on the procuratory, and was infeft on the charter of resignation. And the Court held it competent. Lord Justice-Clerk Boyle and Lord Robertson assented to the opinion of Lord Meadowbank, that the precept was not exhausted. So that although this be not precisely a decision on the point, it is of great importance in balancing the weight of authority on the subject.

BAXTER against WATSON, 15th May 1818. Lord Gillies, on great consideration of this case, held the precept to be unexhausted where the instrument had not been recorded till the 67th day: And the Court adhered. But, on a petition, doubts having been expressed by Lord Balgray, the matter was settled out of Court.

[2] MITCHELL against ADAM, July 16. 1767. (14,335). This case is erroneously reported. The objection was, that the precept in a disposition could not authorize an infeftment of annualrent, a right different in nature, and transmitted by different symbols—a penny money, instead of earth and stone. This objection was not sustained, (as the report bears), but repelled. So Lord Hailes states it, vol. i. p. 185. Lord Pitfour's ground is, that a procuratory and precept are assignable qualificaté, and that in practice an opposite doctrine threatens danger to hundreds of heritable bonds and adjudications. I have seen an extract of the decree, which confirms this statement.

[3] MORE against BONTHORN, 29th May 1805; Baron Hume's Sess. Pap. Here a liferent annuity was constituted, and a subject assigned in security, as contained in a feu-contract, with an obligation to infeft, and an assignation to the unexecuted precept in the feu-contract. Sasine taken on this warrant was objected to as inept. The security was cut down on another foot-

Precept of Clare constat.

to another. 1. It is strictly confined to heirs-at-law, and cannot competently be granted to an heir of provision; so that a title made up, as not unfrequently happens, by precept of clare constat, in favour of an heir in a destination, is exceptionable. 2. It is confined also to the immediately next heir alive at the time. Such a precept, for example, to the heir, in liferent and the next heir in fee, will vest no right in the fiar; nor will his survivance give effect to an infeftment which shall have been taken on such an erroneous precept during the proper heir's life:[1] And, 3. Although an open precept in a disposition is a good warrant for infefting the disponee, or his assignee, or an adjudger acquiring right to the unexecuted precept by his diligence, provided the assignation or adjudication be produced and read and recited in the instrument of sasine, this will not hold good as to a precept of clare constat; which is limited to a character not transmissible.

Doctrine of Accretion.

4. *Jus Accrescendi.*—This doctrine is of great importance in considering the principles on which preferences depend. A sasine may be taken on the warrant of a person having in him only a personal right to lands, to the effect that, by the subsequent completion of his feudal right, the sasine already taken will become effectual. The completed right is in such a case said to accresce to the sasine. This is a part of a more comprehensive doctrine, Jus superveniens auctori, accrescit successori. The general rule expressed in this maxim entitles one, to whom a conveyance is made with warrandice, to the benefit of every supervening right acquired by the disponer after the transmission.[2] But the point that demands attention in the present inquiry is, in what circumstances will the real right accresce ipso jure, so that a provisional completion of the disponee's right shall ipso jure be completed by the completion of that of the disponer? 1. If a precept be contained in a disposition or heritable bond, by one not himself infeft, or granted in a character not yet established in his person, (as a vassal giving a precept for a public holding), such precept, with sasine following on it, as proceeding a non habente potestatem, is quite ineffectual to convey the feudal right. 2. If the granter hold the personal right as a disponee—or if, as heir, he be entitled to complete his title by service, his imperfect right will enable him to give a precept to which the doctrine of accretion will apply. 3. If he have no right whatever to the land, and afterwards acquire it by a title originating after the date of his precept, the sasine which has proceeded on his precept will not be made valid by accretion. And if the sasine proceed on the precept of the ancestor uninfeft, the heir's infeftment will not cure the defect.[3] The effect of accretion is attended with little difficulty where there has been one conveyance only. But where other interests interfere, nice questions arise. Wherever a right is completed on the part of another, previous to the completion of the disponee's or heritable creditor's right, it is a bar or mid-impediment to the accretion. But where there are more rights or securities than one, it is important to determine whether the rule operates according to priority, or all at once, so as to give them preference according to their dates; or pari passu. And, 1. The infeftment first in date will be first completed; 'because the disponer's right,' says Stair, 'accresceth ipso facto.'[4]

ing, and this objection was little taken notice of; but some of the Judges, who at first held the sasine bad, on reconsideration, and looking to the practice, and the sanction given to sasines in liferent taken on assigned precepts in fee, thought the objection unworthy of notice.

[1] FINLAY against MORGAN, 20th July 1770; Fac. Coll. 92. (14,480). Here a precept of clare constat was granted to James Shaw (the heir) in liferent, and his son John, in fee. Infeftment followed in these terms. After James's death, John granted heritable bonds, and afterwards adjudication was led. On John's death, titles were made up to the person who stood last infeft before the precept of clare constat was granted, and in a reduction the heritable bond and adjudication were held null and void.

[2] 3. Stair, 3. § 1. 2. Ersk. 7. 3.

[3] KEITH against GRANT, 14th November 1792.

[4] 3. Stair, 2. § 3. PATERSON against KELLY, 10th December 1742. Kilk. 321. Elchies' Notes, 238. NELSON against GORDON, 22d December 1738.

2. Where the infeftment of the common author proceeds upon the diligence of any party, Stair also thinks the completion of it effectual only to him who does the diligence. This has been held doubtful; and in one case, where the disponer's title has been completed by the voluntary act of a second heritable creditor, though for the sole purpose of giving effect to his own right, that completion of the title has been held to accresce to a prior creditor.[1] It is necessary or advisable on this footing, in completing the right for the purpose of giving effect to a security only provisionally completed, to act so cautiously as to confine the operation strictly to that security.[2] But it may fairly be questioned, on the fundamental principle of the doctrine of jus superveniens, whether in any case after bankruptcy, or where the completion of the common debtor's title is made by a trustee for creditors, that act can be available jure accrescendi to creditors whose securities are otherwise ineffectual. The whole doctrine rests on the ground of warrandice of the right of the grantee; and accordingly there is no accretion in those cases in which warrandice is not stipulated or at least implied. But from the moment that bankruptcy attaches to the person, every action which he does is exceptionable, in so far as it confers on one creditor a preference over the rest. He cannot be compelled to it on his obligation of warrandice. And it would be a strange anomaly to hold, that what a trustee for creditors generally does, in order to complete their right, should be construed as an act of the bankrupt, done in the fulfilment of an obligation which he is prohibited from fulfilling.

3. OBJECTIONS IN RELATION TO INSOLVENCY.

The chief of these rest on the statutes of 1621 and 1696; of which hereafter.

Heir's Disposition within a year.

In contemplation of insolvency also, there is another ground of objection under the statute of 1661, c. 24. relative to dispositions, bonds, and conveyances granted by apparent heirs, in prejudice of the rights of the creditors of the predecessor, to whom the heir has succeeded. By this Act, heirs are prohibited from granting, within a year from their predecessor's death, to the prejudice of the predecessor's creditors, any right or alienation of the predecessor's heritable estate. This law is grounded on the equitable principle, that every man's estate should, in the first place, be liable for his own debts. The regulations for securing the full operation of this principle will be the subject of a commentary hereafter on the respective rights of the creditors of the ancestor and those of the heir. See below, p. 727.

Indefinite extent.

Another objection falling under the same class may be grounded on the indefinite nature of the debt, which is the object of the security. We have already (p. 689.) had occasion to consider the cases in which it was held that no indefinite unknown burden can be created on land. But it may be questioned, Whether this objection lies against a security granted to a cautioner in relief of debts for which he has become bound? In the case of M'Lellan against Barclay, a distinction was taken in argument between this case and that of a reserved burden of all the granter's debts. In the case of Langton,[3] the Court 'found a disposition, granted for security and relief of all engagements the 'grantee had come under for the father, and especially declaring that all bonds wherein 'they stood jointly bound were the proper debts of the father, upon which disposition 'infeftment followed, was a valid and legal security to the grantee upon the estate 'disponed for his relief, of all debts wherein he stood jointly bound with the father

[1] ALISON against CHALMERS, 28th February 1708.

[2] HENDERSON against CAMPBELL, 5th July 1821; Fac. Coll. 433.

[3] Creditors of COCKBURN of Langton against Creditors of COCKBURN, junior, 26th February 1762.

'preceding the date of the disposition, notwithstanding the particular debts were not 'specified.'

EFFECT OF OBJECTIONS.

The effect of the objections now shortly referred to may be very different.

1. Those which attach to the debt itself, or which annul the deed of security, and, consequently, annihilate the real right, have, when applicable to a single creditor, the effect of excluding that creditor altogether from the ranking, or from a preference. Where such objections attach only to one of several creditors combined in the same security, as where a joint disposition is granted to several persons in security of debt, the benefit of the objection accrues not to the general creditors, but to those conjoined in the security in the first place; upon this plain principle, that the security of each creditor extends over the whole subject, so that the annulling of one of the claims augments the fund of security to others.[1]

2. Those objections which are competent only to a particular creditor, have no other effect than to prevent the creditor who holds the objectionable security from ranking, to the prejudice of him who is entitled to maintain the objection; but it does not destroy the title to rank as against other creditors. Such is the effect, for example, of an objection on the ground of inhibition. The arrangements necessary for bringing out the true force of such objections, will be particularly considered in treating of claims of preference on the ground of exclusion.

SECTION III.

OF PUBLIC BURDENS, LAND-TAX, &c.

Public Burdens.

THERE are certain public burdens attending the right of a proprietor, on which a question may be raised in competitions of creditors, whether they be debita fundi and preferable. These it may be proper to explain.

Land-tax.

1. LAND-TAX.—The land-tax, after several revolutions from aids and subsidies to a permanent tax, (the proportion of which between England and Scotland was settled by the treaty of Union), was at last fixed at L.47,954, to be levied out of the land rent of Scotland for ever, subject to a power of redemption.[2] This burden on the land rent is payable partly from burghs, and partly from shires; the former being assessed by stent-masters on the inhabitants of burghs, according to their rents and income; the latter being assessed on the inhabitants of counties, according to the yearly revenue of their land and other real property. But this tax, although called land-tax, and although a burden accompanying the land, is still, strictly speaking, no more than a personal tax on the owners of land, in proportion to the amount of their land revenue, and not properly a debitum fundi. So it was held with respect to the Scottish land-tax in the seventeenth century;[3] and there seems to be no ground for a different judgment now.

[1] BLACKWOOD of Pitreavie, against the Earl of SUTHERLAND, 7th November 1740; where infeftment having been given to several joint disponees, the precept as to one of them being for infefting representatives, without naming or describing them; and having as to him been found null, a competition arose between an adjudging creditor and the other joint disponees: The latter were preferred. Kilk. 518.

[2] 38. Geo. III. c. 60.; 39. Geo. III. c. 6. and 21.; and the consolidating Act of 42. Geo. III. c. 116.

[3] GRAHAM against Heritors of CLACKMANNAN, 13th July 1664; 1. Stair, 212.

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.