BOOK II.

OF THE SEVERAL KINDS OF ESTATE WHICH MAY BE ATTACHED FOR DEBT.

In distinguishing the funds which, by law, may be attached for the payment of debt, two questions chiefly demand attention:—1. What part of the acknowledged estate and effects of a debtor is to be considered as responsible for debt, and open to the diligence of his creditors? and, 2. By what criterion are creditors to distinguish the right of their debtor in cases of ambiguous possession?—Without being too curious about minute divisions of the subject, I shall, in distinct chapters, explain the several sorts of estate which may be made available to creditors.

The general rule is, that all the acknowledged property of a debtor is available to creditors, and may, by the operation of legal diligence, be converted into money, and applied in payment of debt. The property of land and other heritable subjects, whether of the nature of a perpetual estate or of temporary endurance; liferents; reversionary rights; servitudes; leases; faculties and powers,—may all be affected by the diligence of creditors, subject to certain exceptions, restrictions, and conditions. Incorporeal rights also, as Heritable bonds, Bank and Government stock, Shares in public companies, Patents, Literary property, and Debts, are responsible to creditors, under certain restrictions: And, finally, Moveable property, Wares, Merchandise, Money, may be applied by creditors to answer the debts of the owner. In the common course of life, and especially in a trading country, the great foundation of credit is the mass of commodities, of a perishable nature, which pass through a trader's hands, and form the subject of his dealings. But it is not unnatural to consider Property in Land as first in importance; and it may lead to a more systematic arrangement of the subject to take,—

1. Estates in land, and connected with land.
2. Incorporeal rights not connected with land.
3. Moveables.

PART I.

OF ESTATES IN LAND, AND CONNECTED WITH LAND.

According to the prevailing spirit of modern law, Land is considered as a commercial property. While the rules of its succession are clear and uniform, all undue restrictions on alienation are discountenanced; and the rights of creditors in regard to it are ample and of ready access.

With one signal exception in the case of Entails, the rules and proceedings of the law of Scotland relative to this sort of property are simple, just, and efficient. The obstructions of the old law of feudal tenures have been in a great degree removed by the legislative wisdom of more modern times; called into action on occasion of political convulsion and rebellion, but with effects as salutary for the purposes of trade as if devised in the true spirit of commercial policy. The forms of voluntary alienation and security are plain, simple, and intelligible. The modes of execution by creditors are prompt, effectual, and equal, in process and in operation. And, although it has been doubted by some, whether there ought to be, in public records, a complete disclosure of the state of a man's property as charged with debt, while by others it has been suspected that our system of records is fast tending to a state of inextricable confusion and practical uselessness; the fact is, that the whole landed property of Scotland is registered in volumes deposited in the Register House, and exhibiting at one view, to those desirous to purchase land, houses, or other heritable subjects, or meaning to lend money on the security of such property, or desiring to have a correct notion of their debtor's land estate as a ground of general credit, the extent of that estate; the conditions under which it is held; and the securities which may already have been created over it.

Leases are inferior rights in land, with respect to which, although the same means of information do not exist, knowledge sufficiently accurate may be obtained to regulate the credit of the owner. Leasehold property is not recorded in a public register. But no lease of which the term exceeds a year can be effectual unless it be in writing, followed by possession; so that by inquiry at the tenant the whole conditions of the lease may be known.[1]

Servitudes on land are rights of a definite and known description, and, whether as burdens on the debtor's property, or as privileges augmenting its value, they may, on careful inquiry, be discovered by creditors.

CHAPTER I.

OF PROPERTY IN LAND, AS RESPONSIBLE FOR DEBT.

All the land of Scotland, so far as it belongs to individuals, is vested in them either in superiority or in property. The former, called Dominium Directum, is available to creditors, as entitling the holder to draw feu-duties, or to reap occasional advantages on the entry of heirs, or of purchasers, or of creditors; or as giving a right to the elective franchise, if the holding is immediately under the Crown, and the land extends to forty shillings of old extent, or L.400 Scots of valued rent. The latter is the more valuable right of actual occupation and exclusive use, called by our lawyers Dominium Utile. Either of these rights may be sold for the benefit of creditors, or attached by diligence; and although it is not necessary to enter here into the doctrines relative to the titles by which those rights are held, a short view of the leading principles which rule the transference of this sort of property may not be misplaced.

[1] It has been proposed to a certain extent to introduce a system of registration applicable to this sort of property. Whether such a proposal shall be adopted may perhaps be explained in the Appendix to this Work. It may only be observed in the meanwhile, that amidst the advantages proposed to be attained, the increase and complication of records would prove a serious evil.

SECTION I.

OF THE VASSAL'S ESTATE, OR DOMINIUM UTILE.

THIS is the most valuable estate in land known in the law of Scotland, though of less dignity in the scale of feudal importance. In the transference of land, the act of delivery, which is the badge of transference, is very peculiar in its form. In Scotland, in ancient times, Land and Houses were delivered by an actual entry of the acquirer into the possession; but, for many ages past, the delivery of a part symbolically for the whole—of a little earth and stone of the lands, for the lands themselves—has been established as the only legitimate mode of delivery. This symbolical delivery, or Improper Investiture, (in the language of the Feudists), is with us called INFEFTMENT, or SASINE; and has entirely superseded the Proper Investiture, or real delivery of the land itself. It is evidenced only by a Notarial Instrument, which stands connected with the whole system of registration by which land rights in Scotland are kept so clear: And actual possession of land, without sasine, is quite unavailing to pass the property.[1]

Sasine, the modus transferendi of land, is obtained, either directly, under the precept of a feudal proprietor himself infeft, or indirectly from that person's feudal superior on his resignation: Or by assignation, voluntary or judicial, to a warrant for infeftment not yet executed; in consequence of which assignation the warrant may be executed in favour of the assignee: Or, on the devolution of the right to an heir, according to the established law of succession, when the feudal superior grants his warrant for renewing the feudal investiture by sasine to the creditor, or to the heir.

The instrument by which alone this requisite of sasine is established, is itself made entirely to depend for its efficacy, against purchasers and creditors, on the Act of Registration within sixty days. This system of registration will deserve particular attention hereafter.—The expediency has been questioned, the practicability doubted as applicable to a country where many extensive and complicated money transactions take place: But the rules of this act of completion are chiefly deserving of observation. See below, in the Third Book. See Index, voce Voluntary Security.

The right, whether voluntary or judicial, which is first duly completed by sasine recorded, carries the property. Although the purchaser of a feudal subject shall have entered into possession of the lands, and paid the price, a creditor of the seller, or the trustee for the whole body of his creditors, adjudging, or receiving a voluntary conveyance from the bankrupt, and obtaining and recording the first infeftment, will acquire a preference, leaving the purchaser to his dividend as a personal creditor merely.

Even where the seller himself has not taken sasine, so that his right is only personal, this personal right is not conclusively transferred without sasine. If a second disponee, or the general creditors, on the seller's bankruptcy, obtain and record sasine before the right of the first disponee is so completed, they will take the property preferably to such first disponee, provided the title of the seller (as explained in the next paragraph) be so connected as to accresce to the previous conveyance.[2]

[1] In STEWART against SANDIEMAN, decided in 1771, a person had bargained for a house, and received possession; but the conveyances were not completed when he failed, unable to pay the price: the seller was found entitled to withhold, as in an uncompleted bargain. One Judge (Lord Monboddo) was of opinion, that the conveyance was complete, as possession had been delivered. The other Judges were quite clear of the rule, 'no sasine, no delivery of 'land;' and that, till delivery, the bargain was voidable, for failure to pay the price.

[2] It was at one time doubted, whether the conveyance of a right to lands merely personal, did not fully carry the personal right, which was all that belonged to the seller? When this question first occurred,

Where a conveyance to land is granted by one who is not himself infeft, with precept, in consequence of which the disponee takes sasine, that sasine is ineffectual while the granter continues uninfeft; but a subsequent infeftment of the granter will complete the right of the disponee, it being held in law to accresce, or, by a retrospective relation, to accede to the previous conveyance. If, therefore, two conveyances shall have been granted, and both disponees are infeft, and the second, in order to make good his right, shall infeft the disponer, this infeftment will avail his competitor, and complete his previous infeftment.[1]

Among the general creditors of a proprietor of land not infeft, and where none of the competitors have obtained infeftment, the final settlement of the competition cannot be imagined to take place on such imperfect right: So that the question, whether the first disposition would carry the preference, never can occur. The trustee for the whole creditors, or some individual, would proceed to complete the feudal right by which the preference would be regulated.

SECTION II.

OF THE ESTATE OF THE SUPERIOR, AS AFFECTED BY CONDITIONS IN THE FEUDAL GRANT.

THE effect of CONDITIONS in the feudal grant from the superior to the vassal, may be of importance to creditors in two views.—*First*, The creditors of the superior may have to inquire concerning the efficacy of such conditions and clauses in securing or in discharging the pecuniary rights of superiority; or, *Secondly*, The creditors of the vassal

the Court was of opinion, that an assignation to an uncompleted real right was not effectual in competition with a right completed by infeftment; (20th June 1676, Brown against Smith; 2. Stair, 428.) But opinions altered upon the question; and a simple conveyance, without sasine, came to be held completely to denude a disponer, whose right was merely personal. (8th December 1710, Rule against Purdie; Forbes, 455.: 20th November 1733, Sinclair against Sinclair; 1. Dict. 183.) The question, however, came again to solemn trial in the well known case of Bell of Blackwoodhouse. At first judgment was pronounced, finding, that the conveyance to the personal right was a complete transference, and preferable to a subsequent adjudication, even when completed by sasine. But upon a petition and answers, a hearing in presence was appointed, and afterwards informations. The judgment was altered, and 'the second conveyance, being an adjudication, was preferred, in respect infeftment was expede upon the same, the 'other remaining personal.' 21st June 1737, BELL against GARTSHORE. Home, 102; 1. Dict. 183. It was a point, however, which was thought to be attended with very great difficulty. Elchies was against the decision, and some other Judges. Elchies says, in reporting the decision,—'Me et quibusdam aliis re-'nitentibus;' and he adds,—'Arniston avowed, that 'he had several times changed his opinion on this 'question even during the dependence of the process, 'but now he was of the opinion of the last interlocutor; and we both thought, that notwithstanding 'that opinion, if one having a personal right should 'assign it, and thereafter be infeft, and then grant 'a second disposition, and infeft that second disponee, *he* would be preferred to the first. But he said, 'that if the second disponee should first acquire his 'disposition, and then infeft his author, the first 'disposition would be preferred. But I doubted of 'this last, because infefting the author vested the 'property in him, whereof he could not be denuded 'by the personal disposition. But in this case, the 'author's infeftment would have accresced to Black-'woodhouse, since both he and Chatto were infeft, 'but erroneously.' 15th July 1737, Elchies' Notes, p. 103, 4.

But any doubts which were entertained before the above decision are now held to be settled; and according to the doctrine in this case of Bell, the law is laid down by Erskine, that no conveyance of a personal right to lands can so divest the disponer as to prevent him from granting a posterior deed that may, by prior sasine, be made the preferable. 2. Ersk. vii. 26.

[1] HENDERSON against CAMPBELL, 5th July 1821, 1. Shaw and Ballantine, 103. This doctrine requires attention in bankruptcy; for it may happen, that a measure taken for the general behoof, may rear up unexpectedly the security of a creditor, which otherwise would have been unavailing.

may have to determine whether there be not vested in their debtor a real right, which the conditions of the charter may be ineffectual to defeat.

The right of the superior may be made available to creditors as a fund of payment, either, 1. In consequence of affording a freehold qualification, or, 2. By means of the annual duties, or, 3. By the incidents, casualties, and fines which may fall to the superior.[1]

I. Elective Franchise.—The estate of superiority, comprehending this right, may be sold by creditors; and, in particular circumstances, it is of great value in the market. It consists of a clear right, as immediate vassal of the Crown, in any estate of the value of forty shillings of old extent, or of L.400 Scots of valued rent.[2] But it is not the object of this inquiry to discuss the nature of that elective franchise, but to inquire into the pecuniary interests of the superior, in so far as they depend on the condition of the feudal grant. Elective Franchise.

II. Fixed Rents.—These fixed rents are now either feu-duties or blench-duties: The latter being nominal, and mere acknowledgments of superiority; the former sometimes equivalent to a full permanent rent for the lands. Feu-duties.

III. Incidents or Casualties.—The casualties which are of importance in the present day, are nonentry, relief, and composition for an entry. Casualties.

1. Nonentry Duties are due to the superior on the fee becoming vacant by the death of the vassal last infeft; and the duties payable are, 1st, The feu-duties in feu-holding, or the retour-duties or valued rent in blench-holdings, or L.1 Scots for every L.100 Scots of valuation in converted ward-holdings, previous to citation in the declarator; and, 2d, The real rents of the lands, after citation. This last, being a severe penalty, is avoided by any reasonable ground of excuse for delaying the entry, and is generally compounded for the usual duties.[3] The superior's action for making effectual his preference is a declarator of nonentry, grounded on his sasine. The heir is called for his interest.[4] The conclusions of the summons are, 1st, To have it declared, that the lands from a particular term have been in nonentry; 2d, That the retour-duties or feu-duties of the same, belonged from that time to the pursuer; 3d, That the pursuer has right to poind the ground of the lands for the said duties until the heir's entry, and for a year's rent for relief. Decree, declaring the nonentry, entitles the superior not only to his remedy for the past, but also to enter into possession of the lands thenceforward, and to have the ordinary remedy of a proprietor against tenants and intromitters, for the actual rents. Nonentry. Declarator.

2. Relief is the duty which is paid to the superior for a renewal of the feu to an heir, and is generally taxed in the grant at double the amount of the ordinary duties. Where it is not so taxed, it would appear that a sum equal to a single year's duties, paid along with the duties of the year, is the legitimate charge. Relief.

3. Composition for an entry to a singular successor is a charge of more importance. It amounts to a full year's rent of the subject, where it is not taxed by the charter.[5] This is Composition for entry.

[1] The superior is secured in his feu-duties by his own charter and sasine; the vassal's right forming a burden on the superior's, under condition of payment of the feu-duties contained in the reddendo. But of this hereafter, in treating of the superior's preference in competition.

[2] See the titles and requisites of a qualification to vote, explained by Mr Wight, c. 2. p. 158. and by Mr Bell, on Elections, p. 46.

[3] 13th June 1823, Robin against Drummond, 2. Shaw and Dunlop, 404. where there was a doubt, and depending litigation, between the claims of two persons as vassals.

[4] The apparent heir of the person last infeft, it is said, need not be called, where the action proceeds on a defect in the title of a singular successor. But that seems doubtful, and the better practice is to call him where he is known; Haig against Forbes, 16th May 1821; 1. Shaw and Ballantine, 9. note.

[5] It was held not sufficient to exclude the superior's demand for the full rent, that the original grant bound the superior to enter heirs or successors, 22d May 1810, Thomson, Fac. Coll.—confirmed in M'Lachlan against Tait, 14th May 1823, 2. Shaw and Dunlop, 303. —although in the disposition preceding the charter, the words were, 'each heir or singular successor;' the charter bearing 'cujuslibet hæredis vel successoris.'

a payment which is not to be regarded as a feudal casualty, but as a composition resulting out of the statutes, by which superiors have been forced to enter creditors and purchasers, contrary to the original spirit of the law of feus.

The right of relief and composition due to the superior arose out of the nature of the feudal grant. By the original principles of the feudal law, the grant was personal. Neither heirs nor creditors had the least right to ask a renewal of the grant; and the gradual admission of the heir was secured, or accompanied, by a payment to the superior, which, at first, was valuable, at last fell to a double of the feu-duties or retour-duties of the land, while a stranger could obtain a grant only by personal favour or at a high price. The admission of heirs into the destination, was held to entitle the heir to demand an entry, but to import no discharge of the relief or fine; and where the destination was made to assignees, it was held, that the superior was, by his contract, bound only to enter the vassal or his assignee, but not to change his vassal after he had once entered.[1] The first interposition of the legislature was in behalf of creditors. In 1469 it was provided, relative to execution on the brieve of distress, that 'the oure lord sall ressave the creditour, or ony 'uthir byar tennande to him, thay payande to the oure lord a ziere's maill, as the lande 'is set for the tyme.'[2] This is confirmed by 1669, c. 18. where it is declared, that 'by 'several acts of parliament, and constant practeck of the kingdom, there is one year's rent 'of all lands, &c. apprized, due and payable to the superior of the said lands and others, 'before he can be holden to enter and infeft the compriser;' and the same is enacted as to adjudication. Although voluntary purchasers were not, under those laws, entitled to force an entry, they accomplished it by means of a bond, on which they adjudged. But on the successive rebellions which agitated Scotland in the beginning of the eighteenth century, the policy was adopted of breaking the spirit of clanship, by destroying the influence and power of feudal superiors, and extending the power of alienation. By 20. Geo. II. c. 50. it was provided, that any heir served and retoured to, or any one who shall purchase or acquire from, the proprietor last vest and seized, shall be entitled to force an entry from the superior, by horning and other diligence, 'provided that no superior shall 'be obliged to give obedience to such charge, unless the charger, at the same time, shall 'pay or tender to him such fees or casualties, as he is, by law, entitled to receive upon the 'entry of such heir or purchaser.'[3]

Year's rent. AMOUNT OF THE YEAR'S RENT.—Under these statutes, doubts have been moved both as to the rents to be included, and as to the deductions to be made, in reckoning the amount of the composition.

Lands. In a land estate it was held, that the superior was entitled to demand a year's rent, as the lands were let to tenants at the time, deducting feu-duties, public burdens, and annual burdens imposed with the superior's consent.[4]

Houses. To houses built in a village on ground feued, the same rule was applied, with the additional deduction of a reasonable sum for repairs to the houses, and other perishable subjects.[5]

Subjects. Property subfeued as building ground in a city, opened a question of unusual importance, in consequence of the extension of Edinburgh over lands held in feu, and subfeued to builders. The point had been raised and discussed by the anonymous com-

[1] 2. Stair, iv. § 32. 5th February 1663, Lady CARNEGIE against Lord CROMBURN, (4th point of the case); 1. Stair's Dec. 173. 29th January 1673, OGILVIE against KINLOCH; 2. Stair's Dec. 163. & 246.

[2] 1469, c. 37. Acta Parl. vol. ii. p. 96. c. 12.

[3] 20. Geo. II. c. 50. § 12. & 13.

[4] 14th February 1775, AITCHISON against HOPKIRK, Fac. Coll. 29. This case was decided after careful inquiries into the practice, 1st, As to lands; and, 2d, As to village property.

[5] ANDERSON against MARSHEL, 50th November 1824. See the above case of Aitchison, 3. Shaw and Dunlop, 334.

mentator on Stair, (who is understood to have been Lord Elchies), p. 175.; and was judicially determined in the case cited below, where it was decided by Lord Meadowbank, after great consideration, and his judgment affirmed by the Court, and by the House of Lords, that nothing more is demandable than the subfeu-duty.[1] It remains to be determined, what shall be the effect of a subfeu for an elusory feu-duty, or one under the true value, in consideration of a price, which may be called a grassum? This point was questioned in the case cited above, Anderson against Marshall, but it was compromised. It has again been raised, and may be determined in time to be noticed in the end of the Book.[2]

Teind. In calculating the year's rent to be paid to the superior, the vassal is entitled to deduct the value of the teind; but a doubt arose whether, where the teinds were valued, the superior was entitled to insist on limiting the deduction to the valued teind, or whether the vassal might not follow the common rule, of deducting one-fifth of the rent as the value of the teind. On the course of practice, as sanctioned by a decree in 1819, the Court recently held the vassal entitled to deduct one-fifth, notwithstanding the existence of a decree of valuation.[3]

Superiority. An adjudger of a superiority is bound to pay only the feu-duty.[4]

Doubts may arise in various cases, where the vassal comes either in an ambiguous character, or with peculiarities not contemplated in the original contract. Thus,

Heir of Entail. 1. An heir of entail may be viewed either as a disponee, or as an heir. The institute, who is not heir of line, appears to be entitled to no character but that of a singular successor, bound to pay a year's rent; a substitute, who is also heir of the original investiture, is entitled to enter on a mere duplication of the feu-duty.[5] But it remains unsettled, whether a substitute, not an heir of the original investiture, is to fall under the former or the latter rule; the superior not being entitled to have that point fixed in the original charter on the entail.[6]

Corporation. 2. As a superior, where a corporation acquires right to a feudal estate, would, by entering the corporation as vassal, cut off all his future casualties, it has been held, that he cannot be compelled to do so;[7] leaving it as a matter for private compromise how the corporation is to remove the objection; whether by naming a trustee to hold for the corporation, or by stipulating to pay an entry on every revolution of a certain term of years.

Evasions. OF THE EVASION OF CASUALTIES, AND THE REMEDIES.—The casualties of superiority are liable to disappointment, 1. By the vassal or purchaser contenting himself with possessing on the personal right, without taking an entry from the superior, or completing the feudal right by sasine; 2. By conveying the personal right, the purchaser not completing his right by sasine, but keeping the precept open, and selling again with a similar assignation; and, 3. By subfeuing, by which the dominium utile may be transferred, without any immediate necessity of coming to the superior for an entry.

To preserve, against these evasions, this valuable part of the superior's right, various conditions have been introduced into the feudal contract, and various devices used to secure the entry of heirs and singular successors with the superior, and to prevent alienation by means of subfeus. The efficacy of such conditions next deserve attention.

[1] 6. June 1815, COCKBURN Ross against GOVERNORS of HERIOT'S HOSPITAL; 18. Fac. Coll. 392. See report of this case as affirmed, 3. Bligh's Rep. House of Lords, 707.

[2] See ADDENDA. Index, voce Composition for Entry.

[3] 3. March 1819, REID against FULLARTON, (not reported); 24. November 1825, THOMSON against SIMSON, 4. Shaw and Dunlop, 224.

[4] 15. February 1634, MONKTON against Lord YESTER, Durie, 705.

[5] M'KENZIE against M'KENZIE, 4. July 1777; 4. Dict. 314. 7. Fac. Coll. 445.

[6] Duke of ARGYLL against Earl of DUNMORE, 19. November 1795, 11. Fac. Coll. App. 13.

[7] 17. January 1817, HILL against MERCHANT MAIDEN HOSPITAL, Fac. Coll.

There appears in the books[1] a report, which seems to support the doctrine, that a superior is not bound to enter a disponee, whose author was not entered, unless the relief duties shall be paid for that author as if he had entered. The Court has again and again taken occasion to deny that decision as reported, and to recommend that it should be publicly understood that no such determination was given: It is, indeed, not law.

Retention of Charter.

Superiors sometimes attempt to retain their vassal's charter, and refuse to deliver it till sasine be taken and recorded. This was incidentally held to be an illegal practice, unless in so far as the vassal approved or acquiesced.[2] But, more recently, the Court, proceeding on professional usage in cases of this sort, gave their sanction to the device, on the sole ground of practice.[3] At the same time it will be observed, that the effect of such a device against third parties would be very questionable. If it were to happen, for instance, that a person, after having purchased land, and having had his charter made out, should fail, and that, on sequestration, the trustee for his creditors should offer to the superior full payment of the price, it appears that he would have right to demand delivery of the charter, with the precept unexecuted, so as to complete his title under the judicial conveyance to the precept.

Stipulations.

But the chief reliance is placed on particular STIPULATIONS and CONDITIONS in the feudal grant. With respect to these, it is obvious, that unless the condition can be made effectual as a real burden, the superior must trust to the personal obligation of his vassal, and to the remedy which he may have as a creditor on such obligation. The first point, then, to be ascertained, is, What are the requisites of a condition by which the vassal's right shall be held as qualified in the hands of his creditors or of purchasers?

Personal Obligations.

1. A mere obligation on the part of the vassal to enter within a certain time, by taking sasine on the charter; or not to dispone before he has himself entered; or not to subfeu, so as to disappoint the superior of an entry; or not to sell till he has first offered the land back to the superior; can have no effect against third parties, purchasers or creditors. These are obligations merely personal, and can serve only as the ground of a personal action.

Conditions of Grant.

2. But if, instead of being thus expressed, the stipulation shall be made a condition of the grant, it may have a very different effect. It will qualify the vassal's right so long as that right remains *personal;* and it will qualify even the *feudal* right, so as to be effectual against purchasers and creditors, provided the condition shall enter the instrument of sasine, and so appear in the record. This, as to a clause of pre-emption, seems to have been taken for granted in one case;[4] and in another more recent, the doctrine was confirmed, though doubts were entertained by the House of Lords, which leave the question still open.[5]

Mr Erskine seems to hold, that, without a clause of irritancy, the condition will not avail.[6] But this doctrine seems to be questionable. Lord Stair entertains no doubt of the efficacy of the clause of pre-emption, (or of the more sweeping clause de non alienando),

[1] 29. June 1814, GORDON against GRANT and LUMSDEN; 17. Fac. Coll. 666.

[2] 12th November 1794, Petition of DAVID STEWART; Signet Coll. 75.

[3] 21st January 1801, M'RITCHIE.

[4] See below, the case of Sir R. PRESTON against Lord DUNDONALD's creditors, p. 28. Note [4].

[5] CAMPBELL of Blytheswood against DUN, 28th May 1823. 2. Shaw and Dunlop, 341. In that case, a feu-contract was entered into, under condition, that there should be no subfeu, that any conveyance to be granted should be presented for confirmation within twelve months, and that this conveyance should be made out by the agent of the superior. The Court held those conditions effectual, in an action of declarator by the superior against the vassals. The case went to the House of Lords; and, on the motion of Lord Gifford, was remitted back to have the opinion of the whole Judges. But the parties did not proceed farther.

[6] 2. Ersk. 3. 13.; and again more fully at title 5. § 28. where he says, 'that, by our feudal rules, a 'clause declaring any sale of the lands that shall be 'made by the feuar, without offering them first to the

by force of the provision merely. On strict feudal principles, they are effectual as conditions of the grant; without a compliance with which, the superior is not bound to give an entry to the heir of his vassal: And even if the breach of the condition is by a subfeu, though to a certain extent it will be effectual, yet the lands, by descending to the heirs of the vassal, will at last fall into nonentry; and so the necessity will recur of coming again to the superior, who will not be bound to grant an entry, unless the conditions of the grant have been complied with. There is a distinction between the feudal contract of superior and vassal, and the prohibitions of an entail. In the former case, the vassal's right cannot long subsist without his being compelled to recur to the contract with the superior; and the obligations incumbent on the vassal by the contract are conditional, and may be insisted on by the superior before he will consent to renew the title: In the latter, there is no contract affording an immediate and direct remedy, but a perfect fee is bestowed on the heirs of entail, which will be effectual, if not 'irritated 'and resolved.'[1]

Conditions not recorded.

3. When the condition is omitted in the infeftment, and, of course, does not appear in the record, it will not affect third parties; neither purchasers, nor creditors adjudgers, pursuing a judicial sale of the estate: And, therefore, a singular successor, purchaser, or creditor, may adjudge, unaffected by the condition; or an application by the superior on such a clause of pre-emption, to have the lands struck out of the sale, will be ineffectual.[2]

Declarator.

4. If the lands be in nonentry, and the condition not expressed in the titles, the superior may, in a declarator of nonentry against his original vassal, conclude that the vassal shall be decerned so to make up his titles as to give effect to the condition; and the right will accordingly be made effectual by decree of declarator, entitling the superior to refuse an entry on other terms.[3] Where the title is so given, the condition will appear in the record, and so be effectual against strangers.

If the lands were feudally held under infeftment not containing the conditions, the creditors of the vassal so holding will not, after his death, be affected by such decree of declarator, but will be entitled to adjudge and bring to sale the lands to the disappointment of the superior.

5. Although the fee be full, the superior may bring an action of declarator in order to

'superior, to be null, is not of itself sufficient to invalidate the sale, unless there be also a clause irritating 'the feuar's right in that event.'

The authority on which Erskine relies for this doctrine is the case of Sir WILLIAM STIRLING against JOHNSTON, 4th January 1757. Of that case I may observe, that it is very inaccurately reported in the Fac. Coll. vol. i. p. 14. The question arose with a stranger purchaser, *and the condition was not inserted in the sasine.* It occurred to me formerly, that this decision determined only the point,—that in whatever manner the condition becomes effectual, it can have no operation against purchasers, unless it shall be entered on the record. But the Notes now published of Lord Kilkerran, justify Erskine's statement of the result. Lord KILKERRAN'S Cases and Notes, 5. Brown's Supplement, p. 233.

[1] The clause of pre-emption is sometimes so conceived as to give to the superior the power of taking the subject at an appointed sum, as in the case of Annandale, and in Sir C. Preston's case; but, when used at all, of late years, it is as a mere privilege of having the refusal *on the same terms with others.* 'That it shall not be lawful, &c. to sell, alienate, or 'dispone the said subjects, &c. to any person, until 'they have first offered to sell the same to me or 'my foresaids, at the like rate they might get from 'any others.' 2. Juridical Styles, 21. A difficulty may arise in the construction of the modern form of the clause, as the price is to be fixed by public competition at auction; and the sequestration-law expressly requires the sale to proceed by auction. 54. Geo. III. c. 137. § 52. Perhaps the Court, on a petition, would interfere to fix the upset price; and an offer to the superior at that rate would seem to make the sale valid.

[2] So it would have been held in Sir R. Preston's case, had the right to the lands, on the one hand, been other than a mere personal right, or, on the other, had the condition not been entered in the titles. The opinions of the Court went very decidedly to this conclusion. See below, p. 28. Note [4].

[3] See the case of Sir R. Preston, infra, p. 28. Note [4].

have the condition inserted in the future titles; but there is no obvious remedy by which he may establish the condition in the titles before the next entry of an heir. Certainly the declarator, alone, can have no effect on the rights of creditors.[1]

Stipulation lawful.

But it is not enough that the stipulation is expressed conditionally, and that it makes its appearance in the sasine and in the record; it is farther necessary that it be a legitimate stipulation. There were two conditions formerly much in use in feu-contracts, viz. that the vassal should be liable in the casualty of marriage; and that he should not sell without the superior's consent. These were abolished by Act of Parliament immediately after the Rebellion 1745.[2] And considering the words of the Act, it was natural to contend, that clauses of pre-emption and prohibitions to subfeu were also prohibited. But it has been settled that these clauses do not fall under the Act.

Pre-emption.

1. CLAUSE OF PRE-EMPTION.—This is a stipulation in favour of the superior of a right to have the first refusal of the lands, should the vassal be inclined to sell. Erskine is of opinion, that a clause of pre-emption is effectual notwithstanding the Act.[3] And after a very full discussion of the question on several occasions, this opinion seems to have been fully admitted as law.[4] The practical effect of this clause may deserve some attention. If the offer to the

[1] Perhaps Inhibition may be thought a good protection against future creditors; but would certainly leave the estate open to the adjudication of prior creditors.

[2] 20. Geo. II. c. 50. § 10. 'And whereas there are 'certain lands in Scotland held by the tenure of feu, 'cum maritagio, or with clauses de non alienando 'sine consensu superiorum, it is hereby enacted, &c. 'that in all time coming from and after 25th March, 'the casualty of marriage consequent on such hold-'ings, and all such prohibitory clauses restraining the 'power of alienation, be taken away and discharged; 'and it shall and may be lawful, in like manner as is 'herein-before directed, &c., and to apply, &c., for an 'additional feu-duty,' &c.

[3] B. ii. tit. 5. § 28. 'It would seem that such 'clause continues effectual notwithstanding the statute, 'as it is quite different from a clause de non alienando.' See the next Note.

[4] 1. Mr Cochran, a feuar of Kirkbrae from Sir George Preston, granted a bond, that whenever he or his heirs should think fit to dispose of the subject, they should offer it to Sir George or his heirs for £.307. 13s. 4d. The feu came into the person of the Earl of Dundonald, and on his affairs becoming embarrassed, an action of nonentry and declarator was raised for having the lands declared in nonentry; the titles made up under the condition; and the condition inserted in the charter and infeftment. There was a great deal of discussion on the efficacy of the bond, particularly as affected by the 20. Geo. II. But the Court decerned in the nonentry, and found that the tenor of the backbond in question ought to be inserted in all the subsequent titles and investitures of this piece of ground. 20th December 1781, SIR CHARLES PRESTON against LORD DUNDONALD.

The effect of this decision, in a question with the vassal himself, was to hold the right of Lord Dundonald in nonentry qualified by the condition; and to give the superior the future benefit of the bond as a real qualification of the feudal grant.

2. The creditors of Lord Dundonald having brought an action of judicial sale of his estates, a warrant was issued for selling Kirkbrae. An application was then made by Sir Charles Preston, to have those lands struck out of the sale, and his right to redeem them for the sum of £.307. 13s. 4d. declared. The Court found, 'that the right of pre-emption claimed by Sir 'C. Preston, in virtue of the backbond, is not a real 'burden on the lands of Kirkbrae, and, consequently, 'cannot be effectual against creditors; and therefore, 'that these lands must be sold for payment of the 'debts of Lord D.' An appeal was entered, and the House of Lords remitted to the Court of Session, 'to find whether the backbond given by Charles 'Cochran, 30th June 1750, as mentioned in the plead-'ings, is not a real burden on the lands of Kirkbrae, 'it having been found by the interlocutor, 20th De-'cember 1781, that the tenor of the backbond and 'obligation libelled on ought to be inserted in all the 'subsequent titles and investitures of the piece of 'ground in question, which, by the decree of the 'Court of Session in a process of nonentry, remains 'in the superior's hands, together with the maills and 'duties thereof, and will so continue aye and until the 'lawful entry of the righteous heir; and also, to find 'whether the terms of the said backbond, supposing 'it a real burden, are not sufficient to entitle the 'appellant (Sir R. Preston) to a pre-emption.' The Court of Session had the case solemnly pleaded, and delivered their opinions at considerable length, and pronounced judgment,—1. That Cochran the vassal's right never was completed by infeftment; 2. That as a personal right, it was qualified by the condition in the backbond; 3. That the creditors could attach only that personal right so qualified; and, 4. That the backbond never was entered in the title as ordered; and, therefore, it was unnecessary to determine what effect, if inserted, it would have had. The words of the judgment are,—'The Lords find, that Charles Cochran, 'who granted the backbond in question in favour of 'Sir George Preston, had only a personal right to 'the lands of Kirkbrae, which never was completed

superior is to be made at a particular sum, the interests of parties may be easily settled. The superior will be entitled, on offering that price, to have the lands struck out of a judicial sale or sequestration of the vassal's estate; or by interdict to interrupt a private sale, and afterwards, by declarator, to acquire the lands. But, on the other hand, the superior's creditors can make no use of the right, other than as augmenting the value of the superiority on a sale, unless the vassal be under the necessity of selling. If the offer is conditioned to be made to the superior at the same price as to others, it may be difficult to extricate the rights of parties.

Prohibition to Subfeu.

2. PROHIBITION TO SUBFEU.—This may be considered as equally legitimate with a clause of pre-emption; being a condition not for preserving the superior's influence, against which the Act was directed, but for maintaining and rendering effectual a valuable pecuniary interest. It is a stipulation, that the vassal shall not have it in his power to alienate the feu, otherwise than by a conveyance with the proper warrants for holding only of the superior.

If such a clause be expressed only as a condition, a feu-right granted by the vassal will be effectual while the right of the vassal stands. It will fail only when the necessity arises of coming to the superior for an entry on the death of the vassal. The superior may refuse, and so, the lands being in nonentry, the superior may, by decree of declarator of nonentry, destroy the subvassal's right. In the New Town of Edinburgh, grants are generally made with a condition against subfeuing, and with a precept for a public holding only. But it is common for the vassal to sell, with an alternative precept, and the feuar confirms the purchaser without any difficulty. A title so made up is quite unexceptionable in itself, though liable to the danger above pointed out.

If the condition be farther guarded with irritant and resolutive clauses, it seems that the subfeu may be challenged even before the necessity for a new entry with the superior arises.

When the prohibition to subfeu is effectually created as a real burden on the right of the vassal, it is an important question, how the vassal can make the best advantage of the ground, where it is intended for building? This is done in two ways:—Either he sells for a price the area and house built on it, and giving a precept for holding of the superior only, he leaves the purchaser to make up his title by entering with the superior:[1]

' by infeftment either in his favour or in that of his ' successor, Lord Dundonald: find, that the said back- ' bond never was inserted in the titles of the said ' lands, though ordered to be so by the interlocutor ' of this Court in 1781; therefore, find it unnecessary ' to determine, whether, if the backbond had been so ' inserted in the titles, and infeftment had followed, ' it would or would not have constituted a real bur- ' den on the lands: But find, that the personal right ' in Charles Cochran, and his successor, Lord Dun- ' donald, did remain qualified by the condition in the ' said backbond in favour of Sir George Preston; and ' that the adjudication led by the creditors of Lord ' Dundonald can only attach the said personal right, ' subject to the said condition: find, that such interest ' as Lord Dundonald has in said lands is properly ' comprehended in the summons of sale; and there- ' fore find, that Sir Robert Preston has now right to ' redeem said lands on payment of the sum of £.307. ' 13s. 4d., mentioned in said backbond, and decern ' accordingly.' 6th March 1805, SIR R. PRESTON against the EARL of DUNDONALD's Creditors.

Although the judgment does not determine the effect of the backbond, and so the point is not precisely decided; yet the Judges, in delivering their opinions, had no doubt of the efficacy of such a condition, if inserted in the titles; and Lord Armadale, in particular, stated, that his father-in-law, Lord Justice-Clerk M'Queen, and Lord Justice-Clerk Miller, were clearly of opinion that such clauses constituted a real burden.

3. In the case of IRVING against the MARQUIS of ANNANDALE, 6th March 1767, the Court had, in the same way, decided, that a clause of pre-emption does not fall under the Act of 20. Geo. II. And although this decision was in the case of FARQUHARSON against KEAY, 2d December 1800, thrown into doubt by an observation from the Bench, the Judges approved of the decision in Irving's case, in the opinions delivered in Sir R. Preston's case; and in its turn this decision of Farquharson and Keay was held questionable.

[1] Sometimes, in practice, titles are made up on such a precept, as if it were an alternative precept; ex gr. by base infeftment confirmed. Such a title is vicious.

Ground-annual.

Or he constitutes a ground-annual or reserved rent, by a form of grant proceeding on the principle of a burden by reservation. In constituting a title to property with a ground-annual, the grant is by a precept à me, to force the purchaser to enter with the superior: The disponee is burdened with the duty to the superior, and a sum to be paid annually to the disponer, and his heirs or assignees; and this annual payment is declared to form a real burden on the land, which the disponer is to have right to recover by poinding of the ground. Generally a security for the ground-annual is constituted by procuratory and infeftment.[1] While a right of this nature is left merely on the condition and declaration of a real burden entering the infeftment, there may be some doubt both as to the form of transferring, and the remedy for forcing payment of the annual duty: But where it is completed by an infeftment in security, the right seems to be real beyond all question, with all the remedies which are applicable to an annuity secured on land.

SECTION III.

LIMITED ESTATES IN LAND, DEPENDING ON DECLARATIONS OF USES, OR ON RESERVATION OF BURDENS, OR OF FACULTIES.

THESE are conditions directly intended to limit or restrain the right to the land, as in a question with the person whose right is qualified, or with purchasers from him, or with creditors. It may be stated generally, that such limitation depends on one of two principles: Either on the effect of a condition qualifying the conveyance, or on the effect of a reservation out of the conveyance of part of the original right of the granter; there being in either case vested in the granter, or in another, a jus quæsitum, sufficient to ground an action.

ART. I.—*Of the Settlement of Estates in Trust—Limitation of Uses and Purposes.*

In many situations, it is difficult to arrange or dispose of property, without having recourse to the creation of a trust, that there may at once be compliance with the forms of feudal conveyancing, and a free exercise of the power of administration, for the accomplishment of the ends in view. This expedient is especially made use of for securing estates to unknown, or unborn, or very numerous parties; for distributing in shares, varying with circumstances, the property or the price of an estate; for dispensing with or getting rid of the inconvenient and unbending forms of ordinary conveyancing, calculated for common transactions of daily intercourse, but frequently unfit for anomalous, eventual, and mingled interests.

It is the object and operation of trusts, as applicable to lands and other feudal subjects, that in the person of the trustee there shall be vested a legal estate, so limited, and yet so complete, that while the conditions annexed to it, or implied in its constitution, create a separate estate or interest, which forms a burden or condition on the trustee's right; the active powers of administration or of transference, for the accomplishment of the intended purposes, are in the person of the trustee at once unembarrassed and free, and capable of being exercised with perfect safety to those in whom the radical interest

[1] This is by contract. The proprietor, or vassal disponer, in consideration of the ground-annual and other prestations, and with and under the burden thereof, dispones, &c., declaring the annual duty redeemable at 20 years' purchase any time within 10 years, and 25 years' purchase thereafter; and grants a procuratory for resigning, to be held burgage, under burden of the ground rent. Then the purchaser binds himself to pay the ground annual while not redeemed; and, in security, dispones with procuratory of resignation for burgage-holding.

resides. In proportion as these objects are fully attained, the trust may be considered as perfect, or otherwise.

The particular occasions for the employment of this expedient are, the settling of Marriage Contracts; the arranging of Family Settlements; the fixing of a plan for the administration of large estates, which shall not require, or shall exclude, the interference of the proprietor; the facilitating of the sale and distribution of land, or its price, among heirs or creditors; or, finally, the settling of a bankruptcy, with provisions for the benefit of the creditors, and a discharge of the debtor.[1] A system of operations by which arrangements so various and opposite may be accomplished, is of great importance in the practical jurisprudence of Scotland. And the points to be considered are, 1. The constitution of the trust; 2. The estate vested in the trustee; 3. The estate remaining in the granter, or vested in those for whom the powers are to be exercised; 4. The administration of the trustees; and, 5. The extinction of the trust; and reinvestment of the truster, or final conveyance to those who have the reversionary right.

1. CONSTITUTION OF THE TRUST.—Trust is referable to a combination of two contracts—Deposite and Mandate; the estate not being in the trustee for any use or purpose of his own, and the administration being ruled by the directions given by the maker of the trust. And this is a point of chief importance to be observed, that the object in view is not the beneficial interest of the trustee, but some purpose to be accomplished in which a third party is interested; an object to be attained by means of the interposition, the activity, sometimes the peculiar discretion, of the party selected. These points may be laid down :—

1. A trust cannot be constituted in the person of another without his consent; to the effect of obliging him to do any act, however innoxious to himself or easy to be done.[2]

2. A failure in the nomination, the non-acceptance of the trustees, the death of the trustees named, or of one named sine quo non, or of any of the number named as a quorum, will defeat the trust, where the power to be exercised is inseparably connected with the nomination.[3] It will bar, or bring to a close, the administration, even where the interests which form the object of the deed are still to be maintained.[4] But it will not extinguish interests in third parties intended at all events to be raised by the deed, and to subsist independently of the particular administration. It is held in such case, that the mandate was meant absolutely to be available to those whose interest is in contemplation :[5] And the radical right is to be made effectual against the granter's heirs, (or the trustees, if so destined), by adjudication,[6] while the Court of Session will supply what is necessary in the way of administration.[7]

[1] The more particular consideration of Trusts for Insolvency will be resumed in the last Book of these Commentaries.

[2] Yet it was held, that one named as trustee without his knowledge, and in whose favour sasine was taken relying on his acceptance, was bound to grant the deed necessary for denuding, providing he was freed from all warrandice, and relieved of expense. 21st November 1710, DALLAS against LIECHMAN.

[3] In the case of HEPBURN (below, note [7].) the Court interfered, even where there was a discretionary power to be exercised. But in DICK against FERGUSON, 22d January 1758, where there was a discretionary power in the trustees, the exercise of which was necessarily combined with the nomination, the trust was held to fall.

[4] See STODDART's case below, p. 32. note [3]. See also DRUMMOND against M'KENZIE, 30th June 1758. Sel. Dec. 203. Practically it is an advisable precaution, where a majority of the trustees are named as a quorum, that the number of trustees accepting should be defined by a declaration of non-acceptance on the part of those who decline, or who even, in the meanwhile, abstain from acting; reserving in this last case power to resume their place afterwards.

[5] CAMPBELL against CAMPBELL, 26th June 1752. Kilk. 518. Sel. Dec. 35.

[6] See GAVIN against KIRKPATRICK, 30. May 1826. 4. Shaw and Dunlop, 629.

[7] The Court formerly interfered by naming a trustee, to act with all a trustee's powers.; so in HEPBURN

3. Not only the death, but the incapacity, or even (where it essentially abridges his power or fitness for the office) the bankruptcy, of a trustee, will defeat a trust, or bring it to a close, so far as that person is concerned.[1] But it forms no incapacity to act as a trustee that the person named is a married woman; though the husband has undoubtedly a power to prevent her acceptance of an office attended with responsibility.[2] The nomination of a woman as a trustee seems to fall with her marriage, but where the appointment is made before marriage, and the truster survives that event, and is aware of it, without altering the nomination, he is held to continue it intentionally.[3]

4. Non-acceptance on the part of the trustees may defeat the trust; or at least the course of administration projected. But to abstain from acceptance is not to decline the trust, and a trustee so abstaining may afterwards assume his place.[4] Where the trust, however, relates to an estate to be vested in the trustees by infeftment, it would rather seem, that a refusal to allow his name to be included in the infeftment would be equal to a refusal to accept; and the infeftment completed with the omission of the name of any of the trustees would, prima facie at least, be taken as proof of their non-acceptance.

5. Where trustees are named in a marriage contract, for the purpose of protecting the interests of the wife and children, the dissolution of the marriage, though it has the effect of restoring the wife and children to their separate persona standi, will not extinguish the trust;[5] nor will the death of such trustees during the marriage leave the wife and children unprotected.

6. Trustees may effectually be appointed, not only by name, but by descriptive reference; and such reference may be either to office, as in nominating the trustees of a public charity; or to an assumption, or appointment, by those expressly named; or to nomination by a stranger; or to the legal line of succession of the trustees named.

II. Estate in the Trustee.—Estates were of old, in Scotland, vested in trust, chiefly in the disastrous days of rebellion and civil war; when, before engaging in any dangerous enterprise, a land-owner made over his estate to a confidential friend, to be restored after the danger was over. In this use of trusts, the parties necessarily confided in the honour and fidelity of the trustee; the secret compact could not be disclosed, and that equity on which the Prætorian jurisprudence in Rome interfered to enforce the duties of persons similarly intrusted, (though for very different purposes), afforded the only ground of judicial interposition with us. This was the case of Trust Proper; in which, Lord Stair says, 'there is neither bond, condition, nor promise of reversion, or obligement

of Humby's Creditors against Countess of Tarras, 13th July 1699, 2. Fount. 60. The course afterwards was, to name only a Curator Bonis; M'Dowal's case, below, next note; Grant, February and March 1790, 3. Dict. 349. See also Wotherspoon, 15th December 1775, Fac. Coll. More recently it has been the practice to authorize a factor to take all necessary proceedings. In Alexander's case, 27th February 1824, on the trustee's having declined, a factor was named with power to carry the trust into effect. 2. Shaw and Dunlop, 745. And in Busby's, 1st February 1823, the Court, on a search of precedents, granted the special power there required to a factor to make up titles to certain heritable subjects. 2. Shaw and Dunlop, 176.

[1] In M'Dowal against M'Dowal, 20th November 1789, Fac. Coll. a trust was held to fall by the bankruptcy of the surviving trustee, where the interest of parties did not require its continuance; although, as a general proposition, bankruptcy was not held necessarily to defeat or terminate a trust.

[2] Darling against Watson, 14th January 1823, 2. Shaw and Dunlop, 607. Here it was also held, that where a husband and wife are named trustees, they are, quoad hoc, separate persons having separate votes. See also Stoddart's case, next note.

[3] Stoddart against Rutherford, 30th June 1812. The general point of a *wife's* capacity to be trustee was here fixed, and a distinction drawn between this and the case of Tutory: The husband held to have power to bar acceptance; and the supervening marriage taken for granted as defeating the nomination.

[4] See above, the case of Darling, note [2].

[5] Hill against Hunter, 12th February 1766, Sel. Dec. 314.

'to denude,' (4. St. 6. § 1.) The progress was much the same in England; the confusions during the wars of York and Lancaster having given rise to the frequent use of trusts in that country. There the statute of 27. Henry VIII. called the Statute of Uses, had at one time nearly established the legal estate of the Cestui que use, and brought the whole of this department of jurisprudence under the administration of courts of law. But it was found necessary to have recourse to equity; and in this way, the jurisdiction in trusts forms a great branch of that of the Court of Chancery. In Scotland, without any general statute to declare the legal estate of the truster, the gradual operation of our combined system of law and equity, with the aid of our public records, has led to the establishment of a safe, clear, and regular system of trusts; in which the rights of all parties may be vested in the trustee, as in deposit, with perfect security to those interested, and resting upon rules which guide the determinations of our courts with the same precision and uniformity as in other cases.

Taking a general view of this subject, the estate in the trustee will be found to stand in one of three situations: 1. An estate ex facie absolute, with no other than a verbal engagement by the trustee; 2. An estate vested in the trustee by a conveyance in absolute terms; the conditions and purposes of the trust being expressed in a separate deed; or, 3. An estate expressly in trust; the purposes of the trust, and the rights of those for whose benefit it is designed, being stated as conditions and qualifications of the estate vested in the trustee.

Estate absolute, with verbal engagement.

1. The first of these cases was the most frequent when this expedient came to be used, in order to conceal or cover an estate from danger of forfeiture. But out of those trusts so many inextricable questions arose,[1] and there was so much danger of fraud, that in 1696 provision was made by the legislature against such arrangements. In the 25th chapter of the Acts of that year, on a preamble, that 'the intrusting of persons without 'any declaration or back-bond of trust in writing from the person intrusted, are occa-'sions of fraud,' it was enacted, 'That no action of declarator of trust shall be sustained 'as to any deed of trust made for hereafter, except upon a declaration or back-bond 'of trust lawfully subscribed by the person alleged to be the trustee, and against whom, 'or his heirs or assignees, the declarator shall be intented, or unless the same be referred 'to the oath of the party simpliciter.'[2]

Under this Act, the only points which have required the determination of the courts are these: 1. Where the trust arises, not from the act or conveyance of the truster, but results from the interference of the trustee (as negotiorum gestor for example), the Act does not apply.[3] The principle of the Act cannot be extended to such a case. 2. It is not of itself sufficient to exclude the rule of the Act, that the trust arises from the deed of a party different from him who claims the benefit of the trust.[4] 3. The Act is in full observance to exclude a proof by parole, even though some circumstances of real evidence may support the plea.[5]

The effect of the trust, when it is proved by written acknowledgment, or by oath, and is not established by the words of the conveyance itself, is *personal;* so as not to limit the real estate created by sasine in the trustee, or to be effectual against purchasers

[1] See the case of HIGGINS against CALLENDAR, 19th June 1696, 2. Fount. 21. This case was the more immediate occasion of the statute.

[2] 1696, c. 25. This Act also contains an enactment against blank bonds. See Post, vol. ii. Index, voce Blank Bond.

[3] SPRUEL against SPRUEL and CRAWFORD, 16th July 1741, Kilk. 581.

[4] See DUGGAN against WIGHT, 2d March 1797. Fac. Coll.; affirmed in House of Lords, 24. Nov. 1797.

[5] DUGGAN's case above.

from the trustee,[1] or against his creditors adjudging.[2] But this holds only where the estate is vested in the trustee. While it continues a personal right (as where infeftment has not been taken on the trust-deed), the condition of trust, though personal, will limit the personal right effectually against purchasers and creditors, if insisted in before their right is completed. The beneficial interest may also, by means of declarator or by registration, be established as a real qualification of the trust-estate.

Right absolute, with Back-bond.

2. It is not now the practice to constitute a trust otherwise than by back-bond, or by an express trust-deed limited in græmio. Where the conditions and purposes of the trust are expressed in a BACK-BOND, they are, in so far as the extent and limits of the beneficial estate is concerned, not exposed to the doubts which are incident to proper trust; and in all questions with the trustee and his heirs they are effectual limitations of his right. Even with purchasers or creditors, they will effectually qualify the personal right. But if the real estate be vested and complete in the trustee's person, they will not operate as conditions or qualifications of it, unless the back-bond be recorded. By statute, all reversions (or rights to redeem an estate conveyed in absolute terms) are directed to be recorded in the Register of Sasines and Reversions, without which they are to have no effect in limiting the absolute right.[3] And under these statutes, back-bonds of trust will qualify the absolute estate in the trustee.

Trust in græmio.

3. Where the conveyance of the estate is expressly a DISPOSITION IN TRUST, for certain uses and purposes, and the precept and procuratory are so conceived, the completion of the title in the person of the trustee by sasine recorded with its condition, while it vests the fee in him, leaves to the persons for whose behoof it is intended an effectual and secure estate, or jus crediti, as a real burden on the trust-estate. The consequences of this are important: 1. The creditors of the trustee have no right to attach the trust-estate for the trustee's debts. The estate in him is, in its nature and origin, a limited and qualified estate—it is, in regard to his own creditors, a mere formal right, a deposit for the benefit of others; and the estate in all its forms, and even the proceeds of it if sold, while they can be identified, (as bills or bonds of the purchaser, lands exchanged or excambed for the original trust-estate, &c.), belong exclusively to those having right under the trust, and can neither be attached nor divided by the trustee's creditors. 2. The maxim of law, that a fee cannot be in pendente, is satisfied by the vesting of the fee in the trustee: so that for persons yet unborn, or otherwise incapable of holding the fee, an effectual contingent right may be constituted in the meanwhile, which, in due time, may be completely available.

Vesting the Estate.

4. The trust-estate cannot be considered as fully created, until the right is so vested in the trustee as to denude the maker of the trust, and so prevent his creditors, or others deriving right from him, from attaching any thing but the reversionary interest after the purposes of the trust are fulfilled. This, in land estates, can be accomplished only by the same feudal act of sasine by which the trustee's right, if a real creditor or purchaser, would have been completed and rendered effectual against all deriving right from the granter.[4]

5. The trust-estate may be vested, and very conveniently so, in one person, subject to the administration of several trustees. A numerous body is fitter to deliberate than to act. But the common method of creating trusts, is by a deed expressly in trust, or quali-

[1] ANDERSON against DEMPSTER and DUDGEON, 14th Nov. 1702, 2. Fount. 159. and other cases in Dict. voce Personal and Real.

[2] At one time it was held, that adjudgers stood in a different situation from purchasers; that they took only tantum et tale, as the subject stood in the debtor, and so were subject to the personal obligation incumbent on him. THOMSON against DOUGLAS, HERON and Co. 15th Nov. 1786, corrected in ROSS of KERSE, 31st January 1792, and WYLIE against DUNCAN, 8th December 1803, 13. Fac. Coll. 281.

[3] See 1459, c. 27. and 1617, c. 16. KEITH against MAXWELL, 8th July 1795. See below, Index of Cases.

[4] See below, Index, voce Voluntary Securities.

fied by a back-bond, the trust being in either case made to qualify the fee. The estate must, in this case, be conveyed to the whole trustees, and vested in them all by infeftment, in order to enable them effectually to act. Where there is a power to assume new trustees, the conveyance may be so arranged, as either to make the original trustees hold the fee, at the disposal of the deliberative voice of the whole; or to vest it in the united body of trustees. Where on any change the old trustees are to retire from the office, they must be denuded of the trust-estate. They may either denude spontaneously; or being expressly bound in the trust-deed, or under an implied obligation, so to do, an adjudication may be led against them, or their heirs, if the trust be so destined.

6. Where, by the failure of the trustees named and vested with the estate, the trust falls, this effect takes place either absolutely; or, if there be interests beyond, the Court will interfere to preserve them. And this is done either, 1. By appointing a curator bonis; or, 2. By a declaratory adjudication in favour of a new trustee suggested by the parties; or, 3. By a decree of declarator of trust containing a warrant to the superior to enter the person having the radical or equitable right.[1] Those measures may be pursued by adjudication on a charge against the trustee's heir; or, where the conveyance is strictly personal, or the heir is incapable or unwilling to interfere, by declarator of trust, without any charge.

III. The Beneficial Estate under the Trust.—The conveyance by which the trust estate is created in the person of the trustees, while it vests in the trustees a formal feudal estate, does so only for the purpose of enabling that estate to be more effectually held separate from the right of the original owner, for the accomplishment of the purposes of the trust, and for satisfying the interests raised in third parties. The two points essential to be considered are, the radical right still remaining in the granter; and the separate or beneficial interest raised for others.

1. The Radical Right in the granter of the trust may be viewed in relation to his prior and to his subsequent creditors.

Effect on Prior Creditors.

(1.) *Prior Creditors.*—In relation to his already existing creditors, his trust-deed will be good against them only where the granter is solvent, or the beneficial interest to be raised is onerous; and where the trust-conveyance is a fair and honest conveyance completed before those creditors have proceeded to attach the estate. The first branch of the Act of 1621, c. 18., to be afterwards commented on, affords a remedy against trust-conveyances, where the trust is gratuitous and the granter insolvent.[2] The second branch of the same statute gives a remedy where the prior creditors, having already begun to attach the estate, are barred by such a conveyance.[3] Where the granter becomes, or can be rendered, bankrupt within sixty days of the recording of the sasine, a remedy of another kind is given by a later statute:[4] And finally, wherever fraud can be fixed on the transaction at common law, it will be reducible, and creditors, whether prior or subsequent, will have the benefit of the estate.[5]

But where none of those statutes apply, and there is no fraud at common law, the trust-deed will be effectual to its peculiar purpose, wherever the beneficial interests raised to third parties are legitimate, though inconsistent with the claims of the prior creditors. Wherever the trust-right is not inconsistent with the claims of those creditors, they may insist on having admission to the benefit of the trust. So where a trust-deed is made for the

[1] An example of a declaratory adjudication, calling the representatives of the trustee, and all having interest, will be found in the case of Drummond against M'Kenzie, 30th June 1758; and an example of the declarator of trust, in Dalziel against Dalziel, 11th March 1756, Fac. Coll.

[2] See Comm. on this Act, in the 6th Book, below.

[3] See Comm. on the 2d branch of Act 1621, Book 6.

[4] See Comm. on the Act 1696, c. 5. below, Book 6.

[5] See Earl of Roseberry against M'Queen and Cowie, 1st July 1823, 2. Shaw and Dunlop, 443.

payment of certain creditors, and to return the reversion to the granter, or to hold it for his heirs under such a destination as will not deprive him of the fee or disposal of the reversion; the trustees, in accounting to those having the reversionary interest, will be entitled to credit for debts paid under proper measures of diligence; or creditors doing diligence to attach the fund, will be entitled to a share.

Effect on Posterior Creditors.

(2.) *Posterior Creditors.*—As to creditors whose debts arise subsequently to the trust: 1. If the trust be such as to leave no fee in the truster, his subsequent creditors will have no share of the trust-estate. 2. Where a trust is created for payment of prior debts, and the conveyance of the residue to certain persons, in such shares as the truster shall appoint, it is held that subsequent creditors may be introduced by a supplementary trust-deed, or that the trustees making advances to the truster, have right to withhold the estate till indemnified.[1] And so, 3. A trust created for the purpose of paying off debts, and raising money for certain purposes, was held to leave in the truster so much of his original estate,[2] as to authorize the trustees to take credit in accounting for having, in the course of their administration, paid a creditor holding certain bills due by the truster.[3]

Beneficial interest in others.

2. The BENEFICIAL INTEREST raised to others, is in its nature a jus crediti. It is secured to them, on the one hand, by preference over the creditors of the trustee; who can take no share of the trust-estate in competition with the beneficial interest, provided the declaration of trust is properly made a real burden on the fee vested in the trustee: And on the other, it is made effectual against the creditors of the truster, by the real right vested in the trustee for their behoof, excluding the truster and his creditors.

This beneficial interest may be of liferent or of fee: and the doctrines of liferent and fee are here applicable, not changed by the intervention of the trust, but in some respects facilitated, and allowed to operate more effectually by means of it.[4]

The persons in whom this interest is vested, or for whom it is to be held, must be clearly ascertained, otherwise the heir-at-law will continue to have right. But whether it is sufficient to point out such persons by reference to the will of another, has been much doubted: And the doubt has been rested on this footing, that while no one can make a will which depends entirely on the will of another, there must in every trust be a responsibility by the trustees, at the call of some one having a distinct interest; an incontrollable power of disposition being ownership, not trust.[5] It has been held, however, 1. That where the reference can apply only to one single person, or to one settled line of succession, it will be good; as a reference to the Statute of Distributions in England.[6] 2. That where there is reference to an event which leads to uncertainty or inextricability, the trust no longer can subsist, but the true heir takes the right.[7] 3. That it is competent to leave the nomination of the person who is to take succession, to a particular person,[8] or to the trustees.

[1] TURNBULL against TURNBULL's Trustees, 12th Nov. 1822, 2. Shaw and Dunlop, 1.

[2] The radical right in the truster is still held so far to subsist, where the deed is for the granter's behoof in reversion, that his creditors may adjudge validly, by directing their diligence against the truster, notwithstanding the feudal right in the trustees. CAMPBELL against the CREDITORS of CAMPBELL of EDERLINE, 14th January 1801, Fac. Coll. See below, Index, voce Adjudication. See also LOCKHART against WINGATE, 19th February 1819, Fac. Coll. as to the effect of a trust-deed on the elective franchise.

[3] PAGAN against EATON, 17th January 1823, 2. Shaw and Dunlop, 125.

[4] See below, p. 54.

[5] See in England the case of MORRIS against the BISHOP of DURHAM, 6. Ves. 404.

[6] BELLENDEN against Earl of WINCHELSEA, 14th February 1825, 3. Shaw and Dunlop, 530.

[7] DICK against FERGUSON, 22d January 1758. See observations on this case by Lord Gifford, in HILL against BURNS, in House of Lords, 1. Wilson and Shaw's Appeal Cases, 88.

[8] MURRAY against FLEMING, 28th November 1729, where a husband disponed his land estate to his wife in liferent, and any of his blood relations whom she should name by a writ under her hand, in fee. She did name one after the husband's death, and the heir was unsuccessful in challenging the disposition. CRICHTON

As to the nature of the right thus bestowed upon third parties,—

1. As a mere jus crediti, this beneficial (or as it is sometimes called equitable) interest is not a jus in re, or real estate in the land, entitling those interested to maintain any real action; as of maills and duties:[1] It gives only a personal action against the trustee, to execute the trust or to denude.

2. This jus crediti may be effectually conveyed as a personal right, by settlement,[2] or by an assignation which, if duly completed, will be preferable to a subsequent adjudication of the estate, as vesting in the assignee the beneficial interest.[3]

3. Where the beneficial interest affects heritable estate, which the trustees are directed to convey over to the person holding such interest, or which they have a discretionary power so to convey, the jus crediti is to be held heritable in succession; while it is to be regarded as moveable in succession, if the trust-estate be moveable, or if the subjects have been actually converted into money; and as it seems, the jus crediti is also to be held moveable, if the beneficial interest is a share of the estate after it shall be converted into money.[4]

4. Where the beneficial interest is taken in favour of creditors, and the trustee is infeft for the creditors enumerated in a list, the right conferred is a real right in security, and will subsist while the debts are unextinguished.

As to the extent of the estate, where trustees are vested with lands for certain persons or purposes, or have a sum intrusted to them for realizing the intentions of the granter, the implied effect of the trust is to carry the rents or interests to the purpose of the deed. But this always must be a questio voluntatis, depending on the words or plain intendment of the trust-deed.[5]

IV. Administration of the Trust.—The powers to be exercised by the trustees depend on the terms of the appointment; or are implied in the nature of the trust, and the legal capacities of the trustees.

against Crichton, 12th May 1826, where also the power was given to the wife of the granter of the trust-deed; 4. Shaw and Dunlop, 553.

See also Snodgrass against Buchanan.

Campbell against Campbell, 16th December 1738.

Hill against Hood's Trustees, 14th December 1824, 3. Shaw and Dunlop, 389. Affirmed 14th April 1826, 1. Wilson and Shaw's Appeal Cases, p. 80.

[1] Drummond against M'Kenzie, 30th June 1758, 2. Pr. of Eq. 12. Sel. Dec. 203. Here the trustee died, and left the beneficial interest unexecuted. It was held incompetent for the holders of that interest to bring an action of maills and duties.

[2] Gordon's Trustees against Harper, 4th December 1821. In this case the beneficial interest devolved on Robert Gordon, to whom, on majority, the trustees were appointed to 'denude of the lands.' They put him in possession, but he made up no titles, and a competition arose between trustees named by him in a deed of settlement, and the heirs of the original truster, who pleaded, that Robert Gordon not having made up titles, his right to the lands fell. It was held, that the beneficial interest was a jus crediti fully vested in Robert Gordon, and effectually conveyed by his settlement. 1. Shaw and Ballantine, 185.

[3] M'Dowal and Selkrig against Russell, 6th February 1824. This was a competition between an assignee to the beneficial interest, and the trustee for the general creditors of the cedent, specially adjudging and making up titles to the subjects. 'It was 'observed from the chair, that there is a material dis-'tinction between this case, and that where a party 'having the beneficial interest in the trust was the 'granter and original proprietor: that the trust is in 'that case merely a burden on the right; but that 'where there is no original title, and the right arises 'from the trust-deed alone, there is only a jus crediti. 'In this opinion the rest of the Judges concurred, and 'held the case of Gordon's trustees, (see preceding 'note) a precedent in point.' 2. Shaw and Dunlop, 682.

Smith against Leitch, 2d June 1826. Where one holding a conditional fee, executed a trust-conveyance of it after the condition was purified.

[4] Burrell against Burrell, 14th December 1825, 4. Shaw and Dunlop, 314.

[5] See Earl of Stair against Trustees, 21st February 1826, 4. Shaw and Dunlop, 483. where interests of a sum to be laid out in buying land, held to go with the principal. Templar and Lady Montgomerie against Graham's Trustees, 14th February 1826, 4. Shaw and Dunlop, 460. a similar question as to the rents of estate during a contingency.

1. The object of the trust must be legitimate; and all that is now allowed of those MORTIFICATIONS which were once so frequent in an age of superstition and religious bigotry,[1] is accomplished by means of trust; as endowments for universities, hospitals, and charities of various kinds. Lands and other heritable subjects are for such purposes vested in trust, to be held by the trustees in feu or blench; and such trusts are effectual where the purpose is intelligible and capable of being executed. Nay, a trust of this sort has been sustained where the general purpose only has been indicated, and the particular destination left to the discretion of the trustees.[2]

2. The trust will be effectual to sustain future or contingent interests, or those of persons not yet existing; and the fee in the trustees will be effectual to all intents, as if those persons were actually in existence, or as if their right were already purified.

It is on this account that trust-deeds are made use of so much in family settlements and in marriage contracts, where, if the simple conveyance alone were used, the purposes of the arrangement would find an obstacle almost insurmountable in the maxim, that a fee cannot be in pendente.

3. The trustees may be invested with power to accumulate profits for particular purposes or destinations; to sell lands and apply the price; or to realize funds and purchase estates: and their powers and duties will in general depend on the terms of their appointment. But wherever the will becomes inextricable, or where it is intended for too distant a contingency, it will be ineffectual at common law,[3] or barred by a statute made on the view of the difficulties raised on the will of the late Mr Thelluson.[4]

In general it may be laid down, as to the power of sale and distribution, 1. That where trustees are instructed generally to sell property, they may use their discretion in selling by auction or by private sale: 2. That where the sale is intended for the purpose of paying off the debts of the granter insolvent, or where the estate plainly turns out insolvent, the trustees cannot legally pay at their will to the first creditor who makes a demand: 3. That where the trust is for general management and economical arrangement, or for family distribution or settlement, the trustees are entitled, as the granter himself would have been, to pay to the creditor first demanding payment, primo venienti, where such payment is made in bona fide:[5] 4. That where the trustees are judicially called on by a creditor to pay his demand, they cannot in preference pay another without having ample funds for the payment of the creditor bringing his action:[6] And, 5. That even where the call of creditors is extrajudicial, but such as plainly to indicate a shortcoming in the funds, the trustees will probably be held bound to suspend their payments till in a multiplepoinding the order and safety of the course of payment be judicially settled.

In those trusts which are intended for the investment of money in land, either to be entailed or settled on particular persons, the words and plain intendment of the deed give the law of the trust.

[1] 1587, c. 29.

[2] HILL and others against Dr BURNS, 14th December 1824, 3. Shaw and Dunlop, 389.; affirmed 14th April 1826. This was a trust of monies to be distributed to the charitable institutions, established or to be established, in Glasgow and its neighbourhood, at the discretion of the trustees. 1. Wilson and Shaw's Appeal Cases, 80. See also CRICHTON's case, supra, p. 37. note.

[3] See M'NAIR against M'NAIR, Bell's Cases, 546.

[4] 39. & 43. Geo. III. c. 39. It seems very doubtful, however, whether this Act applies to Scotland.

[5] RANKEN against GAIRDNER, 24th November 1741, Kilk. 581. where the general doctrine is delivered in absolute terms.

In ALISON against Earl of DUNDONALD's Trustees, 22d January 1793, Fac. Coll. it was held, that trustees in a family settlement may pay primo venienti, till interpelled by legal diligence, and that they are not under any necessity of bringing a multiplepoinding. The chief question was, whether a private extrajudicial demand was a sufficient interpellation to impose on the trustees the duty of bringing a multiplepoinding; and it was held not to be so.

[6] See the above note.

In all cases of trust, the trustees must strictly maintain their neutrality, and make a complete and thorough separation between their fiduciary and their private character. So, 1. In accounting for their intromissions, they must not only keep exact accounts,[1] but they can take credit only for what they have actually paid:[2] 2. They cannot avail themselves of rights which they have purchased, though such rights might otherwise have entered into competition with those having interest in the trust:[3] 3. In selling the trust-estate they cannot also be purchasers.[4]

In their administration of the trust, a demand made against a debtor to the estate cannot be met by setting off a debt due to the debtor by the trustees who make the demand: There is no concursus debiti et crediti. Neither is there concourse where a trustee demands a private debt from one who is a creditor under the trust. But where a demand is made by trustees for a debt due to the trust-estate, it may be met by a debt due under the trust to the defender. Again, where the debtor of the trustee is called on to pay a private debt, and being a creditor under the trust, and the trustee the sole intromitter, there is room for doubt whether there may not be compensation.[5]

Trustees acting within the line of their trust will render the trust funds responsible; but personally they will not be liable to an action except on the ground of delict or quasi delict. They will not in sales be held to give their own warrandice, except from fact and deed. Nor can action be raised, or decree insisted for against them, except as trustees, and of course as under a responsibility limited to the estate in their hands.

V. Extinction of the Trust, and Reinvestment in those having Radical Right.—When the purposes of the trust are accomplished, the trustees are bound to denude. This may be enforced by Declarator of Trust and Adjudication. It does not take place ipso jure, because, on the one hand, the formal right, the feudal conveyance, must be completed. The feudal casualties fall by the death of the trustee who is the vassal, and the estate must stand transferred on the record. On the other hand, something most likely is to be done; expenses paid; indemnity given against responsibility; advances reimbursed, and so forth; in security of all which the trustee may retain the estate.[6]

Art. II.—*Of Estates by Reserved Burden.*

The fee may be burdened with a sum to be paid to the granter; or with an annuity to be paid to him periodically; or with a sum payable to a third party. This is called Burden by Reservation, or Real Burden.

[1] Gourlay against Dumbreck, 28th Nov. 1710.

[2] Earl of Craufurd against Hepburn, 6th March 1767, Sel. Dec. 327. See also 15th November 1667, Maxwell against Maxwell, 1. St. 485. Rae against Glass, 21st February 1673, Gosford, Morr. 16171. Sinclair against Maxwell, 6th January 1708.

[3] Wright against Wright, 24th June 1712, Forb. 602.

[4] See M'Kenzie against York Building Company, 8th March 1793, as decided by reversal in House of Lords, 13th May 1793. See 4. Dow, 379.

See Smith against Robertson, 10th Feb. 1826, 4. Shaw and Dunlop, 442. as to an accountant employed under an extrajudicial trust, and afterwards in a sequestration: Drew against Paterson, 2d Dec. 1825, 4. Shaw and Dunlop, 259. as to a commissioner on a sequestrated estate: and Jeffrey against Aitken, 16th June 1826, as to creditor selling under his bond.

[5] In Hay against Brown, 22d December 1825, 3. Shaw and Dunlop, 582. a difference of opinion on this point took place on the Bench. A trustee died, and his representative pursuing for a debt due to him, the defender pleaded set-off on a debt owing to him from the trust, the deceased having had the sole intromission with the funds. The Court held there was no concourse, Lord Alloway dissenting.

[6] Watt against Greenfield's Trustees, 18th February 1825, 3. Shaw and Dunlop, 544. See also Carse against Carse, 8th November 1666, Dirl. 87.

The creditors of the burdened disponee cannot attach his right otherwise than under such burden; provided the burden be definite in its amount, and either the right be still personal, and the burden clearly expressed as a condition of the grant; or the feudal right be charged with the burden, so that it may distinctly appear in the infeftment on record.

The person in whose favour the burden is created, has a real right which his creditors may attach. But these rights being of the nature of securities for debt, will be discussed under that department.[1]

ART. III.—*Of Faculties or Powers to Burden Land with Debt.*

There may be reserved, in a conveyance to land, a Power or Faculty, to be exercised by the granter or by another, to burden the estate with debt; and under this power a burden may effectually be created on the estate conveyed, provided it be definite in extent, and appear upon the record. Whether the fee is to be enjoyed by the disponee free from the burden, must remain in suspense until the exercise of the power on the one hand, or the death of the person who holds that power on the other; and if, in the meanwhile, the creditors of the disponee should attach the property conveyed, they must take it subject to the condition of the power to be exercised.

The reserved faculty may constitute an estate attachable either, 1*st*, By the creditors of the person to whom the faculty is reserved, or for whose behoof it is created; or, 2*dly*, By the creditors of the person in whose favour the power has been exercised. But it is requisite to this that the faculty should be properly constituted.

Faculty in Granter.

I. A FACULTY RESERVED TO THE GRANTER, is an estate which, during his life, and while not yet exercised, his creditors have a right to adjudge, to the effect of attaching the fund at the disposal of their debtor; for he is bound to do justice by exercising the faculty in their favour.[2] The diligence of creditors will be excluded by the legitimate exercise of the faculty in favour of a third party; provided the deed in exercise of the faculty is completed before the diligence, and is a due exercise of the faculty.

Definite extent.

1. As there can be no real burden upon land which is not definite in extent, and which a creditor or purchaser cannot know how to extinguish, the reservation of a faculty can form a real burden only when it appears upon the record. During the life of the disponer the faculty itself forms a real burden on the right of the disponee; and every creditor of his, or purchaser from him, knows that, to the extent allowed, it may be exercised hereafter. But while no exercise of the faculty appears on record, the creditors of the disponer during his life, and the creditors of the disponee after the disponer's death, are entitled to suppose the faculty unexercised.

How exercised.

2. But it is not sufficient that the record should give notice of the sum and of the name of the person for whom the faculty is intended: It is farther requisite, that the real right remaining by reservation in the disponer or his nominee, shall be transferred by a voluntary conveyance made real by sasine, or by adjudication duly completed.[3] It was at one

[1] See below, Index, voce Burden by Reservation.

[2] 21st June 1677, HOPE PRINGLE against HOPE PRINGLE, Dirl. 221. 16th December 1698, ELLIOT against ELLIOT, Dalr. p. 8.; 2. Fount. 15. and 26. In the former case the bond was personal, and subsequent to the faculty; in the latter, the debt was prior, and could not in itself be held an exercise of the faculty.

17th January 1723, RUSCOE's Creditors, 1. Dict. 291. Edgar, 173.

[3] Faculty reserved to burden an estate, being exercised by a mere personal deed, not made real by infeftment during the granter's life, cannot compete with an infeftment granted by the person whose right was burdened with the faculty before the personal deed

time invariably stipulated in the reservation or creation of the faculty, that the power shc be exercised by means of an infeftment of wadset or of annualrent, &c. But altho for a long course of practice conveyancers have used a form of expression quite gene reserving or conferring a power to burden the estate to a certain extent, this power m be exercised by such a conveyance as shall not only give notice of the name of the per in whose favour it is exercised, but transfer to him the real right. It may appear to anomalous, and contrary to feudal principles, that a disponer who divests himself, o third party who never was feudally invested, should have power to grant a precept which infeftment may proceed. But the principle is this, that the conveyance to the ponee is limited by a condition, viz. That the disponer shall still retain the power of c stituting a real security over the lands, by his own act, or by that of another appoin by him, and named in the deed.[1]

Mr Erskine says, that if the deed in which the faculty is reserved express not only sum, but the person in whose favour it may be exercised, a personal bond in favou that person by him who is entitled to exercise the power, is a sufficient exercise of it create a real burden;[2] and his reason is, that the purchaser may thus know both the tent of the debt and how to extinguish it. This opinion, however, may be question The true doctrine seems to be that which has already been laid down as applicable to ordinary case.

was made real; 26th June 1735. 21st June 1737, OGILVY against OGILVIE; Elchies, voce *Faculty reserved.*

On this case, Lord Elchies says, in his Notes,—'This reclaiming bill against the interlocutor 26th June 1735, was delayed from time to time, partly till the other question between the parties upon the relict's consent to the disposition to Gardener were likewise reported; and partly because of the importance of the point of law, viz. the effect of a reserved faculty to burden, where either the creditor or the sum was indefinite; that is, where either it was not the burden of a particular debt already existing, or then created. Kilkerran's difficulty was, that though the debts were not real, yet if the faculty was real, which he thought it was, the bonds might be made real by diligence, and would be drawn back to the date of this faculty; and he thought this was a reservation of a part of the fee, to the extent of this sum. Arniston seemed to think this faculty real, and that this was a reserved estate, effectual against singular successors; but then he thought, that if he did not exercise it during his life, by granting infeftments, the bonds granted by him could only be preferred to singular successors of the son, according to the dates of their diligence; and, therefore, was for adhering. I agreed that it was a reserved estate, but not a reserved fee, or part of the fee of the lands, since the whole fee was in the son, who was the only vassal; and that reserved estate was no stronger than the like estate created, (if the father was not before proprietor), as in the case of the Sinclairs, and of the Romes, quoted in the papers, (and in this Arniston agreed with me); for both of them might grant infeftments; but the infeftments would be preferred only according to their dates with the creditors, or singular successors of the son, the fiar: that if this faculty was real, any exercise of it after the father's death was inhabile, at least would only be preferred according to their dates, otherwise they behoved to be preferred to all singular successors, *quandocunque* the creditors in them should adju At last, without a division, the Lords adhered.' MS. 21st June 1737.

In the subsequent case of SCOTSCRAIG, the C held, that a faculty to burden, conceived in the plain and express terms, so as to make every pers deed, in exercise of that faculty, however latent become a real burden, is repugnant to law: and latent deed will be no real burden; nor the possib of such a deed an encumbrance sufficient to entit purchaser to retain any part of the price. 28th 1737, CREDITORS of DOUGLAS of Scotscraig ag STEWART; Elchies, *Faculty reserved*, No. 3.

In the case of HENDERSON's Children against C DITORS of his Son, 7th August 1760, the children creditors of the disponer, were held preferable only cording to their diligence. 2. Fac. Coll. 495.

In a question with the widow of a son claiming terce, a daughter of the disponer was held not to real creditor under a faculty reserved to the father, deed being merely personal, by which she was to the benefit of the faculty. 29th June 1773, MONT against BAILLIE.

See also HILL against HILL, 5th July 1774. Fac. C

The decision in the case of BOQUHAN and C NINGHAM, (see p. 43. Note [1]), which is opposit these, is not approved of. See Kilk. 186, 7. Elc Notes, 131.

[1] Ersk. b. ii. tit. 3. § 21.

See the case of ANDERSON against YOUNG TROTTER, 24th December 1784; 9. Fac. Coll. 30

The difficulty in feudal law was here disposed in a case where the purchaser of lands took titles to another person in trust, with power to purchaser to burden, sell, &c. without the trust consent.

[2] 2. Ersk. iii. § 50.

It may be doubted what should be the effect of an objection, in point of form, fatal to the sasine by which the faculty is exercised. It would probably be held to cut down the right of the person in whose favour the faculty had been exercised, and to give admission to the personal creditors of the disponer doing diligence by adjudication; although the entry of the sasine on the record might be said to give full notice of the burden.

A bare adjudication, without a charge, and merely with its recorded abbreviate, does not seem to be sufficient to constitute the real right in the creditor under the faculty.

II. A FACULTY TO BE EXERCISED BY A THIRD PARTY, has a very different effect from that which is reserved to the disponer himself. Before the disponee's right is completed by sasine, the disponer's creditors undoubtedly may, in this case as in the other, attach the estate disponed, and become by their diligence preferable to the disponee and all others. But after the disponee's right is completed, the creditors of the disponer can have no title to adjudge the faculty vested in a third party; unless it be a mere trust in that person for the disponer's benefit.

III. EFFECT OF FACULTY IN COMPETITION.—After the death of the granter of the faculty, or of him on whom the power is conferred, a competition may arise between the creditors of the disponee and the person (or his creditors) in whose favour the faculty has been exercised. In such a competition the rules seem to be these:—

Death of holder of power.

1. If no real right be created, and on record, at the death of the disponer, or of him who has the power, the faculty, in a question with real securities, or complete conveyances proceeding from the disponee, is to be held as still unexercised, and by the death extinguished; and so the whole estate is an unburdened fund of the disponee.[1]

[1] Lord Kilkerran, in his remarks on the case of BOQUHAN and CUNNINGHAM, (see next Note), says, 'In this judgment the Lords were not unanimous. 'It was observed, that a century ago, all such faculties were quite ineffectual, unless exercised specifically by burdening the lands by infeftment; insomuch, that even no personal action lay against the disponee, to the personal creditor of the granter. 'In process of time, the Lords did, it is true, *ex equitate*, so far remit this rigorous construction of such faculties, as to give personal action; but to give the personal creditor of the disponer a preference, appeared to be without foundation, as it was without precedent. An assignation of the faculty by a personal deed is no exercise of the faculty: It may have been intended as such by the granter; but an intention is nothing when not habilely executed, and such assignee is still no more than a personal creditor. 'Now, had the Lords found that the granter's bare contracting debt was an exercise of the faculty, and thereupon found even the personal creditors of the granter preferable to infeftments from the disponee, the ground of the decision might have been understood, though not approved of; but this middle way of finding the faculty exercised to the effect of giving preference to (over) the disponer's (disponee's) personal creditors, and not also to (over) his real creditors, was what several of the Lords could not approve.

'It is an agreed point, that a faculty to burden, or a faculty to alter, is a real right; but it is quite a different question, What rights granted in consequence of such faculty are real? Now, as such faculty is a real right, it follows, that no infeftments granted by the disponee can defeat the granter's power to burden or alter: Yet this is to be understood with a limitation; for though an infeftment at any time in the granter's life will be preferable to an infeftment by the disponee, though prior; and an infeftment from the granter, though not taken upon his precept till after his death, will be preferable to an infeftment from the disponee, if posterior thereto; yet if at the granter's death there is no infeftment from him on record, the creditor or singular successor of the disponee, obtaining infeftment on the faith of the record, will be preferable to any infeftment that may afterwards be taken upon the granter's precept, which lay latent at his death; and were it otherways, the security by the records would be wholly frustrated.

'And upon this ground it was, that anno 1736, in the case of Ogilvie of Coul, the Lords preferred an infeftment by a son, the disponee, to the creditor of the father adjudging after the father's death, though the son's disposition was with the burden of a faculty to the father to contract debt to the extent of the said creditor's debt. In like manner, anno 1737, a bill of suspension being presented by the purchaser of the estate of Scotscraig against the creditors, on this ground, that he was not *in tuto* to pay the price, for that, by a reserved faculty in his author's right to burden the lands with a certain sum, he might be in hazard of eviction; the Lords, in respect his author was then dead, and no exercise of the faculty on

Power how exercised.

2. If the person in whose favour a faculty has been exercised, has not taken sasine; or, if the deed in exercise of the faculty is personal, and no steps have been taken to make the debt real, it may be questioned whether he has any preference over those who are personal creditors of the disponee at the disponer's death? It was found, in the case quoted below, that there was such a preference.[1] But the judgment is not approved of. Lord Kilkerran, in reporting the case, seems to deliver his own opinion in stating the opinion of the minority against the judgment.[2] The true doctrine appears to be,—1*st*, That the exercise of the faculty, though by personal deed, makes him in whose favour it is exercised a personal creditor of the disponee. Thus, it has been fixed, that a deed containing precept of sasine, though no sasine has been taken, is a good exercise of the faculty against the disponee;[3] and this holds, even although the expression of the faculty should be to burden with wadsets or annualrents.[4] 2*dly*, That the mere contraction of personal debts by the holder of the faculty is an exercise of a power to contract debt, and grant security therefor;[5] and even where the faculty is in common form, the contracting of debt is held a presumptive exercise of it:[6] so that diligence used upon such rights, in order to realize the burden, even after death, if first completed, will be effectual to give a preference. But, 3*dly*, That where the question is between the mere personal creditors of the disponer and those of the disponee, there seems to be no good principle upon which the former can have preference.[7]

'record, "remitted to the Ordinary to refuse the 'bill."'

[1] A father disponed his estate to his son, reserving a faculty to burden the lands with 10,000 merks Scots; and, in his second contract of marriage, he exercised this faculty, by providing a sum to the children of the marriage, declaring it a burden on the lands, and assigning the faculty to the children. The son contracted many debts, some real some personal; and, after his death, a competition arose between a daughter of the second marriage and the real and personal creditors of the disponee, for the price of the lands sold judicially. The Lords all agreed that the 10,000 merks was not a real burden; and that, therefore, the son's real creditors were all preferable; and yet they found the daughter preferable to all his personal creditors, who had done no diligence to affect the estate. 14th November and 11th December 1739, Creditors of BOQUHAN against CUNNINGHAM; Kilk. p. 186, 7. Elchies, *Faculty reserved*, No. 5.

[2] It resolves into these considerations,—that faculties which at first were ineffectual, unless exercised by infeftment, came afterwards to afford a personal action, which can be no ground, however, of preference; that an assignation of the faculty is no exercise of it, and in no shape betters the condition of him in whose favour the exercise is made, or makes him other than a personal creditor; that, although a faculty is a real right during the disponer's life, the creditors of the disponee may, immediately on his death, secure the estate from any exercise of the faculty, latent, and not appearing on the record; and that, to give consistency to this decision, it should have been fixed as a general rule, that the granter's personal creditors, entitled to be considered as objects of the exercise of the faculty, have a preference over even the real creditors of the disponee. See above, for these Notes of Lord Kilkerran, p. 42. Note [1]. The remarks of Lord Elchies on the case will be found in Note [7].

[3] June 1624, HAMILTON of Silverton; Durie, 131.

[4] 21st June 1677, PRINGLE; Dirleton, p. 221.

[5] 17th January 1723, Creditors of RUSCOE.

[6] ELLIOT of Sunneyside against ELLIOT, 16th December 1698; Dict. vol. i. p. 291.

[7] In his Notes on the case of CUNNINGHAM against Creditors of BOQUHAN, (See above, Note [1].) Lord Elchies says,—'The Lords agreed that Miss Cunningham, upon the personal bond, in exercise of the faculty, had no real right upon the subject, nor was she preferable to the real creditors of the son. But they found her preferable to the personal creditors, who had done no diligence (no more than she had) to affect the estates: which to me appeared a very new and odd decision; that in competition of creditors merely personal, for the price of lands, none of whom had any real right in the lands, or used diligence for affecting the same, should yet be preferable one of them to the rest; since the law knows no privileged debt upon lands other than what are real. Arniston put his opinion upon this, that the reserved faculty was an implied prohibition to the son to contract debts in prejudice of the faculty; and the President seemed inclined to carry that observation farther, to be a sort of inhibition to the lieges to lend to the son, in prejudice of the faculty. But Arniston would not carry it so far. But I own the whole went far beyond the reach of my poor understanding. *Vide* 21st June 1737, Creditors of Dr Ogilvy. 16th November 1739. 11th December, adhered, 7 to 6.' See above, Note [1]. p. 42. for Lord Kilkerran's remarks.

Diligence after death.

3. The right of the creditors of the person to whom the faculty is given, to attach that faculty after his death, can scarcely be permitted to ground a real preference, to the exclusion of the disponee's creditors. To carry this right of attachment beyond the life of the person holding the power, without any diligence begun during his life for rendering the subject litigious, seems a great stretch, since the faculty appears by the death to be extinguished, and the land disburdened. And even where there has been an intention of exercising the faculty, but it has been done only by a personal deed, it does not appear that diligence is competent after death. This is still clearer where the deed (as a personal bond) is anterior to the disposition, and so exclusive of all idea of an intention to exercise the faculty.[1]

SECTION IV.

LIMITED ESTATES IN LAND DEPENDING ON DEEDS OF ENTAIL—COMMENTARY ON THE ACT 1685, CAP. 22.

Of all restrictions on the commerce of land, and on the rights of creditors to attach the property of their debtor, the most important, and the most inexpedient and oppressive, are those which arise from entails; and it is sincerely to be hoped, that, ere long, some safe course may be devised for restraining the exorbitant effects of the entail law of Scotland, and for introducing some limitations, consistent at once with the rules of justice, and with public policy. But the present inquiry is limited to the law as it exists.

Deeds of entail are designed to preserve the descent of estates in a particular line of succession, by means of prohibitions, restraints, and conditions; while the full right of a proprietor is, in all other respects, conferred on the persons successively taking under the deed. The law judges differently of the effect of such deeds, as against the heirs who succeed under them; and against strangers who, as purchasers or creditors, acquire the property from the person in the present right of the estate. The former are held, by their acceptance, to undertake the obligations imposed;[2] against the latter there are not, at common law, any unquestionable means of giving efficacy to such conditions. Neither inhibition;[3] nor interdiction; nor even the double clause of irritancy and of resolution, were sufficient at common law to secure this object: And although, in the case of Stormont, and in others,[4] decisions were pronounced favourable to the efficacy of entails, it was found necessary to remove all doubts by a statute, which should, on the one hand, give efficacy to entails, and, on the other, make it an indispensable condition of their efficacy, that creditors and purchasers should have full notice. This is the statute 1685, c. 5.: And on its provisions the effect of the limitations imposed in deeds of entail depends.

By this statute it is declared,—

[1] In the case of Rome's creditors, in February 1719, it was found, that an adjudication led after the disponer's death, upon a personal bond, was not competent to hurt the right of an onerous purchaser from the disponee: but there, indeed, the real right was established in the purchaser, before the leading of the diligence; and, consequently, the diligence might be found insufficient, upon another ground than that of incompetency.

[2] The effect of a breach of the injunction in grounding a claim of indemnification, is at present under consideration in the case of Ascog, and in the Queensberry cases as remitted by the House of Lords. See Earl of Callender, 27th January 1687; and Gordon Cuming, 17th December 1761.

[3] 22d January 1760, Bryson, and 8th August 1787, Lord Ankerville.

[4] Viscount Stormont against Creditors of Earl of Annandale, 1662. See 2. St. 3. § 237.; also 26th July 1677, Stevenson.

1. That 'it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and 'to substitute heirs in their tailzies, with such provisions and conditions as they shall 'think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby 'it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said 'lands, or any part thereof, or contract debt, or do any other deed whereby the same 'may be apprized, &c. declaring all such deeds to be in themselves null and void, &c.:' —2. That 'such tailzies only shall be allowed, in which the foresaid irritant and resolutive 'clauses are insert in the procuratories of resignation, charters, precepts, and instruments 'of sasine:'[1] 3. That 'the original entail shall be once produced before the Lords of 'Session judicially, and their authority interponed to it:' 4. That a 'record be made 'in a particular register book, to be kept for that effect, wherein shall be recorded the 'names of the maker of the tailzie, and of the heirs of tailzie, with the general designations 'of the lordships and baronies, and the provisions and conditions contained in the tailzie, 'with the irritant and resolutive clauses subjoined thereto, to remain in the said register '*ad perpetuam rei memoriam*:' 5. That being so insert, the 'same shall be real and effec- 'tual, not only against the contraveners, and their heirs, but also against their creditors, 'apprizers, adjudgers, and other singular successors whatsoever, whether by legal or con- 'ventional titles:' and, 6. That the omission of the provisions and irritant clauses in the rights under which any of the heirs enjoy the estate, shall be a contravention, whereby the estate shall devolve to the next heir of tailzie; but the same shall not militate against creditors, or other singular successors, contracting bona fide with the person who stood infeft, without having the said clauses in the body of his right.

Two main questions arise for consideration under this Act, wherever creditors are desirous of attaching an entailed estate: viz. 1. Whether the restraining words of the entail comprehend the debtor, and are such as to exclude the diligence of creditors? and, 2. Whether the forms have been duly observed which the statute has required for rendering effectual the prohibitions of an entail?

I. Restraining Words.—The general rule is, that the right of an heir of entail is that of a full proprietor, in every particular in which he is not effectually fettered and limited; and that all words of restriction are subject to strict interpretation.

Fetters of Entail.

1. The prohibitions and limitations (commonly called the fetters of an entail) are directed to three several objects: 1. Against selling the estate; 2. Against the contracting of debt; 3. Against any alteration of the order of succession. And in the practice of conveyancers, clauses are framed for each of these purposes. The entailer may have sufficient confidence that his heirs will not voluntarily sell the estate, or alter the line of succession, but he may think it still necessary to prevent them from contracting debt so as to endanger the entail: Or he may have full reliance on the solvency of the heirs pointed out in his destination, so as to have no fear for the disappointment of his intentions, provided he can prevent them from selling the estate or altering the succession: Or he may think his entail secure against sale and insolvency, and in danger only from an alteration of the line of succession. And as the prohibition of these several acts may each in its turn form the sole object of an entailer, in perfect consistency with unrestrained freedom as to the others, it has been settled, that fetters cannot be extended by implication from cases expressed to cases not expressed. It may happen that, owing to the carelessness or ignorance of the conveyancer, those purposes may have been confounded in a deed of entail; and the manifest purpose of the entailer may appear fairly to include, under any of the conditions, the others—the prohibition to alter the succession, for example, being necessarily a prohi-

[1] See Denham against Stewart, House of Lords, 17th February 1737, 1. Cr. and St. Appeal Cases, 233.

bition against selling, of which the necessary effect is to alter the succession. But the rules are, 1. That, from one limitation, another is not to be inferred; from cases expressed, no prohibition is to be extended to acts not expressed. 2. That the restraining words shall be clear, and that, although there are no technical words, or voces signatæ, by which alone the prohibition can effectually be expressed, the act prohibited must at least be directly specified, either in express and intelligible words, or in words of which the fair and obvious construction shall include the particular act as by substantive prohibition.[1]

How to bar Creditors.

The result is, that in order to make an entail effectual against creditors, it must contain an express prohibition against contracting debts so as to affect the estate, otherwise the creditors will not be excluded. It will be no bar to creditors, that their diligence will necessarily have the effect of defeating the destination of the estate which the heir is prohibited from altering: Neither can they be obstructed by a prohibition to sell.

2. IRRITANT AND RESOLUTIVE CLAUSES.—It is, under the statute, necessary that the words of prohibition shall be accompanied by an irritant and a resolutive clause, clearly directed, each of them, to that particular prohibition. The CLAUSE IRRITANT declares the debts, when contracted, to be void and null.[2] The CLAUSE RESOLUTIVE annuls the right of the heir of entail who shall disregard the prohibition.[3]

3. PERSONS AGAINST WHOM THE RESTRAINTS ARE DIRECTED.—In order to have operation against any one holding the estate under the entail, it is indispensable that the limitations or fetters should be expressly and clearly pointed against such person. But this is not the sole difficulty which has attended the question as to the efficacy of prohibitions.

Institute.

1. With regard to the INSTITUTE, who, as disponee, takes the estate by direct conveyance, and is in no sense to be considered as an heir,[4] the *first* difficulty is, whether, under the statute, he can be subjected to the restraints of the entail otherways than by a personal engagement implied from his acceptance. The words of the statute, in declaring how far the restraints shall be effectual, are applied only to '*heirs*.' The power given is, to tailzie lands, and 'to affect the said tailzies with irritant and resolutive clauses, whereby it shall 'not be lawful *to the heirs of tailzie* to sell,' &c.; and in thus providing, the Legislature, it is said, did enough, since the entailer has it in his power, in making an entail, to fulfil any wish he may have to include the person whom he first calls, by making him an *heir of tailzie*, and himself the institute. But it is now settled, that, notwithstanding the limited expressions of the statute, the institute may, as such, be effectually placed under the restraints of the entail, provided the expressions to this effect be clear and unambiguous.

How to be described.

2. Holding, as the Court of Session seems pretty uniformly to have done, that the in-

[1] For the doctrine of construction of entails, see 17th June 1746, Campbell's heirs against Wightman. 8th November 1749, Sinclair against Sinclair. 29th July 1761, Cuming Gordon against Gordon. 8th November 1763, Scott Nisbet against Young. 8th July 1789, Stewart against Home. 15th January 1799, Bruce against Bruce. 19th May 1803, Elliot against Elliot. 23d June 1807, M'Laine against M'Laine. 23d January 1807, Kerr against Sir James Kerr. 25th May 1808, Brown against Countess of Dalhousie. 18th December 1813, Duke of Roxburgh against Kerr. 21st November 1815, Henderson against Henderson. 18th May 1813, Duke of Roxburgh, and in House of Lords, 17th December 1813, 2. Dow, 149. 9th July 1817 and 2d July 1819, Queensberry case in the House of Lords, 5. Dow, 297. and 1. Bligh, 340. 10th March 1814, Elliot against Potts, and House of Lords, 14th March 1824, 1. Shaw's Appeal Cases, p. 16. and 89. Barclay against Adam in House of Lords, 15th May 1821, 1. Shaw, 24. M'Kenzie, 23d May 1823, 2. Shaw and Dunlop, 331. Nisbet, 10th June 1823, ib. 381.

[2] 11th July 1734, Baillie against Carmichael. 27th January 1744, Gardner against Heirs of Tailzie of Dunipace, Kilk. 540. Elchies, *Forfeiture*, No. 18. See Robertson's Appeal Cases, p. 110. 117. for the case of Riccarton; and compare p. 117. with the report of Lord Kilkerran in the case of Dunipace.

[3] 8th February 1758, Hepburn's Creditors against his Children, affirmed in the House of Lords, 7th December 1758. 28th January 1779, Kemp against Watt; 6. Fac. Coll. lxi. 110. 15th January 1799, Bruce of Tillycoultry, affirmed in the House of Lords. See also Elliot of Stobs, 19th May 1803, and in this case observe what Lord Chancellor Eldon says, 1. Shaw's Appeal Cases, 93.

[4] 3. Ersk. 8. § 31.

stitute *may* be included, provided he is expressly and unambiguously declared so to be, it has been much doubted whether any of the general expressions used in such deeds be sufficient for this purpose. The points settled are, 1. That under the term '*heirs*,' the institute is not included. 2. That under the term '*member of tailzie*,' he is not included. 3. That the combination of these expressions, conjunctively or disjunctively, does not include the institute. 4. That he is not, by implication from other parts of the tailzie, to be construed within the restraints; and that this rule being once settled, it is not now to be got rid of by nice, thin, and shadowy distinctions.[1] But, 5. That where the prohibitions are distinctly pointed against the institute, and the resolutive clauses against the *persons* and heirs, it will be sufficient to comprehend the institute.[2]

Who are Heirs.

3. Where the prohibitions are directed only against heirs, it may, in particular circumstances, be doubted whether the first person who is to enjoy the estate under the tailzie is an heir, and so subject to the restraints, or only an institute, and thereby exempt from them. 1. Where the person first taking is a proper conditional institute, it is held that he is not comprehended under the term *heirs of tailzie*.[3] But, 2. Where the destination is successively to one after another, although all that precede in such destination should predecease the entailer, the person taking by such substitution is not a conditional institute. So where one named his eldest son as institute, whom failing his second son, whom failing his daughter; and the sons died before the entailer, and the daughter on his death came to succeed immediately in the place of the institute, she was not held to be a conditional institute, and as such exempt, but considered as a substitute and heir of entail.[4]

Where Entailer is Institute.

4. Where the maker of the entail gives the first place to himself, it has been held that words of disposition are not sufficient to give the person taking after him the character of institute.[5]

Can Entailer exclude his Creditors?

5. Till lately it was held almost uniformly, that whatever might be the effect of prohibition against institutes or heirs of entail, yet by no device or clause of prohibition could the maker of an entail withdraw his estate from the diligence of his own creditors, or prevent even his future debts from affecting the estate, while he continued to hold the fee. But in the House of Lords this doctrine has undergone a very careful revisal and investigation, and the result is very important: 1. It has been admitted as a point fixed, that the entailer cannot make a gratuitous settlement of the estate so as to bind himself and exclude his creditors. 2. On the other hand, holding it as also settled, that the institute may be bound

[1] In the DUNTREATH case, where the expression was 'heirs,' the House of Lords determined, 'That the 'appellant being fiar or disponee, and not an heir of 'tailzie, ought not, by implication from other parts of 'the deed of entail, to be construed within the pro-'hibitory, irritant, and resolutive clauses, laid only 'upon the heirs of tailzie.' See Morrison's Dict. p. 4411. See Notes of this case as decided in the Court of Session, 1. Lord Hailes' Cases, p. 298. Observe particularly the opinion of Lord Pitfour.

In Steel against Steel, 12th May 1814, affirmed 27th June 1817, where the expression was 'heirs 'and members of tailzie,' a similar decision was given. 5. Dow, 72.

See also Wellwood against Wellwood, 23d February 1791. Bell's Cases, p. 191. Wellwood against Preston, 31st May 1797. Miller against Cathcart, 12th February 1799.

[2] SYME against RANALDSON DICKSON, 27th February 1799. DOUGLAS and Co. against GLASSFORD, 14th November 1823, 2. Shaw and Dunlop, 487.—affirmed, 1. Shaw and Wilson.

[3] MENZIES of Culdares against MENZIES, 25th June 1785, and 18th January 1803, affirmed 20th July 1811. Here the dispositive clause was, 'I hereby, under the 'condition, &c. and *failing of heirs-male of my own body*, '*sell, annailzie, and dispone* to Captain Alexander 'Menzies, during all the days of his lifetime, &c. and '*to the said James Menzies*, my great-grandchild, and 'the heirs of his body,' &c. James Menzies was held a conditional institute, not under limitations directed against heirs of entail.

[4] M'KENZIE against M'KENZIE, 24th November 1818. See 1. Shaw's Appeal Cases, 150. See also Menzies of Culdares against Menzies, above note.

[5] GORDON against M'CULLOCH, 23d February 1791, Fac. Coll. and Bell's Cases, 180. See also LIVINGSTONE against Lord NAPIER, 3d March 1762.

although not mentioned in the statute, it has been considered, that a mutual entail, or an entail for a money consideration, is equivalent to a purchase with an entail by the purchaser, effectual against the proprietor as institute who has entered into this onerous bargain. On these principles the case of Agnew was determined.[1]

Except in the case of mutual and onerous entails, the prohibitions are ineffectual against the creditors of the entailer. If the entailer's debts exceed the value of the estate, it may be brought to a judicial sale, according to the forms hereafter to be explained. If they are such as only to encumber the estate, the only remedy is by an application made to Parliament for authority to sell as much as may be sufficient for paying off the debt. The execution of these Acts is committed to the Judges; generally to the Lord President, Lord Justice-Clerk, and Lord Chief-Baron.

REQUISITES OF EFFECTUAL ENTAILS.—It is not enough to protect an estate from the diligence of creditors, that the lands should be settled by a deed of entail, of which the restraining expressions are clear, and the irritant and resolutive clauses correct, and duly pointed against the person to be restrained: It is further necessary that the forms pointed out in the Act 1685 be complied with.

The following points have been settled under this statute:—

Entail must be recorded.

1. The original deed of entail must, in order to bind third parties, be produced judicially, and recorded in the register of entails, whether it was made prior or posterior to the statute: It is not enough that charter and sasine have followed on the deed of entail, and that the prohibitions in this way appear in the record of sasines,[2] nor is it even enough that the charter be recorded.[3]

[1] The families of Vans and of Agnew were united by the marriage of John Vans of Barnbarroch, and Margaret Agnew, only child of Robert Agnew of Sheuchan. The marriage was at first disapproved of, but the lady's father was afterwards reconciled to it, and a postnuptial but onerous contract was made between Mr Agnew and Mr Vans, whereby Mr Agnew agreed to advance L.3000 to Mr Vans for liquidation of his debts, and also to settle a large personal estate on him and his wife. Mr Vans, in consideration thereof, executed a mutual entail along with Mr Agnew of both their estates on the same series of heirs, Agnew giving &c. to John Vans and Margaret Agnew, and the longest liver of them two, and the heirs of entail named, the lands and estate of Sheuchan; for which causes, and for the sum of L.3000, paid by the said Robert Agnew to the said John Vans, &c. the said John Vans gave, &c. in favour of himself and the said Margaret Agnew, his spouse, and the longest liver of them two, whom failing to the other heirs of tailzie, &c. his lands and estate of Barnbarroch, &c. The deed contained the proper irritant and resolutive clauses, directed against John Vans and Margaret Agnew, as well as the heirs, &c. The entail was duly recorded 1755, but no sasine passed till 1775. The entail was drawn by Lord Braxfield, and the opinion of Lord President Campbell, while at the bar, was in favour of the efficacy of the entail. In an action of declarator to have it found and declared that the entail did not affect or exclude the debts of the entailer, John Vans, the Court of Session decided, that the entail was not effectual to exclude the creditors, 3d March 1784, Fac. Coll.

A private Act of Parliament was then passed to authorize the sale of a part of the estate, in order to pay Vans's debts, and certain lands were sold. But after thirty years, the heir of entail, who was a minor and abroad, having arrived at majority and come to Britain, took an appeal to the House of Lords, who, having remitted the case for reconsideration, the Court of Session confirmed their former judgment, 2d June 1818, STEWART against VANS AGNEW.

It was on a new appeal taken against this judgment that the discussion alluded to in the text took place in the House of Lords, when the judgment of the Court of Session was reversed, and the entail declared effectual to protect the estate against the future debts of Mr Vans. 14th July 1822.

[2] 14th December 1758, PHILP against Earl of ROTHES. 22d June 1765, Earl of Rosebery against Baird, &c. 26th November 1761, Lord Kinnaird against Hunter. 26th June 1776, Irvine of Drum against Earl of Aberdeen. All these judgments were affirmed in the House of Lords.

Debts were contracted by an heir of entail infeft, but before the entail was recorded in the register of entails: the entail was then recorded; and in a question between the creditors proceeding to attach the estate, and the next substitute, the estate was held attachable. 14th May 1807, SMOLLET against Creditors of SMOLLET. See below, p. 51. Note [1].

[3] 26th June 1776, IRVINE against Earl of ABERDEEN, Fac. Coll.

2. The entail, though recorded in the register of entails in terms of the Act, has no effect against the creditors of the heir-at-law, unless it has been completed by infeftment;[1] and even the admission by the creditors that they knew of the entail, will not defeat their diligence.[2] Infeftm necessa

3. As the creditors of the heir-at-law may attach the estate, notwithstanding a recorded entail, while it continues a personal deed; so, on the other hand, if, in the sasine taken on the entail, the conditions have been left out, or even if they have been inserted only by reference to the conditions in the deed of entail, and not verbatim inserted, creditors will not be barred.[3] Omissi Conditi

4. How far an estate may be availably attached by the diligence of creditors, or imperfect securities completed in competition with those having a jus quæsitum under uncompleted entails, has given rise to several questions. And the principles have, in no small degree, been disturbed, by attention to certain loose conceptions, which are said to have been entertained by conveyancers and practical lawyers, and relied on by the country, favourable to creditors, and hostile to the rights of heirs of entail. This is a bias not unnaturally arising from the wish to find some practical remedy against the severe restraints by which, against reason and equity, our law of entails forbids even the most moderate family provisions. But it is perhaps one of the worst ways of working a reformation Compet Credito Substitu

[1] This will be found well illustrated in two important cases, reported in Bell's Cases, p. 166. 179.

The first case is that of DOUGLAS of Kelhead against the Creditors of Sir JOHN DOUGLAS, 22d February 1765. Sir William Douglas, who was absolute fiar of the estate, made an entail to himself in liferent, and his son, afterwards Sir John Douglas, &c. in fee. This entail was recorded regularly, but no infeftment was taken upon it. Sir John entered to the possession, and continued in it as apparent heir for many years; he contracted much debt; and his creditors adjudged the estate, were infeft, and raised an action of judicial sale. An application was made by a substitute in the entail to have the lands struck out of the sale, but the Lord Ordinary refused to do so; and the cause having been stated in memorials to the Court, was solemnly decided in the same way.

RUSSELL, Ross, &c. against Creditors of Ross of Kerse, 31st January 1792. Hugh Ross was absolute fiar of Kerse, and infeft. He made an entail to his eldest son, &c. with prohibitions to sell and contract debts, and with irritant and resolutive clauses. The entail was duly recorded, but no sasine was taken upon it. The entailer died, and his son, although he made up titles by general service as heir of line, and also by special service to other subjects, possessed Kerse without making up any titles, and without taking sasine. His creditors adjudged upon charges to enter heir in special, and raised a judicial sale. The object of the question was to clear the title of the purchaser, and enable him to pay safely. The papers in Douglas's case were reprinted by order of the Court, and the case was fully argued. The Court found the tailzie no bar to the sale. In pronouncing this decision the Court seemed to be unanimous; and the grounds upon which they proceeded are resolvable into the following propositions.—1*st*, That an entail, while personal, is qualified with the conditions and limitations which it contains; for every personal right must thus be subject to the conditions under which it is granted. 2*d*, That it follows from this proposition, that where the heir of entail has no other right, his creditors, who can reach the land only by the entail, cannot, while it continues personal, attach the lands, if the limitations strike against debts. 3*d*, That while the right continues personal, the creditors of the granter, or those of his apparent heir, or of the heir of entail, if *alioquin successurus*, may attach the land, because no encumbrance can be effectual against land to burden or destroy a former sasine, unless by infeftment, to which, in the case of entails, is superadded the necessity of recording the deed in a particular register. 4*th*, That creditors may, where there are several rights in their debtor's person, take which they please, and render it effectual by their diligence—the first infeftment deciding the preference. 5*th*, That the old distinction stated between purchasers and adjudgers, viz. that adjudgers must take their rights tantum et tale, as they stand in the debtor, subject to all the burdens with which his right is attended, was pushed too far. And, 6*th*, That the very terms of the Act 1685, in requiring the conditions to enter the infeftment, imply that no entail can be secured against creditors or purchasers, unless infeftment has been taken.

See also the case of AUCHINDACHY, affirmed in the House of Lords.

[2] 23d February 1787, CUTHBERT against PATERSON.

[3] In Lord MAXWELL's case, effect was given to the entail, as at least forming an obligation on him who was selling, and so effectual against a buyer from him while in nudis finibus contractus. Kilk. 539. But private knowledge has no effect against creditors doing diligence. 5th July 1744, Creditors of MURRAY KYNINMOND.

in jurisprudence to give sanction to practical facilities, which are never beyond the reach of doubt, but which yet serve to hide the evils of the law. More correct views appear to have been adopted in the House of Lords in the Sheuchan case, and also to have been entertained by many eminent lawyers in the Court of Session; the substitutes under an entail being regarded as creditors entitled to particular remedies against the defeasance of their jus quæsitum, and as engaged, on the ordinary principles of competition, in a rivalship with creditors of the ordinary description. To explain the principle of this doctrine, let it be considered, that creditors of the ordinary description either trust to real security, or rely on general credit. In the former case, they have such benefit as the property on which they are secured, voluntarily or by diligence, may afford them: in the latter, they take the rights of their debtor, such as they are, with all the limitations and qualifications to which they are subject; and with the benefit of the laws, which guard against fraud by gratuitous alienations, or by undue preferences granted to particular creditors. But under those rights, a creditor, especially on general credit, is still liable to certain disappointments—by the sale of the debtor's estate; by the constituting of securities for money borrowed; by the diligence of other creditors; by diligence in implement of obligations to convey: and unless the substitutes holding a jus quæsitum under an entail are to be denied all remedy for implement of their right, they also by their diligence may defeat the right of ordinary creditors on general credit, and get the start of them in various ways. They may apply to have the entail recorded, if that be wanting to its efficacy: They may compel the heir in possession to complete his right by infeftment. Thus, in all cases where there is a jus crediti, the creditor is entitled to his legal process; and where there are opposing rights, the competitions should be determined by the priority of the completion of the real security. This brings the matter to a simple principle universally applicable to all cases of competition. But it has been urged against this conclusion, 1. That there is thus an unjust favour shown to substitutes over other creditors, since the act by which the real security is completed is instantaneous—while the process by ordinary creditors is tedious. 2. That it has long been held as settled law, that a person lending money to an heir of entail in possession, but without having completed the entail, has a right to attach the estate at any time, even after the entail is completed; in so much, that it has been held an advantage to such creditors to have the entail completed, as excluding others, but saving their right; and on the faith of this, immense sums have been lent to heirs of entail. Even were such understanding and practice uniform, it might be a subject of regret, that innocent and confiding creditors should suffer. But this never can be sufficient to establish the rule, if in point of law it is groundless. The opinions of some of our greatest lawyers of the last age, in consultations which I have seen, is quite adverse to this supposed general understanding, although undoubtedly it does appear, that other lawyers had held a different opinion.

On looking to the statute, which has been supposed to support the alleged general understanding, two cases are distinguishable: 1. The general case of an incomplete entail, whether by want of infeftment, or by want of recording in the register of tailzies; with regard to which it is enacted, that the requisites of the statute being complied with, the entail shall be effectual, not only against the contraveners and their heirs, but 'against creditors, comprisers, adjudgers, and other singular successors whatsoever,' whether by legal or conventional titles: 2. The other case is a special one, where the heir of entail is infeft, but has omitted from his infeftment the irritant and resolutive clauses, in which case the entail is not 'to militate against creditors and other singular 'successors, who shall happen to have contracted bona fide with the person who stood 'infeft in the said estate, without the said irritant and resolutive clauses in the body of 'his right.'

Two cases have occurred relative to this doctrine, the case of SMOLLET and that of SHEUCHAN.

In SMOLLET's case, titles were made up under the entail, and the heir was infeft, and contracted debt before recording the entail; and after the entail was recorded, the creditors adjudged the entailed estate, now in possession of the next heir of entail: And an action of judicial sale having been raised, one farm was sold, the price of which was sufficient to discharge the debts. The purchaser raised the question as to the validity of his title, and it was held good; in other words, the creditors of the heir in possession, although their debts stood on his general credit at the time the entail was completed by registration, were held entitled to adjudge the estate from the substitutes.[1]

In the case of SHEUCHAN the same question occurred with little variation. It was a mutual entail in 1757, proceeding on a contract, by which it was provided, that the debts which Mr Vans then owed should not be affected by the deed: The entail was immediately recorded; but there was no infeftment in the entail till the year 1775; and debts were contracted previously to the sasine, but after the recording. The Court of Session in 1784 held, 'that the estate of Barnbarroch was affectable by the debts of John Vans 'at the time of his death.' And afterwards, on remit from the House of Lords, (2d June 1818), they confirmed their former judgment. The House of Lords 'found the estate 'affectable only, 1. By the debts due by John Vans at the date of the deeds of tailzie, and 'which remained due at the time of his death,'—this was under the special stipulation of the deed; and, 2. By such other debts of the said John Vans as had become real charges upon the said estate before the infeftment of 20th May 1775.[2]

Where Entail the sole title.

5. If the debtor's sole right be derived from the entail, the conditions will be effectual against him and his creditors, though not recorded, provided infeftment have not followed on the entail.[3]

[1] SMOLLET's Creditors against SMOLLET, 14th May 1807, Fac. Coll. Although here the judgment was unfavourable to the entail, the opinions of the Judges who were against the decision seem to be law. They held the creditors contracting on general credit, to trust their money to the personal faith of their debtor, exposed to all the risk of sales, securities, and other spontaneous acts on the one hand, and to adjudication and all sorts of diligence on the other; that the substitutes were proper creditors under the entail, entitled to enter into competition; and that while the personal creditors have the whole artillery of the law at their command, it is under this limitation, that they shall complete their security, while yet the lands are not bound in the fetters of the entail. This opinion had the support of Sir Ilay Campbell, President of the Court, who particularly referred to his whole course of experience as consistent with this doctrine.

[2] STEWART against VANS AGNEW in House of Lords. See the opinions of Lord Chancellor Eldon and Lord Redesdale in Sandford on Entails, p. 375. As to the debts incurred after the date of the entail, and to which the special stipulation did not apply, and those which were incurred afterwards, and while yet the right remained personal, the ground of the Lord Chancellor's opinion was thus expressed: 'Although 'the debts incurred between the date of the contract, 'and the infeftment of the heirs of entail in 1755, were 'personal obligations, yet, if adjudication had been 'led on them before that infeftment, it appears to me 'they would be prior rights. But I do think, that as 'soon as infeftment was taken for the heirs of entail 'upon the onerous contract, their right became pre-'ferable to all personal debts contracted after the date 'of the entail, and which had not before that infeft-'ment been rendered real charges by adjudication.'

The whole doctrine here laid down has been contested, in a pamphlet published by Mr Swinton, entitled 'Remarks by Archibald Swinton, Esq. Writer 'to the Signet, 1824.' The defect in the argument of this paper appears to be, that the analogy is attempted to be run too closely between an entail and an interdiction. If it be granted to Mr Swinton, that an entail operates merely as an interdiction, his argument is good: But Mr Swinton forgets that the heirs of entail have also a jus crediti under the irritant and resolutive clauses.

Mr Sandford, in his 'TREATISE on ENTAILS,' has also contested the doctrine of the decision in the House of Lords, p. 124. But his reasoning is not satisfactory.

[3] See the cases of DOUGLAS, &c. in a preceding note.

In the following case, the deed had not been recorded, DENHOLM of Westshiells against BAILLIE, 1731, as reversed in the House of Lords. Kilkerran, 545-6, states as the principle of this reversal, that as infeftment had not followed, the creditors could not plead

DILIGENCE COMPETENT TO CREDITORS.—It has been doubted what diligence is competent, during the heir's possession, to creditors who are affected by the restraints of the entail.

Rents and Fruits.

1. It seems to be quite indisputable, that the rents may be arrested as they fall due; and that the fruits may be poinded, where the land is in the heir of entail's natural possession.

Liferent of Heir in possession.

2. It has been doubted, whether the liferent right of the heir may be adjudged; and whether a judicial sale and sequestration of the rents be competent. It is said, that this would be against all the views which commonly dictate the conditions of an entail, and inconsistent with that family dignity, connected with the land, which the prohibition to contract debt is intended to secure, by preventing the estate from being possessed by another than the heir of entail. It is said, besides, to be exceedingly difficult to perceive how there can be an adjudication, with infeftment, much more a sale followed by infeftment, without incurring the irritancy of alienation; since it is scarcely enough to say, that there is no alienation as to the subsequent heirs, that there is alienation as to the heir in possession only, and that he is barred personali exceptione from objecting to any proceedings having that effect. But it is held, notwithstanding, that the right may be adjudged.[1] Nay, it is also held, that the heir in possession may voluntarily grant an effectual security over his liferent right by bond of annuity and infeftment, provided the conveyance contain a declaration, that it is not to affect the property or injure other heirs or substitutes.[2]

Right to cut Woods.

RIGHT OF HEIR OF ENTAIL TO WOODS, &c.—Although the right of an heir of entail seems, in many respects, to be similar to that of a liferenter, in others it is stronger, partaking of the nature of a fee. Thus, in the case of a common liferenter, liberty will not be given to cut even sylvæ cæduæ, unless they have been laid out into allotments for cutting:[3] But an heir of entail may cut woods, or dispose of them if ripe for cutting, under certain restrictions: the cutting ceasing with his life; what is uncut at his death being pars soli, descendible, as part of the entailed estate, to the next substitute.[4]

that they had contracted on the faith of the records, and so could not object to their being bound by the clauses in the entail, as if recorded. See the case of Creditors of CARLETON against GORDON, 21st November 1753. Elchies, *Tailzie*, No. 51. 1st February 1803, SYME against DEWAR, Fac. Coll.

In the following case sasine had not followed, CHISHOLM against M'DONALD, 27th February 1800.

[1] Creditors have been found entitled to adjudge even the fee of the estate itself, *valeat quantum valere potest*. This was decided in a case peculiarly strong. The estate of Colvill was held by the bankrupt under a strict entail, which forfeited the right of the heir in possession, and all his descendants, if the estate was allowed to be attached for debt. A creditor adjudged the estate; and the debtor petitioned the Court, representing the inevitable consequences of this diligence, and stating that it was in truth a device used by one of the substitutes, in collusion with the adjudger, to obtain the estate by the debtor's forfeiture. But the Court held, that creditors were entitled to adjudge their debtor's estate, whether it was entailed or not. 23d January 1779, COLVILLS, Petitioners.

Surely this decision is not to be approved of, and would not be repeated, were such a question to occur again. See the case of NIVEN against M'FARLANE, (alluded to below, page 79. Note [2].), where the Court did not entirely disregard the defence of the bankrupt, who refused to assign his lease, on pretence that it contained an irritancy; but an inquiry was made into that fact before proceeding. In the case of JOHNSTON, (same page), the Court refused to order the bankrupt to sign a conveyance of the lease.

[2] Sir W. NAIRN against GRAY, 15th February 1810. Fac. Coll.

[3] See below, p. 63.

[4] The following cases illustrate some points of the doctrine.

16th February 1757, HAMILTON, where the substitute in vain offered the price, to save the trees.

PRINGLE against SCOTT of Gala. The question was argued, Whether an heir of entail had a power of selling the woods on the entailed estate, so as to entitle the purchaser to continue the cutting after the seller's death or forfeiture? The Court found, 'that the disposition to the woods did subsist for no longer than 'for the granter's lifetime.' But afterwards they found, that 'if the woods were ripe for cutting at the time 'of the seller's death, the deed is still a good and sub-

The rents or price suffer a corresponding division: the price of what is cut before his death goes to his executors; the price of what is not cut till after, goes to the next substitute, and may be attached by his creditors.[1] Under the heir's right as fiar, it has been thought that creditors can attach the faculty of cutting the timber, or by means of diligence take the uncut timber and bring it to market: At least the woods usually allotted for cutting will, in such a case, be regarded as part of the liferent use and produce of the estate, and subject to diligence. If the heir of entail's right to cut wood depended, as sometimes has been said, on his power of administration, it might fairly be argued that he alone could exercise the faculty of cutting the timber;[2] and that although the creditors might take the benefit of that timber when cut, or of any contract for cutting it, they could have no right to exercise this power themselves: At any rate, creditors should have no right to cut any wood except that which is designed for timber; not the ornamental trees, which are as part of the estate or mansion-house.

Right to Mines.

The heir of entail may work mines, minerals, stone-quarries, &c. and his creditors will be entitled to the benefit of them. But it does not appear to have been decided, whether the creditors of an heir of entail can explore the lands, and open such mines or quarries.

It has been held, that an heir of entail cannot pull down the mansion-house for the purpose of exposing the materials to sale, nor can his creditors do so.[3]

There are other important questions of power under the restraints of entails, which will find a more fit place under the subjects to which they more immediately relate. Such are, questions as to powers to grant leases,[4] and questions as to provisions to widows and children.[5]

'sisting deed.' Against this judgment a petition was presented; but the cause was amicably settled. July 1730, Session Papers Advocates' Library.

In the subsequent case of Lord CATHCART, the heir of entail had sold all the growing timber on the estate, both planted and natural, with liberty to cut it at any time before the year 1767. The Court found, that none of the planted trees could, in virtue of this contract of sale, be cut after the death of Sir James Shaw, the seller and heir of entail; and in respect it was alleged by the pursuer, and not denied by the defender, that the natural woods, sold by Lord Cathcart, were not fit for cutting at the time of Sir James Shaw's death, therefore they reduced the said contract. 31st January 1755, Lord CATHCART against Sir JOHN STEWART NICHOLSON SHAW; 1. Fac. Coll. 193.

This was not a negative determination or opinion, that the trees might have been cut before the death of the heir of entail. That question was not determined, and there was no occasion to decide it, since the contract was not acted on till after the heir of entail's death, and so what was actually decided was sufficient to preserve the planted wood.

In the later case of VEITCH of Elliock it was decided, that the right of the purchasers was at an end the very instant of the heir of entail's death; and that they were obliged to account for the wood cut between the moment of his death at London, and the time when it was known in Dumfries-shire, where the estate lay, though it was not alleged that the woods were not ripe for cutting.

In M'KENZIE and SHAW against M'KENZIE, 6th March 1824, the Court seemed to hold, 1. That they have a jurisdiction to interfere, at least in extreme cases, to prevent destruction and waste. 2. That the heir of entail lies under certain restraints; as, *first*, Not to cut unripe wood; *secondly*, Not to cut ornamental and shelter wood. The Court ordered a minute to be put in by consent, stating the limits of the right claimed, and on such minute allowed the cutting to proceed in terms of it, under inspection of neutral persons. 2. Shaw and Dunlop, 775.

[1] 24th June 1721, M'LEOD against Sir JOHN STEWART'S Creditors.

[2] The cutting down of planted timber, for gain or for payment of debt, might be a very questionable act, if the point could be held as open. See p. 52. Note [4]. And so it appeared to Lord President Blair in GORDON'S case, 24th January 1811; 14. Fac. Coll. 161.

[3] 24th January 1811, GORDON against GORDON; 14. Fac. Coll. 161.

[4] See afterward, vol. i. p. 68. and 72.

[5] See afterwards, Index, voce Marriage Contracts.

SECTION V.

LIMITED ESTATES OF LIFERENT AND FEE.

FEE, as a relative term contradistinguished from LIFERENT, is the estate to which a person is entitled after the death of one who has the use of the property during his life. But fee, as an absolute term, is taken to express the full right of property, without any immediate reference to a subsisting liferent.

LIFERENT is a right conferred either by the law itself, or by deed, to enjoy the use, possession, and fruits of property, during the life of the person favoured, or of another.

Liferent and fee, while subsisting together, are mutual restraints on each other, and so are necessarily both of them limited estates, conferring on each of the holders relative rights. But not only does a liferent not exclude a fee; it implies the existence of a fee independent of it.

Liferents, where properly constituted either by legal construction or special deed, are effectual burdens on the right of fee; and creditors attaching the fee can bring the estate to sale only under burden of the liferent.

Liferents are either conventional or legal. The conventional are by reservation, or by constitution; the legal are Terce and Courtesy.

I. OF CONVENTIONAL LIFERENTS.

Among conventional liferents the chief distinction is between reserved liferent and liferent by grant to another.

I. LIFERENT BY RESERVATION is created by a conveyance, transferring the fee or property of land, but reserving to the granter the use and enjoyment of the property during his life. It does not require sasine to be taken on the conveyance in order to constitute the liferent in this case. It rests on the original sasine as still by force of the reservation subsisting. And the right depending on the original infeftment unexhausted, it is in law considered rather as a fee limited than as a new liferent. On this principle the liferenter by reservation can enter heirs and purchasers.[1]

II. LIFERENT BY GRANT TO ANOTHER, is constituted by deed of conveyance, completed by sasine duly recorded; and the title of the liferenter depends on a sasine duly registered, as in other alienations of land.[2] Liferent by grant depends entirely on the words of its creation. There are not, indeed, any voces signatæ by which alone the liferent can be created. But where land is conveyed, the meaning at least must be clear and obvious, that the right is intended to be restricted to liferent, otherwise it will be held a fee.

Liferent exclusively.

Where the words used are clearly descriptive of a liferent, as 'to A B in liferent,' or 'for liferent use allenarly,' or 'liferent alimentary use only,' they are never held to convey a fee, unless in circumstances where there would otherwise be no fee existing. But such a necessity may occur in consequence of the maxim, that the fee of an estate cannot be in pendente. The law will not endure the absurdities which would follow such suspension of the fee. Thus, if a superiority were disponed in terms not comprehending a fee, there would be no superior, and the vassals could not be entered:—If the dominium utile were so conveyed, the superior would have no vassal; so that, where the former

[1] 2. Ersk. 9. § 42. Formerly he was allowed to enter *heirs* only; though, in Craig's time, his power extended to all vassals. Now it seems to be settled, that he may enter both *heirs* and *purchasers*, the interest of the fiar to object being taken away by 20. Geo. II. c. 50. § 12., which compels the superior to admit singular successors.

[2] 2. Ersk. ix. § 41.

owner of the estate had contracted debt, his creditors could not reach it, because there would be no one from whom it could be adjudged. To avoid these absurdities, law construes a fee where the words strictly seem to imply only a liferent, though sometimes the fee, which thus ex necessitate juris is implied, is only fiduciary or in trust.[1]

Fiduciary Fee.

When, coupled with such a liferent, the fee is so conferred that it cannot vest in the person for whom it is designed, there may ex necessitate juris, or by operation of the deed, be a fiduciary fee till the person having the beneficiary right can take; but the fee vests the moment that by possibility it may. So an estate to a father in liferent for liferent allenarly, and to his eldest son in fee, is held by the father in fiduciary fee till his son exist, and then the fee is with him;[2] or an estate disponed in trust, with a strictly limited liferent, and a suspensive disposition of fee, is held in fee by the trustees till the purifying of the condition, when it instantly vests as a jus crediti against the trustees.[3]

Conventional liferent commonly forms a part of the provisions in marriage contracts and family settlements. And the following seem to be the chief points:—

Locality.

1. A liferent is frequently created in marriage contracts in favour of the wife, instead of leaving her to her legal liferent of terce. This is generally called a LOCALITY; and the lands Locality lands, from the localling or apportioning of particular lands for the use of the widow. The wife, by this liferent right, is saved from the danger of the defeat of her terce by the alienation of land during the husband's life, and from the necessity of legal proceedings after her husband's death, for settling her proportion; but she takes the risk of the produce of the locality lands.

Conjunct fee and Liferent.

2. In marriage contracts and family settlements it is also common to create a species of right called Conjunct fee and liferent, CONJUNCTIVA INVESTITURA; having in contemplation the interests of husband and wife, or of parents and children.

[1] See this doctrine well explained in M'INTOSH against M'INTOSH, 28th January 1812. See below, p. 57. Note [2].

[2] See below, p. 57.

[3] WELLWOOD'S TRUSTEES against WELLWOOD, 24th February 1791; Bell's Cases, 191. The deed was to the granter 'during all the days of his life, *and failing of him by decease*, to my heirs, &c. after-mentioned.' This was considered as suspending only the *exercise*, not the *vesting* of the right of fee. See opinion of Lord Braxfield particularly.

M'DOWAL and SELKRIG against CRAWFORD'S Trustees, 6th February 1824; 2. Shaw and Dunlop, 682. Here there was a trust-deed: Certain furniture, &c. 'together with a tenement of houses, to be liferented, used, and possessed by Margaret Buchanan, 'my spouse, during all the days of her life, while she 'remains my widow only; but on her death or second 'marriage, if she survive me, or at my death if I survive her, my said furniture, &c. and the said tenement of houses, to go to and be the absolute property 'of the said George Crawford; whom failing, &c. Declaring, that on my death, and the death or second 'marriage of my wife, &c. my trustees shall be bound 'to denude themselves of the said tenements, &c. in 'favour of my said sons in their order.' In 1793 the granter died. In 1797 George assigned his share in security of a debt. He became a bankrupt, and was sequestrated in 1811, and the widow died in 1818. The chief question was, Whether George's interest was a jus crediti vested by the purifying of the condition, and transmissible by assignation? The Court held it to be so; and in deciding thus they considered his right to be a fee vested and transmissible.

SMITH against LEITCH, 2d June 1826. Here there was a trust-deed 'for behoof of E. Ironside, my wife, 'in case of her surviving me, in liferent for her life-'rent alimentary use allenarly during the time of her 'life, and of her continuing my widow; and after her 'death, or in case of her entering into another mar-'riage after my death, then for behoof of George 'Leitch, my brother, and his heirs and assignees in 'fee, in case he shall survive me, and shall be in life 'at the time of the death or second marriage of the 'said E. Ironside; and failing the said George Leitch 'by decease, &c. then I appoint the said trustees to 'hold, &c. in trust for behoof of James F. Leitch, &c. 'in fee, in case he shall be in life at the time of the 'death or second marriage of the said E. Ironside; 'and failing the said James F. Leitch by decease be-'fore me, or prior to the death or second marriage of 'the said E. Ironside, then I appoint the said trustees 'to hold, &c. in trust for behoof of Andrew Leitch, 'my nephew; whom failing, for behoof of my sisters,' &c. George and James F. Leitch survived the truster. They predeceased the widow, who never married a second time; and Andrew Leitch having, as thus succeeding to the fee, made a trust-disposition, died also before the widow. On her death, a competition arose between Andrew Leitch's trust-disponee and the sisters of the granter of the original settlement. The Court held the fee to be in Andrew Leitch, and transmissible when he made his trust-conveyance, as vesting by the purifying of the condition. 4. Shaw and Dunlop, 659.

Construction as between Husband and Wife.

With respect to HUSBAND and WIFE.—1. Where property is vested in conjunct fee and liferent; where it does not come from the wife or her relations; and where the destination does not peculiarly favour her or her heirs, and distinctly intimate a preference in her behalf; the husband is proprietor or fiar, and his creditors are entitled to attach the subject under the burden of the wife's liferent:[1] the creditors of the wife, after the husband's death, can affect only the liferent.[2] 2. If the subject come from the wife or her relations, and the expression is not such as clearly to intimate a preference in favour of the husband, the wife is fiar, the husband liferenter: The husband's creditors cannot attach the fee,[3] while the wife can grant no conveyance, nor her creditors attach her right, otherwise than with a full reservation of the husband's liferent. But it is a sufficient destination to give a fee to the husband, if the subject is taken in conjunct fee and liferent, and the heirs of the marriage in fee.[4] 3. If the wife's heirs are preferred in the destination, the fee is held to be in her. 4. The wife is fiar on her survivance, where the fee is destined to the *survivor*.[5] 5. Where the destination is to husband and wife, and the survivor and *their* heirs, it was doubted whether *their heirs* did not mean only the heirs of the marriage. But this opinion did not prevail: The fee was held to be in the surviving wife and her heirs.[6] It would, however, rather appear, (at least where the subject belongs to the husband, or the money by which it is purchased comes from him), that while the husband lives he may alienate, or his creditors attach.[7] And, 6. Although the wife will be held as fiar, cæteris paribus, where the subject flows from her, yet if it has come into the communion as tocher, it will require the strongest expressions of preference in her favour to vest her with the fee.[8]

As between Parent and Child.

In rights taken to PARENT and CHILD, the parent is in general held as proprietor or fiar; the child's right being considered only as a spes successionis, and so postponable to the parent's creditors.[9] But this rule suffers the following exceptions:—1*st*, Where the children are in existence, capable of taking the fee, and the right is taken to the parent in liferent, and the child or children *nominatim* in fee: 2*d*, Where the right bears an

[1] 2. Stair, iii. 41.; 19th June 1667, Johnston, Dirl. 85. 3. Ersk. viii. 36.; 23d July 1713, Edgar.
Even the husband's *heir* is held fiar on the wife's survivance. And so *his* creditors will be entitled to affect the fee under the burden of her liferent.

[2] 30th July 1562, RIG; Morr. 4197.

[3] 18th July 1750, Wordie against Sampson; 2. Falc. 174. 20th Nov. 1771, Sinclair against Anderson; Lord Hailes, 450. 6th Dec. 1780, Paterson against Balfour. 7th Feb. 1794, Frazer against M'Gilvray. 9th Dec. 1795, Robertson's creditors against Mason. Turnbulls against Turnbull, 12th Nov. 1822; 2. S. and D. 1. Muirhead against Paterson, 16th Jan. 1824; 2. S. and D. 617. See 30th July 1736, Scott of Blair's Creditors; 1. Cr. and St. App. Cases, 251.

[4] WATSON against JOHNSTON, 22d July 1766, Fac. Coll.; 1. Lord Hailes, 82.

[5] 22d July 1739, Ferguson against M'George; Elchies, *Fiar*, No. 5. Notes, p. 136.; Kilk. 189. 6th November 1747, Riddels; Kilk. 190.; Elchies, *ut supra*. Both these are cases of bonds for borrowed money. 22d November 1749, Lord Boyd against King's Advocate, relative to a lease; 2. Falc. 114.

[6] 22d July 1739, FERGUSON, Kilk. 189.

[7] Kilk. in Ferguson's case, 189. 20th June 1804, Reid against Forrester. 19th November 1806, Pringle against Richardson.

[8] 20th January 1790, BRUCE HENDERSON; 8. Fac. Coll. p. 185.; 3. Ersk. viii. 36. See Lord Pitfour's opinion in Watson against Johnston in 1766, 1. Hailes, 85.

[9] WILSON against GLEN, 14th December 1819. Here the disposition was to husband and wife, and the longest liver in conjunct fee and liferent, for their liferent use allenarly, and to their son nominatim, his heirs, &c. in fee. Sasine was taken in these terms. The son, after his parent's death, possessed the lands without completing titles otherwise than by the original sasine. A question arose between his heir and the heirs of his father, turning on the point, whether the fee was in the father or the son. The Court held the fee to be in the father.
See also the following cases:—25th November 1735, Children against Creditors of Frog, Home, 1.; confirmed 24th February 1741. Lillie against Riddel, Kilk. 190. 10th February 1756, Cuming against Lord Advocate. 1st March 1781, Cuthbertson against Thomson. 20th November 1806, Robertson against Duke of Athole. 4th July 1806, Pollock against Pollocks. 9th December 1807, Lindsay against Dott. 27th January 1797, Shanks against Kirk-Session of Ceres. Maxwell against Grieve, 7th January 1822. 1. Shaw and Ballantine, 509. Kennedy against Allan, 19th February 1825. 3. Shaw and Dunlop, 554.

express limitation of the parent's interest to a liferent, as by the expression 'for liferent use allenarly,' (only), or 'for liferent alimentary,' where these words are not coupled with words importing a fee:[1] *3d*, Even where the children are not yet born, if the right be taken to the parent 'for liferent use allenarly, (only), and the children in fee,' in such case, ex necessitate juris, the property is held to be in the parent till the existence of the children. There being no one alive capable of taking the fee, and the law requiring a fiar, a constructive fee in trust for the fiar in spe is held to reside in the parent; but creditors have no right to it: it is merely fiduciary. If a trust be established for the parent's liferent and children's fee, the fee is in the children:[2] But, *4th*, Where the children are in existence, and the destination is to the husband and wife in liferent, and the children by name in fee, reserving to the parent in whom the original fee resided the power of burdening and disposing of the property, the fee is held to be in the parent:[3] And, *5th*, The parent may make a destination to his children by name successively in liferent allenarly, and their heirs in fee, to the effect of creating a succession of liferents with fees merely fiduciary.[4]

II. OF LEGAL LIFERENTS.

The legal liferents are Terce and Courtesy.

I. TERCE.—The terce is a liferent, given by law to the widow of an heritable proprietor who has been married to her for year and day, or has had a living child by her; provided she has not accepted of a special provision. It extends to one-third of all lands; of teinds, if vested by separate infeftments;[5] and of heritable securities, in which, at the time of her husband's death, he stands vested as of fee by infeftment.[6] This liferent, given by the law, is grounded on the obligation incumbent on a landed proprietor to make a reasonable provision for his wife, according to that condition of life in which she has been during her marriage.[7] And, consistently with this, the legal provision ceases where a settlement has been made and accepted of; unless the deed shall bear expressly[8] Terce.

[1] FALCONER against WRIGHT, 22d January 1824. 2. Shaw and Dunlop, 633.

[2] See, for the doctrine of this paragraph, the case of NEWLANDS against his Father's Creditors, 9th July 1794; 12. Fac. Coll. p. 287.; Signet Cases, p. 54, *et seq.* and p. 72.; affirmed in the House of Lords, 26th April 1798.

See also THOMSON against THOMSON, Sig. Cases, 72.; affirmed 14th December 1812; 1. Dow's Rep. 417.

See also the cases quoted in those Reports: 25th November 1801, WATHERSTONE against RENTONS. 17th June 1801, GORDON against ALLAN.

The words must be clearly taxative. 9th December 1807, LINDSAY'S Children against DOTT. 20th November 1806, ROBERTSON against Duke of ATHOLE.

See farther, 6th March 1793, SETON against the Creditors of SETON of Touch; 12. Fac. Coll. p. 92.

And see the principle of fiduciary fees *ex necessitate juris* well explained by Lord Meadowbank; and his communication of Lord Justice-Clerk M'Queen's opinion on the point. 28th January 1812, M'INTOSH against M'INTOSH. 16. F. C. 493.

[3] TURNBULLS against TURNBULL'S Trustees, 12th November 1822; 2. Shaw and Dunlop, 1. See also CUMING against KING'S ADVOCATE. Post, p. 59. Note [4].

[4] ALLARDICE against ALLARDICE, 25th Feb. 1795. Sig. Cases, p. 156. See the doubts and scruples stated by Sir Ilay Campbell, lest this should create a dangerous innovation in the Law of Scotland.

[5] 20th July 1627, Countess of DUNFERMLINE against her Son; Spottiswood, 336. 13th February 1628, same parties; Durie, 344. 9th February 1667, MONCRIEFF against Tenants of Newton; 1. Stair, 440. 30th June 1779, BELSCHIER against MOFFAT; 8. Fac. Coll. 159.

[6] 29th January 1706, CARRUTHERS and MAXWELL against JOHNSTON; 2. Fount. 320.

A real lien, as in a burden reserved, depending on the sasine of the disponee, seems, however, to afford a terce to the widow of the creditor. See below, p. 59. No. 3.

[7] This obligation is not held as *discharged* by the terce, for it may be entirely inadequate. See THOMSON against M'CULLOCH, 6th March 1778; 8. Fac. Coll. 34. See also below, p. 60. Note [4].

[8] This might seem to be a natural consequence at common law of the principle on which the terce is grounded. But a statute was required to settle the point.

that the wife shall have right to the terce as well as to the conventional provision. This rule holds even where the conventional provision is out of an estate in another country, and where the contract or settlement is foreign.[1] To discharge the terce, however, the wife must accept of the conventional provision, either in the marriage contract, or by accepting or acquiescing in a provision by separate deed; and this in the full and fair knowledge of her rights.

Terce of Mansion-house.

The necessity of the widow having a house in which to reside, has given rise to the question, Whether she has not right to a terce of the mansion-house; or, at least, where there are two houses, to the use of one of them? In one case, the Court held the widow entitled to a terce of the mansion-house and garden.[2] But, in a subsequent case, this was much and justly doubted.[3] In that case it was even doubted, whether, where there were two mansion-houses, the widow could claim terce on either.[4]

Exceptions from Terce.

The exceptions from the terce are not reducible to any uniform principle. The following, however, seem to include all the cases in which the estate of an heritable proprietor is not liable for terce.—1. Superiorities, in relation to feu-duties, as well as casualties.[5] But it might admit of question, whether this would hold in the cases of whole cities feued out; as Greenock or Paisley.[6] 2. Rights of reversion, as unfit subjects of aliment to a wife, since they produce no annual profit.[7] 3. Patronage, for a similar reason.[8] 4. Coal, as being the consumption of the principal subject itself.[9] 5. Leases, as not feudal subjects. 6. Burgage subjects afford no terce,[10] for which no very satisfactory principle has been assigned. Subjects, although situate *beyond the burgh*, provided they hold burgage, are exempt from terce; which was found with regard even to a land estate:[11]

The question arose in the case of Lady CRAIGLEITH against Lady PRESTONGRANGE, 23d November 1681, and this case was referred to Parliament by the Court: But Parliament did not think themselves authorized to pass a *declaratory* law. Therefore, they sent the case back to the Court, and passed the Act of 1681, by which it was enacted, that 'where there 'shall be a particular provision granted by a husband 'in favour of his wife, either in a contract of marriage 'or some other writ, before or after the marriage, the 'wife shall be thereby secluded from a terce out of 'any lands or annualrents belonging to her husband, 'unless it be expressly provided in the contract of 'marriage, or other writ containing the said provi-'sion, that the wife shall have right to a terce by and 'attour the said provision conceived in her favour.' 1681, c. 10.

See Sir G. M'Kenzie's Obs. 460.

[1] LOTHIAN against Ross, 20th January 1797, as reversed in House of Lords, 15th December 1797. JANKOUSKA against ANDERSON, 29th November 1791. Countess of FINDLATER against Earl of SEAFIELD, 8th February 1814.

[2] 29th June 1773, MONTIER against BAILLIE; 6. Fac. Coll. 186.

[3] 24th February 1796, MEAD against SWINTON; 11. Fac. Coll. 487.

[4] There was no occasion to decide the point; for the one house had been built with the design of pulling down the other.

[5] 2. Stair, vi. § 16. 2. Ersk. ix. § 49. 13th February 1628, Lady DUNFERMLINE against her Son; Durie, 344.

[6] In Lady DUNFERMLINE's case, the Court proceeded chiefly on the practice, and were unwilling to introduce a new usage, where the lady was, besides, sufficiently provided. Durie, 345.

[7] 2. Stair, vi. § 16. 2. Ersk. ix. § 49. M'DOUGAL against M'DOUGAL's Creditors, 3d July 1801; Fac. Coll.

[8] But patronages have been held as legitimate subjects of conventional provisions to widows by way of locality. Lady FORBES, 2d August 1758, as reversed in House of Lords, 18th February 1760. Duke of ROXBURGH against Dutchess, 25th June 1818.

[9] 2. Bank. vi. § 11. 14th February 1628, Lady LAMINGTON against her Son; Spottis. 336. 30th June 1779, BELSCHIER against MOFFAT, where the coals were let on lease; Fac. Coll. and 2. Hailes, 838. But have not widows from a going coal sufficient for their own consumption?

[10] 2. Craig, xxii. § 34. 2. Stair, vi. § 16. Also 1. Stair, iv. § 23. 2. Bank. vi. § 11. 2. Ersk. ix. § 49. But observe the ambiguous terms which these lawyers make use of.

[11] 10th June 1801, LOWTHIAN against AGLIANBY, where terce was found not to extend to a land estate held burgage.

On the other hand, subjects *within burgh*, not holding burgage, are liable to terce.[1] Terce is given of tenements in burghs of barony.[2]

Extent of Terce.

The husband's infeftment as of fee, as it subsists at the time of his death, is both the measure and the security of the wife's terce.[3] But, 1. It must be a real and substantial fee, not nominal or in trust.[4] 2. The wife comes not in as a purchaser, but her right is a part of the husband's original sasine. 3. Although, in strict terms, the husband has no infeftment in a burden reserved in his favour, but the sasine of the disponee is his security, yet, according to the spirit of the rule, a terce seems to be due from such an heritable debt, as well as from an heritable bond: the disponee's sasine is the sasine of the creditor. 4. It is of no consequence whether the lands have descended from an ancestor, or have been acquired by the husband himself: The rule in courtesy is different. 5. The terce is not excluded by any right merely personal: And so while the husband has full power to alienate or burden his land during his life, infeftment must have followed, before the right of either purchaser or creditor can exclude the terce.[5] And the purchaser may retain the price of lands till the terce be satisfied.[6] So it is not sufficient to defeat the terce, that resignation in favorem has been made and accepted by the superior:[7] though an instrument of resignation ad remanentiam would exclude the terce, as completing the feudal conveyance to the superior. So the exercise of a faculty to burden will not exclude the terce, if infeftment have not followed.[8] And, finally, the terce is not excluded by a creditor adjudger, who has given a charge on his adjudication to the superior. This question our lawyers of the seventeenth century seem to have held extremely doubtful.[9] But at last it was determined in the widow's favour on a hearing in presence, and this has been since held for law.[10] 6. The terce is excluded or diminished by heritable securities on which infeftment has followed. If the security has been granted by way of absolute disposition, the terce is not totally excluded, but the disposition is taken only as a burden to the extent of the debt really meant to be secured.[11] The debt is, however, enlarged, and the terce diminished, by new bonds extending the security as eiks to the reversion.[12]

[1] 26th January 1790, ROSE against FRASER; Fac. Coll.

[2] 15th November 1769, PARK against GIBB; Fac. Coll.; 1. Hailes, 306.

[3] So the terce is a preferable burden on the estate in the hands of a purchaser, where it has been sold by the heir, and the title completed before the widow's service to her terce. BOYD against HAMILTON, 7th March 1805; Fac. Coll. See below, Note [6].

[4] And so where an infeftment was to a father in liferent, and his son in fee, *with power to the father to sell, and contract debt*, this being held radically a fee in the father, the son's widow, on his death, during his father's life, was refused a terce. The question arose with the Crown, as in right of the father, by forfeiture for his rebellion in 1745. 10th February 1756, CUMING against KING'S ADVOCATE, Fac. Coll.; also Monboddo's Dec. 5. Brown, 843.

[5] CAMPBELL against CAMPBELL, 17th February 1776; Tait, 5. Brown Sup. 627. 10th July 1788, M'CULLOCH against MAITLAND; 10. Fac. Coll. 50. —This established so early as 21st February 1532, CRICHTON against HAMILTON; Balfour, 109.

[6] In BOYD against HAMILTON, supra, Note [5], the Court held 'a purchaser entitled to retain a part of 'the price during the subsistence of the right of terce, 'which is a preferable claim.' Fac. Coll.

[7] Dirleton, indeed, seems to hold a contrary doctrine; but he is well refuted by Stewart. Dirleton and Stewart, *voce* Terce, p. 309; de Resignationibus, p. 250—262.

[8] 29th June 1773, MONTIER against BAILLIE. See above, p. 58. Note [2].

[9] Dirleton states it as a doubt, and Stewart resolves it in favour of the comprizer, p. 309. And it was, accordingly, so decided, 28th January 1715, HUNTER against DOUGLAS; Bruce, 60.

[10] 22d January 1725, CARLYLE against Creditors of EASTER OGLE; Edgar, 152. 2. Ersk. ix. § 46.

[11] Thus, terce found due from lands absolutely disponed, but qualified by a back-bond, deducting only the debt in the back-bond. 21st February 1811, BARTLET against BUCHANAN; 16. Fac. Coll. 200.

[12] 27th November 1812, same parties; 17. F. C. 14.

Evasions of Terce.

The widow will have redress against any fraudulent contrivance or neglect by which the infeftment of the husband has been lessened. Thus, the husband cannot divest himself in favour of the heir, reserving only his own liferent.[1] So a fraudulent delay to take infeftment will not avail the husband's heir; although doubtful cases of mere delay will not entitle the wife to relief.[2] Mr Erskine is of opinion, that the redress in these cases is only by a personal action; and that onerous creditors will be preferred:[3] and this seems to be law.

Aliment beyond Terce.

Although the terce is provided by law for the widow, it does not necessarily follow that her claims shall in all cases be restricted to a third of her husband's estate. Against his creditors, indeed, she will have no available claim beyond the third; but against his heir she will be entitled to claim an additional aliment.[4]

Completing right to Terce.

SERVICE AND KENNING TO THE TERCE.—The widow's right to her terce is vested by her service as tercer; a decree of the sheriff, proceeding on the verdict of a jury impanelled in virtue of a brief from Chancery.[5] The effect of this is to give the widow a pro indiviso right of possession, and to vest in her a third of the rents from the term after her husband's death. It is not necessary in order to confer on her a preference; the preference of the terce depending not on this proceeding, but on the husband's sasine.[6] But without the service her right does not transmit to her heir on her death.[7]

Kenning.

The appropriation of a particular portion of the estate to her is accomplished by the process of KENNING to the terce, which proceeds before the sheriff, and the widow's right is completed by delivery of earth and stone, and an instrument of possession.

The widow's claim, as against creditors selling the estate, may either be, 1. For a third share of the price of the lands, or of the sum if the subject be an heritable bond; to be secured to her in liferent: or, 2. For the actual possession, as a burden on the purchaser; or a third of the rents, or of the interests. In the former case, her service is a sufficient title to enable her to join in the conveyance to the purchaser. When she claims possession, she must be kenned to a particular portion of the estate, or, at least, that portion must be set aside for her by agreement or arbitration.

Courtesy.

II. COURTESY, or CURIALITY.—The husband, as administrator of the goods in communion, has, JURE MARITI, a right during the marriage to draw the rents of his wife's heritable property of all descriptions: After her death, where there has been a living child, the husband's right is converted into a liferent, by the COURTESY of SCOTLAND, in all her heritage, as contradistinguished from conquest. These two rights may be considered separately.

[1] Balfour, xcv. § 13. 2. Craig, xxii. § 27. Dirleton, voce Terce. 2. Stair, vi. § 16. 1st December 1711, Marquis of ANNANDALE against SCOTT of Gillesby, determined on a hearing in presence. 2. Fount. 681.

[2] CARRUTHERS against JOHNSON, 11th December 1705, Fount.; and 29th January 1706, Forbes.

[3] 2. Ersk. ix. § 46.

[4] THOMSON against M'CULLOCH, 6th March 1778; 8. F. C. 34. Here the estate yielded L.240 of rent, but the husband had been infeft in no more than gave a terce of L.40. The eldest son and heir, in an action for aliment, was held to plead no good defence in saying, that, 'having a legal provision of terce, the widow 'was entitled to nothing more.'

[5] This brief is directed to the Sheriff to inquire and assign to the widow her reasonable third of the lands, &c. in which her husband died last vest and seized as of fee. The jury is thereupon impanelled to try, 1. Whether the claimant was the lawful wife of the deceased? and, 2. In what lands the husband died infeft as of fee? To these two questions an answer is given by the verdict, which specifies also the first term after the husband's death as that from which the widow's right is to commence. The Sheriff subjoins a decree conformably to that verdict, and ordains extracts.

[6] See BOYD's case, p. 59. Note [5].

[7] M'LEISH against RENNIE, 21st February 1826; 4. Shaw and Dunlop, 485.

Husband's right to Rents.

1. The JUS MARITI is not a liferent in the husband, but the power of administering the wife's estate, reaping the fruits, and taking the rents during the subsistence of the marriage. The husband's creditors have the power of attaching the rents of the wife's estate for his debts; but the principle on which this attachment proceeds seems very questionable. The husband's right is not, strictly speaking, prospective; but attaches in the moment of the existence of the rents, fruits, &c. as moveables falling under his jus mariti, which carries all moveables. On this ground the proper diligence by creditors seems to be arrestment for affecting the particular rents. If the creditors, desirous of a more comprehensive diligence, should proceed to adjudge the jus mariti, they may find their diligence come into competition with arresting creditors, such adjudication being competent only as the diligence applicable to a right having tractum futuri temporis. On the validity of such an adjudication, however, our lawyers differ. Erskine seems to regard the adjudication as ineffectual.[1] Sir James Stewart thinks it will be good.[2] Bankton also lays it down expressly, that the jus mariti may be adjudged;[3] and in an argument by Lord Kaimes, after his method, in a question respecting the adjudication of an office, he seems to favour the same opinion.[4] In one case, the Court held an adjudication of the husband's interest in the wife's lands to be good.[5] And in a later case, where the question occurred in the shape of competition with arresting creditors, such adjudication was held an effectual form of attaching the rents, though, in the peculiar way in which the adjudication had in that case been led, it was bad.[6]

Where the jus mariti is excluded, the husband's creditors have no right to the accruing rents; nor will they be allowed to profit by an evasion of this exclusion, contrary to the nature of the settlement which confers the right.[7]

Widower's right by Courtesy.

2. The COURTESY or CURIALITY seems to be of the nature of a proper liferent in the husband. He takes the rents not merely by force of the jus mariti, which absorbs each accruing moveable as it vests in the wife, but he enjoys the estate and rents as a liferenter. This is, in truth, the counterpart of the Terce, though it differs from it in many essential points. It is indispensable to this right, 1. That there shall have been a living child born of the marriage, who is heir of the wife, or who, if surviving, would have been entitled to succeed:[8] 2. That the wife shall have succeeded to the subjects in question as heir either of line, or of tailzie, or of provision; in contradistinction to conquest, or property acquired

[1] See 1. Ersk. vi. § 12.; 2. Ersk. ii. 6.; 2. Ersk. xii. 6.

[2] Ans. to Dirleton, *voce* Jus Mariti, p. 174.

[3] Bankt. b. iii. tit. 2. § 38.; vol. ii. p. 219.

[4] Select Dec. p. 220.

[5] 8th December 1761, MENZIES against Creditors of GILLESPIE; 3. Fac. Coll. 151. There an adjudication on bond, by husband and wife, found null, in so far as proceeded on wife's bond, as being void; but sustained on the husband's bond, in so far as it adjudged his interest in the rents during the marriage.

[6] 19th November 1818, CALDER against STEEL. Here certain creditors of John Sommervill had adjudged his wife's estates as if they had belonged to the husband, with all right, title, &c. Subsequently to this, other creditors arrested the rents as they fell due; and, on a competition, the Court (Second Division) held, that although it was competent to adjudge the husband's interest in his wife's estate, the adjudication led in that case could not so affect the future rents of the wife's estate as to stand against the arrestments; and, therefore, preferred the arresting creditors.

[7] PALMER, trustee for WIGHT's Creditors, against M'CONOCHIE, 11th December 1816. Lands were by a father settled on his daughter in liferent for her liferent allenarly, and her children in fee, excluding the jus mariti. The daughter and her husband made up titles, not in terms of the destination, but in simple and absolute terms by precept of clare constat, and sold the lands for a perpetual heritable annuity, taken payable to her and her husband for his interest, and her heirs. The husband became insolvent, and his creditors claimed his life interest in the heritable annuity. The Court held the husband's creditors not entitled to the annuity during his life.

[8] See 2. Ersk. 9. § 53.

by purchase, donation, or other singular title.[1] It is not easy to see a good principle for this distinction; and some of our best lawyers (as Lord Pitfour and Lord Braxfield) have declared, that they can discover no good reason for the distinction.[2] But they all agree that it is a fixed point not to be touched. 'Servate terminos quos patres vestri posuere,' is Lord Pitfour's answer to doubts suggested on the point. It is sufficient if the wife be alioquin successura; although she has her direct title as disponee: she is held as taking in such case præceptione hæreditatis.[3] 3. It is requisite that the wife shall, at her death, have been infeft.

Extent of Courtesy.

As the courtesy comprehends only heritable subjects, vested by infeftment in the wife at her death, it is, of course, liable to diminution by every burden vested by infeftment; and so far it resembles terce. The difference between the rights is, that while terce suffers diminution only by debts and burdens completed by infeftment; courtesy is accompanied by a general responsibility for all the wife's debts. But the husband has relief against the wife's executors for such of her debts as are personal.[4]

Courtesy vests ipso jure; the husband, without any form of law, merely continuing his possession. The criterion of preference is his wife's infeftment.

III. EXTENT AND EXERCISE OF THE LIFERENTER'S RIGHT.

In concluding this subject of liferent and fee, it may be observed, that in all cases, whether the liferent be reserved by one who was formerly full proprietor, (which is the most favoured species of liferent); or be constituted by grant; or flow from the legal effect of marriage, as the courtesy or terce; the right of the liferenter is merely that of possession and ordinary administration during his own life.[5] The only way in which creditors can avail themselves of it, is either, by the diligence proper to moveables, to attach the rents or fruits as they arise; or, by adjudication, to get into possession; or, at least, to put themselves in a condition to apply for a sequestration under the common law during the liferenter's survivance; or, by judicial sale, to bring the liferent to market, and convert it into money.

The general rule respecting the use and possession to which a liferenter is entitled, and of the benefit of which his creditors may by diligence avail themselves, is, that he may take every use which is possible, and requisite to the full enjoyment of the subject, without consuming the substance. He may, for example, reap the fruits, natural and industrial, but not destroy or alienate any part of the subject itself; and so as minerals and coal are properly a part of the subject, not regenerating like fruits, a liferenter has no right to them without a special grant, even where they are opened and in a course of being worked.[6] But

[1] HODGE against FRAZER, 11th January 1740. PATERSON against ORD, 1st February 1781. Fac. Coll. 2. Hailes, 879.

[2] See 1. Hailes, 458. 2. Hailes, 879.

[3] PRIMROSE against CRAWFORD, 5th December 1771. 1. Hailes, 458.

[4] MONTEITH against MONTEITH, 3d January 1717.

[5] Leases fall on death even of liferenter by reservation. 26th February 1794, FRAZER against MIDDLETON; 12. Fac. Coll. 242.

The fiar and liferenter generally concur in granting a lease for an absolute term, which is useful to both, and beneficial for the country.

In England, where an estate for life is constituted, it is generally accompanied by a power to grant leases, in order to prevent the determination of the tenant's right on the death of the lessor.

[6] 2. Stair, iii. 74. 2. Ersk. ix. 57. In the Dutchess of ROXBURGH's case, a liferenter by marriage contract was held not entitled to let a lease of limestone rock; or to work it for sale. SWINTON against DUTCHESS of ROXBURGH, 1st February 1814; Fac. Coll. If the mines or minerals be let on lease for a rent it seems doubtful whether the yearly accruing rent is not the liferenter's. But the better opinion seems to be, that it is not; such rent being, in truth, the conversion of the fiar's right. Yet see the question as to Woods, next page; also p. 22. supra.

though this be the general rule, yet wherever the minerals are let on lease, and it is plainly the intention of the granter of a liferent that it should include the rents, this intention will be effectual.[1]

Woods. As to Woods, the liferenter has no right to cut those which do not spontaneously grow again; as Firs. The liferenter (unless a liferenter by reservation[2]) has no right to cut even silvæ cæduæ, when not laid out in annual cuttings or haggs, though in use to be cut and sold once in 25 or 30 years. And although the wood should become ripe for cutting during the liferent, he has right to cut only what may be necessary for the use of the estate,[3] after making due communication to the fiar, and with the privilege to him of designating the trees fit to be cut.[4] But copse-wood, laid out in annual allotments for cutting, is like a part of the regular profits of the land,[5] and the liferenter may continue the cutting.

Minerals. Liferenters may take coal, or stone, or timber, from going mines, quarries, and silvæ cæduæ, for the use of the estate under liferent.[6]

The liferenter may in competitions claim the value of his liferent, but he cannot be compelled to take the value instead of the actual enjoyment of the right.

EXTENT AND EXERCISE OF THE FIAR'S RIGHT.

The estate of the fiar can be available to creditors only under burden of the liferent. And the fiar and his creditors can demand no use which may disturb even the amenity of the liferenter's possession. They are not entitled to cut growing timber, even under that limitation.[7]

SECTION VI.

LIMITED ESTATES BY MEANS OF CONJUNCT RIGHTS.

Conjunct Right, or common property among strangers, is established sometimes by accident, sometimes by design. Thus, heirs-portioners succeed to land in equal shares, pro indiviso; and, while the subjects continue undivided, are common proprietors: So when persons engaged in a scheme of merchandise, or manufacture, purchase jointly the houses, lands, mines, ships, &c. which are necessary for carrying on their adventure, they are common proprietors of them.

[1] So a general liferent of all heritable and moveable subjects held to include rents of a lease of minerals. 21st January 1812, Waddel against Waddel. In a question of bona fides as to the rents or price of what had been worked, the Court sustained the bona fides of the liferenter as entitling her to keep those rents. But this was admitted with some difficulty. Duke of Roxburgh against the Dutchess, 17th February 1815; Fac. Coll.

[2] See 26th July 1737, Ferguson; Clk. Hume, 123. Elchies, *Liferenter*, No. 1.

[3] 2. Stair, iii. 74. Lang against Duke of Douglas, 21st December 1752. Elchies, *Liferenter*, No. 6.; and see the case of the Kinneil woods there referred to.

[4] Dickson against Douglas Dickson, 24th January 1823. 2. Shaw and Dunlop, 152.

[5] 2. Erskine, ix. 58. See also 31st December 1737, Ferguson, Elchies, *Liferenter*, No. 1.

The question solemnly tried in the case of Seton of Touch, where the Court had, at first, without opposition, allowed the creditors of the liferenter to sell coppice-wood, which had not been cut for 30 years. But, on the fiar appearing, this decree was recalled, and the Court held the liferenter entitled only to cut wood so as to yield a constant yearly income. 24th February 1789, Gray against Seton; 2. Hailes, 1067. See Dickson's case, supra, Note [4].

[6] In the Dutchess of Roxburgh's case, she was held entitled to work the lime for the use of the locality lands, and this although first opened by herself. 9th March 1815. This was acquiesced in.

[7] See 2. Ersk. ix. § 56. Tait against Maitland, 2d December 1825. 4. Shaw and Dunlop, 247.

Property naturally divisible may, by succession or by purchase, become common, and by convention may be made indivisible; while that which is by nature indivisible may, in point of right, become separate instead of common property. For any of the joint proprietors may insist for the separation of his share, and dissolution of the community, unless the condition of his right, or his own agreement, or the occasion which led to the community, bar the proceeding. The right, in such cases, extends only to a share, after the debts to which the property is liable are discharged.

In order to bring common property to a division, application may be made to a court to distinguish the shares, if the subject be naturally capable of division.[1] If the subject be not naturally divisible, the object of the application is, to enforce one or other of the following alternatives:—Either that the defenders should dispose of their shares at a certain price, or take the pursuer's share at the same rate: Or that the whole should be exposed to sale, and converted into the divisible form of a price or sum of money.[2]

The creditors of a joint proprietor, after using the proper diligence for acquiring to themselves the rights of their debtor, may take proceedings as he himself might have done, for having the property divided or sold.

Sometimes an estate in land, or a bond for money, or even moveable property, is taken with a destination, out of which disputes arise relative to the interests of the parties as common or separate.

1. Where the conveyance is made simply 'to two or more persons and their heirs,' or to them 'in conjunct fee,' this forms a case of community or common property.

2. When an infeftment is granted, (or a bond taken, or a lease made), to two or more, 'in conjunct fee and liferent, and to their heirs,' the right of each is not only a right pro indiviso, but is burdened with the eventual liferent of the other, and can be sold, burdened, or adjudged, only under that qualification.[3]

3. Where it is to two 'jointly, and the survivor and their heirs,' each has a fee which his debts will affect; the survivor becomes sole fiar:[4] But the right thus bestowed seems to be of the nature of a mere destination. Either of the parties may onerously dispose of, or grant securities over, the subject; which will be effectual notwithstanding the destination to the other: Or his creditors may adjudge it, and so defeat the right of the associate.

4. Where it is 'to two jointly, and the heirs of one of them,' the one less favoured is a bare liferenter, the other is fiar, and not only cannot be gratuitously disappointed, but cannot even by onerous conveyance be deprived of his right. 3. Ersk. 8. § 35.

[1] For the case of heirs-portioners, the very old form of a Brieve of Division still subsists. It is directed to the Sheriff: a jury is named under his authority to measure and lay off the shares, and by lot they are appropriated to those interested. The matter is commonly arranged extrajudicially by referees.

[2] 1. Stair, vii. 15. and xvi. 4. 1. Bankt. viii. 40. 3. Ersk. iii. 56. 8th February 1782, MILLIGAN against BARNHILL; 9. Fac. Coll. p. 51. This was the case of a brewhouse, of which the original proprietor had sold one-half pro indiviso. The action was to enforce the alternative. *Defence.*—No man is to be compelled to part with his property except for the public benefit. The defence was repelled.

A proceeding of this kind, for dividing the property of ships, is well known in Admiralty. The Judge either orders a sale, or, on a judicial minute by the parties, adjudges the share of the party willing to sell to belong forthwith to the other.

[3] 18th November 1789, BROWN. The rule here was applied to a lease; where the landlord's right, as assignee of one of the tenants, was restricted on the cedent's death; the other, as liferenter, acquiring right to the whole.

[4] 26th November 1799, BISSET against WALKER; where rights to land so taken were held to vest a fee in the survivor not requiring service to complete it. Fac. Coll.

CHAPTER II.

OF LEASEHOLD PROPERTY AS RESPONSIBLE FOR DEBT.

LEASEHOLD property is of great and growing importance. The farmer of modern times is a person possessed of skill, industry, and capital, which he is willing to apply in the cultivation of land belonging to another, provided he have full assurance of the stability of his right during a period sufficient for bringing back the proper returns; and of indemnification for his improvements, if it should happen that the lease should be prematurely brought to a close.

In the contract of lease, on which this sort of property depends, as regulating the respective estates of the landlord and of the tenant, the landlord furnishes land, and all the necessary accompaniments of houses, offices, fences, and drains, to adapt it for residence and cultivation; while the tenant, on his part, furnishes the capital, industry, and skill, which are necessary to make the land produce its increase: And this mutual contribution is made for the raising of a gross produce to be divided between the parties (after defraying necessary charges), in the largest proportions to each, which their respective means and situations afford—the highest rent to the landlord, the largest profit to the farmer; with security to each in the undisturbed enjoyment of his peculiar estate.

In contemplation of the events which are chiefly in view in the present inquiry, two questions suggest themselves as important to be settled: 1. What assurance does the law give to a tenant against the insolvency and creditors of his landlord; or against purchasers of the estate; or substitutes in a deed of entail? And, 2. What are the rights of which the creditors of the tenant may on his insolvency avail themselves?

SECTION I.

EFFECT OF LEASE AGAINST PURCHASERS OF THE LAND; AGAINST CREDITORS; AND AGAINST HEIRS OF ENTAIL.

THE security of a tenant depends on a statute passed in the fifteenth century, whereby 'it is ordanit for the sauftie and favour of the puir pepil that labour the grunde, 'that they and all uthers that hes takyn or sal tak landis in tyme to cum fra lordis, and 'has termes and zieres thereof, that suppose the lord sel or analy their landes, that the 'takers sal remayn with thare tackis on to the ische of their termes, quhais hand at ever 'thai cum to, for sic lik male as thai tuk them of befoir.'[1] It is settled in the construction of this statute, 1. That it applies to all leases both agricultural and urban.[2] 2. That the lease must be in writing.[3] 3. That there must be a rent stipulated; this being both requisite in the nature of a lease, and taken for granted in the statute: but it is not necessary that the rent be an adequate consideration for the right to possess.[4] 4. That the

[1] 1449, c. 17. 2. Act. Parl. p. 35. c. 6.

[2] 2. Ersk. vi. § 27. 10th December 1794, WADDEL against BROWN, Fac. Coll.

[3] SKENE, 15th July 1637, Durie, 852. KIELL against JOHNSTON's Tenants, 16th July 1636; ib. 817. LIETH against STEWART, 5th December 1776, 1. Hailes, 174.

[4] 2. Ersk. vi. § 24.

tenant must be in possession, this being the sasine of a lease, and the sole indication by which purchasers or creditors may with certainty know of the existence of the tenant's right.[1] 5. That the lease must have a termination or ish, as it is called in the books: and so, indeed, the Act itself declares, in describing the tenants to be protected as those 'who 'have terms and years;' and in declaring the protection to continue 'on to the ische of 'their terms.' The construction of law is, that a lease which does not express the term of endurance, is, in so far as purchasers or creditors are concerned, granted only for a year; or, at farthest, for such time as is *necessarily* implied from the words of the lease.[2]

§ 1. COMPLETION OF THE TENANT'S RIGHT.

In competition with a singular successor in the lands, the contract gives no real right, but only action on the warrandice against the landlord.

Possession. 1. A lease becomes a real right in the land, operating like an alienation, to the exclusion of singular successors, from the moment of the tenant attaining possession. By the Roman law, the rule was,—'Emptorem fundi necesse non est stare colono cui prior 'dominus locavit.'[3] In Scotland, of old, it was common, in order to make the right of the tenant real upon the land, to insert a precept of sasine in the lease, so that the tenant might be infeft: And if the question had occurred at that time, whether a tenant, without having completed his real right by sasine, could have opposed an onerous purchaser, there could have been no doubt that his right would have been held merely personal, and, consequently, ineffectual. The statute has substituted possession for sasine, conferring on tenants in possession a real right; and under it, a tenant, not having attained and continued in possession, is, in competition with singular successors, purchasers, or creditors adjudgers of the landlord's estate, merely a personal creditor under the contract of location; just as in a contract of sale of land, the vendee is a personal creditor prior to his sasine.[4] Many cases are to be found in the books settling this question beyond all controversy.[5] If, therefore, the creditors of the landlord adjudging, or a purchaser from the landlord, should find it for their benefit to refuse implement of the lease, the tenant, not being in possession, is entitled to no preference.

2. One acquiring right, not from the landlord, but as assignee or as subtenant from the original tenant, completes his real right by possession, as the original tenant did; and thus having obtained his right, is secure against the landlord and his singular successors on the one hand, and against the cedent's creditors on the other hand, provided that assignees and subtenants are admitted by the original lease, or that, where they are excluded, the landlord makes no exception to the transference in question.

[1] 3. Stair, 2. § 16. 16th November 1750, WALLACE against CAMPBELL; Kilk. 143.; 2. Ersk. 6. § 25.

[2] 22d November 1737, REDPATH against WHITE; 2. Dict. 420. SCOTT against STRAITONS, 19th February 1771, 1. Hailes, 404. Held indefinite ish good against heirs, ineffectual against purchasers.

[3] Cod. lib. iv. tit. 65. l. 9.

[4] The analogy generally referred to in illustration of the effect of possession in completing the tenant's right, is sasine. But there is this difference, that sasine once taken, continues to operate; possession taken and lost, is ineffectual.

[5] So early as Lord Durie's time, we find a decision, in which a competition had arisen between a tenant and an appriser.—1*st*, The Court was of opinion that the tenant, having obtained possession before the appriser had made his right real by infeftment, was clearly preferable, and the lease effectual. 2*d*, But it having turned out that the sasine of the appriser was taken before the tenant had entered to the possession, the Court preferred the appriser. 11th July 1627, WALLACE against HARVEY; Durie, 307.

In this and the subsequent cases it is proper to observe, that a question of considerable importance in competitions is included, viz. Whether creditors holding heritable securities by infeftment on heritable bonds, or by adjudications, are to be considered as having a

3. Where the original tenant has granted a sublease, and afterwards assigns his right as principal tenant, the assignment is truly of the surplus rent only; and uplifting the rents, or intimation to the subtenant, completes the real right.[1]

4. Where a tenant not prohibited has assigned, the assignation is not effectually completed by intimation to the landlord without possession.[2] But the possession of the assignee may be civil as well as natural; and therefore, if *his* subtenant hold the lands under a written lease, it will be enough.[3] The only difficulty is the ostensible ownership from continued possession where the cedent is subtenant. This would be fatal in Moveables; but the tenant's right in Land has two points—written title and possession—without the union of which there is no legal ground of credit or of reputed ownership.

5. In assigning a sublease, intimation to the principal tenant is not sufficient.[4]

right exclusive of a tenant? or, Whether this right is not rather of the nature of a burden, leaving the proprietor's right and administration, to the effect of giving possession to the tenant, unimpaired? But this is a question to be treated afterwards.

[1] This doctrine is first laid down by Lord Kilkerran, in reporting the case of WALLACE against CAMPBELL, p. 143. (above, p. 66. Note [1].) He says, 'that in a case 'where the assignee cannot attain the actual possession, the civil possession, by uplifting the rents, comes 'in its place; or if such assignee should be considered 'only as an assignee to the maills and duties during 'the currency of the tack, it must, as other assignations, be completed by intimation to the tenant.'

This principle ruled the case of SIME'S Trustee against FIDLER, 23d May 1806. Sime borrowed from Fidler L.1000, and gave bond for it with a subset of a farm which he held from Lord Arbuthnot, (under burden of a previous subset to Davidson), and an assignation to the surplus rent payable by Davidson. Fidler uplifted the surplus rents for several years; afterwards Sime became bankrupt, and the trustee on his sequestrated estate sold the lease. Fidler then claimed the balance of his debt unextinguished, and the trustee resisted this, and maintained that no preference was constituted. The question was, Whether payment of the rents by the subtenant to the creditor holding this right, completed the assignation to the surplus rent, so as to raise a preference. Lord Glenlee found Fidler 'had a preferable right to the tack 'in question, and the proceeds thereof, to the extent 'of the balance of debt due to him.' Lord President Campbell said, There have been sundry questions as to completing assignations of tacks, and it was settled in HARDIE DOUGLAS'S case that possession is the proper course. Now here is all the possession which the case admits of, viz. possession of the subrents. Lord Hermand, same view. Lord Newton had always a difficulty about completing real lien on a lease, without putting creditor into possession.—Doubt whether there be possession here. Lord Armadale agreed with the President. Petition refused. 23d May 1806, 13. Fac. Coll. 554.

[2] The case of YEOMAN against ELLIOT and FOSTER, 2d February 1813, is reported so as to give an impression, that the Court held mere intimation to the landlord, and entry in his rental book of the assignee's name, to be sufficient to complete the transference. The following observations on that case in the former edition of this work, drew the attention of the Court to the subject.

'It deserves to be reconsidered, whether intimation 'ever is a completion of an assignation, except when 'it is made to a custodier of moveables, converting 'him thenceforward into a custodier for the assignee; 'or to a debtor, discharging the claim of the former 'creditor, and substituting the assignee in his place. 'So the assignation of a lease, where there is a sub-'lease, is well completed by intimation to the sub-'tenant, because it is truly only an assignation of rents, 'and the subtenant is the debtor. But there seem to 'be no termini habiles for intimation to the landlord, 'to the effect of transferring a lease. And the argu-'ment, that otherwise there are no means of borrowing 'money on the security of a lease, is fit only for the 'legislature.'

In the subsequent case of BROCK against CABELL, 29th November 1822, (see next note), the Judges of the Second Division denied Yeoman's case as an authority for the above doctrine, and referred to the words of the Lord Ordinary's interlocutor to shew, that the decision went on the sublease and possession, as the only possession which circumstances admitted, having been held as good civil possession by the assignee.

[3] BROCK against CABELL, 29th November 1822; 2. Shaw and Dunlop, 52. Tenants of a bleachfield borrowed money from the Glasgow Bank, on an assignment to their lease ex facie absolute. The Bank intimated their assignation to the landlord, and were to give a sublease to the debtors, on which they might continue their possession. But the sublease was not authenticated, nor did it specify any rent. The Court held the assignation incomplete to bar the general creditors of Newbigging and Company; and this chiefly on the invalidity of the sublease to sustain the possession as for the assignees, and under their authority.

See RUSSELL against Lord BREADALBANE, 3d December 1822, 2. Shaw and Dunlop, 62.; under appeal.

[4] Such an assignation was loosely supposed to have been held as completed by intimation to the principal tenant, in HARDIE DOUGLAS against HAY'S Creditors, 6th June 1794. But no such judgment was pronounced;

6. It has been questioned, whether a tenant already in possession, receiving a prorogation of his lease beyond the term originally stipulated, is to be held, while the original term is unexpired, as in possession of a real right, or only as a personal creditor, with respect to the prorogated term. This question has been decided in two cases against the tenant, and on just principles.[1]

Proposed Record for Leases.

In concluding on this point, it may be observed, that the difficulty in completing the rights of assignees of leasehold property, is chiefly felt in those cases where it is desirable to give a power of borrowing money on the security of the tenant's right. The improvement of the country, and the safety of manufacturers, frequently come to depend on this resource; and although Courts have, in the above cases, gone as far as the principles of law will allow, in order to support the credit and resources of the tenantry, this is not without considerable danger of another kind, since it is not possible, under such ambiguous and secret transactions, for general creditors to know how far their debtor's leasehold property is unburdened. It has been proposed to facilitate these operations, with due attention to the general credit of tenantry, by introducing a record for exhibiting, as in feudal property, the state of leasehold rights. Whether this proposal shall be entertained by the legislature, and with what precautions, I may be able perhaps to state in the Appendix to this Work.

§ 2. DURATION OF THE LEASE.

A lease must have a definite term of duration to be effectual against purchasers of the land, or the creditors of the landlord adjudging. But it is a question of no easy solution, to what length of time such term may be prolonged? In many parts of the country, landholders have no better right than a lease for a great number of years; and villas and pleasure-grounds are frequently laid out in reliance on leases of such endurance as may seem to give to the possessor at least the full enjoyment during his life. Such leases are effectual against the granters and their heirs; but their efficacy against singular successors has been doubted where the granter holds his land under prohibitions against alienation.

1. When no prohibition exists against alienation, or the granting of long leases, it does not appear on what ground of law a stranger purchaser or creditor can object to the efficacy of a lease, however long, provided, in terms of the statute, the ish be certain.

and in YEOMAN against ELLIOT and FOSTER, 2d February 1813, that case was said by Lord Balgray to be incorrectly reported.

[1] 1*st*, In the case of Lord CRANSTOUN'S Creditors against SCOTT, where the new lease was granted three years before the expiration of the possession under the old lease, the Court found,—'That the tack 'was not good against creditors, in respect the tacks-'man did not attain possession of the lands set, by 'virtue of the tack quarreled, prior to the dates of 'the infeftments in favour of the real creditors, &c.; 'and therefore sustained the reasons of reduction in 'so far as concerned the interest of the said creditors, 'reserving action to the said Thomas Scott against 'the Lord Cranstoun upon the personal obligation.' 4th January 1757, 2. Fac. Coll. 12.

2*dly*, In the case of the Creditors of DOUGLAS of Dornock against CARLYLES, where the tenant, holding a lease for twenty-one years, obtained a prorogation of it from year to year till certain sums were paid to the tenant;—the original term expired; and, during one of the years of the prorogation, the question arose, Whether the tenant's possession was effectual to make the prorogation for the subsequent years good against the creditors? The Court found that it was not. 2d July 1757, 2. Fac. Coll. 62.

There is one case apparently establishing an opposite doctrine from that of the above cases; but the decision proceeded not upon the simple question. The competition was between a tacksman and a purchaser; but, 1*st*, The purchaser had been informed of the existence of the lease by the seller; and, 2*d*, The sale was made on deathbed, without consent of the heir, who being liable in the obligation of warrandice in the lease, was, by such a sale, if held good against the tenant, materially injured; and upon this ground the Court proceeded. 7th January 1725, RICHARD against LINDSAY; Edgar, 143.

It is a sort of land right, different from that which is enjoyed under a feudal grant, but still a right of a legitimate kind; clearly effectual against the heirs of the granter; and of which, by possession and the written lease, third parties may be as well aware as if it were recorded in the register of sasines. Whether, in policy, there may be any reason to discountenance the creation of a sort of middle right, which may lead in the end to a new constitution of land rights in Scotland, is a question which, in the present inquiry, it would be out of place to consider. It has also been questioned, Whether an unlimited proprietor can, by leases, affect the future and contingent right of subsequent purchasers or creditors? But there is no case in which any such limitation has been established, as to deny efficacy to a long lease. Doubts have been thrown out occasionally, and an opinion in one case given, unfavourable to the effect of a long lease against a purchaser; but nothing amounting to a decision has ever been pronounced on the point.[1]

2. Where there is a prohibition, however, in a deed of entail properly constituted, it will be effectual to hinder a lease of long endurance.

First, Even where the prohibition is general against ALIENATION, it has been held that this extends to long leases,[2] as being a species of alienation; and this in questions with inhibitors, in cases of forfeiture, and under the law of deathbed. In the discussions on this subject as applicable to leases, the only reconciling principle which, in the House of Lords, appeared amidst the difficulties fit to be adopted, was to hold all leases as alienations, unless in so far as may be necessary for reaping the full profits of the estate; and to inquire, with a view to the application of the prohibition, what is fairly to be deemed within the necessary or useful power of administration, and so in legal construction to be conceded to heirs in possession, for the enlargement of their powers against the strict words of such prohibitions, as if a clause of power was introduced, giving authority to grant leases necessary for good cultivation.[3] This general principle still leaves the question, What shall be taken as the proper criterion by which to determine what is within the implied power?

On this subject it may be observed,—1. That a lease for a very long term of endurance, though at an adequate rent, has been held an alienation:[4] 2. That in the case where a lease of a thousand years was questioned, there was no occasion to determine the point, as the lease was objectionable on another ground.[5] A lease for a hundred years has been considered as an alienation: A lease of ninety-seven years was held to be so in the Queensberry cases under the Neidpath entail:[6] Afterwards, a lease

[1] HOUSTON's case in ranking of Jordanhill, 1752; Kilk. 395. The case of FRASER of Belladrum, 6th December 1758, was not such a decision. If the Court of Session proceeded on such ground, it certainly was not so held in the House of Lords. In the case of Lord HOPETOUN, 17th November 1763, there was no lease fot more than nineteen years, but merely an obligation to renew every nineteen years.

[2] See LESLIE against ORME, 2d March 1779, but especially the statement of the case after a careful investigation into Lord Thurlow's papers, by Lord Redesdale; 2. Dow, 112.; and again, 1. Bligh, 510.

[3] This principle, after many varying determinations in simple cases, and much uncertainty, was finally adopted in the QUEENSBERRY cases. And the principles of the doctrine will be found largely explained and illustrated by Lord Chancellor Eldon, in the reports of those cases. See Duke of QUEENSBERRY's Executors against Duke of BUCCLEUCH, 7th March 1816, Fac. Coll.; as in House of Lords, 10th July 1817, 5. Dow, 293. Again, same case, 5th February 1818, Fac. Coll.; in House of Lords, 2d July 1819, 1. Bligh, 339.

[4] Duke of QUEENSBERRY's Trustees against Lord WEMYSS, (Neidpath entail), decided in House of Lords, 10th December 1813, 2. Dow, 90.; as explained in deciding the Roxburgh feus, ib. 206.

[5] TURNER against TURNER, in House of Lords, 1st July 1812; 1. Dow, 423. See Lord ELGIN against WELWOOD, on a special permissive clause. 1. Shaw's Cases in House of Lords, 44.

[6] See above, Note [5].

for ninety-nine years in the Balbedie case:[1] And one for fifty-seven years in the case of the March leases. Perhaps, according to the principle finally assumed, a lease of nineteen years is alone to be relied on under a general clause prohibiting alienation; although a lease for twenty-one years seemed on one occasion incidentally to be supposed effectual. Leases for thirty-one years seem to be effectual only as improving leases under the 10. Geo. III. c. 51.[2]

Secondly, But it has been much questioned, whether, under a prohibition to DISPONE, the same sort of exception can be taken as under a prohibition to alienate. Here the great ruling principle has, in all the cases decided by the Court of Session, prevailed with our Judges, that no prohibition which is to limit the powers of the heir of entail as a fiar, can be admitted by inference or implication:[3] But a distinction has been taken in the House of Lords, holding the general doctrine established by the uniform course of entail law in Scotland, only to bar an inference from one prohibition to another, but not to exclude a rational construction of the prohibitory clause; which must be held effectual, if clear and intelligible. Both in this way, and also on the force of the authorities respecting the use of the word dispone, that word has received a construction equivalent to alienation.[4]

3. Where a lease has been granted for a term of years beyond that which is permitted by the entail, it would rather seem, that, on this sole objection, the lease would be reducible only in so far as the power had been exceeded:[5] And, at all events, where a lease is granted *nominally* for a longer term, but of which no more is to run *after* the date of the lease than the permitted term, it is good.[6]

Where the entail contains a general prohibition against alienation, or a restraint on the power of leasing, there is commonly added, as a regulator of that prohibition, a clause of power to let leases beyond the ordinary duration on particular conditions. But there is also a statute conferring powers; and to a certain extent it controls all such prohibitions, originating frequently in the short-sightedness of individuals, and imposing restraints hostile to the improvement of the country. About half a century ago, the restraints of deeds of entail pressed so heavily on agricultural improvement, that a statute was passed,[7] conferring certain powers on heirs of entail in possession, however strictly fettered by the deed, enabling them to grant leases for improvement under certain limitations. The leasing powers conferred by this Act are, 1. Power to grant leases for thirty-one years; or

[1] HENDERSON and BROWN against Sir JOHN MALCOLM in House of Lords, 18th May 1814; 2. Dow, 285. See also Sir W. ELLIOT against POTTS, 14th March 1821; 1. Shaw's Cases in House of Lords, 16. and 89.

[2] STIRLING against WALKER, 20th February 1821. Sir M. MALCOLM against BARDNER, 19th June 1823; 2. Shaw and Dunlop, 410.

[3] 10th March 1814, Sir W. ELLIOT of Stobbs against POTTS; 17. Fac. Coll. 588. 3d March 1815, HAMILTON against M'DOWAL; 18. Fac. Coll. 302. 5th February 1818, Duke of QUEENSBERRY's Executors against Duke of BUCCLEUCH; 19. Fac. Coll. 466.

[4] In case of ELLIOT against POTTS, 14th March 1821; 1. Shaw's Cases in House of Lords, 16. and 89.; and of the BUCCLEUCH LEASES, House of Lords, July 1819; 1. Bligh, 339; COLQUHOUN STIRLING against WALKER, 20th February 1821, Fac. Coll.

[5] The only case in which the question has been discussed, was one in which the lease was greatly objectionable on many grounds, and especially as being a lease of the whole entailed estate. The lease was reduced entirely, both in Baroness MORDAUNT's case against INNES, 9th March 1819, affirmed; and in the Duke of GORDON's case against INNES, 22d November 1822, 2. Shaw and Dunlop, 32. But the opinions of the Court seem at least to leave the question open, in a case where the sole objection was length of endurance.

See Sir M. MALCOLM against BARDNER, 19th June 1823; 2. Shaw and Dunlop, 410.

[6] 23d June 1813, AGNEW against M'NIVEN, Fac. Coll.

[7] 10. Geo. III. c. 51. An Act 'to encourage the 'improvement of lands in Scotland, under settlements 'of strict entail.'

for fourteen years and a life; or for two existing lives, provided the tenant shall be taken bound to enclose certain proportions of the farm, within certain terms, and the whole within the period of the lease. And, 2. Power to grant, for the purpose of building, leases for any number of years, not exceeding ninety-nine, provided no more be leased to one person than five acres; and that the lease shall be voidable, if not built on to a certain extent. Two restraints, however, are imposed; one, that the statute shall not authorize a lease of the manor-place, offices, garden, &c.; another, that the rent shall not be under those of former leases, and without grassum, foregift, or benefit direct or indirect.

§ 3. OF RENT.

The rent payable to the landlord forms an important object of inquiry, both when considered as a part of the estate of the landlord attachable by his creditors, and when considered as a burden on the right of the tenant. Rent is that portion of the produce of lands, or its value, which remains for the landlord, after all the outgoings of cultivation are defrayed, including the profits of the capital employed, according to the ordinary rate of profit of agricultural stock. Loosely speaking, but not correctly, rent also is held to include the remuneration for capital expended on houses, drains, &c. Rent ought to alter with the value of the produce of which it is a part; and this is sometimes thought to be sufficiently studied in stipulating a corn rent. But it is so only when a rateable proportion is taken. While the rent is fixed, though payable in corn, the produce of the farm, it bears hardest on the tenant when he is least able for it. In bad years his produce may be below the average, and he must buy corn with which to pay his rent. The landlord, on the other hand, suffers in cheap years, when the rent falls below his necessities. To do justice to both,—to give to the tenant, on the one hand, that confidence and independence which are necessary in order to encourage improvement, steady industry, and enterprise; and on the other, to guard the landlord from the sudden changes in the value of farm produce, and thus to banish uncertainty and the necessity for arbitrary and humiliating interferences in the way of occasional abatements,—the matter should be so regulated, that the yearly rent, or a considerable part of it, should be ruled by the fiars of such grain or other produce as the farm is likely to yield, and in the proportions likely to be raised; and a maximum and minimum should be fixed, above or below which the augmentation of the money conversion, or its diminution, should not go.[1]

In contemplation of insolvency, it is a material question, whether it be competent, as against purchasers or creditors, or heirs of entail, to stipulate that the rent shall be absorbed in the payment of debt; or to reduce it to an inconsiderable sum, and take a grassum at the beginning of the lease?

1. STIPULATED RETENTION OF RENT.—At one time leases seemed to have been much used as securities for loans of money; and many decisions relative to their effect are to be found in the books between the end of the sixteenth and the beginning of the eighteenth centuries: after which time the use of this sort of security probably yielded to the prevailing form of securities by heritable bond. It would appear,—

First, That a lease to subsist till a debt shall be paid, is not effectual against singular successors, as all leases must have a certain termination.[2] An exception was at one time

[1] These principles have guided many of the judicious arrangements framed for extensive estates by Dr COVENTRY, professor of agriculture; and in the appendix to Mr ROBERT BELL'S Treatise on Leases: in the last edition, his son has collected some very valuable practical information and precedents of subleases. See vol. ii. p. 187.

[2] 15th June 1664, THOMSON against REED; 1. Stair, 198. 27th June 1674, PEACOCK against LAUDER;

admitted to this rule, where there was a surplus rent over the interest, by the application of which the debt would some time or other be extinguished, so as to bring the lease to an end.[1] But this was altered, and the lease held to be ineffectual, the termination of the lease being uncertain.[2]

Second, That although it is competent to a tenant to retain the rents, in order to enforce performance of the landlord's counter-obligations contained in the lease,[3] a tenant cannot acquire, either by separate bond or contract, or even by a stipulation in the lease itself, a right to retain the rents against singular successors, in extinction of debt or payment of interest.[4]

Third, That a lease may indirectly be so arranged as to afford a good security to the tenant for the interest of a loan, or even for the principal. The rent may be fixed arbitrarily at any sum which the parties choose to appoint; nor have purchasers or creditors any ground in law for insisting that the tenant shall pay a fair and adequate rent. Coming in the place of the landlord, they can take only such right as he has by his contract reserved; unless they can object to that contract on the bankrupt laws, or as against a prohibition to alienate. The parties may, on calculation, settle a rent, and fix a period, which will afford to the lender full security for his interest, and a gradual extinction of his principal.

Fourth, That as the tenant must be in possession upon the lease, in order to make his right real, he can claim no preference on a prorogation of which the term has not commenced.[5]

2. Of Grassums.—The power of a proprietor to let leases at low annual rents, taking grassums, does not appear to be under any restraint, either in relation to the right of a subsequent purchaser; nor even in relation to substitutes in an entail, unless the entail contain special limitations of the power, or prohibitions against alienation.

1. As to Purchasers, the Act 1449, c. 17. not only contains no limitation on the power to fix the rent, but seems to sanction the lease as effectual against third parties, whatever may have been the rent stipulated, 'for sik like male as thai tuk them of befoir.' The only limitation is, that it shall not be a rent entirely elusory; which seems to be a fair construction of the statute, as applying expressly and giving efficacy only to leases having an *ish* and a *male*.[6]

2. As to Lands under Entail; it is in this situation that the practice of taking grassums has most prevailed. Under strict entails in Scotland, the proprietor had in

Gosford. 2d July 1757, Douglas of Dornock's Creditors.

[1] 11th December 1677, Oliphant against Currie; 2. Stair, 574. 10th February 1698, Cockburn, &c. against Sampson; 1. Fount. 822.

[2] 16th February 1748, Factor on Auchinbreck against M'Lauchlan; Kilk. 534; Elchies, *Tack*, No. 14. 9th March 1754, Robertson against Spalding; Elchies, *Removing*, No. 8.; Notes, p. 405.

[3] 16th February 1780, Walpole and Alison against M. Beaumont. 3d February 1787, Morrison against Pattullo. 14th June 1814, Bell against Lamont.

[4] 2. Stair, ix. § 29. 31st January 1626, Ross, Durie, 266. where an *opinion* given by the Court, that a discharge of the rent to the tenant, in extinction of debt, would not avail against singular successors. 2. Ersk. vi. § 29. M'Tavish against M'Lachlan, 11th February 1748, 1. Falc. 325. Lord Cranstoun's Creditors against Scott, 4th January 1757. Here there were two questions, 1. Whether a power given by a separate deed to retain rents for relief of obligations, undertaken for the landlord, was effectual against creditors? and, 2. Whether a lease prorogating a former, and containing a similar power, was effectual, no possession having as yet followed? The power to retain was held not effectual after sequestration; as to the others, see above p. 68. Note [1].

[5] 4th January 1757, Lord Cranstoun's Creditors against Scott. 2d July 1757, Douglas of Dornock's Creditors against Carlyles.

[6] 2. Ersk. Principles, vi. § 10. 2. Ersk. vi. § 27. 2. Bank. ix. § 1.

general such slender means of providing for his family, his widow and children, that it became a very common practice to raise a fund by means of grassums taken from the tenants with great diminution of the periodical rent. This, especially when combined with a power of granting leases of long duration, threatened the utter impoverishment of heirs of entail; but it has now been placed, by the determinations of the House of Lords, on the true footing, and a great ruling principle applied to guide the determination of the several cases. Three cases may occur:— Grassums.

1. If there be no prohibition to diminish the rental, or to alienate, the same rule must apply as to the case of purchasers; there can be no objection under the entail taken against a lease, whatever rent, not elusory, may be stipulated.

2. If there be a prohibition to alienate, although there may not seem to be much danger of evil arising from the diminution of the rents, in a lease of moderate duration; yet it is an important question, and of some difficulty in construction, whether it be *lawful* to cast the transaction in a form which will deprive the succeeding heir of any part of the proper rent, which is the fair produce of the estate; so as to bring, by anticipation, into the pocket of the granter of the lease what ought to have been spread over all the years of it as a rent? Something of this has been mingled in the argument in most of the cases of leases of long duration, as tending to make up the character of alienation. But applied strictly to the question of grassums, the principle adopted is, That the heir of entail in possession has no right to take to himself a greater benefit from the estate than he leaves to be reaped by his successors, whether that benefit be derived from an anticipation of rent in the shape of grassum; or from varying rents, excessive at first and inconsiderable afterwards; or in whatever shape of bonus, or otherwise, it may be taken.[1]

3. In order to counteract the general prohibition against alienation, an express power is frequently granted to give leases, under condition of not diminishing the rental. If the prohibition be against diminution of the rental *generally*, it seems to be considered as having reference to the state of the rental under the last lease; so that any augmentation which circumstances may admit of, may be taken as grassum. But a prohibition to let leases below the *just rent or avail for the time*, is a bar to the taking of grassums, as forming in all cases truly deductions from the proper rent. This, after a series of the most learned and ingenious arguments which perhaps ever distinguished the discussion of any legal difficulty, the House of Lords have finally settled.[2]

Wherever the prohibition against diminution is fixed expressly to certain limits, it is sufficient if those limits be adhered to; the power of the heir in possession is unrestricted beyond that point; and he may take grassums, and dispose of them at his will, in so far as there is any augmentation beyond the limits assigned.[3]

§ 4. OF MELIORATIONS AND IMPROVEMENTS.

The improvements and operations, by which the productive powers of the soil are aided, or the necessary facilities to cultivation afforded, properly are incumbent on the

[1] See this question of grassums, in all its relations, largely discussed in the House of Lords, and the above stated principles settled in the Queensberry leases, 1. Bligh, 339—534.; 5. Dow, 297. See also Duke of HAMILTON against SCOTT WARING, 21st May 1816, as decided in House of Lords, 2. Bligh, 196.

[2] See the Queensberry cases, ut supra, Note [1].

[3] WELLWOOD against WELLWOOD, 12th November 1823. Here the restraint was against letting tacks 'at a smaller yearly rent than 3 bolls of oatmeal, at '8 stone weight per boll, for each acre so to be set.' But this allowed the heir in possession to take a grassum of L.12,000, on a lease for 999 years. This was held good against the heirs of entail. An heir of entail claiming the bond for L.12,000, as truly rent, which

landlord, to be replaced by an annual payment on the part of the tenant. The yearly return made by the tenant for such improvements, whether of drains, fences, farm-offices, &c. is not, strictly speaking, rent, as already observed. But it may appear that, as such return is paid to the landlord along with the rent, a part at least of the capital expended on improvements ought to form a burden on those who successively derive the benefit.

Under Entail.

1. It has been fixed, however, that an heir of entail, under restraints against alienation and the contraction of debt, is not, at common law, entitled to burden the estate, or succeeding heirs, with the expense of improvements.[1] But the same statute which authorized the granting of improving leases, gave also power to heirs of entail to burden the succeeding heirs of entail to a certain extent with this expense. This was the statute 10. Geo. III. cap. 51. By section 9. et seq. of this Act, on observing certain precautions, giving certain notices, and lodging with the sheriff-clerk the vouchers of payment, the sums expended on improvements are allowed to form a burden on the succeeding heirs, to the extent of certain proportions of the rents of the estate. But, 1. The precautions enjoined must be observed with the most scrupulous accuracy, else the benefit of the Act is forfeited, and the rule of the common law will guide the decision. 2. The sum expended will not ground any adjudication against the entailed estate. And, 3. While it forms a debt personal against the heir, it is declared by sect. 15. that this claim shall be preferable over every other creditor of the heir in possession, in competition for the rents.

Where no Entail.

2. Where there is no entail, expense laid out by the proprietor can ground no claim against singular successors: But where the tenant is to make the improvements, and the lease bears that he shall receive a consideration at the close of the lease, this will be effectual against singular successors.[2]

§ 5. EFFECT OF LOCAL CUSTOM.

But although a lease in writing, containing such terms clearly expressed, will be deemed effectual against purchasers and creditors, how shall particular claims and rights of the tenant, arising not under the written lease, nor from the general law, but from local custom, be disposed of? If, for example, it should be the custom of a particular district, that the tenant may remove the houses on the farm, or all that can be removed, and claim the value of what he leaves, will that affect a singular successor? In a case of this sort, the Court, distinguishing between a local usage and a verbal bargain or understanding as to a particular farm, held the stranger bound by the former.[3] But serious doubts have been raised to what extent conditions implied from usage can be sanctioned? In the House of Lords, after very ample discussion, on two occasions, relative to the disposal [4] of

ought to be reconverted into rent for the benefit of the substitutes, it was held a bond good to the heir of entail to whom it was granted, and his heirs. 2. Shaw and Dunlop, 475.

See Earl of ELGIN against WELLWOOD, 1821, House of Lords, 1. Shaw's Appeal Cases, 44.

[1] DILLON against CAMPBELL of Blitheswood, 14th January 1780; FARQUHAR against WEBSTER, 3d March 1792; Bell's Cases, 207. TAYLOR against BETHUNE, March 1792; Bell's Cases, 214. TODD and MONCRIEFF against SKENE, 14th January 1823; 2. Shaw and Dunlop, 113.; affirmed 26th June 1825.

[2] ARBUTHNOT against COLQUHOUN, 5th February 1772, Fac. Coll. MAXWELL MORRISON against PATULLO, 3d February 1787.

[3] 14th June 1814, BELL against LAMONT.

[4] Duke of ROXBURGH against ROBERTSON, 28th June 1816, reversed in House of Lords, 2. Bligh, 156. GORDON against ROBERTSON, 11th March 1825, 3. Shaw and Dunlop, 656.; reversed in House of Lords, 19th May 1826, 1. Wilson and Shaw, p. 115. OGILVY against GRUAR, Aug. 3. 1770, 1. Hailes, 364. 1. Bell on Leases, 331. Note.

the straw of the way-going crop, the lease was held as the rule of the contract; not to be extended by any *implied* assent to local usages.

SECTION II.

OF THE TENANT'S ESTATE, AS AVAILABLE TO CREDITORS OR ASSIGNEES.

THE permanency of the tenant's estate is of great consequence to the agricultural interests of Scotland; and absolute security on this point is the only certain encourager of honest industry, spirited exertion, and the fearless application of capital in the cultivation of the land. While yet tenants were entirely dependent on the will of their landlords for the continuance of their possession, no system of cultivation could be followed. The rotation of crops, of which the average produce is necessary to indemnify the original outlay, could not be depended on, and was not studied, or understood. The science and art of agriculture may almost be said to commence with the permanence given to the right of the tenant; and although this department of the law of Scotland has not yet arrived at perfection—the delectus personæ implied in leases being still a cause of great uncertainty—perhaps, on the whole, considering the intimate relation of landlord and tenant, as much relaxation has been given to the landlord's privilege, as well can be expected in a matter so nearly connected with the comfort of his own possession of his lands.

LIMITATION OF TENANT'S ESTATE BY DELECTUS PERSONÆ.—By the law of Scotland, the landlord is held to select his tenant with an especial view to personal qualifications. In this delectus personæ he is considered as having two objects in view:—1. To procure good security for his rent; and, 2. To be assured of the skill and fidelity of his tenant as an agriculturist, and of his peaceable disposition as a neighbour and a tenant.

In Scotland, as well as in England, a lease is regarded as an absolute estate for years. But, in England, this has more effect in colouring the whole doctrine of the law relative to the assignable nature of a lease than in Scotland. In England, so absolute is the tenant's right, that his creditors may take the lease under a commission of bankruptcy, although it should bear an express provision against the tenant's assigning without the landlord's consent.[1] The landlord's remedy is, by stipulating for re-entry on the tenant committing an act of bankruptcy; or that the farm shall be actually occupied by the tenant, and that he shall actually hold the lease, and 'depart with no part of it.'[2]

By the law of Scotland, the bias inclines the other way. Instead of the lease being held in the general case to be assignable, it is considered as naturally exclusive of assignees, in being granted with a particular respect to the personal qualities of the tenant; insomuch that it is necessary to have a declared, or, at least, an implied consent, that

[1] This settled in DOE against CARTER, 8. Term. Rep. 57. where the whole question is amply discussed. This determination was approved of by the Master of the Rolls in WEATHERALL against GEARING, 12. Vesey, 513.; and very recently the same doctrine delivered in King's Bench, DOE against BEVAN, (1815), 3. Maule and Selwyn, 358. The principle of these cases is so narrow as this, that the statute execution of a commission of bankruptcy, is no breach of covenant by deed of the tenant, to which alone the stipulation applies; or that the exclusion of *assignees* is not the exclusion of *assignees by law*.

[2] See cases in preceding Note; and DOE against CLARK, 8. East. 185.

the creditors shall have right to enter upon the lease, or to sell it, in order to entitle them to do so.

1. HEIRS.—Originally, in Scotland, the delectus personæ implied in leases was so strong, and the lease so strictly personal, that the right was not held descendible even to HEIRS, unless they were expressly mentioned in the lease. But the whole spirit of the law, and the nature of the connexion between proprietors and their vassals and tenants, is now changed, and a freer interpretation of the contract of lease has been introduced. Heirs now succeed in leases without any special mention of them.[1]

2. ASSIGNEES.—In agricultural leases of ordinary duration, the connexion which subsists between landlord and tenant, and the annoyance which a landlord may suffer from a disagreeable neighbour, still continue the delectus personæ so strongly, as to require an express destination to ASSIGNEES, in order to make effectual a voluntary transference without consent of the landlord.[2] The more slender connexion which subsists between the landlord and the tenant of a house or urban tenement, with the many accidents that in a lease for years may render it necessary for the tenant to leave the house, and desirable for both parties that he should have a power of assigning, have been held to justify an opposite inference in such leases, and to give an implied power to the tenant to assign;[3] which yields, however, to the implied prohibition against assigning for a different purpose or sort of habitation.[4] The cases stand thus opposed: In agricultural leases of ordinary duration there is an *exclusion* of assignees, unless the contrary be stipulated; in urban, there is an *admission* of assignees, unless excluded.

Assignment differs from sublease mainly in this, that the landlord who accepts of an assignee passes from all claim against the cedent, and takes the assignee as sole party in the lease; while a sublease has no effect to discharge the principal tenant.[5]

3. SUBTENANTS.—The above doctrine holds relatively to SUBTENANTS. They, as well as assignees, are excluded in agricultural leases, unless an express stipulation to sublet,[6] or a

[1] 2. Ersk. vi. 31.

[2] Erskine has said, that marriage is a virtual or legal assignation of a lease; and that as the marriage is indissoluble, the lease falls. 2. Ersk. vi. 31. But this is not law. The marriage is not an assignation of a lease. As heritable property, it does not fall under the jus mariti, although the accruing fruits do.

In HUME against TAYLOR, 16th February 1734, Elchies, *Tack*, No. 2. the Court held a lease to be void, on the woman who held it being married. But that decision has not since been approved of. See ELLIOT against Duke of BUCCLEUCH, 4th December 1747. And accordingly, in GILLON against MUIRHEAD, 9th March 1775, the Court sustained a lease granted to a man and his wife, and the longest liver, as not made void by the surviving wife's subsequent marriage. Affirmed on appeal.

[3] In a lease of urban tenements, the Court found the rule of exclusion not applicable. 'Several of the 'Lords, however, were of opinion, that there is often 'no less an electio personæ in the tack of a house 'than of land.' 7th January 1748, AITCHISON against BINNIE, Kilk. 533. Those Judges appear from Elchies to have been Arniston, Drummore, Murkle, Shewalton, and Elchies himself. Elchies, *Tack*, No. 13. Notes, p. 444.

This determination was confirmed, 10th July 1811, ANDERSON against ALEXANDER and MATHER, 16. Fac. Coll. 327.

[4] In certain cases of urban tenements, a delectus personæ seems as natural or necessary as in an agricultural lease,—as in the case of a shop, tavern, &c. having a particular character; and although perhaps it was better to bring the whole to a general rule, leaving the parties to regulate the matter by special agreement, there is one case in which an alteration in the nature of the possession, coupled with a personal objection to the assignee known to the tenant, were sufficient to exclude the assignee. GORDON against CRAWFORD, 15th June 1825, 4. Shaw and Dunlop, 95.

[5] SKENE against GREENHILL, 20th May 1825, 4. Shaw and Dunlop, 25. See also LOW against KNOWLES, 5th July 1796, 11. Fac. Coll. 532.

[6] 22d January 1788, ALISON against PROUDFOOT, 10. Fac. Coll. 29. In that case, the general question was decided on a hearing in presence; and although some lawyers of high authority were dissatisfied with the determination, and doubtful of the soundness of the principles on which it rested, the decision has since been confirmed in a lease of nineteen years. 8th March 1791, Earl of PETERBOROUGH against MILNE; and 5th De-

destination to heirs and subtenants be in the lease; and they are admitted in the case of urban tenements, unless expressly excluded.[1]

4. Long Leases.—The rule is reversed in leases of long duration. Such leases are generally improving leases, and the tenant is supposed to be induced to risk somewhat on the faith of the possession being assured to him during the whole term. On this ground the right both of assigning and of subletting is implied, unless expressly excluded.[2] And the express exclusion of the one will not exclude the other.[3] The ordinary duration of agricultural leases is nineteen or twenty-one years; and although there has not been laid down any precise rule by which to determine what in this class of questions is to be deemed a long lease, the term of thirty-eight years has been held sufficient to confer the implied power. It has also been implied in liferent leases.[4]

5. Exclusion of Adjudgers.—But although there is an implied exclusion of voluntary assignees in agricultural leases, an express exclusion of assignees is requisite to prevent creditors from attaching the lease by legal diligence.[5] Such express exclusion of assignees will, in all cases, whether the lease be of short or of long endurance, prove fatal to the diligence of creditors.[6] Leases are sometimes made to the tenant, and his heirs and subtenants, excluding assignees. Where the tenant in such a case becomes a bankrupt, and, at the desire of his creditors, gives a sublease of the whole farm, it is almost the same with assigning the lease; but no objection can be taken to this on the part of the landlord.[7]

6. Leases which exclude assignees, commonly exclude subtenants also; and this exclusion is effectual to prevent a sublease to creditors without the consent, express or implied, of the landlord.

7. Exclusion Personal to Landlord.—Where an agricultural lease is taken ‘ to ‘ heirs,’ or an urban lease is made to exclude assignees and subtenants, the exclusion is in law held to be absolute. It may be questioned, however, whether an assignment is in such a case null, or whether it is only subject to an objection on the part of the landlord. Erskine seems to consider such assignation as absolutely null, and incapable of transmitting any right to the assignee.[8] If this doctrine be correct, the heir entitled under the destination to take the lease after the tenant's death, should have a right to challenge the conveyance to the assignee; and the lease should (with consent of the landlord) afford a fund of payment to the creditors of the heir: But the Court have decided on a different principle, and held the landlord alone entitled to challenge.[9]

cember 1806, Lord Cassilis against Dunlop, in a lease of twenty-one years.

[1] See p. 76. Note [3]. In Anderson's case, the lessee of a house was allowed to sublet, the nature of the possession not being changed.

[2] 22d May 1794, Simpson against Gray and Webster. 10th June 1802, Pringle against M'Laggan.

[3] 22d November 1770, Trotter against Dennis. 28th June 1768, Crawford against Maxwell and others. 6th July 1791, Ogilvie against Creditors of Fullarton.

[4] See cases in the two preceding Notes.

[5] 2. Stair, ix. 26.; 2. Ersk. vi. 32. 4th December 1747, Elliot against Duke of Buccleuch; Kilk. 398. 6th July 1791, Kinloch against Creditors of Fullarton, and Ogilvie against Creditors of Fullarton.

This proceeds on a principle somewhat analogous to that of the English law, as already stated, Note [1]. p. 75.

[6] See the above case of Elliot, Elchies' Notes, 444. A lease for 57 years, with an express exclusion, found not adjudgeable. 21st November 1770, Cunningham against Hamilton.

See also below for the possibility of evading such exclusion by means of a manager, &c.

[7] 28th June 1758, Crawford against Maxwell and Creditors. 22d November 1770, Trotter against Dennis; Hamilt. p. 14.; and 6th July 1791, Ogilvie against Creditors of Fullarton.

[8] 2. Ersk. vi. § 31.

[9] 8th December 1801, Hay and Wood; Fac. Coll. Here, a lease to David Hay and his heirs, excluding

8. Clause of Exclusion, unless with Landlord's Consent.—Where the lease contains a clause admitting assignees or subtenants, 'if approved of by the landlord,' or excluding them 'unless approved of;' an opinion formerly prevailed, that the landlord was under judicial control in the exercise of his discretion; that he was bound to assign his reasons for rejecting the tenant; and that he might be compelled, if his objections were frivolous, to admit him. In short, this was considered as a case in which both parties, contemplating the many justifiable causes that may arise on the part of the tenant for abandoning the possession, without renouncing the benefit of the contract; agree that, in accomplishing his purpose, the tenant is to meet with obstruction only if he should propose as tenant one whom, in equity and fair dealing, the landlord can hold exceptionable and unfit. Accordingly, it was at one time laid down, that in such a case the landlord 'was not entitled arbitrarily, or out of mere caprice, to withhold his consent.'[1] And this doctrine, delivered in a book of authority, was long in practice held as the settled construction of this contract. But the doctrine, though confirmed by subsequent cases,[2]

assignees, was by David's son, after his father's death, assigned to his natural son. The son having died, Hay and Wood, as heirs at law, challenged the assignee's right. The Lord Ordinary and the Court held the clause of exclusion entirely in favour of the landlord; and, as he did not concur with the tenant's heirs, the action was dismissed.

In the case of Deuchar against Lord Minto and others, 20th November 1798, a similar judgment was pronounced by Lord Meadowbank, and confirmed by the Court; and it was only after the landlord appeared and concurred with the heir in the challenge, that the assignation was held bad. 12. Fac. Coll. 208.

[1] In the Dictionary of Decisions, vol. iv. p. 75. this report stands:—'The Lords found, that where the 'heritor's consent was made necessary to the assignation, he was not entitled arbitrarily, or out of mere 'caprice, to withhold his consent, where the proposed 'assignee was in good circumstances, and otherwise 'unexceptionable.' 5th March 1785, Duke of Roxburgh against Archibalds; 4. Dict. 75.

[2] Sir Alex. Ramsay Irvine against Valentine, 29th June 1791. There a lease was granted by Sir Alexander to 'Valentine, his heirs and assignees, such 'assignees being always agreeable to, and approved 'of by the said Sir A. R. Irvine, his heirs and successors, by a writing under his or their hands to 'that effect.' The endurance is 'for the space of '19 years from and after his entry thereto; and which 'tack is to endure and continue after the expiration 'of the said 19 years, for all the years and crops of 'the lifetime of the person in the actual possession 'of the said lands at the expiration of the said 19 'years.' Valentine possessed for some years under this lease, and becoming at last insolvent, a sequestration was applied for under the Act of the 12th of the King; and under this statute a trust-deed was afterwards executed, by which the trustees were empowered to dispose of the leases. At a meeting of his creditors, the landlord attended and presided, when a resolution was taken to sell the lease. Previous to the sale, the landlord, in a letter to the trustees, said, 'I consent to an assignation of the lease, '&c. on the following conditions:—1. That the te-'nant shall reside on the farm, and have no other re-'sidence and no other farm; 2. That the tenant shall 'find security for five years' rent, and for the stocking 'of the farm; and, 3. That certain regulations in crop-'ping shall be observed.' When the lease was exposed to sale with these conditions annexed, nobody appeared to offer but the landlord himself, and evidence was brought to shew that the competition was in this way prevented. The landlord bought the lease; and after keeping it for some time in his own hands, let it to another tenant for nearly double the rent. Valentine having been absent during those proceedings, brought an action on his return against his landlord and the new tenant. Lord Gardenstone pronounced a judgment, finding, 'that the conditions and restric-'tions proposed by the defender, Sir Alexander Ram-'say, and adopted by the trustees, as articles of the 'public roup, were competent, fair, and rational; and 'that the purchase made by the defender at the public 'roup was unexceptionable.' The Court, on reviewing this judgment, reversed it; and this appears to have been upon the ground, that the landlord, by the proposal of absurd and unauthorized conditions, had contrived to secure to himself an augmented rent at the tenant's expense. Lord President Campbell held incidentally, that the clause relative to assignees gave a discretionary, but by no means an arbitrary power of refusal to the landlord; and that the conditions insisted on by the landlord were not justified by the discretion he had reserved to himself. Lord Eskgrove held, that by his presence at the meeting the landlord had assented to the sale, upon the original conditions of the lease. The judgment was, to 'sustain the 'reasons of reduction in so far as regards the landlord, 'and reduce, decern, and declare accordingly: find 'him accountable for the profits of the farm, &c.; and 'find him and his tenant bound to remove at the next 'term.' The House of Lords affirmed the judgment. The only difference was in these two respects:—1. A reservation was inserted of all claims competent between the creditors and Sir A. R. Irvine against each other; and, 2. 'As it appears that the said Robert

is now entirely abandoned on full consideration; and the landlord's power of exclusion under such a clause is held to be absolute.[1]

The creditors may insist on the tenant granting an assignation or sublease, with the chance of its being objected to; for the old doctrine, which inferred forfeiture from the mere attempt to assign, is now exploded. If the lease, however, should contain not only an exclusion of assignees, but also a consequent irritancy of the tenant's right, it seems doubtful whether the creditors could insist on a thing so useless to themselves as an assignation, and so destructive of the right of the bankrupt.[2] The adjudication, and also the deed of conveyance to be granted by a bankrupt under the Sequestration Act, (54. Geo. III. c. 137. § 29.), is not hurtful to the tenant, being only effectual 'so far as he can safely convey.' Under the subsisting Act, then, there is no occasion for the precaution taken in a case under the former statute.[3]

9. Where the creditors adjudge a lease that is open to diligence, or where in a bankruptcy such a lease is adjudged or assigned to the trustee, it may be doubted whether the creditors or the trustee are to be held as proper tenants, independently of any new contract of lease. 1. The landlord is entitled to insist for a tenant, who shall be liable for arrears and rent:[4] 2. When the creditors, by themselves or by the trustee, take up the lease and cultivate the farm, they are liable as tenants, not only for the rent of the year which they possess, but also for arrears and all the obligations under the lease.[5] 3. Where

'Kinnear (the tenant) has not been heard for his interest, it is therefore ordered, that the cause be remitted back to the Court of Session to hear parties upon the said interest of Robert Kinnear; and in respect that, in case of judgment passing in favour of Robert Kinnear, the privity and relation which may thereupon be found to subsist between Sir Alexander Irvine and Robert Kinnear may appear to make some difference as to the mode and form of redress which may be competent to the pursuer, Alexander Valentine—it is farther ordered and adjudged, that the consideration be, in like manner, remitted back; and that in the mean time the said interlocutor be reversed in so far as it finds Sir A. R. Irvine, and Robert Kinnear, his tenant, must remove from the farm at Martinmas next, without prejudice, however, to any point which may arise thereupon; and that with these variations the said interlocutor be affirmed.' House of Lords, 4th March 1793, Mr Baron Hume's Sess. Papers.

[1] MUIR against WILSON, 20th January 1820, Fac. Coll. I was counsel in this case, and gave an opinion extrajudicially on it, conformably to the authorities in the books. When the question came to be discussed, Lord Alloway ordered it to be reported for the opinion of the Court, 'In respect that an opinion has prevailed for some time in this country, founded upon the authority of the cases Duke of Roxburgh against Archibald, 5th March 1785, (Mor. p. 10412.) and Sir Alexander Ramsay against Valentine, 29th July 1791, that when a lease excludes assignees and subtenants without consent of the landlord, this contemplation of consent so far alters the rights of parties, that the landlord must assign some reasonable cause for refusing his consent; and a great deal has now been stated to shake the authority of these decisions, as establishing that point; and the Second Division of the Court, in the case of M'Kenzie against Learmont and Munro, not reported, has pronounced a decision directly contrary thereto,—In order that this matter, of such importance to the landlords and tenants of this country, may be put to rest, makes avizandum with the case to the First Division of the Court,' &c. A good report of the case will be found in a note to the 4th edition of Mr Robert Bell's Treatise on Leases, published by Mr William Bell, p. 181.

[2] The creditors of a bankrupt tenant, whose lease excluded assignees and subtenants, insisted for a conveyance to it. The bankrupt refused, on the ground that his lease would be forfeited. The Court was clear that he was bound to grant the conveyance; but that, if his lease contained a clause of irritancy, it would both be invidious in the creditors, and hurtful to their interests, to insist for it, and that it ought not to be allowed. An inquiry into the conditions of the lease was ordered. I believe the case was afterwards compromised. 20th November 1799, NIVEN against MACFARLANES.

[3] The judgment, after confirming the nomination of the trustee, and ordaining the bankrupt to dispone, bears this exception:—'With the exception of the last alternative prayer for special powers over the lease for the benefit of the creditors, as to which, refuse the prayer of the petition, and under the said exception adjudge, &c. in terms of the statute.'—Sequestration of THOMAS JOHNSTON, 4th February 1813.

[4] NISBET'S Trustee, 10th December 1802, Fac. Coll. Landlord found entitled to remove the trustee, unless he would pay not only present and future rent, but also arrears.

[5] CUTHIL against JEFFREY, 21st November 1818, Fac. Coll. Sir W. FAIRLY against NIELSON and FULTON, 18th December 1821; 1. Shaw and Ballantine, 242.

they abandon the possession, selling off the stocking, and leaving the farm uncultivated, the landlord may let to another tenant;[1] and also, at the same time, claim on the estate for damage, if the new lease be at a lower rent; holding the bankrupt as his tenant, and proceeding on the maxim,—'In loco facti imprestabilis subsit damnum et interesse.'

10. Power to Possess for Benefit of Creditors.—Although the creditors cannot directly acquire, either by assignation, or by sub-lease, or by legal process, where there is an express exclusion in the lease; it is important to inquire, whether they may not indirectly attain the same object?

1. Bankruptcy does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly, and perform the other stipulations of the contract.[2] All that the landlord is entitled to do in case of his tenant's failure to pay the rent, is to have recourse to the hypothec, and the proceedings prescribed in the act of sederunt 1756.[3] And as the tenant's capacity of acting still remains to him after bankruptcy, his creditors seem to be entitled, by agreement with him, to supersede their diligence, and allow him the use of the stocking, so as to enable him to possess the farm upon accounting to them for the profits,—a certain allowance being made to him for his subsistence.[4]

[1] See Lord Kilkerran's notes subjoined to Elliot against Duke of Buccleuch, p. 397.

[2] 28th June 1758, Crawford against Maxwell and his Creditors; 2. Fac. Coll. 203.

[3] 'Where a tenant,' says that act, 'shall run in 'arrear of one full year's rent, or shall desert his pos- 'session, and leave it uncultivated at the usual time of 'labouring; in these, or either of these cases, it shall 'be lawful to the heritor, or other setter of the lands, 'to bring his action against the tenant before the 'judge ordinary, who is hereby empowered and re- 'quired to decern and ordain the tenant to find cau- 'tion for the arrears, and for payment of the rent of 'the five crops following, or during the currency of 'the tack, if the tack be of shorter duration than five 'years, within a certain time to be limited by the 'judge; and, failing thereof, to decern the tenant 'summarily to remove, and eject him in the same 'manner as if the tack were determined, and the 'tenant had been legally warned, in terms of the Act 'of Parliament 1555.' Act of Sederunt, 14th December 1755, § 5.

[4] When this question first occurred, the creditors of a bankrupt tenant consulted Mr Lockhart (afterwards Lord Covington) upon the proper method to be followed for rendering the lease serviceable to them. The opinion delivered was, 'That, as the lease excluded 'assignees, an assignation should not be granted, but 'that a person ought to be appointed manager or fac- 'tor, for managing the farm.' The creditors did not follow these directions exactly. They took an anomalous sort of half assignation in favour of a person who engaged to advance a sum of money; and the bankrupt himself, who had at one time been a baker in Canongate, resumed his trade there. The Court found that the letter conveying the lease to Henderson, the manager, was equivalent to an assignation, and therefore decerned in the removing. 23d January 1773, Jamieson Durham against Henderson and Livingston; Fac. Coll.

The tenant then came to reside on the farm, and got together, with the aid of his creditors, a sort of stock. He then presented a bill of suspension of the decree of removing; and a proof was allowed whether this was not collusive. The Court, on advising informations, suspended the decree of removing, upon the ground, that although, by the lease, assignees and subtenants were excluded, yet it was material justice to allow the tenant to possess, when assisted by his creditors. 27th July 1774, Jamieson Durham against Livingston. This was stated by one of the Judges in the case of Laird, and who was one of the counsel in Jamieson Durham's case, to be the ground of the reversal.

In Laird against Grindlay, it was held, that, when a tenant dies, his heir may enter into the management for the benefit of the creditors; and that there is no necessity for the profits going to the tenant, since the heir may enter cum beneficio inventarii, and pay every farthing to the creditors. 30th June 1791, Bell's Cases, p. 296.

This doctrine was approved of in the case of the Earl of Galloway against M'Hutcheon, 6th June 1803, though the case was finally decided upon peculiar grounds. M'Hutcheon of Chang held leases from Lord Galloway, which had several years to run, and having planned great improvements, he applied for and obtained a renewal for twenty-one years. The tack excluded assignees and subtenants. M'Hutcheon died after two years' possession of the new lease, very greatly in advance for improvements, and with his affairs in disorder. His brother entered cum beneficio inventarii, to give the creditors, without risk to him, the whole advantage of the funds; and he named trustees for the benefit of the creditors. He possessed the farm by managers, giving up the whole profits to his brother's creditors. An action of removing was first brought by the landlord, and afterwards an action of declarator. A condescendence by the

2. But where the tenant does not himself possess the farm, he will not be allowed to appoint a manager accountable to the creditors. This device was at one time thought to be sanctioned by the case of Jamieson Durham;[1] and it, accordingly, was held to be legitimate:[2] But it is now settled, that a mandate of this sort, intended to give the creditors the entire benefit of a lease, under the administration of a manager, is to be regarded as a covered assignation;[3] and, above all, it is held, that the lease is forfeited by the tenant's absence from Scotland.[4]

3. Although creditors may, with the consent of the bankrupt, or of his heir, elude the force of a common clause of exclusion, it would seem that there is no direct way in which they can force the tenant so to concur. They may do execution against his person, take his stocking and his crops, and oppose, on the ground of his dishonest retention of the lease, any application he may make for protection, liberation, or discharge; but there is no form of diligence by which the lease can in such a case be taken into their hands, or placed under a manager.

IRRITANCY ON BANKRUPTCY.—A declaration that the bankruptcy of the tenant shall infer a forfeiture of the lease, will, in all cases, deprive the creditors of the benefit of the lease, where they have not taken the precaution to avoid rendering the tenant bankrupt.[5]

landlord was ordered, and, upon the relevancy of the proof, some difference of opinion took place upon the Bench. The majority of the Court was earnest in having the former decisions followed out, and a point so solemnly fixed not again set afloat; but it was thought proper to let in all the light possible relative to the circumstances, and the proof was allowed. At advising the proof, it was held, that the tenant, in entering cum beneficio inventarii, and giving over the profits to the creditors, used his own right not only legally, but laudably; that he was entitled to possess by a manager, since his own residence was not required; and that Laird's case was a solemn decision on the general principle, and ought not to be overturned, nor even lightly questioned. But afterwards M'Hutcheon came to an agreement with the creditors, who, in consequence of a sum of money, discharged his brother's debts, and then he entered into possession by his own servants. The case was finally decided, on the effect of this transaction, against Lord Galloway.

And in the case of MONRO against MILLER, 11th December 1811, where the Court held the appointment of a manager to be ineffectual, the tenant having left the country; the opinion of the Court pointed towards a decision in favour of the creditors, if the tenant had really and bona fide returned to reside upon the farm and cultivate it. 14. Fac. Coll. 384.

The same determination, 13th December 1811, WATSON against DOUGLAS; ib. 412.—*N. B.* This case decided on consulting with the First Division of the Court. BUCHAN SYDSERF against TODD, 8th March 1814; Fac. Coll.

[1] This case was quite misapprehended. The true circumstances are stated above, p. 80. Note [4].

[2] In LAIRD against GRINDLAY, see Bell's Cases, 296.; and in Lord GALLOWAY against M'HUTCHEON, see above, p. 80. Note [4].

[3] 11th December 1811, MONRO against MILLER's Creditors; 14. Fac. Coll. 384. Here the tack excluded assignees and subtenants, legal as well as voluntary. The tenant went to England, and before he went granted a mandate to the trustee for his creditors, a skilful farmer, 'empowering him, as manager 'for me, to enter to and possess the lands, &c. you, in 'the first place, paying regularly the rent, &c. and 'fulfilling the other obligations incumbent on me as 'tenant; and any overplus or profits arising from the 'said land, you are to apply in extinguishing the 'debts due by me; and for any balance that may be 'over, you are to be accountable to me.' The Court, in respect of the desertion of the farm, and that the factory in question seems to be of the nature of a covered assignation, decerned in the removing.

[4] See the above case of MONRO, Note [3]; also, 1st December 1802, Earl of DALHOUSIE against WILSON. 13th December 1811, WATSON against DOUGLAS; 14. Fac. Coll. 412.

[5] 7th December 1805, COPLAND against GORDON. Here there was an exclusion of assignees, subtenants, and the diligence of creditors, with a covenant, 'that 'this tack shall at once be irritated and made void 'by the statutory or actual bankruptcy of the tenant.' The irritancy was found to be incurred by sequestration; and decree of removing was pronounced.

In FORBES against DUNCAN, the clause was in these words:—'It is farther agreed, that the notour bank-'ruptcy of the tenant shall be an ipso facto voidance 'of the tack.' A sequestration was awarded of the tenant's estate, and the Court held that decisive on the precedent of Gordon's case; and the Sheriff having decerned in the removing, the Court refused to advocate. 2d June 1812, 14. Fac. Coll. 662.

It was, in England, held doubtful, whether a stipulation could be effectual for the landlord's re-entry on the tenant's committing an act of bankruptcy on which a commission should issue. PHILPOT against HOARE, Ambler, 480. But it seems now to be settled, that

But where the irritancy is stipulated on mere insolvency, the effect of it is rendered doubtful by the ambiguity of the condition. Nothing less than a proof of clear and undoubted insolvency in a declaratory action would suffice.[1]

Retention for Meliorations.—Where, in consequence of the tenant's bankruptcy, and a clause of exclusion or of forfeiture, the lease is forfeited, the creditors seem to be entitled to claim from the landlord the value of meliorations which may have been made in contemplation of possessing during the whole term, but which the tenant's misfortunes have now thrown into the landlord's hands.[2]

Where a lease is granted to a company, with an exclusion of subtenants and assignees, the bankruptcy of the company puts an end to the lease.[3]

Power to Name an Heir.—Similar to the effect of an entail, is that prohibition which the clause excluding assignees and subtenants in a lease produces in the event of the tenant's death. It has been found, that the effect of this clause is to prevent the tenant from naming an heir to himself without the consent of the landlord.[4] It may be questioned whether the heir, who succeeds to the lease under such a clause, does not take it without incurring any passive title farther than as he can be shewn to have taken up a subject, which, as properly belonging to the predecessor, his creditors could attach. The stocking of the farm is, indeed, the fund of the creditors: So are all arrears due by subtenants: But, with regard to future and accruing profits, have the creditors right to them—their debtor's right having expired with his life, like that of an heir of entail?[5]

such condition is available as consistent both with law and with sound policy. Roe against Galliers, 2. Term. Rep. 133. It does not seem effectual, however, to stipulate in a lease for a term of years absolute, that it shall not be seized under a commission. See d. p. Buller, J. loc. cit.

[1] Hog against Morton, 4th March 1825; 3. Shaw and Dunlop, 617.

[2] Morton against Lady Montgomery, 22d February 1822; 1. Shaw and Ballantine, 383.

[3] 11th December 1805, Campbell of Shawfield against the Calder Iron Company. Campbell of Shawfield, and 'David Muschet of the Calder Iron-'work, for himself and partners,' entered into a lease, by which Shawfield 'let to David Muschet, and his 'heirs, *secluding assignees, legal or voluntary, and all 'subtenants, except with the proprietor's consent*,' certain veins of iron-ore, &c. The Calder Iron Company, for whose behoof this lease was professedly granted, became bankrupt; and a new company having bought their works, Muschet became bound to supply them with iron-stone from the veins contained in the lease. Security was offered for the rent. But Shawfield brought an action for declaring that Muschet, and the said Calder Iron Company, 'of which he was a partner, 'and for whom he took the lease,' had failed 'to im-'plement the conditions;' and that, therefore, 'he, 'for himself, and his said partners,' had forfeited the lease, and that the tack was extinct. The Court held the lease to be at an end by the bankruptcy of the company, and the necessity of their assigning to another, in order to take farther benefit from it, which the lease expressly prohibits. Lord Armadale delivered a very clear opinion, that this was a lease to the Calder Iron Company, existing and carrying on business: that this company being now dissolved, by bankruptcy and the sale of the works, there was no longer a tenant; the lease was assigned: that this would have held in an agricultural farm, but that, in a mining concern, it was of still more importance who should manage the mines. Lord Meadowbank had some difficulty, as Shawfield could have held Muschet bound to the end of the lease; and it is not easy to find one bound and the other free. But he thought the opinion delivered extremely strong; and felt relieved from further anxiety, by Muschet having gone to England, and abandoned the lease. Lord President Campbell said the lease was inaccurate: in the preamble, an agreement with Muschet, *for the use of the company*, though, in the dispositive clause, *to him and his heirs*. But the whole object of the lease made it a company concern, and the company possessed, and were really the tenants. The company, however, was now gone by bankruptcy and sequestration, and by the benefit being made over to another company. A general question has been raised as to the effect of a tenant's bankruptcy; but, without entering into that in the case of an individual, here the company, the tenant, is gone.

[4] 20th November 1798, Lord Minto against Dewar; 8th March 1803, Colonel Cunningham against Grieve; and 21st November 1805, and 25th February 1806, same case; 11. Fac. Coll. 208. and App. p. 7. See also 21st November 1805, Loudon against Adam.

[5] It was contended in a case, Campbell of Melford against Gallanach, that the heir of a tenant under such a clause *being a substitute*, was not liable as representing his ancestor. Lord Newton, in the Bill-Chamber, refused his sanction to this plea. A petition was presented to the Court, but refused on a point

CHAPTER III.

OF SUCCESSION IN HERITAGE AS AFFECTING THE INTERESTS OF CREDITORS.

By the law of Scotland the right of creditors is not limited to the estate in possession of their debtor. The creditors of an heir are entitled to adopt and prosecute their debtor's right of succession to the estate of his deceased ancestor: While the creditors of a deceased proprietor of land are entitled, after the death of their debtor, not only to follow his estate and attach it for their payment, but to hold the heir who takes the benefit of it as personally undertaking his ancestor's debts.

The former of these rights is accompanied with the adoption of all the privileges which the heir himself is entitled to exercise. The latter, in so far as it infers personal liability, suffers, in certain circumstances, a limitation to the precise amount of the ancestor's estate.

The discussion of these important rights will form the subject of this and of the next chapter. In this chapter will be considered, 1. The right of the heir's creditors, generally, to adopt and enforce his claim of succession; 2. Their right to exercise the heir's privilege of challenging the ancestor's deeds made on deathbed to the heir's prejudice; 3. Their right to exercise their debtor's other privileges as heir.

SECTION I.

OF THE RIGHT TO ADJUDGE THE ANCESTOR'S ESTATE FOR DEBTS OF THE HEIR.

The title of the heir to the feudal property of his ancestor is completed by sasine. But the heir must make his way to this final completion of his title, and establish his right to demand sasine, either by the verdict of a jury in a service, or by persuading the superior to recognize his right voluntarily in a precept of clare constat.

The title to heritable property not requiring infeftment, is completed by service alone.

The estate thus vested in the heir, comprehending all the heritable property which can descend by the law of succession, is equally liable to the debts of the heir as if it were his own original estate; with this difference, that during a certain time there is a preference given to the creditors of the ancestor over those of the heir.[1]

But it is not entirely in the discretion of the heir to take up the succession, or to abstain from it, to the effect of disappointing his creditors. They have a right of themselves to adopt and enforce his claim of succession, even against his will; to adjudge the estates as his, and to bring them to a sale for the payment of his debts. This right is established by a statute passed in the 17th century, on which, in considering the law of adjudication, a full commentary shall afterwards be given. In the meanwhile it may be sufficient here to state the general policy of this Act, that is to complete the system of remedies in relation to succession; introduced first with regard to the ancestor's creditors; then extended to those of the heir; and opening to creditors in both those situations access to the estate of the deceased. By 1540, c. 106. the creditors of the ancestor had access to his estate in

of form, the Court regretting that the merits of the question could not be tried. 11th July 1806.

[1] This is established by statute 1661, c. 24. on which see a full commentary in Book IV.

the person of the heir: By 1621, c. 27. the heir's creditors are declared to have a similar right to attach the succession which falls to him: And the form of proceeding introduced by the former statute, for the benefit of the ancestor's creditors, is new-modelled, so as to suit this new occasion.

SECTION II.

OF THE RIGHT OF CREDITORS TO ADOPT THE HEIR'S CHALLENGE OF DEEDS ON DEATHBED. COMMENTARY ON THE LAW OF DEATHBED.

THE right of creditors is not limited to the attachment of estates to which the heir's title is open. They have also a right to avail themselves of estates which have been alienated to his prejudice while his ancestor was on deathbed. And on this subject it may be proper to explain, first, the general doctrine of the law of deathbed; and afterwards, the exercise of the right of challenge by creditors.

By the law of Scotland, the imbecility of a mortal disease is held so far to incapacitate a person from conveying, burdening, or disposing of his land-estate, and generally his property descendible to his heir, as to entitle the heir to challenge, and have such deeds declared null, if prejudicial to his interests. This is called the Law of Deathbed. The rule is well laid down in Regiam Majestatem; which, although not a genuine record of the law of Scotland, does contain some of the old rules of our jurisprudence, mingled with those of England: and among others this has every appearance of being a text of Scottish law, 'Where a man in deadly sickness maketh an alienation, which in health he did not think 'of, the same is presumed to be done through trouble of mind, and not deliberately nor by 'good advice.'[1]

This law has a double object; first, To protect the interests of the heir-at-law from the devices to which they may be exposed in the imbecility of the last illness of his dying ancestor; and, secondly, To guard, by the operation of a general rule, the last stages of mortal suffering and weakness from the importunity of self-interested attendants. This last fear was chiefly excited, perhaps, by the prevailing arts of the clergy of the Romish church; who, with all the opportunities of auricular confession, and all the influence of superstition in their hands, held constantly in view the advancement of their order, and especially the aggrandizement of the church, by the possession of territorial property. But this law also contemplated the dangers to which the heir and the ancestor were exposed from other sources more domestic; and which in our days are chiefly to be dreaded.[2]

[1] Licet autem generaliter cuilibet liceat de terra sua rationabilem partem pro voluntate sua cuicunque voluerit in vita sua donare, in extremis tamen agenti hoc nulli hactenus est permissum. Unde præsumeritur quod si quis in infirmitate positur quasi admortem terram suam distribuere cæperit quod in sanitate facere noluit hoc potius ex fervore animi quam ex mentis deliberatione eveniret. 2. Reg. Maj. c. 18. § 7. and 9.

[2] Lord Stair says, 'The main reason of this law 'hath been for the quiet and security of dying persons, 'against the importunity of husbands, wives, children, 'or other relations; and especially against the impor-'tunity of the Romish priests, who pretended a far 'greater interest and duty of mortification to pious 'uses than of leaving to heirs, not only as meritorious 'to expiate the sins of the donors' lives, especially of 'the more vicious persons, but also for obtaining con-'stant prayers and supplications for delivering their 'souls out of purgatory. And therefore this is a most 'convenient and just law, when men, through any 'indisposition, continue in or about their houses, and 'are not seen to indifferent and unsuspect witnesses, 'that thereby they may be free from all importunity, 'seeing they can do no more but dispose of their share 'of their moveables, which is rarely of considerable va-'lue, moveable debts being deduced.' 4. Stair, 20. § 38.

Dirleton, after likening a dying person to the carcass about which the eagles hover, says, 'Ex eo tem-'pore igitur, quo æger sese domi abdidit, nec amplius

It is a fault, not unfrequent among theoretical lawyers, to reduce every doctrine to a single principle, as more simple, and more according to the law of nature; and in this spirit a contest has been maintained, in respect to the policy of the law of deathbed, whether it is referable to the interests of the heir, or to the tranquillity of the dying ancestor. Lord Kaimes, on several occasions,[1] has laboured to establish the interest of the heir as the sole object of the law; while our old lawyers seem rather to look to the tranquillity of the dying man as the purpose chiefly contemplated. But in practical jurisprudence, which has to deal with the mingled business of human life, any attempt to restrain the rules of law to the operation of too simple and uniform a principle is dangerous. In the present matter, both the principles which have been mentioned combine; and whatever may be thought of the expediency of the law,—whether, for the purpose of protecting against a possible danger, an unbending presumption ought to be established of evil design and importunity; or whether it were not better to leave every man to encounter the risks which nature has planted around him, trusting to the vigilance of the heir to detect and expose frauds,—it is impossible to deny that this provision of our jurisprudence, though lauded by our own lawyers and by others, is far from being perfect as a protection to the heir, but, on the contrary, is exposed to palpable evasions: while, as a safeguard to the dying man, it is perhaps still less effectual; more particularly in our days, when the whole power over the moveable succession, generally much more valuable, is open to such importunity.

In commenting on this law it is fit to consider,—

1. The state or condition which the law holds to be Deathbed;
2. The deeds which are challengeable;
3. The various attempts to evade the law of deathbed; And,
4. The exercise of the right of challenge on the part of creditors.

§ 1. LEGAL CHARACTER OF DEATHBED.

Liege Poustie.

While a person is in his ordinary state of health and capacity, and not a minor, nor cognosced as an idiot or madman, nor under interdiction, he is said to be in 'legitima 'potestate,' or in 'liege poustie;' and has the full and uncontrolled power of disposal of his property. The restraint on this power begins with the commencement of his mortal disease. From that moment law presumes him to be unable to resist importunity; and on that account imposes restraints on the exercise of his disposing power; raising a presumption that any thing which he then does to the prejudice of his heir is the result of importunity alone. But this presumption is not absolute. There are two several counter-proofs, or indications, of the existence of a strength sufficient for resistance, to which the rule yields. 1. By a statute in 1696, c. 4. the survivance of the granter during the space of sixty days 'is a sufficient exception to exclude the reason of deathbed;' and, 2. At common law,

Deathbed.

'in propatulo, foro, aut ecclesia sui copiam facit; 'licet ex morbo non decumbat, lento fortasse, eoque 'magis periculoso, dicitur, esse *lecto ægritudinis* et in 'extremis agere; et alienatione terrarum, aut rei ali- 'cujus hæreditariæ ei prorsus interdicitur.' *Dirleton, voce Legitima Liberorum.*

Of this consuetudinary law Lord Chancellor Eldon, in the House of Lords, said, 'It was held out that this 'was a personal privilege in favour of the heir-at-law, 'a regulation for his benefit alone: But in my opinion 'this comes far short of the excellence of the regulation: it is also highly favourable to the dying man, 'that his last moments shall not be disquieted. It was 'perhaps at first intended to put a stop to the granting 'of legacies to the church, and to charities, which pre 'vailed so much in those days. It now prevents the 'mischiefs that might arise, from deeds obtained by 'besieging a person when near his death.'

[1] Lord FORBES's Daughters against Lord FORBES, 11th February 1755; Sel. Dec. 108.

if the granter have, after the date of the deed, been at kirk or market unsupported, he is deemed vigorous enough to dispense with the protection of the law,—he is held as still in liege poustie.

In establishing the challenge, the first point of inquiry relates to the nature and power of the disease. And although it is a question fit for the decision of a jury, whether the granter was, at the date of the deed, ill of the disease of which he died, yet there are some points of law here for the Court.

1. NATURE OF THE DISEASE.

Mortal Disease.

1. It is not enough to support the challenge, that the granter of the deed has not survived for sixty days: he must have been actually sick of his last illness at the date of the deed.

2. Although labouring under sickness at the time of making the deed, this will not be held his mortal disease, if the granter should perish by an accident; as a fall from his horse, shipwreck, apoplexy, &c.

3. Analogous to this is the case of death occasioned by a distinctly different disease from that with which the granter was afflicted at the date of the deed. Wherever the new disease is so clearly unconnected with the original complaint that it can be regarded in the light of a supervening accident, it will not be sufficient to make out deathbed. So a person ill of a disease of the prostate gland at the date of the deed challenged, having afterwards died in consequence of a severe bilious attack from irregularity, was held not to have been on deathbed when he made that deed.[1]

4. It may happen, however, that death was occasioned by a disease different from the original ailment, and yet there may be such a connexion, that it shall be held a continuance of the same illness from first to last. There are known to physicians many translateable or convertible diseases; which are apt to induce each other, or which may almost be considered as different stages of the same disease, though distinguished in Nosology by different characters and symptoms. But without entering into any inquiry of this sort, (which is fit matter of evidence by physicians), it is sufficient to say, that where the diseases are convertible, or found in close connexion and relation with each other, or where the last disease is an ordinary consequence of the first, it will be sufficient to make out a case of deathbed.[2]

5. It is not necessary that the disease of which the granter is ill shall be of a kind which physicians call mortal; nor is it even essential (notwithstanding the name of deathbed),[3] that it should be so severe an illness as to confine the patient to his bed; or to his chamber;[4] or to interrupt business, sometimes called morbus sonticus.[5] It is sufficient that the person is in a state of manifestly disordered health, sickness, or decay; which, although not marked perhaps by any nosological character, is still distinguishable as an indisposition or illness continuing till death.[6] Nor is it indispensable that the disease

[1] PATERSON'S Trustees against JOHNSTON, in Jury Court, 24th June 1816; 1. Murray, 71.

[2] See HIDDLESTON against GOLDIE, in Jury Court, 12th April 1819; 2. Murray, 120.

[3] SHAW against GRAY, 7th January 1624; Durie, 95. See 3. Stair, 4. § 28.

[4] ROBERTSON against FLEMING, 1st February 1622; Durie, 13. SHAW against GRAY, 7th January 1624; Durie, 95. BLACK against BLACK, 11th December 1787; Fac. Coll.

[5] Morbus sonticus, properly speaking, is an illness so severe, as to furnish a just excuse from the performance of duty or transacting of business; more strictly it is applied to incapacitating diseases. See Kaimes's conclusion in LAIRD against KIRKWOOD, Sel. Dec. 274.

[6] PRIMROSE against PRIMROSE, 28th January 1756, 1. Fac. Coll. 271. Old age, decay of constitution,

shall be of a medical character; a surgical disease or accident will be sufficient, if death follow.[1]

6. Although it be not essential that the disease should occasion confinement, yet confinement, contrary to the granter's usual habit, is a strong circumstance in proof of the existence of illness; and the policy of the law confirms this, in so far as the state of a person who is withdrawn from observation cannot be discovered or easily proved.[2]

7. Sickness proved at the date of the deed, followed by death within sixty days, gives the presumption of continued illness.[3] This question was formerly decided by the Court; and will be found stated either in the older decisions, in judgments on the relevancy, or in later reports in decisions on the proof: The question is now for a jury, under such directions in point of law as the Court may give.

2. COUNTER PRESUMPTIONS, AND EVIDENCE OF LIEGE POUSTIE.

But, supposing the disease to be established, and that the granter was under its influence at the date of the deed, and that it proved in the end mortal, what is evidence to remove the presumption?

There are, as already stated, certain counter indications of firmness and strength of mind admitted by law as counteracting the presumption that the granter yielded to importunity:—1. Survivance during sixty days; and, 2. Going to kirk or market unsupported.

Survivance for Sixty Days.

1. COMMENTARY ON THE STATUTE 1696, c. 4.—The presumption established by statute as a counterbalance to that of deathbed, arises on the granter of the deed surviving the execution of the deed for the space of sixty days. This was introduced for the purpose of correcting the evil of the old law, by which, if the granter was ill of his mortal disease at granting the deed, and had not afterwards been at kirk or market, he was held to be on deathbed, whatever might be the distance of time; unless it could be proved that he had reconvalesced. The difficulty of such proof, and the inconclusiveness of the presumption of imbecility during so long a time, led the legislature to give their sanction to the opposite presumption of strength and vigour sufficient, if the granter of a deed should outlive the space of sixty days subsequent to the execution of the deed.[4] On a preamble that 'many questions had arisen concerning deeds done upon deathbed,' it was, by statute 1696, c. 4. enacted for clearing thereof, 'That it shall be a sufficient exception to exclude the reason of deathbed as to all bonds, &c. made and granted by any person after 'the contracting of sickness, that the person live for the space of threescore days after 'the making and granting of the deed; albeit during that time they did not go to kirk 'and market. But prejudice always, as of before, to quarrel and reduce the said rights 'and deeds, if it shall be alleged and proven that the person was so affected by the

gouty indisposition, held deathbed. ROBERTSON against M'CAIG, 1st December 1823, 2. Shaw and Dunlop, 544. Old age, no other complaint but a stuffing and cough; held not to be deathbed.

[1] DUN against DUNS, 25th February 1668, 1. Stair, 534.; a case of a broken leg, afterwards amputated. SCOTSTON against DRUMMOND, 20th February 1694, 1. Fount. 611.; a case of running sore in the leg, occasioned by accident.

[2] 3. Stair, 4. § 28. p. 462. See Dirleton, as quoted above, p. 84. Note [2].

[3] 3. Stair, 4. § 28. p. 463. 3. Ersk. 8. § 96.

[4] The case which immediately preceded the Act, and out of which it seems to have arisen, was GORDON against GORDON, 11th June 1696, where the Lords 'thought it hard to fix a deathbed so far back, (as 'three years), and that it ought not to exceed a year.' 1. Fount. 720. In the hands of the legislature, this was reduced to the better term of two months.

'sickness the time of the doing the said deeds, that he was not of sound judgment and 'understanding.'

The presumption of convalescence, or at least strength sufficient to resist importunity, is established by the mere elapse of time. The rule of computation of the term is of the greatest importance under this Act; and after full consideration it was finally settled, in a case where the deed was made at eight o'clock on 22d February, and the granter died on 22d April between ten and eleven in the evening, that the deed was ineffectual, as having been executed on deathbed. The ground of decision was thus expressed in the House of Lords: 'That the terminus a quo mentioned in the Act respecting death-'bed, is descriptive of a point of time, (viz. the day or date of the deed), which is indivi-'sible; and sixty days after is descriptive of another and subsequent period, which begins 'when the first is completed. The day of making the deed must therefore be excluded; 'and so the maker lived only fifty-nine days of the period required. Had he seen the 'morning of the subsequent day, the rule of law would have applied, Dies inceptus pro 'completo habetur, which makes it necessary to reckon by hours.'[1]

The date of the deed must be legitimately proved, and, 1. Holograph deeds do not, unless subscribed before witnesses, with a testing clause bearing the date, prove their own date; 2. If a false date be given to the deed to defeat the law of deathbed, it cannot competently be rectified by parole evidence.[2]

Kirk or Market.

2. KIRK OR MARKET; COMMENTARY ON ACT OF SEDERUNT 29TH FEBRUARY 1652.—Although the granter of a deed should be sick at its date, and should die within sixty days, yet he is held to have been in vigour of mind sufficient to entitle him to make an unchallengeable settlement, if, at the time of making it, he was able to go about his ordinary duties at kirk or market. There are other proofs of capacity and strength of mind as good perhaps in many respects; but this has been adopted by the law as best answering its purpose, as a protection to a man after he has retired to his own house out of the observation of the world: And so appointed, it is required with absolute strictness; not left to discretionary decision on equivalents.

The law then holds the presumption of inability and importunity sufficiently refuted, if, after the date of the deed, the granter have made his appearance at kirk or market unsupported.

1. It is not necessary that he be seen both at kirk and at market; one is sufficient.[3]

2. The purpose of requiring the granter's presence on occasions so public, is, that his true condition may be open to the observation of impartial witnesses, instead of being confined to a few persons selected to favour the deceit. The rule on this matter has been declared in an act of sederunt of 29th February 1692, which has ever since been recognized as law.[4]

[1] Contrast these cases:—Sir JOHN OGILVIE against MERCER, 10th December 1793; House of Lords, 1st December 1796, where the death was on the 59th day; and MITCHEL against WATSON, 3d February 1801, where the deed was dated 23d May at two o'clock; the granter died at one o'clock of the 22d July, the 60th day.

[2] MERRY against HOWIE, 6th February 1801, affirmed in House of Lords, Fac. Coll. App.

[3] Creditors of BALMERINO against Lady COUPER, 28th June 1671; 1. Stair, Dec. 742. RAGG against FORBES, 28th January 1725; Edgar, 157.

[4] The Lords of Council and Session, taking to their serious consideration that the excellent law of deathbed, securing men's inheritances from being alienate at that time, may happen to 'be frustrate and eva-'cuate, if their coming to church or mercate be not 'done in such a solemn manner as may give some 'evidence of their convalescence without supportation 'or straining of nature: And seeing some may think 'it sufficient if parties, after subscribing such disposi-'tions, come to the church at any time and make a 'turn or two therein, though there were no congrega-'tion at the time: And likewise, if they make any 'merchandise privily in a shop or crame, or come to 'the mercate-place when there is no publick mercate;

Proof of Strength.

In commenting on the declaration of the law as contained in this act of sederunt, the preamble first deserves attention. It is there taken for granted, that the object of requiring appearance at kirk or in market is to show 'convalescence.' The whole preamble is loosely and vaguely expressed; and this word in particular is too indiscriminately used; seeming to require in all cases that the person shall have recovered from his illness. The true principle of the presumption of deathbed is, that the disease is attended with such a degree of weakness as to expose the granter to importunity. It is against this that the law is intended to be a shield, both to the ancestor and to the heir. In refuting the presumption, there is room for a distinction of cases. If the disease be strictly morbus sonticus, such a disease as is accompanied with incapacity, (as acute fevers, phrenitis, &c.), there must be convalescence proved publicly: But if the illness be not of that description, then strength and vigour sufficient to carry the party to kirk or market unsupported, form the only necessary points of evidence.[1]

It is required, that the granter shall appear 'without supportation or straining of 'nature.' The degree of support is a question for a Jury; not of law for the Court: And little can be laid down in point of law to regulate such decisions.[2] It may, however, be observed, that there is a distinction to be kept in view, in all such questions, between the case of a man who is found freely and frequently going about his ordinary duties at kirk and market, and one who makes his appearance there on one particular occasion for the mere purpose of supporting his deed. It cannot be said, that this last exhibition is necessarily a fraud; or that it is to be rejected as incompetent evidence of liege poustie. But at least the party will be required to exhibit himself in circumstances much less questionable than where his appearance at market is in the natural course of his occupations, or at church in his regular and accustomed way. In the latter case, it will not invalidate the evidence that he receives occasional aid; while, in the other case, the same assistance may be sufficient to overturn the presumption intended to be raised of liege poustie. The rule is, that the granter shall be seen in the same condition, in so far as regards aid from others, as while in good health; and the rule in this

'and all this performed before their own pickt out 'witnesses, brought along by the party in whose favour 'the disposition is made, that the state and condition 'of his health or sickness may be as little under the 'view and consideration of other indifferent persons 'as can be: the occasion of which mistake might have 'been, that formerly there were public prayers, morning and evening, in the church in many places, to 'which those who apprehended any controversie might 'arise upon the validity of their dispositions were accustomed to come at the time of prayer; and some 'thought they might come to the church though there 'were no publick meeting thereat, since these publick 'prayers were not accustomed, and to take instruments of their appearing there: For remede whereof 'the Lords declare, they will not sustain any such 'parties going to church and mercate, where it is proven that he was sick before his subscriving of the 'disposition quarrelled as done *in lecto*, unless it be performed in the day-time, and when people are gathered 'together in the church or church-yard for any publick 'meeting, civill or ecclesiastick; or when people are 'gathered together in the mercate-place for publick 'mercate: And further declare, whensoever instruments are taken for the end foresaid, that the said 'instrument do expressly bear, that it was taken in the 'audience and view of the people gathered together 'as aforesaid, otherways the Lords will have no regard 'to the said instrument.'

See Lord Fountainhall's commentary on this Act in his note to the case of CRAWFORD against BRICHEN, 5th December 1711; 2. Fount. 683.

[1] CRAWFORD against BRICHEN, December 5. 1711; 2. Fount. 683. LAIRD against KIRKWOOD, 9th July 1763; Sel. Dec. 274. FAICHNEY against FAICHNEY, 9th July 1776; 7. Fac. Coll. 247. has been reported as finding presence at kirk or market to be proof of convalescence. The true point of the case I take to have been, the want of that fair and unaided presence at kirk and market which gives proof of vigour to resist importunity. And accordingly this is the view of it given by Mr Tait; 5. Brown, Sup. 422.

[2] In illustration of such cases, a series of decisions from 1629 to 1787, collected in Morrison's Dictionary, p. 3303. to 3318. will be found useful. See also YOUNG against SCOTTS, 3d July 1777; Tait, 5. Brown, 423.

respect is tightened or relaxed, as the act of going to kirk or market is done in the ordinary course of business, or for the mere purpose of giving effect to the deed.[1]

The act of sederunt requires that the appearance shall be public,—in church or at market, while the people are assembled; and any instrument taken on the occasion (and so any proof offered) must shew the act to have been done, and the appearance made in 'the audience and view of the people gathered together.' Under this head, 1. It is requisite that the granter shall not only make his appearance, but in such a way as not to betray symptoms of weakness and support. So if he appear in church for the purpose of attending worship, he must not enter when the service is half over, and leave the church before the end of it;[2] or if he go to market, he must not, in attempting to prove his independence, betray his weakness in being compelled to take the aid of those who attend him in making any ordinary bargain. But, 2. He is not required either to attend during the service of the church, or to make bargains in the market. It is sufficient if he show himself at either place while there is a public resort of indifferent persons. So a person walking through the market-place, while market was held, to the house of one with whom he was to dine, was sufficient.[3] 3. What shall be held a market is matter of law for the Court, not otherwise for the Jury than on the direction of the Judge, and so subject to review on bill of exception or new trial. The Cross of Edinburgh was held to be a market-place;[4] and appearance in the market-place of Dumfries was held sufficient, though not on the market-days appointed by statute.[5] So transacting business in the Commercial Bank of Aberdeen in Castle-street, where the regular market is held, and where there are daily stalls of vegetables, fruits, &c. for sale, and buying in two shops in the view and vicinity of the market-place, and walking through the market-place, were held sufficient, though not on the regular market-days.[6] But whether other places of public assembly and resort are to be regarded as market, within the construction of the rule, does not seem to be conclusively settled. In an early case it seems to have been held, that the going to an election-meeting at Inverkeithing was equivalent to market.[7] In another, a horse-race, where there was a conflux of people, but no regular market, was sustained.[8] But in a recent case, a general county meeting, and a meeting of trustees of the roads of the county, were not held equivalent to market.[9]

3. WHETHER EQUIVALENTS ARE ADMISSIBLE TO PROVE LIEGE POUSTIE.

It is an important question, whether, although a person has not been at kirk or market, and has died within the sixty days, it is nevertheless sufficient to overturn the presumption of deathbed, that he has with vigour and ability gone about his ordinary business, in other resorts of public affairs. It will here be recollected, that while presence at kirk or market is not required by legislative enactment, but by a rule only of common law, in which a Court is to look rather to the principle and policy of the rule than to

[1] See 3. Stair, 4. § 28. p. 463. See BALMERINO's case, supra, p. 88. Note [3]. 3. Ersk. 8. § 96.

[2] See FAICHNEY against FAICHNEY, 9th July 1776; above, p. 89. Note [1].

[3] TAILZEOUR against TAILZEOUR, 11th December 1787; 10. Fac. Coll. 19.

[4] Earl of ROSEBERRY against PRIMROSE, 24th November 1736; Elchies, *Deathbed*, No. 8. and Notes, p. 115.

[5] M'CRACKEN against PEARSON, in Jury Court; 2. Murray, 551.

[6] RAIT against RAIT, 27th Nov. 1818; Fac. Coll.

[7] Lady SCOTSTON against DRUMMOND, 20th February 1694; 1. Fount. 614.

[8] LAIRD against KIRKWOOD, 9th July 1763; Sel. Dec. 274.

[9] MAITLAND against MAITLAND, 16th May 1815; 18. Fac. Coll. 253.

limit themselves to the strict and literal construction of the words of it, as delivered in the books, or declared in the act of sederunt; yet it is also to be considered, that when a certain criterion has been sanctioned, (though only by usage), and firmly fixed in the practice and understanding of the country; and where it is one with which it is easy to comply if the party be within the reach of the rule; it may be dangerous to relax it, so as to leave the matter on the uncertain footing of an arbitrary judgment to be formed concerning a man's state of health and mental vigour. The inclination of the law has been to give effect to these latter considerations, and adhere to the rule as rigidly as if it were a legislative enactment. Although, therefore, where a man is found going about his ordinary business; wrangling, and making bargains in his own house or in shops; settling accounts, or writing out his settlement; sitting at table with strangers; doing the honours of his house, and accompanying his guests to their horse; going about freely, riding, walking, dancing, and whistling; walking on the streets of a town, amid promiscuous population; or going to public meetings of a county, or of road-trustees;[1] these may well be regarded as more clearly indicative of vigour of body and strength of mind, than the mere appearance in a market or at church; yet, in various cases, such indications have been rejected, the Court refusing to sustain equivalents instead of the settled criterion of kirk and market.[2] Unless, therefore, the defender can make out the place in which the granter exhibited himself, or did the act relied on, to be a church, or a public market in the construction already put on it in the cases above cited, he will not succeed in establishing his exception.

4. REFUTATION OF THE PRESUMPTION ARISING FROM PRESENCE AT KIRK OR MARKET.

The proof arising from presence at kirk or market, unsupported, and without betraying the weakness and prevalence of his disease, is held decisive of the strength by law required for resisting importunity. It will overturn this conclusion, however, if it should be proved that the granter of the deed was, at the very moment, under the influence of his disease to such a degree, as to evince rather a design fraudem facere legi in his attempt to appear publicly, than the vigour of a man in sufficient health to be the protector of himself and of the just rights of his heir. Although, therefore, it will not be sufficient to prove that the disease was on him, or never abated, if it be not morbus sonticus;[3] yet if plain symptoms of a disease of this description should appear, (as in Stair and Fountainhall's example of a man in the paroxysm of a fever running to market,[4]) or if the weakness and depression of an ordinary illness should appear to exhaust the patient in this attempt, the deed will be reduced.[5]

§ 2. DEEDS LIABLE TO CHALLENGE ON DEATHBED.

The general rule is, that no deed granted, or act done spontaneously on deathbed, to the prejudice of the heir, directly or indirectly, will be sustained as effectual, if challenged by the heir, or by those in his right.

[1] All these circumstances occur in the cases referred to.

[2] LOWRIE against DRUMMOND, 7th February 1671; 1. Stair, 716. Creditors of BALMERINO against COUPER, 28th June 1671; Gosford, Mor. Dict. 3295. MOUNTAINHALL's Daughters, February 1683; Harc. p. 179. LIVINGSTON against GOODAL, February 1683; Ib. 180. MAITLAND against MAITLAND, 16th May 1815; Supra, p. 90. Note [9].

[3] ORMISTON against GREIG, 17th May 1821; F. C.

[4] 3. Stair, 4. § 28. p. 464. 2. Fount. 683.

[5] See 1. Fount. 356. 3. Stair, 4. § 28. p. 464-5. 3. Ersk. 8. § 96.

1. DEEDS DIRECTLY PREJUDICIAL TO THE HEIR.

Deeds spontaneous, which directly alienate, or invade, or diminish, or burden the estate descendible to the heir, whether affecting lands and houses, debt heritably secured, bonds excluding executors, heirship moveables, conquest provided to the heir, or any other inheritance descendible to him as heir, are reducible on deathbed.

Those deeds may be classed as deeds of Alienation, of Settlement, or of Discharge.

1. DEEDS OF ALIENATION INTER VIVOS, are reducible by the heir, if made on deathbed in the following circumstances:—

Gratuitous.

Where the alienation is gratuitous, that is to say, without full consideration or value given for the conveyance, it is challengeable on deathbed.[1]

Onerous alienation reducible if spontaneous.

The converse does not hold, that where the deed is for an onerous consideration it is safe from challenge. The distinction ought carefully to be marked between gratuitous and spontaneous. Although the deed be not gratuitous, yet if spontaneous, the heir is entitled to be relieved from it, however full a consideration may have been given for it. But this is a doctrine which involves some very nice and difficult questions. And,

Sale of Land.

1. A sale of land is not safe from challenge on deathbed.[2] But it may be observed, 1. That if the price be inadequate, redress will be given to the heir as in a transaction prejudicial to him, in which bona fides cannot be pleaded. The heir will be entitled to have his land again on repayment of the inadequate price. 2. That although the price be adequate, the heir may be prejudiced by the sale, in consequence of the dismembering of his estate, &c. and he will have redress on restitution of the price.[3] 3. That considerable difficulties arise in respect to the terms on which the heir is entitled to his challenge. If he be required to make restitution of the price before he can be allowed to reduce, this must frequently operate as a bar in his way to relief; and Mr Erskine lays down the rule so broadly as to imply, that the heir would not be required to pay the price where it had been dissipated gratuitously to strangers.[4] But there must be a distinction of cases here; and, *first*, If the ancestor has died with the price unpaid, a bond granted for it, or bills in his repositories, the heir will have his challenge on discharging the price, or cancelling the bond or bills; and he will be entitled to have them for this purpose. *Secondly*, If the purchaser himself be the person favoured to the heir's prejudice, the reduction will be competent to the full extent.[5] *Thirdly*, If the purchaser have granted bond or bill to younger children, &c. to the heir's prejudice, he should be held as in mala fide in the transaction; but although a sale in such a case was held reducible, the reducer was ordained to pay to the defender the just sums for which the alienation was made and truly disbursed.[6] *Fourthly*, In all cases where money has been actually paid to the deceased, a debt is created for which his heir is by representation liable, and therefore the heir cannot be heard to reduce, (unless in a case of collusion and fraud),

[1] 3. Ersk. 8. § 97.

[2] See case of GILBERT, 3d December 1608. Haddington, Morr. Dict. 3290.

[3] 3. Ersk. 8. § 97.

[4] 'A sale of lands executed by the proprietor in 'lecto is subject to reduction, though the purchaser 'should have paid full value for it, if the heir be hurt 'either by the bargain itself, or by the ancestor's 'dissipating the price gratuitously to strangers.' 3. Ersk. 8. § 97.

[5] LINDSAY against LINDSAY, 2d December 1819, where an estate was conveyed on deathbed for a price to a second son. The sale was reduced.

See also CAMPBELL against RANKIN, 6th December 1805; 13. Fac. Coll. 517.

[6] RICHARDSON and Lord CRANSTON RIDDEL against SINCLAIR, 30th July 1635; Durie, 776.

without, as the condition of his success, indemnifying the purchaser. He will have his remedy on deathbed against the executors who may have been favoured, or any one to whom the price has been paid on deathbed to his prejudice; but his first step to redress is indemnification to the third party.

Burdens and Securities.

2. The creation of burdens and securities are truly alienations, and are reducible if to the heir's prejudice; as for raising a fund to benefit the younger children or others. The following cases may be distinguished: 1. If the security be granted for a debt already subsisting, and for which the heir is liable, it cannot be challenged on deathbed; although the debt secured was at the date of the deathbed deed a proper debt of the executry, and although the debtor was not bound to grant any deed of security.[1] The heir's remedy here must be directed against the executors for relief. 2. If a debt arising by legitimate and necessary furnishings to the ancestor be so secured, the security will be unchallengeable; the heir's relief being reserved against the executry.[2] 3. If the money be borrowed while the borrower is on deathbed, and dissipated, or given in donation to younger children or strangers, still the security would seem to be effectual to the lender, but the heir, as before, would have redress against those who have been benefited.

Assignations.

3. Assignations of bonds, whether secured on land, or heritable by destination, as bonds excluding executors, are reducible on deathbed.[3]

Leases.

4. Leases are in this question, as alienations, challengeable on deathbed, where they exceed the ordinary term of duration;[4] but where granted in the fair and reasonable exercise of a landlord's administration, they are not held reducible.[5] Where a grassum is taken from the tenant on deathbed, it seems to be challengeable, in so far as the money so raised is given to executors to the heir's prejudice; but it is very doubtful whether against the tenant any challenge can be maintained, to the effect of compelling him, without restitution of the grassum, to pay the full rent.

Sale of Wood.

5. A bargain of sale of timber has been sustained as an act of ordinary administration.[6]

Discharge.

6. A discharge for an heritable debt, paid up by the debtor in bona fide, is good.[7]

2. Settlements and Dispositions mortis causa, are the peculiar objects of this protecting law; and this is the class of deeds on which questions of deathbed most commonly arise. As in alienations inter vivos, onerosity is no defence against deathbed; so, in this class of deeds, the greatest rationality and moral obligation will not sustain the settlement. It is requisite, for its support, that the granter shall be placed under an obligation effectual in law, and which the heir may be compelled to fulfil. Bonds of pro-

Bonds of Provision.

[1] Darling against Hay, 18th January 1709; 2. Fount. 482. The Court distinguished well between the right of an inhibiting creditor and that of the heir.

[2] Shaw against Gray, 7th January 1624; Durie, 95. This was a security for drugs and medical attendance. Pollock against Fairholm, 13th July 1632; Durie, 645. For malt furnished. 2. St. 4. § 30. 3. Ersk. 8. § 97.

[3] M'Kay against Robertson, 12th January 1725; 1. Kames, 103.; Murray against Borthwick's Trustees, 5th December 1797; 12. Fac. Coll. 108.

[4] Christison against Ker, 20th December 1733; Elchies, *Deathbed*, No. 2. This was a lease for three 19 years. Bogle against Bogle, 19th June 1759; 2. Fac. Coll. 334. This was a lease for 38 years.

[5] Semple against Semple, 1st June 1813; Fac. Coll. Here a lease was subsisting, and 13 years were to run. The deceased renewed the lease for 19 years, at an increased rent. It was sustained with great difficulty; but the validity of a lease of ordinary endurance was unanimously taken for granted.

[6] Maxwell against Corrie, 15th July 1724; Edgar, 83. Here the distinction was drawn between the act of administration, and the destination of the price to executors.

[7] Brown against Thomson, 15th March 1634; Durie, 713.; 3 Stair, 4. § 29.

vision therefore, however rational, are reducible, when granted on deathbed,[1] unless they be fortified by a legal obligation effectual against the heir.[2]

3. DISCHARGES OF HERITABLE DEBTS OR SECURITIES on deathbed, are challengeable, if gratuitous. Even if the discharge have proceeded on payment of the debt, the heir has his remedy against the executor, or any person to whom the money had been given.[3] The only difficulty is on the point of fair administration, where the debtor insists on paying up the debt; or when, on bankruptcy, a dividend is paid, &c. In such cases there would seem to be no reduction on deathbed. It is not then a spontaneous act.

2. DEEDS INDIRECTLY PREJUDICIAL TO THE HEIR.

Such deeds are reducible, if not as against third parties, at least in so far as the deceased has favoured others gratuitously by the transaction.

1. A voluntary alteration of a subject, converting it from heritable to moveable, is liable to challenge.[4]

2. If a deed, prejudicial to the heir, be made in liege poustie, though not delivered so as to become effectual till the granter was on deathbed, it rather seems to be unchallengeable, as being the completion of a purpose settled in liege poustie.[5]

3. Moveable bonds, legacies, provisions, &c. in so far as they are claimed against the heir, or made the subject of diligence by adjudication, or otherwise, against the heritable estate; or even so far as they may reduce the fund for payment of moveable debts to the prejudice of the heir, are challengeable.[6]

4. The heir may be prejudiced indirectly by a purchase of lands made on deathbed, with a destination to one not the heir-at-law. The fund here employed, however, is not previously heritable; and the heir suffers only in so far as he might otherwise have collated. But as that right belongs to him only as executor, this seems a case in which deathbed could not be pleaded.

5. Where the deed is in fulfilment of an obligation, which, had it not been so implemented, the heir would have been responsible for, the heir will be barred. So where there is a previous obligation or provision in a contract of marriage; or where the deed is a security for debt due; or in implement of a sale concluded by minutes in liege poustie;—in all these cases the heir's estate may be affected by adjudication, or adjudication in implement, leaving him only his claim of relief: And so his challenge on deathbed, as against third parties, will be debarred. But if the previous contract or obligation be not complete and binding, it will not support the deathbed deed.[7]

[1] See this question fully discussed in LOGAN against CAMPBELL, 25th February 1757; Sel. Dec. 178. and Fac. Coll. of 15th November 1757. LESLIE against LESLIES, 17th December 1747; Kilk. 154. Lord CRANSTON RIDDEL against RICHARDSON, 1st July 1637; Durie, 847. Sir JAMES FOULIS against FOULIS, July 1721; 1. Kames, 59.

[2] EDMONDSTONE against EDMONDSTONE, 20th July 1706; 2. Fount. 344.

[3] GILLESPIE against MARSHALL, 2d Dec. 1802, where an heritable bond was sold, and the money laid out on a promissory-note. Reduction sustained.

[4] 3. Ersk. 8. § 98.

[5] SHORSWOOD'S Children against SHORSWOOD, 24th July 1669; Gosford, 77.; 1. Brown, Sup. 597. presented this question;—not decided. I find, in perusing the consultations of our older lawyers, some difference on this point: Pitfour holding deathbed not to apply; others, that it does.

[6] See above, case of SHAW against GRAY, supra, p. 93. Note [2].

Earl of LEVEN against MONTGOMERY, 27th February 1683; Pres. Falc. 31.

COWIE and HARDIE against BROWN, 22d July 1707; Forbes, 187.

[7] CAMPBELL against RANKINE, 6th December 1805; 13. Fac. Coll. 517. Here a minute of sale was entered into, but deposited in neutral custody, till called for by both parties. On deathbed, a feu was granted, with an addition of L.10 of feu-duty to the original

§ 3. MEANS TAKEN FOR EVADING THE LAW OF DEATHBED.

When it is recollected how unjust the restraint must often prove which the protecting genius of the law would extend over every person on deathbed, however secure against the assaults of importunity or selfishness; and how inconvenient and inexpedient the operation of such a rule must be in the case of foreigners having money secured in Scotland; it will not seem unnatural that various devices should have been attempted for evading the law. But those evasions have seldom proved successful. The policy of the law, as a protection not to the heir only, but also to the dying man, has prevailed over, and baffled most of the attempts made to defeat it. And,

1. A power granted in a Crown-charter to dispone or contract debt on deathbed, seems at one time to have been thought effectual to defeat deathbed. But it was held by Dirleton and other great lawyers of his day to be unavailing.[1]

2. Reservation of power to convey or burden in a settlement, has been held ineffectual to bar the challenge, where the conveyance is to the heir, and the power is not expressly reserved to be exercised etiam in articulo mortis; but only 'at any time in his life.' This is grounded on the presumption that such a reservation is meant to be consistent with law; in terminis habilibus juris, and so to except deathbed:[2] And even where the reservation is to the full extent, namely, that the power is to be exercised etiam in articulo mortis, although collaterally the heir may be barred if the reservation be in a disposition to a stranger; the mere force of the reservation in a settlement on the heir will not validate a deathbed deed, 'since no man can reserve to himself that he shall have then 'solidity of judgment, without which he ought not to have power.'[3]

3. If by marriage contract a right is given to the heir, subject to provisions to be granted by the father at any time in his life, or on deathbed; or, if the heir accept of a disposition burdened with a power, the faculty may be exercised, and challenge on deathbed will be barred.[4] Although the heir's acceptance of a deed, with reservation of a precise power, will have effect when it can fairly be ascribed to his approving of the particular deed or act in the contemplation of the power reserved; yet where the reservation is entirely general to do any deed on deathbed, to give it effect would be equivalent to a defeating of the law of deathbed.[5]

4. It has been attempted, but ineffectually, to retain power on deathbed by executing a deed in liege poustie, blank in the disponee's name, and filling it up on deathbed.[6]

5. The total exclusion of the heir's right by a deed in liege poustie gives efficacy to a disposition on deathbed altering that settlement. For as the only title to challenge on deathbed belongs to the heir, this is a case in which he cannot allege that his interest is hurt, while the reduction of the new deed cannot benefit him.[7] But,

price. The Court reduced the feu-disposition, and held the minute of sale not binding.

[1] IRVINE of Drum's case, 1. Fount. 479. See 2. Fount. 324-5.

[2] HEPBURN against HEPBURN, 25th February 1663; 1. St. 186. But it is implied in dispositions to strangers that the power is reserved even in deathbed, 1. Dict. 215. DOUGLAS against DOUGLAS, 22d June 1670, Gosford, Mor. Dict. 329.

[3] DAVIDSON against DAVIDSON, 17th November 1687; 1. Fount. 478. See also Dirleton and Stewart, 8vo. 334. and p. 137. BERTRAM against VERE, 8th February 1706; 2. Fount. 324.

[4] FORBES against Lord FORBES, 11th February 1755, as decided in House of Lords, Mor. Dict. 3284. PRINGLE against PRINGLE, 28th February 1765, decided in House of Lords, 29th January 1767, Mor. Dict. 3290.

[5] REEDS against CAMPBELL, 13th November 1728. INGLIS against INGLIS, 4th December 1733. 1. Dict. 220. 3. Ersk. 8. § 99.

[6] PENNYCOOK against THOMSON, 18th January 1687; 1. Fount. 441. BIRNIES against Laird of POLMAISE, 22d June 1678; 2. Stair, 624.

[7] Duke of ROXBURGH against WAUCHOPE, Dec. 13. 1816; 19. Fac. Coll. 238. Affirmed, 3. Bligh, 630.

6. Where the deed of exclusion in liege poustie contains a power of revocation, and a new settlement is made on deathbed, a question of construction is raised. And, 1. Where there is an express revocation by separate deed or act, the heir's right revives, and with it the challenge on deathbed.[1] 2. Even where the revocation is in the same deed with a new disposition differing from the liege poustie deed, but the revocation is not made expressly provisional, the same effect follows: The heir's right revives, accompanied by his title to challenge the deathbed deed.[2] 3. Where the revocation, separate or in the same deed, is expressly made conditional, and the liege poustie deed declared to subsist if the other disposition should prove ineffectual, the heir will be barred of his challenge.[3] 4. How far the same effect will be produced where the new disposition is in all respects similar to the liege poustie deed, is a question undecided.[4] And, 5. Where the revocation is not express, but implied only from the deathbed deed, it has been held, that the testator is to be regarded as having virtually declared the efficacy of the new deed to be a condition of the revocation of the old. This has been greatly doubted, in point of principle: But it is held as a decided point not now to be shaken.[5]

7. It is not competent by the aid of a Trust-deed, with reserved powers, ('to alter, 'provide, &c. even on deathbed,') to dispose of heritable subjects by testament.[6] Nor will a trust with such clauses confer a power to execute a conveyance, (though in regular form as a deed inter vivos), on deathbed.[7] But where a trust is executed with a complete exclusion of the heirs-at-law, a power to declare uses on deathbed is effectual.[8]

8. A general obligation by the presumptive heir not to challenge any deed to be granted by the ancestor is ineffectual.[9] But his assent to a particular deed or disposition, if fairly obtained, is good, on the principle already stated with regard to acceptance.[10]

The doctrine of Approbate and Reprobate it may be proper to consider afterwards in all its relations, rather than as confined to this case of deathbed.

[1] FINDLAY against BIRKMIRE, 29th July 1779; 8. Fac. Coll. 173.

[2] COUTTS against CRAWFORD, 17th November 1795; Fac. Coll. and Bell's Cases, p. 207. In the Court of Session, the revocation was held to be provisional only, so that the heir's challenge on deathbed was still barred. In the House of Lords the case was viewed differently, and the revocation held to give admission to the heir, no longer excluded by a liege poustie deed. The case was remitted for reconsideration, when the Court of Session confirmed their former judgment, 3d February 1801. But this decision the House of Lords reversed, on a ground on which the opinions of Lord Rosslyn, Lord Thurlow, and Lord Eldon, successively given, concurred; namely, that the intermediate disposition was absolutely destroyed, and the right of the heir to claim the estate was again set up, opposed only by a deathbed deed. 3. Bligh, 655—691. 14th March 1806.

The doctrine of that case was confirmed in BATELY against SMALL, 2d February 1815, the deed there being held not to qualify the revocation.

In MOIR against MUDIE, 2d March 1820, there was still another confirmation of the rule. Affirmed in the House of Lords, 1st March 1824.

[3] See Lord Chancellor Eldon's opinion in COUTTS' case, 3. Bligh, 686.

[4] Lord Chancellor Eldon in MOIR's case, (above, Note [2].) said, 'I give no opinion whatever upon the 'principles which might or might not rule the case, if 'the dispositions had been exactly the same.'

[5] ROWAN against ALEXANDER, 22d November 1775, Fac. Coll. Tait's Cases, 5. Brown, Sup. 423. 2. Lord Hailes' Cases, 659. See 3. Bligh, 662. 679, 680-1. 687.

Duke of ROXBURGH against WAUCHOPE, 13th December 1816, Fac. Coll.; 3. Bligh, 619.

[6] WILLOCH against AUCHTERLONY, 14th December 1769, Hamilton's Coll. as reversed in House of Lords, 18. See for opinion of Judges in Court of Session, 1. Hailes' Decisions, 321.

[7] Ladies KERR against WAUCHOPE, 8th July 1806. The Duke of Roxburgh, in 1803, made a trust settlement, after having, in 1790, conveyed his estates to Ladies Kerr, with a power of revocation. On deathbed he gave directions to his trustees to pay legacies, and divide the residue among certain residuary legatees, but did not revoke the deed 1790. The ladies challenged on deathbed, and were successful. Affirmed in House of Lords.

[8] BELLENDEN against Earl of WINCHELSEA, 14th February 1825, 3. Shaw and Dunlop, 530. Here the settlement gave the estates primarily to those entitled to succeed under the statute of distributions; which, by excluding the heir, gave full effect to a disposition on deathbed.

[9] INGLIS against HAMILTON, 5th December 1733. Elchies, *Deathbed*, No. 1. See above, p. 95. Note [5].

[10] See MURRAY against MURRAY, 21st January 1826, 4. Shaw and Dunlop, 374.

§ 4. EXERCISE BY CREDITORS OF THE RIGHT OF CHALLENGE.

In considering the doctrine of deathbed relatively to the rights of creditors, and their power to avail themselves of the heir's privilege to challenge a settlement on that ground, there are three points which deserve attention: 1. What heirs are themselves entitled to challenge on deathbed. 2. The title of the creditors to prosecute in the heir's place. 3. The effect of the heir's approbation of the deed in excluding his creditors.

1. DESCRIPTION OF HEIRS ENTITLED TO CHALLENGE.

The general rule is, that the plea of deathbed is competent to the heir who, alioquin successurus, is entitled to be served but for the deathbed deed. So,

1. The heir-at-law, whether of line or of conquest, has the most undoubted title to maintain a challenge on deathbed.

2. The heir of investiture, whether by tailzie, marriage contract, or destination in the investiture, has the privilege, even against the heir of line called to the succession by the deathbed deed; on the principle, that the succession, as settled by law or deed previously to deathbed, is not to be altered on importunity during that period of weakness.[1]

3. It does not alter the rule, that the heir's right is constituted by personal deed, not completed by infeftment.[2]

4. It is not enough, however, that a right of succession, which would have been sufficient if imbodied in the investiture, remains in obligatione, or as mere matter of contract on the part of the ancestor. The remedy in such a case, is by action on the contract, not by reduction on deathbed.[3]

5. The heir of line who has the right of challenge, will of course succeed to that privilege if it have not been renounced: But a remoter heir seems also to have the privilege in his own right, although the immediate heir should not have been injured by the deathbed deed,[4] unless where the heir first succeeding has taken benefit, and approbated the deed.[5]

6. This is a privilege which the heir-at-law may, on apparency, and without completing his titles, plead.[6] Whether the same right is enjoyed by the heir of provision, has been much doubted. It was held at one time, that such an heir cannot exercise his privilege without completing his title.[7] But an opposite opinion was held in the case of one, who, being heir of investiture, his title on apparency was considered as good.[8]

[1] HEPBURN against HEPBURN, 25th February 1663, 1. Stair, 186. PORTERFIELD against COOK, 24th July 1672, 2. Stair, 109. MAXWELL against NICOLSON, February 1722, 1. Kames, 64. 3. Ersk. 8. § 100.

[2] Marquis of CLYDESDALE against Earl of DUNDONALD, 26th January 1726, 1. Kames, 138.

[3] CAMPBELL against CAMPBELL, 16th December 1738, 1. Dict. 211. See also Lord Monboddo's Cases, 5. Brown, Sup. 651. Here the conquest during the marriage was by marriage contract provided to the children of the marriage in fee. The father bought an estate during the marriage, taking the right to himself, and his heirs and assignees; and on deathbed settled his whole property on his eldest son, under the burden of certain provisions. The Court held the privilege of deathbed not to be pleadable by the younger children, whose remedy was only by action. See Kilk. 456.

[4] KENNEDY against ARBUTHNOT, 13th July 1722, 1. Dict. 212. CRAIGS against MALTMEN of Glasgow, 3d and 13th February 1739, Kelly, 151. The distinction between these cases was, that in the former the nearest heir was not prejudiced, in the latter he was. And it appears from Elchies, that, in Craig's case, some doubts were suggested of the decision in Kennedy's. The Court held it not right to alter so important a decision; but they held it safe to sustain the challenge, as the deed was in prejudice of the first heir, as well as the second, that first heir being an infant. Elchies' Notes, p. 116.

[5] IRVINE against TAIT, 3d June 1808, Fac. Coll.

[6] GRAHAM against GRAHAM, 4th February 1779, Fac. Coll.

[7] EDMONSTON against EDMONSTON, 16th March 1637; Durie, 838.

[8] See above, Case of GRAHAM. This was held against the opinion of Lord Braxfield, who considered him as a mere stranger, not having made up titles to the person last infeft.

Where a title is necessary, it has been held, that a general service to the person last infeft will not entitle him to challenge on deathbed a conveyance of the estate.[1]

7. But if the heir die in his apparency, no right will be transmitted to his representatives or creditors. See below, Commentary on the Act 1695, c. 24.

2. TITLE OF THE CREDITORS TO PROSECUTE IN ROOM OF THE HEIR.

While the heir lives, his right under his apparency, or in virtue of his service, may be exercised by creditors, either by adjudging his right, or even, as Erskine has laid it down, without any adjudication, by direct action libelling on their right as creditors.[2] This seems to rest on the ground, that the creditors may competently have a declarator, that their debts should have free course to attach the estate unobstructed by the deathbed deed.[3]

3. EXCLUSION OF CREDITORS BY THE HEIR'S APPROBATION.

The privilege is personal to the heir, and no one who comes in his right is entitled to object to the deed; not even the debtor in an heritable bond alienated on deathbed. The heir's approbation, therefore, confirms the deed. And it will be effectual even against creditors, unless the act of the heir is itself subject to exception.

Whether the deed have been truly ratified, is a question of evidence. And, 1. It is not enough that the heir have signed witness to the deed: He is not presumed to know the contents; or if he do, he is held to sign under the influence of feelings which will not bar his right—the principle of homologation ruling the question.[4] 2. If the deathbed deed be a general disposition requiring to be completed by adjudication in implement, a question may arise as to the effect of the judicial proceedings for that effect: If, in the action of constitution, the heir should not defend himself on deathbed, it would operate as a ratification, against which reduction might be competent, or otherwise, as the decree was in absence, or in foro.

The doctrine of ratification Erskine places on the same footing with an absolute conveyance to the heir, and a reconveyance by him to the stranger.[5] But, 1. If the ratification be on deathbed, it is held ineffectual:[6] 2. If the heir be insolvent, and gratuitously assent or ratify, there will be a remedy to the creditors on the Act 1621, c. 18.; or, 3. If the person favoured by the deathbed deed be a creditor of the heir's, and the heir's assent really operate as a preference to that creditor, the others will be entitled to challenge it, either on the Act 1696, c. 5. or at common law.

The creditors of the person who has granted the deathbed deed may suffer by it as much as those of the heir. But their remedy stands upon another footing than deathbed: They are entitled, on the Act 1621, c. 18. to reduce the conveyance, if gratuitous.[7]

[1] See GRAHAM's case above.

[2] 3. Ersk. 8. § 100.

[3] Creditors of BALMERINO against Lady COUPER, 16th February 1669, 2. St. 605.

[4] DALLAS against PAUL, 13th January 1704; Dalr. 46.; 3. Ersk. 3. § 48.

[5] 3. Ersk. 8. § 99.

[6] CLEUCH against LESLIE, 2d November 1744, 2. Kames, 84.

[7] Creditors of LINDSAY competing, 24th June 1714, Dalr. 153.

SECTION III.

OF THE RIGHT OF CREDITORS TO AVAIL THEMSELVES OF THE DEBTOR'S OTHER PRIVILEGES AS HEIR.

THERE are other rights which belong to an heir, of which creditors may avail themselves, namely, 1. The right of an apparent heir to continue the possession of the ancestor; and, 2. The heir's right to demand a share of the moveable succession, where he is also one of the next of kin.

§ 1. APPARENT HEIR'S RIGHT TO POSSESSION OF THE ANCESTOR'S ESTATE.

Although the right of the heir is not completed without service, and feudal estates require infeftment, yet even during apparency the heir has certain privileges by which his creditors may be benefited. An apparent heir is a person to whom the succession to an heritable estate has, on the death of the ancestor, opened either by disposition of the law, or by the destination of the subsisting investiture,[1] but whose feudal title is not yet completed.

1. He is entitled to enter at once into the natural possession of the estate.[2] Where he is opposed by a disponee, holding only a personal right, he seems still entitled to his privilege;[3] though that has been questioned. So far effect will be given to the doubt, that if the apparent heir's circumstances be such as to put in hazard the rents, the estate will be placed under sequestration till the disponee shall establish his title.

2. The apparent heir is now held entitled (though even that was considered once as doubtful), to levy the rents of the lands from tenants deriving their right from the ancestor. Where a claim for the rents is made by a disponee, it would appear, 1. That if the disposition be inter vivos, with an assignation to the rents, it will be a good title to exclude the apparent heir and his creditors: But, 2. If it be a deed of settlement still personal, on which no infeftment has followed, the apparent heir will not be excluded.[4] Of those rents, such as were still unlevied during the apparent heir's life are held as part of his funds, and attachable by his creditors. But at one time it was conceived, that although the apparent heir had a right to levy the rents, his actual exercise of this right, by obtaining payment of the rents, was the only proper completion of his title; and therefore that those rents which he had not received, were still to be considered as in hæreditate jacente of the ancestor, so as to devolve along with the land, on the next heir completing his title by service. But this opinion, though it regulated the judgment of the Court in one case,[5] was completely overturned subsequently, and the doctrine finally established, that as the apparent heir has the undisputed right of levying the rents, the accidental interruptions he may meet with are not to alter the nature of his right: And what he is entitled to take, is held as part of his funds, available to his executors or his creditors.[6]

3. The apparent heir has right to cut the wood on the estate; but this right expires with his life. The timber then uncut is the heir's, and the benefit of any contract entered

[1] M'KIE against M'KIE, 19th February 1741, Kilk. 237. Sir A. OGILVIE against REID, 18th July 1737, 1. Dict. 357.

[2] 3. Stair, 5. § 2.

[3] See above, Note [1].

[4] See cases in Note [1]. supra. The only remedy in such a case to the disponee, will be by application for sequestrating the rents.

[5] HAMILTON against HAMILTON, 5. Dict. 1760.

[6] 2. Stair, 3. 16. p. 207. This controversy was still unsettled in Erskine's time, 3. Ersk. 8. § 58. See also Kames' Law Tracts, No. 5.
28th January 1756, HOUSTON against NICOLSON

into for silvæ cæduæ will be his; not available to the creditor of the apparent heir, with whom the contract was made.[1]

4. If the apparent heir do not himself owe debts, so as to give his creditors a right of adopting his interest in the succession, and choose to renounce the succession and abandon it to the creditors of the ancestor, of course the arrears falling due after the ancestor's death, may, as a part of the hereditas jacens, be taken up by the ancestor's creditors.

§ 2. OF THE HEIR'S RIGHT TO CLAIM A SHARE OF THE MOVEABLE ESTATE, WITH OR WITHOUT COLLATION.

The equal partition of the succession which prevailed in the Roman law, has place also in the law of Scotland in the succession of moveables.

But with regard to land, the policy of the feudal system has introduced a remarkable change. The sole right of succession has been conferred on the heir; while of the executry nothing was left to him but the heirship moveables, consisting of the best of certain articles of furniture, horses, military accoutrements, and so forth. These were given to him that he might not succeed to a mansion utterly displenished, or incur the disgrace of being found unprepared with horse and harness to attend his lord in the field.[2] The heir is thus the exclusive successor to the land; the other nearest of kin the exclusive successors to the moveables;—the portio legitima of the former being the heritage, the portio legitima of the latter, the personal estate. But to the heir thus excluded from the moveables, provided he be also one of the next of kin, a privilege has been reserved of throwing the heritable estate into a common stock with the moveables, and demanding as one of the next of kin a share along with the rest. This privilege has, in the natural progress of wealth, come frequently to be of the first importance to the heir or to his creditors. The effect of it is to restore, as to the whole estate, the Roman rule of equal partition among all the nearest of kin; the heir taking his share as one of the number: And it takes place only where there is a moveable as well as an heritable succession; and where the heir, but for the heritage, would divide with the rest the moveable funds. In former times, while the land-estate was the only one of value, the preference of the heir to the land-estate was in general a most valuable right. But in our days, the land-estate is often inconsiderable; while the shares belonging to the deceased, in national establishments, in government and bank stock, or in public companies, his exchequer bills, his notes and bonds for lying money, the stock of commodities in his warehouse, his property in ships, and other moveables, may amount to an enormous capital; which in its legal description in point of succession is executry, and to a share of which, the heir, in his mere character of heir, has no right whatever.

In the succession to one whose moveable estate is valuable, two questions may be raised. 1. Whether the person who as heir is entitled to the land may reject it, and on collation claim his share of the moveable estate? And, 2. In what cases the person who takes the land is entitled to claim his share as executor, without collation or giving up the land? The consideration of these questions, and of the interest of the heir and of the executors in consequence of collation, will exhaust all that is useful in this matter.

STEWART. 24th July 1765, Lord BANFF against JOASS. In both these cases, the right was held to be with the executors of the apparent heir. And this was confirmed by a judgment of reversal by the House of Lords of the decision of the Court of Session in the above case of HAMILTON, 8th April 1767.

[1] TAYLOR against VEITCH, 24th June 1796; Sir Ilay Campbell's Sess. Pap.

[2] 3. Stair, 4. § 24. 3. Stair, 5. § 9. 3. Ersk. 8. § 17. et seq.

1. RIGHT TO COLLATE THE SUCCESSION.

This is a right which by law belongs to the heir ab intestato, (being himself one of the nearest in kin), where the deceased has left both an heritable and a moveable estate.

1. If the heir be also the sole executor, he is not required to collate in settling with the relict.[1]

2. This right to collate, holds not only in the direct and descending line of succession, but also in the collateral.[2] As in the descending line, the eldest son may insist on collating with his brother and sisters; so in the collateral, the elder or the younger brother, who, as heir of line or of conquest, has right to the heritable estate of a brother deceased, may insist on collating with the rest of his brothers and sisters who have right to the executry.

3. The heir of conquest, as well as the heir of line, has right to collate, and it may happen that two heirs may thus become entitled to a share of the moveable estate along with the executors,—the heir of line and the heir of conquest. In this there is no inconsistency.

It has been doubted whether one of these heirs would be entitled to collate without the concurrence of the other. But the executors certainly cannot insist on a collation from both, where the privilege is claimed by one only.

It has also been questioned what share one of several heirs entitled to collate may demand of the executors, if all the heirs do not concur? It would seem that the heir thus collating comes to the division of the mingled succession, just as if that succession formed the only estate, and as if the executors and he were the sole heirs.

4. If the heir be not also one of the next of kin, he has no right by collation of the heritage to demand a share of the executry.[3] The grandson, by the eldest son, is heir to the exclusion of his uncles, the younger sons of his grandfather; but he cannot collate and claim a share of the moveable succession with his uncles, for there is no representation in moveables, and he is not one of the next of kin. So, if one of two heirs-portioners die, her child cannot collate: He will take his mother's share of the heritage by representation, but his aunt is the sole executor, and, as such, is alone entitled to the moveable succession.

5. There is no collation in heritable succession; among heirs-portioners, for example. So where one heir-portioner receives a preference by deed of the ancestor, she is still entitled to her share of the residue of the heritable estate.[4]

6. The privilege of collation may be excluded by the will of the deceased, where he has the uncontrolled power of disposing of his moveables. If the ancestor have died intestate as to his land, but leaving a will ordering the disposition of his moveables, that will, if exclusive of the right of legal succession, bars the heir from collation. Thus, if the will bequeath legacies, and leave the residue to an executor, or residuary legatee,—or clearly bequeath the succession to the next of kin as specifically under the will, the heir will have no right to demand collation.[5] This power, however, of debarring collation, cannot be exercised to the prejudice of the legitim, where a will is made by the father, and the legitim is not discharged. For the father has no power to exclude the heir from his legitim.

[1] TROTTER against ROCHEID, 12th January 1681; 2. Stair, 831.

[2] CHANCELLOR against CHANCELLOR, 2d December 1742; Kilk. 124.

[3] Erskine states the opposite to be law, which it is not; 3. Ersk. 9. § 3. His doctrine was overruled in M'CAW against M'CAWS, 28th November 1787; Fac. Coll.

[4] JACK against JACKS, 20th December 1673; Gosford, Morr. Dict. 2369.

[5] See below, p. 103. of the method of completing this transaction.

2. RIGHT OF THE HEIR TO SHARE THE MOVEABLES WITHOUT COLLATION.

The same character of next of kin which entitles the heir to collate, gives a right to demand a share of the moveable succession without collation, either, 1. Where the person so claiming (not being heir alioquin successurus) takes the heritable estate of him whose succession is in question, not as heir ab intestato, but either as heir of provision or by conveyance; or, 2. Where he takes the estate not directly from the deceased, but from one more remote. But wherever the heir claiming a share of moveables is alioquin successurus, he must collate, not merely the estate which he takes as heir of line, but every thing forming the proper subject of descent to an heir of line, whether enjoyed by him in that precise character or not. It seems as if the law held the heir as in all cases bound to purchase the privilege of being admitted to a share in the moveables, by giving up all that he has received as heir, or præceptione hæreditatis, before he can take his place as an executor; while one who is executor proprio jure, and holds not the exclusive character of heir, has a right already vested, of which he must be deprived before forfeiting his share of the executry. Thus,—

1. One who, although he holds the character of heir, takes nothing in that capacity, is entitled to his share as next of kin, without collating what he may have derived from a more remote ancestor; although it is by the death of him whose succession is in question that the succession opens to him. So on the death of a father who is a mere life-renter by grant from another, his heir taking as fiar will not be required to collate in claiming a share of the executry. Again, where the deceased has not completed his titles, but possessed only on apparency, his heir, though it is by means of his death that the succession opens, and he takes in virtue of being his son, yet succeeds as heir of the person last infeft.[1]

2. An executor not being heir alioquin successurus, but taking the land by destination, was found entitled to enjoy his share as executor, notwithstanding his being also heir of provision to the land-estate.[2]

3. But if the person so claiming be heir alioquin successurus, although the legal title has been superseded by conveyance, he *must* collate. So, 1. An heir succeeding by disposition, in which the purchaser, to save expense, takes the land in liferent to himself, with power to burden, sell, or dispone, and in fee to his son, must collate.[3] 2. Where the heir receives the land by disposition from his ancestor, he is not held by this præceptio hære-

[1] SPALDING against FARQUHARSON, 11th December 1812. Here the point seems to have been assumed without much argument. The question arose on the death of Daniel Spalding. His heir served, not to him, who never was infeft, but to his father, David, the last infeft; and so, in claiming a share of Daniel's executry, he refused to collate. It was held, that there was no reason for the plea of collation between the executors and the heir, as the heir claims the heritable estate which he has from one source, and his right as executor, along with the other executors, from a different source. This was adhered to.

RUSSELL against RUSSELL, June 1822. Thomas Russell left a son and two daughters. He had, as apparent heir of his brother, succeeded to the farm of Foldhouse, but never made up titles. He died after ten years' possession, and a question arose of collation, Whether the son was entitled to a share of the moveables, without collating the farm to which his titles were to be made up, not to his father, but to his uncle? Lord Gillies held him bound to collate, but the Court reversed this judgment.

[2] RAE CRAWFORD against STEWART, 3d December 1794. Lord Braxfield, in a judgment confirmed by the Court, 'In respect that Mrs Rae Crawford was not 'heir of line, but only heir of provision in a particular 'estate, which she takes under a deed of entail, found 'her entitled to her share, along with her brother and 'sister, without collating the tailzied estate.'

See Duke of BUCCLEUCH against Earl of TWEEDALE, 14th February 1677; 2. Stair, 504.

[3] BAILLIE against CLERK, 23d February 1809; Fac. Coll. The heir here was considered as having not the fee, but merely a spes successionis.

ditatis to have acquired right to the executry without collation.[1] 3. It was supposed that succession under an entail, in which the heir is placed under trammels, raised an insurmountable difficulty in applying this doctrine; but the rule is held not to be disturbed by this peculiarity. The heir of entail, being also heir of line, cannot claim a share of the moveable estate without collation of the rents, or value of his heritable right.[2]

4. But it has been said, that a distinction is to be made in the case of an heir-portioner claiming a share of the moveables; that she stands not in a state of exclusion like the heir from her share of the moveable succession, but has right as her portio legitima to a proportion of both estates; and that she cannot be deprived of her share of the moveables by a conveyance meant to better her condition.[3] But this is a distinction which has not been confirmed; on the contrary, in a later case, the doctrine of Riccart's case has been denied;[4] and, on the whole, it rather seems to be law, that the heir-portioner is bound to collate her own share.

5. If the estate to which the heir succeeds be real estate, situate in another country, he is bound to collate, in claiming as a Scottish executor, a share of the moveable estate in Scotland. Coming forward as a Scottish heir, to avail himself of a Scottish privilege, and to take something from the executors, they are entitled to insist that he shall comply with the condition annexed to the exercise of that privilege in Scotland, by throwing the real estate into the common fund, that equality may be preserved.[5]

But if he claim not as a Scottish executor, but under the English statute of distributions, the heir is not bound thus to collate.[6]

3. MODE OF GIVING EFFECT TO THE SEVERAL RIGHTS IN COLLATION.

In contemplating the effect of collation on creditors, although the heir may dispense with his privilege, he cannot do so effectually in a state of insolvency to the prejudice of

[1] MURRAY against MURRAY, 23d February 1678. Here the heir held the land, partly by succession, partly by disposition, from his father. He offered to collate the former, but refused the latter. The Court 'admitted him to a share with the other bairns, provided 'he communicate all that he had of the heritable 'estate by disposition or by succession;' 2. Stair, 640.

[2] LITTLE GILMOUR against LITTLE GILMOUR, 13th December 1809; Fac. Coll. 449.

[3] RICCART against RICCARTS, 19th November 1720; 1. Kames, 42. See observations of Lord Meadowbank on this case in LITTLE GILMOUR's case, (above, Note [2]); Fac. Coll. 457.

[4] HAY BALFOUR against SCOTT, 15th November 1787. In this case, on the supposition that the succession was to be regulated by the law of Scotland, (see below, Note [6]), it was held, that the eldest heir-female succeeding by destination without division, was, in claiming a share of her uncle's moveable succession, bound to collate. 'The defender, Miss Scott, was not 'entitled to claim any part of the executry of her 'uncle, David Scott of Scotstarvit, without collating 'his heritable estate, to which she succeeds as heir.' Lord Meadowbank, in his remarks on this question, above referred to, says, 'This, perhaps, is the most 'nice and subtle view of the case, but the answer is 'plain and obvious,' &c.

[5] ROBERTSON against MACVEAN, 18th February 1817; Fac. Coll. 297. The Court held, 'That James 'Robertson is not entitled to claim legitim, unless he 'collate such right as he has to the estate situated in 'the island of Jamaica, as well as the other provisions 'and possessions received by him as devolving upon 'him by the death of his father.'

[6] In HAY BALFOUR against SCOTT, (above, Note [4]), as decided in the House of Lords, the distinction drawn here between the heir's claim to English moveables, and to those situate in Scotland, was disregarded, and the case was determined on this principle, that the domicile and death of David Scott having been both in England; and the rule being, that the whole moveable succession, wherever situate, follows the person, and is regulated by the law of his domicile, the whole moveable succession was in this case English, and to be regulated by the law of England. The judgment of the House of Lords, as given in the Faculty Collection and in Morrison's Dictionary, is incorrect. The words of the judgment are these: 'That the said 'Henrietta Scott is entitled to claim her distributive 'share in the whole personal estate of her uncle, David 'Scott of Scotstarvit, in Scotland, without collating 'his heritable estate, to which she succeeded as heir, 'in so much as she claims the said share of the said 'personal estate by the law of England, where the said 'David Scott had his domicile at the time of his death.' 11th March 1793; JOURNALS of HOUSE of LORDS.

his creditors. The liability of the executors to the demand of the heir, on the other hand, is one which gives to the heir not merely a personal claim for a dividend, but a jus in re; a real interest in the executry while extant and distinguishable.

Several situations may be distinguished as giving rise to questions relative to the rights which have just been considered; and,

1. Where collation is not required as the condition or consideration for the heir's admission to the privilege, there is little difficulty. The heir then takes his place from the first with the other executors, and his right is completed as theirs is. It is like the case of a succession entirely moveable, in which the whole of the next of kin are executors, and so entitled to confirmation. The late statute applies to the heir in such a case, as it does to the others, vesting the right ipso jure to the effect of transmitting it to his representatives:[1] and he is entitled to take out an edict, and be confirmed; or to insist on being joined in the confirmation with the other next of kin.

2. Where the heir purchases his privilege by collation, the only difference seems to be, that the heir shall first effectually renounce his preference, before he is entitled to his right as executor. It is only by massing the whole succession that he acquires right, as if there were no heritage, to confirm as executor with the rest. And it would appear that, from the moment he makes up his titles to the heritage, and dispones, he is entitled to assume and assert the character of executor: So that, if no application for an edict has been made, he may take out his edict for confirmation; and, if opposed, his conveyance is a good reply: Or if the other executors have applied to be confirmed, he may appear, and desire to be conjoined as one of the executors; and his conveyance of the heritage will entitle him to be conjoined.

The transaction is in general settled, either by private contract or judicially:—

1. By Private Contract the heir and executors, on a recital of their intention to divide the whole succession, reciprocally dispone and assign; the heir the heritable subjects, the executors the moveable funds; and bind themselves to complete titles, and make all necessary conveyances for accomplishing their purpose. If the title of the executors is not yet completed, there is no occasion for any thing on their part but the admission of the heir to his place in the confirmation; and it lies with the heir to complete his title, and grant the necessary conveyance for giving to the rest of the next of kin their proportions of the heritage. If the executors have already completed their right by confirmation, they must of course grant assignations, deliver a share of the moveables, and pay money to the heir, to the effect of equalizing their mutual rights. It would seem that from the moment of irrevocable declaration on the part of the heir, his right vests as executor; while the right of the executors is precisely of the same nature with that of a purchaser of land under missives of sale.

2. Judicial Settlement of collation is by an action at the instance of the heir against the executors, stating his right to collate as one of the next of kin, and his offer to do so; and concluding, *first*, That his right should be declared; *secondly*, That the defenders should be ordained to produce all bonds, bills, account-books, &c. with a full state of their intromissions; *thirdly*, That on the heir completing his title, and disponing to the defenders their shares, they should be ordained to convey and pay over to him his share. There is commonly a conclusion that the defenders should complete their titles to the moveables; instead of which the heir seems entitled to conclude, that he should be found and declared entitled to confirm as one of the next of kin.

This faculty or privilege the creditors of the heir are entitled to exercise, and this is done without any adjudication or previous process.

[1] 4. Geo. IV. c. 98. § 1.