TIT. IV.

Of the Diſſolution of Obligations.

AFTER having explained how obligations may be conſtituted, it falls to be conſidered how they may be extinguiſhed.——They may be extinguiſhed, *firſt*, by ſpecifical performance on the part of the debtor; *2dly*, by the bare conſent of the creditor; *3dly*, by compenſation; *4thly*, by novation; and, *laſtly*, by confuſion.——*Firſt*, by ſpecifical performance. Thus an obligation for a ſum of money is diſſolved or extinguiſhed by payment. A creditor can demand full payment of his debt at once, and is not compellable to receive it by ſuch parts as the debtor is pleaſed to offer, *l.* 41. § 1. *De uſur.* But where a ſum is, by the obligation itſelf, payable in parts, the creditor muſt accept of payment by the ſeveral diviſions contained in the obligation; for in ſuch caſe, there are truly as many different obligations as terms of payment. By the ſame rule, a creditor in two or more ſeparate debts, cannot refuſe to accept the payment of any one of them, though the debtor ſhould not offer to clear off the others, or even the intereſt due upon them; for every one who is laid under an obligation, is intitled to a diſcharge or acquittance upon performance, in the preciſe terms of it.

2. By the Roman law, where a debtor who owed ſeveral debts to the ſame creditor, made a payment, without declaring at the time to which of the debts he aſcribed it, it behoved the creditor to apply ſuch indefinite payment as it was to be preſumed the debtor would have done, who had it in his power to make the application, if he had declared his intention when the payment was made, *l.* 1. *De ſolut.*; and conſequently indefinite payments were, by that law, applied *in duriorem ſortem*, or, as it is ſometimes expreſſed, *in graviorem cauſam*, to that debt which bound the debtor faſteſt, or to which a penalty was adjected, *l.* 3. 4. 5. *eod. tit.* But the uſage of Scotland has, in this point, ſhewed a greater regard than the Roman to the intereſt of the creditor. Where indeed one of the debts carries a high penal certification againſt the debtor; where, for inſtance, adjudication is led upon it, which may carry off the debtor's whole eſtate upon failure of payment within the legal; the payment is applied towards the extinction of that debt, to ſave the debtor from ſo rigorous a forfeiture: but the application, where it hath no ſuch penal conſequence, is made in favour of the creditor. Thus, where one debt is ſecured by inhibition, the other not, the payment is applied to the debt not ſecured, though ſuch application may hurt the other creditors of the common debtor, *Jan.* 1744, *Paterſon*; ſee *Home*, 133. Thus alſo the creditor may apply an indefinite payment to that debt which would be loſt by preſcription without the aid of ſuch application, *Kames*, 5. Where one of the debts carries intereſt, the other not, the payment is imputed to that debt which carries no intereſt: for the intereſt of money cannot be called a penalty inflicted on the debtor for not payment, but is truly a juſt equivalent given by him for the uſe of the money, which the creditor would loſe, if the payment were applied to a debt bearing intereſt againſt the debtor, while he is at the ſame time allowed to retain another ſum which bears none, *Fount. Jan.* 17. 1693, *Sir J. Hall*; *Kames*, 5. Indefinite payments muſt, in every caſe, be applied to the extinction of intereſt, before they can be allowed to incroach on principal ſums. Where one of the debts is ſecured by a cautioner, while the other reſts on the debtor's ſimple obligation, an indefinite payment cannot, after the debtor's bankruptcy,

bankruptcy, be applied wholly to that debt to which no cautioner was interpoſed, and ſo leave the cautioner's obligation altogether unpaid; nor can it be applied entirely to that debt in which the cautioner was bound, and ſo leave the creditor to demand the whole of the other debt from a bankrupt; but it muſt be applied proportionally between the two, ſo that both the proper creditor and the cautioner may get equal juſtice done to them, *Feb.* 13. 1680, *Macreith*; *Kames*, 58.

3. Payment, when it is made *bona fide* by the debtor, to one who he had probable ground to think had a right to the debt, but had not, extinguiſhes the obligation effectually. This is the caſe of payment made to one who had formerly been factor to the creditor, before the revocation of the factory was intimated to the debtor; and of payment of ſtipend made to an incumbent, who had been deprived of his office by the ſentence of a proper church-court, but who nevertheleſs had continued to ſerve the cure, *Feb.* 10. 1666, *Pariſh of Maybole:* but it is no longer a *bona fide* payment, after the ſentence hath been publiſhed from the pulpit, or intimated to the debtors in the ſtipend; ſee *Jan.* 10. 1679, *Coll. of Aberdeen.* This *bona fides* in the debtor ceaſeth in the general caſe, after citation given by any having intereſt in the ſubject, interpelling the debtor from making payment as formerly: but a bare citation by a purchaſer of lands whoſe title is completed by charter and ſeiſin, to a tenant, is not ſufficient to put him *in mala fide* to pay his rent to the former landlord, till the purſuer's titles be produced judicially, or intimated to the tenant, *St. b.* 1. *t.* 18. § 3.; *Br. MS. July* 4. 1716, *Macgill.* Payment made to one to whom the law hath denied the power of receiving payment, is not accounted *bona fide* payment; for *ignorantia juris neminem excuſat.* Thus payment made by a debtor to a meſſenger who is carrying him to jail, does not extinguiſh the obligation; for he ought to have conſigned the debt in the hands of ſome public officer, as a magiſtrate, or the keeper of the priſon, if they were ſolvent. The ſame is the caſe with payments made to meſſengers executing poindings; for tho' a meſſenger is conſidered as a judge in the execution of poindings, it is not thence preſumed, that a mandate had been given him by the uſer of the diligence to receive payment.

4. To prevent colluſion between landlords and tenants to the prejudice of third parties, payment of rent made by a tenant to his landlord before the term of payment, is deemed colluſive in a queſtion with the landlord's creditor or his ſingular ſucceſſor, and ſo excludes *bona fides*, *June* 12. 1629, *Gray*; *Feb.* 5. 1667, *La. Traquair.* Nor will ſuch payment avail the tenant in whoſe hands the landlord's creditor had arreſted the current rents before the term, even though the arreſtment was uſed after he had made the payment. The ſame doctrine holds in payments made by a vaſſal to his ſuperior before the term; but in common debts, where the creditor and debtor are not connected, the debtor may ſafely pay, even before the term of payment.

5. Obligations may be diſſolved, not only by actual, but by preſumed payment. Payment is preſumed, if the written voucher which conſtitutes the obligation be found, either in the hands of the proper debtor, or even of the cautioner, *Fount. Feb.* 5. 1703, *Gordon*, according to the rule, *Chirographum apud debitorem repertum præſumitur ſolutum.* This preſumption holds, not only where the ground of debt is perſonal, *ex. gr.* a bill, or a moveable bond; but in heritable bonds, even when they are perfected by ſeiſin, *Dalr.* 92. But it may be elided by poſitive evidence, that the ground of debt came into the hands of the debtor otherwiſe than by the creditor's conſent. Conſignation of a debt by the debtor, where the creditor refuſes without juſt ground to receive payment, if uſed in the hands even of a private

vate perſon who is ſolvent, not only ſtops the currency of intereſt which was running againſt the debtor, *Feb.* 1. 1738, *Robertſon*, obſerved in *Dict.* i. *p.* 199.; but is, in the judgement of law, equivalent to payment; *vid. ſupr. b.* 2. *t.* 8. § 19.; *b.* 3. *t.* 1. § 31.

6. Payment by a third perſon is, *in dubio*, preſumed to be made with the debtor's money. Thus if a diſcharge or receipt bear payment by one perſon in the name of another, it is preſumed that the ſum was paid by him in whoſe name payment was made, and that the maker of the payment was no more than an interpoſed perſon, *Jan.* 20. 1672, *Trotter*; *Fount. June* 12. 1711, *Donaldſon.* Though the acquittance expreſsly recite, that payment was made by one of ſeveral obligants; yet if the payer afterwards cancel the bond, he is preſumed either to have been the principal debtor from the beginning, or to have recovered payment after the diſcharge from the other obligants of their proportions, *Dec.* 10. 1709, *Waddel.*

7. The legal effects of payment, conſidered as a method of extinguiſhing obligations, muſt, in queſtions with foreigners, be determined according to the *lex loci contractus*, if the payment was made in the country where the deed was ſigned. If, for inſtance, the law of that country allows the payment of a debt conſtituted by writing to be proved by witneſſes, that manner of proof will be alſo allowed by the court of ſeſſion, as ſufficient for extinguiſhing ſuch debt, though, by our law, obligations formed by writing are not extinguiſhable by parole-evidence; becauſe the debtor had reaſon to rely on that ſort of proof which was ſufficient to extinguiſh the obligation by the law of the country where the payment was made, *Nov.* 16. 1626, *Galbraith*; *Fount. Jan.* 10. 1702, *Chatto.*

8. Obligations may be extinguiſhed by the bare conſent of the creditor; for every creditor in an obligation may renounce or diſcharge whatever right is conſtituted in his own favour, without ſpecifical performance, or indeed without any performance by the debtor. An obligation which is conſtituted verbally, may be thus extinguiſhed by a verbal declaration of the creditor, that he paſſes from it. But debts formed by writing cannot be extinguiſhed, without either the creditor's oath, or a written acknowledgement ſigned by him. This manner of extinction, where the creditor accepts of ſomething merely imaginary in ſatisfaction of the debt, or declares he has received payment of it, when in truth he has got none, is called *acceptilation:* and it may be not only expreſs, but implied. Thus, acceptance by a *negotiorum geſtor*, of a diſcharge of intromiſſions from him whoſe affairs he had undertaken the management of, upon a clearance in which no article was ſtated for ſalary, was adjudged to imply a paſſing from his claim of ſalary, ſuppoſing ſalary had been truly due, *Pr. Falc.* 39. Though a diſcharge granted by one whom the debtor *bona fide* took for the creditor, but who was not, is equivalent to actual payment, and ſo diſſolves the obligation, *ſupr.* § 3. where the ſatisfaction made by the debtor is real, *i. e.* where ſomething is given or performed by him, equal in value to the amount of the debt, *l.* 57. *De reg. jur.*; yet imaginary ſatisfaction, though it ſhould be made by the debtor *optima fide*, has not this privilege: for though *bona fides* may from equity ſcreen a debtor in a queſtion *de damno vitando*, where he is ſhunning the payment of a debt a ſecond time, which he had truly paid before; he can have no plea of equity in a queſtion with the true creditor, where he is *in lucro captando*, endeavouring to ſhake himſelf looſe of an obligation, for which he himſelf acknowledges he had made no degree of real ſatisfaction to any perſon, *arg. Dec.* 14. 1661, *Homes.*

9. The ſame ſolemnities that are requiſite to a deed which creates an obligation, are neceſſary in a written diſcharge of it, according to the rule, *Unumquodque eodem modo diſſolvitur quo colligatur.* It is a maxim univerſally received,

received, That in all deeds which contain both general and particular clauſes aſcertaining their extent, whether conveyances, diſcharges, bonds of arbitration, &c. the general clauſe is not to be extended to ſubjects or claims of a different kind, or of greater importance, than any of the particulars mentioned in the ſpecial: for if the granter had not intended to confine himſelf to ſubjects of the ſame ſpecies, or of as ſmall importance as thoſe which appear from the deed to have been under his view, it is preſumed he would have expreſſed his whole intention as clearly as he has done that ſpecial part of it, *St. b.* 1. *t.* 18. § 2. Thus, though a general clauſe ſubjoined to the diſcharge of a ſpecial debt, may, without a ſtretch, be extended to debts for greater ſums than thoſe that are mentioned, provided they be of the ſame kind; if, for inſtance, they be both perſonal debts for ſums of money, *June* 29. 1705, *Chapel*; yet it will not comprehend an heritable bond bearing a clauſe of infeftment. A diſcharge, or other deed, where it is entirely general, without mentioning any ſpecial debt or claim, though it receives a more liberal interpretation than the firſt kind, and is conſequently more effectual to the grantee, is not to be extended to debts of an uncommon nature, which are not preſumed to have fallen under the grantee's notice; *ex. gr.* to obligations of relief from cautionary engagements not yet paid to the creditor, *Jan.* 23. 1678, *Campbell*; nor to obligations of warrandice not yet incurred, nor to thoſe for performing ſpecial facts. Hence a general diſcharge of all debts and claims does not include an obligation to purchaſe an appriſing, *Nov.* 19. 1680, *Dalgarno.* Nor does it comprehend ſuch debts due by the grantee as the granter had aſſigned to another previouſly to the diſcharge; which obtains, though the aſſignment had not been completed by intimation; for no intention can be preſumed in the granter to diſcharge a debt, which he had no longer any title to demand, or make over to another, *Feb.* 3. 1671, *Blair*; *Feb.* 14. 1736, *Lady Logan*, cited in *Dict.* i. *p.* 343.

10. In all yearly or termly payments, as of rent, feu-duties, intereſt of money, ſalaries, penſions, &c. from three conſecutive diſcharges granted by the creditor, of the yearly or termly duties, it is preſumed that all preceding duties had been paid. In the rent or feu-duty of lands, part of which is payable in grain, this preſumption hath no place, if the diſcharges be not granted for full years, becauſe the victual-rent is deliverable only once in the year; but where the whole is ſilver-rent, and paid at two terms, or by two moieties, the preſumption is inferred from three ſucceſſive diſcharges for three termly duties. In like manner, where a ſalary or the intereſt of money is payable at two terms in the year, three diſcharges for three conſecutive half-years, infer the payment of all precedings. This preſumption ariſes from reiterating the diſcharges thrice ſucceſſively; and ſo does not hold in the caſe of two diſcharges, though they ſhould contain the duties of three or more years or terms. Mackenzie, § 4. *b. t.* conſiders the creditor's heir in this queſtion as the ſame perſon with his anceſtor; but a later judgement, *Dalr.* 21. appears better founded, that the preſumption is not inferred from two diſcharges by the father, and the third by his eldeſt ſon, unleſs where it appears that the ſon knew of the two diſcharges that had been granted by his father. Three conſecutive diſcharges by the creditor's adminiſtrator, *ex. gr.* a tutor or ſteward, do not infer the payment of all preceding rents indiſcriminately, but only of ſuch as were incurred during the granter's adminiſtration, *Feb.* 1682, *E. Mariſchal*, cited in *Dict.* ii. *p.* 137. The arrears of rent, or of intereſt, conſtituted by a bond granted by the debtor, are deemed to be ſtill ſubſiſting, though the creditor ſhould afterwards grant three conſecutive diſcharges for three poſterior terms or years; becauſe theſe diſcharges cannot, by any juſt interpretation,

include ſuch arrears as the debtor had formerly acknowledged to be due by a proper written voucher. And, on this ground, a decree recovered againſt the debtor for the intereſt of certain paſt years, is ſufficient to ſupport a demand for that intereſt, though the debtor ſhould produce conſecutive diſcharges, to any number, for the intereſt of poſterior years; becauſe ſuch arrears of intereſt, rent, feu-duty, &c. after being conſtituted by bond or decree, from that period ceaſe to be reſting as annual preſtations, but are to be conſidered as a common debt. But the defence founded upon three conſecutive diſcharges, may, under ſpecial circumſtances, be ſuſtained, to the effect of cutting off the purſuer's claim for paſt arrears, even where the debtor has acknowledged them to be due by ſeparate written vouchers, *New Coll.* ii. 11. This method of extinction, being founded entirely on preſumption, may be elided by the debtor's oath, *Feb.* 18. 1669, *Cockburn.*

11. Compenſation, which is defined the contribution of debit and credit among themſelves, hath been introduced where the ſame perſon was both debtor and creditor to another, to avoid the unneceſſary circuit of two mutual payments. It has the effect to exſtinguiſh both obligations, if the ſums due *hinc inde* be equal; and if they are not equal, ſtill both obligations are extinguiſhed, in ſo far as there is a concourſe of debit and credit, or, in other words, in ſo far as the two parties were mutually debtor and creditor to each other; ſo that he who owed the greater ſum is afterwards debtor in no more than the balance or difference between the two debts.

12. Compenſation, becauſe its doctrine ariſes from the nature of the thing, had, by the Roman law, its effect *ipſo jure*, *l. ult. C. pr. De compenſ.*; and conſequently, ſo ſoon as ſufficient evidence of the concourſe was laid before the judge, it had its full operation backwards to the period of concourſe, even though he who pleaded it had been willing to paſs from ſome of its legal effects; for whatever operates *ipſo jure*, has effect by the neceſſity of the law, without regard to the intendment of parties: yet even by the Roman law, it behoved the party intitled to it to plead it; and the judges, after hearing both ſides, to pronounce ſentence, ſuſtaining the ground of compenſation, before any of its effects could appear. By the ancient law of Scotland, which rejected compenſation, no debtor who was ſued upon a debt, could have defended himſelf on a debt due by the purſuer to him to the ſame extent, had it been ever ſo liquid, but it behoved him to inſiſt in a ſeparate action for recovering it, *Balf. p.* 349. *c.* 32. till it was enacted, by 1592, *c.* 141. that compenſation *de liquido in liquidum* ſhould be received by way of exception as well as of action. Lord Stair's doctrine, *b.* 1. *t.* 18. § 6. that compenſation operates with us ſince that ſtatute, as it did by the Roman law, *ipſo jure*, is not to be underſtood in its full extent: for ſeveral effects which are by our cuſtoms given to it, begin only from its being pleaded in judgement, without having any retroſpect to the date of the concourſe; ſo that it is conſidered, in regard to theſe particulars, as the operation of the judge rather than of the law. Thus compenſation is not admitted on a debt extinguiſhed by preſcription at the time of pleading it, though it was not preſcribed at the period of concourſe, *Kames*, 17.; even where the debt pleaded as compenſation was cut off, not by the long preſcription, but by one of the ſhorter, *Tinw. Aug.* 1. 1753, *Baillie:* whereas if compenſation had operated backwards to that period, the mutual grounds of credit muſt have then extinguiſhed the mutual obligations. Thus alſo, one who has ſeveral debts in his perſon on which compenſation may be pleaded, may plead it upon ſuch of the debts as he judges moſt for his intereſt, viz. on thoſe which are the leaſt ſecured, even though the firſt concourſe was made by the others, *Nov.* 15. 1738, *Sir W. Maxwell.*

Maxwell. In like manner, the party who pleads compenſation in a ſuit, may paſs from it at any time before ſentence, *July* 14. 1664, *L. Balmerino*; ſee alſo *New Coll.* i. 85. It is nevertheleſs true, that compenſation, when admitted by our judges, extinguiſheth the mutual obligations from the time of concourſe downwards; and, conſequently, ſtops the currency of intereſt on both ſides from that period, in as far as there is a concourſe; for an extinguiſhed obligation can carry no intereſt. This laſt effect of compenſation is founded on the higheſt equity, which will not ſuffer a debtor who hath paid to his creditor a ſum equivalent to the debt, to continue ſtill liable for the intereſt of it, merely becauſe he hath taken an obligation for the ſum paid, without a clauſe of intereſt, in place of a bond, or diſcharge of his debt.

13. In order to found compenſation, it is neceſſary, *firſt*, That each of the two parties be both debtor and creditor in his own right: where, therefore, a tutor owes a ſum *proprio nomine* to a creditor, he cannot compenſate it with a debt due by his creditor to the minor; for though he be debtor in his own perſon, he is creditor no otherwiſe than as adminiſtrator to the minor, who is the proper creditor. But if a bond be granted by the tutor *tutorio nomine*, upon the minor's account, he may properly plead compenſation upon a bond due by the creditor to the minor, *Goſf. Feb.* 5. 1670, *E. Northeſk.* An executor confirmed is, in this queſtion, accounted the ſame perſon with the deceaſed; for by the confirmation, he becomes debtor to the creditors of the deceaſed, and creditor to his debtors: an executor, therefore, who owes a ſum *proprio nomine*, may plead compenſation upon a debt due by his creditor to the deceaſed: And, on the other hand, a debt due to one who afterwards becomes executor to a perſon deceaſed, may be compenſated with a debt due by the deceaſed to the executor's debtor, *Spottiſw. p.* 118. *Nov.* 12. 1628, *Williamſon.*

14. *2dly*, Each of the two parties in compenſation, muſt be both debtor and creditor to one another at the ſame time. Hence, if Seius were debtor to Titius in a ſum which he aſſigned to another, and if, after the conveyance was intimated, Seius ſhould become creditor to the ſame Titius, Seius cannot plead compenſation againſt the aſſignee upon the debt due by Titius the cedent to him; becauſe there was never a concourſe of debit and credit between the ſame perſons; for before Seius became creditor to Titius, he had ceaſed to be his debtor, by the conveyance of the debt to a third perſon, *Dirl.* 3. But if the debt due by Titius to Seius had been truly contracted before intimating the conveyance of the debt due by Seius to him, though perhaps not conſtituted by decree till afterwards, compenſation would be competent to Seius againſt the aſſignee, though he were an onerous one, *Jan.* 11. 1627, *Paton.*

15. Compenſation takes no place in debts which are not of the ſame ſpecies and quality; for if they be not commenſurable of their own nature, the one cannot be preciſely balanced by the other. Generally compenſation is underſtood of one ſum of money with another; and though it may be alſo receivable in quantities of corns, or other fungibles, provided the fungibles be of the ſame good quality, *ex. gr.* two quantities of wheat, both of equally good growths; yet a ſum of money cannot be compenſated with a quantity of corns, or any other thing of a different kind or ſpecies from itſelf; becauſe till the preciſe prices are fixed at which the grain is to be converted into money, the two debts are incommenſurable. But in this caſe ſome ſhort time would probably be indulged to him who pleads the compenſation, for aſcertaining the converſions or liquidations, in order to make his debt a proper ſubject of compenſation. On the ſame ground, compenſation could not be admitted between moveable ſums and thoſe ſecured

cured by wadſet, or by a right of annualrent after the old form, bearing a clauſe of requiſition; for a ſum, which by the conception of the right ſecuring it, cannot be exacted without a previous notorial requiſition, is not truly due till it be ſo required, ſince, till then, the eſtate burdened is debtor more properly than the owner of it, *Nov.* 12. 1675, *Home:* but after requiſition, the granter becomes debtor in a ſum of money; by which both debts become money-debts, and ſo capable of compenſating one another. An heritable bond after the new form, containing an obligation on the granter to pay without requiſition, may doubtleſs compenſate a moveable bond: for though the one ſum be heritably ſecured, the other not, yet both parties are both debtor and creditor to each other in a ſum of money; and no difference in the ſecurity of the two creditors makes any in the ſpecies or quality of the debts, *June* 18. 1675, *L. Leyes.* If compenſation be not admitted between debts of different qualities, an abſolute and pure debt already payable, cannot be compenſated with a conditional debt, or one whereof the term of payment is not yet come; for conditional debts are not proper debts till the condition exiſts: and though a debt payable on a day not yet come, conſtitutes a proper obligation; yet it is not a debt of the ſame quality with a debt already payable: the creditor of the one has *parata executio*, and can immediately proceed to all legal diligence againſt his debtor for payment, which the other cannot do, *l.* 7. *pr. De compenſ.*

16. Compenſation is not regularly receivable where the debts on both ſides are not clear and beyond diſpute. They muſt be aſcertained, either by a written obligation, the oath of the adverſe party, or the ſentence of a judge. Though the foreſaid act 1592 requires, that all grounds of compenſation be inſtantly verified, yet by our uniform practice for near a century, which ſeems grounded on the Roman law, *l. ult.* §1. *C. eod. tit.* if a debtor in a liquid ſum ſhall plead compenſation upon a debt due by his creditor to him, which requires only a ſhort diſcuſſion to conſtitute it, ſentence is delayed *ex æquitate* againſt the debtor in the clear debt, that he may have an opportunity of making good his ground of compenſation, according to the rule, *Quod ſtatim liquidari poteſt, pro jam liquido habetur.* Agreeably to this, compenſation has not only been admitted, where the debt was offered to be proved inſtantly by writing, or by the oath of the party, *Fount. Feb.* 13. 1711, *Roſs*; *Dirl.* 200.; *July* 31. 1707, *Macdoual*; but the extract of the purſuer's decree hath been ſuperſeded for ſome months, where the liquidation of the debt required a proof by witneſſes, *Fount. Nov.* 22. 1683, *Seton*; *Fount. Jan.* 14. 1686, *Brown*; *Fount. Dec.* 8. 1697, *Muir and Milliken.* Where debts are of a different kind, and afterwards converted into money, either by the ſentence of a judge, or the conſent of parties, the compenſation can have no effect farther back than to the period of liquidation; becauſe till then, the mutual debts were not commenſurable, and ſo incapable of compenſation, *Fount. Nov.* 22. 1711, *Murray.* But where both debts are liquid in ſums of money, but the one not conſtituted, depending perhaps on the debtor's oath, if the debtor ſhall, in the courſe of the ſuit, acknowledge the debt, the compenſation founded on his oath will, in ſo far as relates to the currency of intereſt, operate backward, not barely to the time that the debtor made oath, but to the period at which, by his acknowledgement, the debt became due: for in that caſe the debtor's oath is not what properly creates the debt, or makes it liquid; it only declares, that ſuch a liquid ſum was truly due before, *Dec.* 4. 1675, *Watſon.*

17. Certain debts, though liquid, are not in their nature proper ſubjects of compenſation. Thus it ariſes from the exuberant truſt implied in depoſit, that compenſation cannot be received againſt the depoſitor, *ſupr. t.* 1. § 27. Neither could it be pleaded in the caſe of blank bonds, in which the debtor, by

by granting the bond blank in the creditor's name, virtually renounced the benefit of compenſation againſt him from whom he received the money, at leaſt where the compenſation was founded on debts which had been contracted before the date of the bond, *Harc.* 265. Neither can it be pleaded againſt the poſſeſſor of a note payable to the bearer by the debtor, upon a debt due to him by any of the former poſſeſſors of it. This doctrine is, for the encouragement of commerce, extended by all trading nations to indorſed bills, which the debtors cannot compenſate with any debt due to them by the indorſers; ſee *New Coll.* iii. 79. Neither, laſtly, can ſmall blanch duties due by a vaſſal, be compenſated with a money-debt due to him by the ſuperior; becauſe theſe duties are payable barely as an acknowledgement of homage, without any conſideration had of their value. But it is thought this would not hold, notwithſtanding the deciſion *July* 26. 1678, *L. Powry*, in the caſe of feuholdings; for feu-charters are granted with a ſpecial view to bring an annual profit to the granter by the yearly feu-duty, which, in more ancient times, was frequently equal in value to the full rent of the lands; and it would be the height of iniquity and oppreſſion, to forfeit the vaſſal upon an irritancy incurred through the fault or fraud of the ſuperior, who, by detaining from the vaſſal his juſt debt, diſabled him from performing his part of the feudal contract, and ſo made that forfeiture neceſſary.

18. Where the concourſe is made by the debtor's acquiring a debt due to his creditor, compenſation is rejected, either where a bad intention is preſumed againſt the acquirer, or where the compenſation, if admitted, would evacuate the legal diligence of third parties. Thus a factor who is ſued by his conſtituent for intromiſſions, cannot offer compenſation upon a debt due by that conſtituent, and acquired by the factor after receiving the rents ſued for, *Nov.* 9. 1672, *Pearſon*; nor is it pleadable by the debtor to a perſon deceaſed, who hath, after his creditor's death, acquired the right of a debt due by him, in a queſtion with the other creditors of the deceaſed, *Feb.* 8. 1662, *Craufurd.*

19. By the foreſaid act 1592, *c.* 141. compenſation is only pleadable by way of exception before ſentence; ſo that a debtor who might have defended himſelf by a ground of compenſation, but neglected to plead it pending the ſuit, cannot plead it afterwards by way of ſuſpenſion or reduction of the creditor's decree, *Fount. Dec.* 5. 1710, *Naeſmith.* But if it has been pleaded by the debtor in the courſe of the proceſs, and repelled by the judge, it may be received, either by ſuſpenſion or by reduction. Even decrees in abſence are by our practice conſidered as decrees in the ſenſe of this ſtatute; and conſequently have the effect to cut off the plea of compenſation, whether pronounced by the court of ſeſſion, or by any inferior judge, if the decrees themſelves have not been ſet aſide on ſome legal nullity, or have been turned into a libel, or proceeded upon a general proceſs againſt debtors, *July* 25. 1676, *Wright*; *Fount. March* 21. 1707, *Corbet.* It may perhaps be maintained, that the plea of compenſation ought in no caſe to be excluded by any decree in abſence, ſince paſſing the act of regulations 1672, *c.* 16. though it were pronounced by the court of ſeſſion; becauſe that act eſtabliſhes a general rule, that all defences competent in law may be pleaded, notwithſtanding a decree in abſence, in the ſame manner as if there had been no decree, without the leaſt inſinuation, that the exception or defence of compenſation was not to have the benefit of that rule. A purſuer, when he is creditor to the defender by a ſeparate debt, which has not been included in the libel, may, if the defender ſhould plead any ground of compenſation, elide his defence, by pleading recompenſation upon that ſeparate debt. Both compenſation and recompenſation are governed by the

ſame rules: but where recompenſation is pleaded, matters generally reſolve into an action of count and reckoning.

20. The right of retention may be here explained, upon account of its near reſemblance to compenſation, though it has not the effect of extinguiſhing obligations, but barely of ſuſpending them till he who pleads it obtains payment or ſatisfaction for his counter claim; and it is admitted in thoſe caſes only where compenſation can have no place. Thus a debtor in a ſum, who becomes afterwards cautioner for his creditor in a ſeparate debt, cannot plead compenſation againſt him upon his bond of relief, till he be diſtreſſed; becauſe a cautioner before diſtreſs is only a conditional creditor to the principal debtor: yet he may plead retention, either againſt him, or even againſt his onerous aſſignee, of the ſum contained in the bond, till he be relieved of his cautionary engagement, *Harc.* 256.; *Fount. July* 1. 1709, *Strachan.* Thus alſo, though compenſation cannot be pleaded againſt a creditor, and far leſs againſt his aſſignee, after decree; yet if the original creditor, after having aſſigned the debt to another, be *vergens ad inopiam*, the debtor may, even after decree, retain the debt due by himſelf, till the aſſignee give ſecurity to clear off that which is due to the retainer by the cedent, *Feb.* 18. 1736, *Maclaren.*

21. This right is moſt frequently pleaded by thoſe who have beſtowed either their money or their labour upon the ſubject ſought to be retained; and it commonly ariſes in that caſe from the mutual obligations which naturally lie upon the contracter. Thus a writer or agent is intitled to the retention of the writings in his cuſtody belonging to his client, till his bill of accounts be paid; a tradeſman may retain the piece of work which he was employed to make, till payment of the expence he has diſburſed on it, or of the price of the workmanſhip; a factor or ſteward of a land-eſtate may retain the balance of his intromiſſions till he recover the reaſonable diſburſements which he has laid out on the ſubject of his factory. Nay, this kind of retention is ſometimes extended to debts due to him who claims it, which do not flow from the nature of the obligation by which he is debtor. Thus a factor may, in the caſe laſt ſtated, retain his balance, not only till he recover payment of his expences, (for in ſo far the right ariſes from the nature of the factory), but alſo till he be relieved of the ſeparate engagements he hath entered into on his conſtituent's account; which retention will be effectual againſt all diligences that may be uſed by the conſtituent's creditors to attach the balance due by the factor to the common debtor, *Nov.* 1729, *Stark.*

22. Obligations are alſo diſſolved by novation or innovation, which, in the ſtrict acceptation of the word, denotes the change of one obligation to another, in ſuch manner that both the debtor and creditor continue the ſame. The firſt obligation being thus extinguiſhed by novation, the cautioners in it muſt neceſſarily get free; and all the penalties or damage ariſing from it are underſtood to be purged or rather diſcharged; ſo that the debtor remains bound, only by the new obligation. Delegation, which may be accounted a ſpecies of novation, is the changing of one debtor for another, by which the obligation which lay on the firſt debtor is diſcharged: *ex. gr.* if the debtor in a bond ſhould ſubſtitute a third perſon, who becomes obliged in his place to the creditor, and who is called in the Roman law *expromiſſor*, this requires not only the conſent of the expromiſſor, who is to undertake the debt, but of the creditor: for no debtor can get quit of his obligation without the creditor's conſent, except by actual performance; and no creditor can be compelled to accept of one debtor for another againſt his will. Neither novation nor delegation is to be preſumed: for a creditor who has once acquired a right, ought not to loſe it by implication;

cation; and conſequently the new obligation is, *in dubio*, to be accounted merely corroborative of the old, § 3. *Inſt. Quib. mod. tol. obl.*; *l.* 8. *C. De novat.* Hence, though the debtor in a ſpecial ſum contained in a bond ſhould aſſign to his creditor a bond granted to him by a third party for the like ſum, the firſt debtor's obligation is not extinguiſhed by the aſſignment, unleſs the creditor has clearly diſcovered his intention to ſet him free. But where a ſecond obligation expreſsly bears to be granted *in ſatisfaction* of the firſt, theſe words muſt neceſſarily be explained into novation, or a diſcharge of that firſt, *Dec.* 6. 1632, *Chiſholm.* Yet put the caſe, that lands are ſold by a conveyance, purporting that ſatisfaction, or even payment of the price, is made by the purchaſer, and that a bond is nevertheleſs granted by him to the ſeller, of even date with the deed of conveyance, for a determinate ſum as the price of theſe lands, the conveyance and bond are accounted part of one and the ſame tranſaction, notwithſtanding the diſcharge of the price; more weight being laid, under theſe circumſtances, on what was *actum et tractatum* between the parties, than on the *forma verborum* made uſe of in the conveyance; ſee *Nov.* 14. 1628, *Cumin.*

23. Laſtly, Obligations are diſſolved *confuſione*, where the ſame perſon becomes both debtor and creditor in them, and ſo is not only veſted *activè* with the right of the debt, but *paſſivè* ſubjected to the payment of it, *l.* 21. § 1. *De liber. leg.*; for no perſon can be creditor or debtor to himſelf. This manner of extinction by the ſucceſſion of the creditor to the debtor, or of the debtor to the creditor, or of a ſtranger to both, is to be ſo underſtood as to comprehend, not only univerſal ſucceſſion, or proper repreſentation, but ſucceſſion by ſingular title; *ex. gr.* the ſucceſſion of the debtor to the creditor by an aſſignation *inter vivos.* Extinction by *confuſio* is total, where the ſucceſſor is ſole heir and executor to the deceaſed; but where the ſucceſſion is divided among ſeveral co-heireſſes, not any one of them can be ſaid to repreſent the deceaſed fully; and conſequently, if one of the co-heireſſes were either debtor or creditor to the deceaſed, the obligation is extinguiſhed no farther than her repreſentation goes: if ſhe is, for example, one of three co-heireſſes, the obligation is diſſolved *confuſione* as to a third; and it ſubſiſts *quoad reliquum*, and will accordingly afford action either to or againſt the other two co-heireſſes.

24. In this point we muſt diſtinguiſh between principal and acceſſory obligations. If the principal debtor, who is intitled to no relief from the other obligants, comes in the right of the creditor, the principal obligation muſt be extinguiſhed, becauſe one cannot lie under an obligation to himſelf; and conſequently the acceſſory obligation muſt alſo be diſſolved, which cannot be figured to exiſt without a principal. But if he on whom the right of credit devolves, whether by ſucceſſion to the deceaſed creditor, or by an aſſignation *inter vivos*, be only liable as cautioner, the acceſſory obligation is indeed extinguiſhed, becauſe the debtor in that obligation becomes alſo creditor in it; but the principal obligation is not extinguiſhed, becauſe in that the debtor and the creditor continue to be different perſons; and therefore the principal debtor is liable to the cautioner, who ſucceeds in the right of the original creditor, as fully as he was before to the original creditor himſelf. On the ſame ground, though it be true that an heir is liable *in ſuo ordine* for his anceſtor's moveable debts, he is only liable *ſubſidiariè*, in caſe the moveable eſtate ſhall fall ſhort of paying them off; and therefore, if a creditor in a moveable debt ſhall ſucceed as heir to the debtor, or ſhall make it over to the debtor's heir upon a ſingular title, the debt is not extinguiſhed *confuſione*, but ſtill ſubſiſts in favour of the heir againſt the executor, who is properly and primarily liable in that ſort of debts, *Had.*

July 20. 1610, *Johnſton*. This doctrine, and the reaſon of it, may be applied *vice verſa* to an executor acquiring right to an heritable debt.

25. When the principal debtor ſucceeded as heir to the cautioner, or the cautioner to him, the acceſſory obligation was quite extinguiſhed by the Roman law; becauſe it was deemed incongruous, that a debtor ſhould be bound by two ſeparate obligations for the ſame debt, *l.* 21. § 2. *De fidej.*; *l.* 95. § 3. *De ſolut.* Which doctrine, by a mere ſubtilty of law, but contrary to reaſon and equity, deprived the creditor of the fidejuſſory ſecurity which he had ſtipulated for himſelf, without any fact of his own; for the proper eſtate of the cautioner, whoſe obligation was, according to that rule, extinguiſhed by his death, could be no longer affected at the ſuit of the creditor by any diligence uſed againſt his heir. But by the uſage of Scotland, both the principal obligation and the acceſſory ſubſiſt in the caſe above ſtated; ſo that the creditor may uſe diligence againſt the eſtate of the deceaſed cautioner, who is ſtill accounted the proper debtor in regard of the creditor, upon which diligence he will be preferred before the creditors of the heir, according to the rules to be afterwards explained, *t.* 8. § 101.

26. Rights purchaſed by an apparent heir, affecting the eſtate of his anceſtor, are not extinguiſhed *confuſione*: for an heir, while he is not entered, does not repreſent the debtor, nor fill his place; and conſequently the debt and credit do not meet in the ſame perſon. Hence an adjudication deduced againſt a debtor's eſtate ſtill ſubſiſts, though after the debtor's death it ſhould be purchaſed by the apparent heir, and made the title of his poſſeſſion: for though poſſeſſion had by him on ſuch right ſubjects him *paſſivè* to all his anceſtor's debts, *Act of ſed. Feb.* 28. 1662; 1695, *c.* 24.; yet that, as it is a ſtatutory penalty, enacted merely in favour of creditors, is not ſufficient to create a proper repreſentation of the deceaſed, nor to fix any legal identity of perſons between the anceſtor and the heir unentered, that may be effectual to diſſolve the rights and diligences ſo acquired. Hence alſo ſuch purchaſes ſtand good, not only in the perſon of the acquirer, but of his ſingular ſucceſſors, againſt the next heir who ſerves to the debtor, *Kames*, 102. But if ſuch right acquired by the heir hath been either in whole or in part paid out of the rents of the deceaſed debtor's eſtate, which are the proper ſubject of its payment, the debt is extinguiſhed to all effects, in ſo far as extends to ſuch payment, *Feb.* 13. 1713, *E. Dalhouſie*. Upon the ſame ground, a debt purchaſed by the debtor's heir, who is liable *præceptione hereditatis*, is not extinguiſhed in the perſon of the acquirer: for tho' ſuch *præceptio* is not barely a paſſive title, but gives an active title alſo to the heir, it is not ſuch an univerſal active title as makes him *eadem perſona cum defuncto*, *Fount.* 24. *Jan.* 1694, *Burnet*.

27. *Confuſio* hath not always the effect of a total and perpetual extinction of a debt or right. Sometimes it produces only a temporary ſuſpenſion of it, while the debtor and creditor continue one and the ſame perſon, or while the ſame perſon is intitled to the ſucceſſion of the two ſeveral rights, from the different deſtination of which the *confuſio* flows. But when the ſucceſſion of theſe rights happens again to divide in two, the obligation or right, which lay for a while ſunk or dormant *confuſione*, revives, and recovers its firſt force, *Dec.* 21. 1680, *Cuningham*; *Jan.* 4. 1726, *Cumin*, cited in *Dict.* i. *p.* 196.; *St. b.* 1. *t.* 18. § 9. Hence the conveyance of a debt affecting an entailed eſtate, in favour of the heir of entail, and his heirs whomſoever, does not import a perpetual extinction of the debt. The debt is indeed dormant during the life of the diſponee; but if the heir at law and the heir of entail happen at any time after to be different perſons, the ground of the extinction, or rather of the ſuſpenſion, ceaſeth; and conſequently the debt will revive

revive in the perſon of the heir at law, againſt the heir of entail; for it is conſidered as a ſeparate eſtate, in the abſolute power of the heir who purchaſed it, and affectable by his creditors, *New Coll.* ii. 63. *art.* 2. Nay, though the deed aſſigning the debt to the heir of entail ſhould alſo contain a diſcharge of it in his favour, as having made the payment, the diſcharge hath not the effect of extinguiſhing it *confuſione*, ſeeing that part of the deed which aſſigns it is a ſufficient indication of the heir's intention that it ſhould ſtill continue to ſubſiſt in his perſon, *New Coll.* ii. 101.

TIT. V.

Of Aſſignations.

AFTER having conſidered how obligations are conſtituted, and how they are diſſolved, the natural order leads to explain, how they may be tranſmitted from one to another *inter vivos*, without extinction. It has been explained, under *b.* 2. *tit.* 7. that heritable rights, when they are made properly feudal by infeftment, are tranſmitted by a deed of conveyance containing procuratory of reſignation and precept of ſeiſin, in the form ſometimes of a charter, and ſometimes of a diſpoſition: but heritable rights, before they become feudal by ſeiſin, cannot, ſtrictly ſpeaking, be transferred by a deed of that ſort; becauſe the granter, who is veſted with a right barely perſonal, is not himſelf proprietor in the true legal ſenſe, and ſo cannot effectually grant either procuratory for reſigning the lands, or warrant for taking ſeiſin upon them; ſee *ſupr. b.* 2. *t.* 7. § 2. & 26.—— Conveyances of rights, when oppoſed to proper diſpoſitions, are either, *firſt*, preſumed; 2*dly*, legal; or, 3*dly*, voluntary.—From the poſſeſſion of the *ipſa corpora* of moveables a conveyance by the former proprietor is preſumed, without either written deed, or the teſtimony of witneſſes.—Conveyances or aſſignations are ſaid to be legal, when they are made, either, *firſt*, by an act of the law. Thus marriage is a legal aſſignation of the wife's moveable eſtate in favour of the huſband. Or, 2*dly*, By a judicial ſentence, *ex. gr.* where the judge, by a decree of forthcoming, declares goods arreſted to belong to the creditor-arreſter, or where one is confirmed executor in ſpecial ſubjects by the commiſſary, which is accounted in law an aſſignation, in certain reſpects, to the ſubjects confirmed.—But by aſſignation in proper ſpeech is underſtood, a written deed of conveyance, by the proprietor, to another, of any ſubject not properly feudal; ſo that even heritable rights, when they are either not perfected by ſeiſin, or when they require no ſeiſin, as ſervitudes, reverſions, patronages, &c. are proper ſubjects of aſſignation. Aſſignations are, either of debts, as bonds; and theſe are completed by intimation: or of moveable goods; which ſometimes, though improperly, get the name of *diſpoſitions*, and are completed by an inſtrument of poſſeſſion. The granter of the aſſignation is called *the cedent*, becauſe it is he who cedes or parts with his right in favour of the aſſignee. The receiver or aſſignee is ſometimes called in our law-ſtyle, as he was alſo by the Roman, *ceſſionary*, becauſe the right is ceded in his favour. If the aſſignee makes over his right to a third perſon, the deed is called *a tranſlation*; and if that third perſon conveys it back to the cedent, it is called *a retroceſſion.*

2. It would ſeem, that by our ancient law all obligations were intranſmiſſible, from a notion that no creditor could compel his debtor, contrary to the preciſe terms of his obligation, to become debtor to another, where the obligation did not expreſsly bear *to aſſignees*. And it was perhaps up-

on this ground, that by the old ſtyle of aſſignations, which is ſometimes continued to this day, the aſſignee was made mandatary and procurator *in rem ſuam*; which mandate impowered him to ſue for, recover, and diſcharge the obligation, as the creditor himſelf could have done: but our later cuſtoms have conſidered aſſignations, not barely as mandates, but as conveyances, by which the property of the ſubject aſſigned is, without any ſuch clauſe, fully veſted in the aſſignee; and the general rule is, that whoever is in the right of any ſubject, though it ſhould not bear *to aſſignees*, may at pleaſure convey it to another, except where he is barred, either by the nature of the ſubject, or by immemorial cuſtom.——The chief of thoſe exceptions may be ſhortly mentioned. *Firſt*, Some rights, not only natural, as conjugal, or parental, but conventional, are ſo conſtituted as to be incapable of proper tranſmiſſion; *ex. gr.* rights of liferent; for of theſe nothing can be aſſigned but the profits during the life of the granter, *ſupr. b.* 2. *t.* 9. § 41. *2dly*, Certain rights are, in reſpect to the uſes for which they are granted, incapable of tranſmiſſion; as alimentary rights, which are given for the perſonal ſubſiſtence or alimony of the grantee. *3dly*, Other rights are ſo perſonal to the creditor, from the *delectus perſonæ*, or choice made of him by the granter, that they cannot be transferred by him to another, without ſpecial powers given for that purpoſe by him from whom he himſelf derives right; as the right of an office, of a leaſe, &c. *Laſtly*, There is a ſpecial kind of rights, which, though the proprietor hath full power over them, are not preſumed to be conveyed, unleſs they be particularly ſpecified in the aſſignation; as paraphernal goods, which are ſo peculiarly the wife's property, that a general aſſignation by her to her huſband, of all the moveable eſtate which did then or ſhould afterwards belong to her, was adjudged not to include the paraphernalia, *Dec.* 1733, *Paton*.

3. Though no heritable right is perfected by the delivery of the charter or diſpoſition conveying it, till it be followed by ſeiſin; yet in perſonal rights the doctrine of the Roman law obtains with us, that property is fully transferred by the will of the proprietor, joined with the delivery of the right aſſigned. But becauſe a deed of conveyance, while it continues under the power of the granter, may be cancelled at his pleaſure, therefore no conveyance can be effectual to the grantee, unleſs the deed conveying be delivered to him, as well as the right conveyed, *Harc.* 113. And, as a conſequence of this, one who had ſold a ſubject, but retained in his own hands the conveyance granted by himſelf, in ſecurity of the price, was preferred to the creditors of the buyer upon the ſubject ſold, *New Coll.* ii. 133. ——As debtors, who are not preſumed to know that their debt has been made over to a third party, cannot, by the conveyance, be put *in mala fide* to pay to the original creditor, it was thought neceſſary that the aſſignation ſhould be intimated or notified to the debtor, to let him know that he muſt make payment, not to the firſt creditor, but to his aſſignee. But though this ſeems to have given the firſt riſe to intimations, it is certain, that, by inveterate cuſtom, intimation made under form of inſtrument by the aſſignee or his procurator to the debtor, or at leaſt ſome notification which the law accounts equivalent to it, is an eſſential requiſite, not only for interpelling the debtor from making payment to his firſt creditor, but for completing the conveyance, *Jan.* 22. 1663, *Wallace*; *Dirl.* 3. Hence, though an aſſignation not intimated be valid againſt the granter, who cannot queſtion his own deed; yet if, before intimation of a firſt aſſignment, the cedent ſhall grant a ſecond to a different aſſignee, the ſecond, if it be intimated before the firſt, will be preferred to the firſt. On this ground alſo, an aſſignee cannot plead compenſation upon the debt aſſigned, if the concourſe

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ceaſed before the aſſignment was completed by intimation, *Nov.* 1733, *Barham*. And, in like manner, if an aſſignation be not intimated by the aſſignee during the life of the cedent, any creditor of the cedent, who, upon his death, ſhall confirm the debt aſſigned before the aſſignment be intimated, ſhall be preferred to ſuch aſſignee, *Kames*, 87. Nor is any alteration made in this point by 1690, *c.* 26. declaring ſpecial aſſignations, tho' not intimated during the granter's life, to be valid titles, on which the aſſignee may ſue or defend, without the neceſſity of confirmation: for that ſtatute reſerves entire the rules of preference formerly eſtabliſhed in competitions among the creditors of the deceaſed.

4. Though intimation by the aſſignee to the debtor be neceſſary towards the completing of aſſignations, a formal intimation atteſted by a notary is not always preciſely required. It is true, that where any proper ſolemnity is eſtabliſhed for perfecting a right, equipollents are not to be admitted, *ſupr. b.* 1. *t.* 1. § 54.; as in the caſe of feudal rights, in which no equivalent can ſupply the want of a ſeiſin. Intimation therefore of a conveyance by a notorial inſtrument is not a ſolemnity in this acceptation of the term. All that the law requires is, either the intervention of ſome public officer, as a notary, to intimate the aſſignation to the debtor, or ſome other notice, which implies intimation as ſtrongly as a notorial inſtrument. Thus, *firſt*, An action brought by the aſſignee, or a charge on letters of horning, or a citation upon any diligence uſed by him againſt the debtor, has been uniformly ſuſtained to ſupply the place of intimation; becauſe in any of theſe inſtances, the publication of the conveyance is ſtill more ſolemn than in the caſe of a notorial inſtrument; for they are judicial acts, expoſing the conveyance of the right in favour of the purſuer to the eye of the judge as well as of the debtor. Thus alſo, *2dly*, The debtor's promiſe of payment to the aſſignee, upon the aſſignee's ſhewing him the conveyance, whether the promiſe be made by a miſſive, or other proper writing, ſupplies the want of a formal inſtrument, *Jan.* 22. 1630, ; becauſe it is in effect a corroboration by the debtor of the original debt in favour of the aſſignee, to which the cedent's conſent is held as interpoſed, by his having made a conveyance thereof to him. And as a debtor might ſafely make payment to the aſſignee, when he demands it with the aſſignation in his hands; ſo he may ratify the debt, by a deed corroborating the firſt obligation in the aſſignee's favour; ſee *Kames*, *Rem. Dec.* 124. Nay, a verbal promiſe of payment by the debtor to the aſſignee, upon a communing, ſerves for an intimation; but no verbal promiſe is accounted equivalent to an intimation, unleſs it has proceeded on a communing, *Dalr.* 179.

5. Payment of intereſt made by the debtor to the aſſignee is equivalent to intimation; for the aſſignee, by his receiving intereſt, is truly in the actual poſſeſſion of the debt, in virtue of his conveyance; and all rights not feudal may be completed by the acquirer's entering into the natural poſſeſſion. But the debtor's private knowledge of the aſſignation is not ſuſtained as intimation; ſince that imports neither publication nor poſſeſſion on the part of the aſſignee. This doctrine is however confined to the caſe where there is a competition of creditors: for where there is no creditor in the field, and the ſole queſtion is between the aſſignee and the debtor, the debtor's private knowledge of the conveyance is a ſufficient interpellation to him, and puts him *in mala fide* to make payment to the cedent, *Fount. Feb.* 16. 1703, *Leith*. If poſſeſſion by an aſſignee completes his right, it follows, that the aſſignation of a leaſe, or of the rents of an eſtate, is perfected without the neceſſity of intimation, as ſoon as poſſeſſion is attained by the aſſignee: and, on the other hand, an aſſignation of rents, or, as it is commonly called, *mails and duties*, though it ſhould be intimated to the tenant,

tenant, is not valid in a competition with creditors, if the aſſignee hath ſuffered the granter to continue in poſſeſſion; for all rights of moveable ſubjects that are granted *retenta poſſeſſione*, where the granter continues to hold the poſſeſſion, are preſumed to be colluſive for the granter's own behoof, and only intended as a cover againſt juſt creditors. It may be here obſerved, that an aſſignation of the rents, creates merely a perſonal right to the aſſignee againſt the poſſeſſor, or againſt perſonal creditors, but confers no real right in the lands, *Dec.* 13. 1628, *Huntly:* for the cedent continues proprietor of the lands, notwithſtanding the aſſignation granted by him of the rents; and as he transfers his property to a purchaſer by a ſale of the lands, the purchaſer from him muſt, in the character of proprietor, be preferable in a competition with aſſignations of rent, or other perſonal rights of that ſort, which fall upon the cedent's being diveſted of the property. Where there are many obligants, whether joint debtors, or principals and cautioners, intimation made to any one is ſufficient for completing the conveyance: but ſuch intimation is not effectual for interpelling thoſe to whom no intimation was made, from making payment to the cedent; and therefore aſſignees ought in prudence to make intimation to all of them, *St. b.* 3. *t.* 1. § 10. In debts due by a corporation, or a trading company, it would be often extremely difficult, if not impracticable, to diſcover all its members, and the places of their reſidence; ſo that if there was a neceſſity to intimate to all of them, there could be no ſecurity in the purchaſing of ſhares in any joint ſtock: wherefore in practice the intimation of an aſſignation of a debt due by an hoſpital, made to no other but the treaſurer, was admitted as a proper intimation, *Jan.* 1739, *Cred. of Lethem*; and an intimation to two clerks, who were alſo the managers of a trading company, a minute of which was regularly entered into their books, was adjudged to have the effect of fully diveſting the cedent, *Tinw. Nov.* 19. 1755, *Watſon of Muirhouſe contra Murdoch, &c.*

6. There are ſundry kinds of aſſignations which need not be intimated: *Firſt*, Tranſmiſſions or indorſations of bills of exchange; becauſe as the different parties to commercial tranſactions reſide in different countries, their conveyances muſt not be fettered with forms introduced by the laws of particular ſtates, but ought to be governed by the *jus gentium*, and the cuſtom of trading nations. Inland bills, though the parties to theſe are not foreigners, have by cuſtom all the privileges of bills of exchange, and conſequently require no intimation to complete their tranſmiſſion. *2dly*, Bank-notes, or bank-bills, which the law conſiders as caſh or ready money, are fully transferred to the poſſeſſor by the bare delivery of them; for being payable to the bearer, their property muſt paſs with the poſſeſſion. And even where one offers a proof, that a particular note had been his property, and was taken from him either by ſtealth or violence; though payment may be refuſed to him who was guilty of the theft or robbery, yet the note, the moment it is out of his hands, is no longer affected with any *vitium reale*, but muſt be paid to the bearer, without regard to the claim of the former proprietor, *Falc.* ii. 64.; *Kames, Rem. Dec.* 105.; which ariſes both from the nature of bank-notes, and from the plain intention of the law authoriſing banks. This ſeems alſo to have been the caſe of bonds taken blank in the creditor's name, while ſuch bonds were authoriſed by law; for they were in effect payable to the bearer. Yet the delivery of the bond by the original creditor to another was conſidered by our ſupreme court as an aſſignation, which conſequently required intimation to complete it, *Harc.* 260. This judgement, though hardly reconcileable with the obvious notion of blank bonds, was thought neceſſary for checking the frequent frauds committed by the poſſeſſors of them to elude the payment of their lawful debts. *3dly*, Aſſignations

ſignations of aſſignable reverſions (*i. e.* according to the common opinion, of reverſions granted to heirs and aſſignees) need not be intimated, but muſt be recorded in the regiſter of reverſions, which is appointed for that very end, to publiſh to all the lieges what reverſions affect any land-eſtate, and who ſtand in the right of them, *Dec.* 5. 1665, *Beg.* But the recording of the conveyance of a moveable bond in a regiſter does not ſupply the want of intimation; becauſe the records are not intended to ſerve for publication, in the caſe of perſonal rights, but barely for ſafe cuſtody, or as a warrant for diligence. Hence, inhibition uſed by the aſſignee againſt the cedent, though the letters of inhibition be regiſtered, has not the effect of interpelling the debtor from making payment to the perſon inhibited; for as that diligence is directed againſt the cedent, not againſt the debtor, the debtor is not bound to know of it, and the regiſter of inhibitions is not intended for a method of putting debtors *in mala fide* to pay to the original creditor, *March* 14. 1626, *L. Weſteraw.* 4*thly*, A right of lands not perfected by ſeiſin, need not, or rather cannot be intimated, the nature of the right not admitting of it; for an intimation muſt be made to the debtor: but in rights of land, though not completed by infeftment, the lands are properly debtor, and not any perſon, *Dec.* 8. 1710, *Rule.* For the tranſmiſſion of this laſt kind of rights, *vid. ſupr. b.* 2. *t.* 7. § 26.

7. Laſtly, No legal or judicial aſſignation need be intimated, ſuch as adjudication or marriage; for that ſort derives force from the law itſelf, and ſo carries the full right of the ſubjects thereby conveyed, without the interpoſition of any legal ſolemnities, *St. b.* 3. *t.* 1. § 13. 14. Hence a decree of adjudication, though the adjudger had neglected to take ſeiſin upon it for many years, was, without any intimation, preferred to an arreſtment, *Feb.* 23. 1671, *Lo. Juſtice-Clerk.* But though legal aſſignations veſt the aſſignees with the full right of the ſubjects thereby conveyed, yet as debtors have no acceſs to know of them, without ſome notification, they cannot, till that period, interpel the debtor from making payment to the original creditor. Hence a debtor to a woman by a moveable bond, is *in bona fide* to pay to her, even after her marriage, until it be intimated to him: and in like manner a debtor to one by an heritable bound is *in bona fide* to make payment to the original creditor, notwithſtanding its being adjudged by a third perſon, till he be properly certified of the decree of adjudication. Though the legal conveyance by marriage requires no intimation, yet an aſſignation granted by a woman to a third party before her marriage, even without intimation, is preferable upon the ſubject aſſigned to the right which the huſband acquired by the marriage, *Goſf. Dec.* 6. 1673, *Robertſon*; becauſe the huſband is, by the marriage, liable in payment of the moveable debts contracted by the wife previouſly to it; and ſince the aſſignation granted by the woman before her marriage implies warrandice againſt her, that obligation of warranty is truly a moveable debt due by her to the aſſignee, with which the right the huſband had acquired by the marriage is burdened; ſo that the huſband cannot plead upon his legal aſſignation in prejudice of that warrandice.

8. Aſſignations, when properly perfected, carry to the aſſignee all rights which corroborate or ſtrengthen the right conveyed, and all diligences which have proceeded upon it, though thoſe corroborative rights ſhould not be ſpecially mentioned in the conveyance, *Feb.* 3. 1676, *Cultie.* As they are procuratories *in rem ſuam*, they intitle the aſſignee to proſecute his right in the ſame ſtate in which it was made over to him by the cedent. Hence the aſſignee may uſe diligence on the debt aſſigned to him, either in his own name, or in that of the cedent, while he is alive: but where diligence is once begun in the cedent's name, it cannot be executed in the

aſſignee's; for the meſſenger, who is barely the hand employed in the execution, and ſo not a proper judge in the import of tranſmiſſions, is limited in his execution to the warrant contained in the letters of diligence: the court of ſeſſion therefore, on report of the clerks to the ſignet, that it was not uſual for an aſſignee to charge or arreſt, upon a horning raiſed at the ſuit of the cedent, declared ſuch arreſtment null, *Falc.* i. *June* 11. 1745, *Steuart* *. In a right conveyed ſimply in truſt, all queſtions relating to the extent of the truſtee's powers depend on the nature and purpoſes of the truſt. If the truſtee cannot properly diſcharge his truſt, without having ample powers over the ſubject intruſted, he may grant feu-charters, remove tenants, receive the rent, and diſpoſe of the farm-grain, to merchants, and in fine exerciſe every power, except that of alienation, which is not to be preſumed in any caſe, and requires a ſpecial clauſe. But if the truſt be created for one purpoſe only, which does not require ſo extenſive powers, *ex. gr.* for adjudging a debtor's eſtate; then the truſtee's powers, though not expreſsly limited, extend no farther than is neceſſary for the ſpecial purpoſe of the truſt. It is for this reaſon that by the ſtyle of thoſe rights the truſtee is not, as in the common caſe, made accountable for intromiſſions, but is taken bound, merely to diveſt himſelf, after the adjudication is led, of the truſt, and of the diligence uſed upon it, in favour of the cedent. The right of a ſubject, when made over by a debtor to his creditor, is granted either *in ſolutum*, that is, in ſatisfaction of his debt, or barely in ſecurity of it. In the firſt caſe, which *in dubio* is not to be preſumed, the former debtor's obligation is extinguiſhed by novation, explained above, *t.* 4. § 22.; and the creditor, in place thereof, accepts of the debtor in the bond aſſigned for his debtor, and takes upon him the full hazard of making the ſubject conveyed effectual. When the aſſignation by the debtor is ſimply in ſecurity, he ſtill continues bound; and the creditor, for whoſe ſecurity it is granted, is intitled to hold that corroborative right in his hands, till ſatisfaction be made to him by his debtor of the debt for which the ſecurity was given, though at the ſame time he is not obliged to uſe any diligence for recovering the ſum or ſubject conveyed.

9. As all exceptions competent to a debtor may be proved by the oath of the creditor, a debt, though aſſigned to a third party, may be extinguiſhed by the oath of the cedent, before the aſſignation be intimated; becauſe the cedent continues creditor till intimation; and as he may in that character extinguiſh the debt by ſigning an acquittance to the debtor, he may alſo extinguiſh it by his oath, acknowledging that he hath received payment, *Feb.* 15. 1662, *L. Pitfoddels*. But no exception againſt the debt, of compenſation, or even of payment, when it is to be proved by the oath of the cedent, can affect the aſſignee after the aſſignation is intimated; becauſe the cedent, being fully diveſted of the debt by the intimated aſſignation, hath no longer any intereſt in it; and conſequently the aſſignee cannot afterwards be hurt by his oath, more than he can be by the oath of any third party whatever.

10. Two caſes muſt however be excepted from this laſt rule. *Firſt*, The oath of the cedent is good againſt the aſſignee, even after intimation, if the ſubject conveyed hath been rendered litigious before intimation, *ex. gr.* by an action brought by the debtor againſt the cedent, *June* 20. 1673, *Somervel*. But the ſubject is not rendered litigious, barely by a citation given by the debtor to the cedent, which hath not been brought the length of an action, *Jan.* 21. 1709, *Houſton*. *2dly*, As the aſſignee is, after intimation, truly creditor, the debtor may refer to his oath, whether the aſſignation was gratuitous, or in truſt for the cedent, *June* 16. 1665, *Wright*; and if he acknowledge either of the two, the cedent's oath will prove againſt him, as

* The ſame judgement was given, *Dec.* 7. 1769, *Fogo and Galloway contra Scot and Oliver.*

if

if there had been no aſſignation; becauſe no creditor can, by a deed granted without a valuable conſideration, put his debtor in a worſe caſe than he was before, ſo as to deprive him of any method of proof formerly competent to him. If the aſſignation be in part onerous, and in part gratuitous, the oath of the cedent will be received againſt the aſſignee in ſo far as it is gratuitous, *Feb.* 25. 1679, *Steel*; *Harc.* 258. All defences competent to a debtor in a moveable debt againſt the original creditor, which he can prove otherwiſe than by his oath, continue relevant againſt even an onerous aſſignee, whether thoſe defences ariſe from a ſeparate backbond granted by the creditor at conſtituting the debt, or from other grounds, *Jan.* 14. 1663, *Scot*; becauſe no aſſignee can be in a better condition than his cedent; *utitur jure auctoris*; for the aſſignment gives him the right merely as it ſtood in the cedent or original creditor. And this doctrine extends alſo to mutual contracts, in which the aſſignees are ſubjected to all the burdens which affected the right while it was veſted in the cedent, not only where the mutual obligations are inſerted in the contract itſelf, (for theſe the aſſignee cannot be ignorant of), but even where they are partly formed by a ſeparate backbond, if it ſhall appear by witneſſes, that the contract and backbond have a relation to, and are mutual cauſes of one another, *St. b.* 1. *t.* 10. § 16. It is otherwiſe in the tranſmiſſion of feudal rights: for there the diſponee reſts upon the faith of the records; and ſo may diſregard all rights granted by his author, upon which infeftment has not been taken before that which hath proceeded on his own diſpoſition. The queſtion, How far, in contracts whereof the foundation is laid in fraud, a purchaſer *bona fide* will be ſecure? may be ſolved by a ſimilar reaſoning. Purchaſers of real rights rely on the faith of the records, and the ſubject of their purchaſe is the moſt valuable of all thoſe which fall under the conſideration of law, for which reaſon the legiſlature hath, for their ſecurity, enacted by ſpecial ſtatute, 1621, *c.* 18. that they ſhall not be affected by the fraud of their authors, if they themſelves have not been *participes fraudis*. There was alſo a neceſſity for extending the ſame doctrine to purchaſers of moveable ſubjects, and to onerous indorſees in bills, to give a free courſe to commerce; but in bonds, or other perſonal obligations or contracts, the aſſignee is neither ſecure by ſtatute, nor by the neceſſity of the caſe; and therefore he falls under the general rule, *Aſſignatus utitur jure auctoris*; he is no more than procurator *in rem ſuam*, and therefore muſt be in the ſame caſe with the cedent; ſo that all exceptions founded upon any declaration or deed of the cedent, whether ariſing from his obligation or delict, are good againſt the aſſignee, *St. b.* 4. *t.* 40. § 21.; *New Coll.* i. 152.

11. This title may be concluded with obſerving, that conveyances, not only of rights of land, but of perſonal obligations, may be neceſſary on the part of the creditor; for where-ever a creditor receives payment from one who is not the proper debtor, but who has right of relief competent to him againſt the debtor, he who pays is from equity intitled to demand an aſſignation from the creditor of every ſeparate ſecurity which he hath in his perſon for the debt, that he may thereby work his relief the more effectually againſt the principal debtor; ſee *Feb.* 1735, *Garden*, obſerved in *Dict.* i. 227.; inſomuch that if the conveyance be rendered impracticable by the fault of the creditor, who has perhaps through negligence loſt the grounds of debt, he alone muſt ſuffer the conſequences, and not the cautioner, whoſe condition ought not to be rendered worſe through the omiſſion of another. But if ſuch aſſignation tends to hurt the granter, equity interpoſes on the other part with this rule, That no creditor can be compelled to aſſign a right to his own prejudice. Hence, though a creditor who has got a pledge from his debtor in ſecurity of his debt, may be forced to tranſmit

mit his right of pledge to the cautioner, upon payment made by him of the debt; yet if the creditor hath the ſame individual ſubject impignorated to him in ſecurity alſo of another debt, in which the cautioner is not bound, equity will not compel him to transfer it, and thereby run the hazard of loſing the other debt, unleſs the cautioner ſhall likewiſe pay off that debt for which he did not interpoſe his credit. The doctrine of neceſſary aſſignations, in the caſe of rights of land, hath been explained, *ſupr. b.* 2. *t.* 12. § 66.

TIT. VI.

Of Arreſtments and Poindings.

PERSONAL obligations, though conſtituted according to the forms of law, may be rendered ineffectual to the creditor, either in whole or in part, by the debtor's inability to pay or perform, and by the preference of other creditors upon the debtor's funds. In the competition of perſonal creditors, where no diligence has been uſed by any of them, they are all preferred *pari paſſu*, without regard to the dates of their obligations or grounds of debt. And though the court of ſeſſion did, by the more ancient practice, prefer widows for the ſums of money or moveables ſettled on them by their marriage-contracts, before other perſonal creditors, from favour and compaſſion, *Feb.* 8. 1662, *Craufurd*; yet by a ſolemn deciſion, *Fount. Feb.* 17. 1688, *Keith*, the preference of perſonal creditors, even where widows were competing, was ſettled according to the common rules of law, without privilege. The practice ſince has been conformable to that deciſion, *Dalr.* 100. 110. It is therefore the priority of the diligence uſed upon the debt, and not of the debt itſelf, which alone intitles the creditor to a preference before others who have not uſed ſo timely diligence. The diligence competent to creditors againſt their debtor's heritable eſtate has been explained *ſupr. b.* 2. *t.* 11. & 12. Where his eſtate is moveable, the creditor may either arreſt or poind.

2. The term *arreſtment* denotes ſometimes the ſecuring of a criminal's perſon, till he undergo trial, or give bail, 1487, *c.* 99. At other times it is uſed to expreſs the order of a judge, injoining two or more competing parties not to intermeddle with the ſubject in diſpute till the event of a proceſs. But when it is conſidered as a diligence competent to a creditor, it may be defined, The command of a judge, by which he who is debtor in a moveable obligation to the arreſter's debtor is prohibited to make payment of his debt, or perform his obligation, till the debt due to the arreſter who uſes the diligence be paid or ſecured. The arreſter's debtor is uſually called *the common debtor*, becauſe where there is a number of competing creditors, he is debtor to all of them. He in whoſe hands the diligence is uſed is ſtyled *the arreſtee*.

3. Arreſtment may be uſed by the authority, either of the court of ſeſſion, or of an inferior judge. Where it is laid on by the authority of the ſeſſion, it proceeds, either, *firſt*, on a warrant contained in letters of horning; for all hornings, whether grounded on regiſtered obligations, or on more formal decrees, contain an order to the meſſenger to arreſt all the debtor's moveable goods in default of payment within the time limited in the letters: or, *2dly*, Arreſtment proceeds upon ſpecial letters; which the creditor, if his ground of debt be liquid, may obtain upon exhibiting it to the court, though not regiſtered; or, if the debt due to him be not yet conſtituted or aſcertained by any ſentence, he may raiſe a ſummons againſt his

his debtor for payment; which ſummons, after it is executed againſt the debtor, is conſidered as a begun action, and conſequently is a proper ground for obtaining ſpecial letters of arreſtment. This laſt ſort is ſtyled arreſtment *on a dependence*, or *on a depending action*.—The warrants which iſſue from inferior courts for arreſting get the name of *precepts*; and they are commonly executed by the officers of the court from whence they iſſue. Theſe precepts cannot be executed againſt the arreſtee without the bounds of the inferior judge's territory, though the common debtor ſhould have his reſidence within it, *Dec.* 5. 1671, *Millar*; for execution is an act of juriſdiction. Upon a ſimilar ground, no creditor can, by an arreſtment ſerved edictally at the market-croſs of Edinburgh, and pier and ſhore of Leith, effectually attach his debtor's effects which are lodged in a foreign country, *July* 26. 1733, *Coutts*, obſerved in *Dict.* i. *p.* 330.; becauſe the perſon in whoſe poſſeſſion ſuch goods are lodged, is not ſubject to the juriſdiction of any court of Scotland.

4. Arreſtment is moſt commonly uſed in the hands of him who is debtor to the arreſter's debtor in any bond or obligation. If that perſon be incapable of managing his own affairs, either through nonage or natural infirmity, *ex. gr.* a pupil or an idiot, arreſtment muſt be uſed in the hands of his tutors or curators, as his legal adminiſtrators. If he be a minor paſt pupillarity, it may be uſed in the hands, either of the minor himſelf, or of his curators, *Harc.* 92. Yet the curators, who are by law intruſted with the management of the minor's eſtate, and with the payment of his debts, appear to be the moſt proper arreſtees. If the debtor to the common debtor be major, and have committed the general management of his affairs to others, either on account of abſence, or from any other cauſe, arreſtment may be uſed in the hands of his commiſſioners: but where it is laid on in the hands, not of the debtor to the common debtor, but of his factor, or ſteward, or truſtee, whoſe powers are limited to the receiving and diſpoſing of the rents of a particular land-eſtate, ſuch arreſtment hath been adjudged improper; becauſe though the arreſtee may be debtor to his conſtituent or truſter, he is not debtor to the common debtor, *New Coll.* i. 44. Such arreſtment however ſeems as proper as that uſed againſt commiſſioners, ſubject to the following reſtrictions. *Firſt*, The conſtituent himſelf cannot be affected by the prohibition contained in the arreſtment, becauſe it was neither directed to him, nor to his general adminiſtrator. *2dly*, Such arreſtment cannot hinder the factor from clearing accounts with his conſtituent, and paying him the whole balances: it imports barely an injunction to him as factor, not to make payment to the arreſter's debtor. *3dly*, The conſtituent muſt be made a party to the action of forthcoming, *infr.* § 16.; otherwiſe his whole rents may, without his knowledge, be recovered from his factor, for debts which are perhaps not juſtly due, *Jan.* 18. 1709, *Donaldſon*. Arreſtment may be uſed in the hands of the purchaſer of an eſtate upon which the common debtor is a creditor, becauſe the purchaſer is truly debtor by his purchaſe to the creditors: and indeed if the eſtate be ſold at the ſuit of an apparent heir, the purchaſer is the only proper arreſtee; for the apparent heir, who is ſuppoſed not to have ſubjected himſelf to his anceſtor's debt, is in no ſenſe debtor to the common debtor, *Tinw. Nov.* 27. 1753, *Cred. of Bonjedburgh*.

5. Arreſtment uſed by a creditor in the hands of his own debtor, did, by our former deciſions, ſubject thoſe who had *bona fide* purchaſed the goods arreſted from the arreſtee, to reſtore them to the arreſter. Stair, tho' he cenſures thoſe judgements, inclines to think, *b.* 3. *t.* 1. § 25. that arreſtment uſed in the debtor's hands ought to have the effect of ſubjecting the debtor, who ſhall afterwards diſpoſe of the goods arreſted, to the pains of breach of arreſtment: but Steuart's opinion, *Anſ. v. Arreſtment*, ſeems

better founded, that as that diligence is intended merely for a reſtraint on third parties who are debtors to the arreſter's debtor, the only legal method of affecting moveable goods in the debtor's own poſſeſſion is by poinding; and that conſequently arreſtment in the debtor's own hands is an inhabile and improper diligence. Arreſtment may be uſed in the hands, not only of private perſons, but of corporations: but as corporations have no natural perſon of their own, to repreſent the whole body-corporate, the directors have an implied power, though there ſhould be no ſpecial proviſion in the grant for that purpoſe, to appoint an officer, in whoſe name the corporation may ſue or be ſued; and arreſtment uſed in the hands, either of that officer, or of the directors themſelves, is effectual, *Jan.* 10. 1739, *Cred. of Menzies.* Arreſtment was found to have been improperly uſed in the hands of a mere depoſitary; becauſe the proper method for recovering ſubjects depoſited, is by an action of exhibition, not by the diligence of arreſtment, *Dec.* 1726, *Jamieſon*, obſerved in *Dict.* i. *p.* 56. But by a later deciſion, *New Coll.* ii. 256. arreſtment uſed in the hands of one to whom the common debtor had committed the cuſtody of his goods was ſuſtained. Arreſtment cannot be effectually uſed in the hands of him to whom the goods arreſted are conſigned, before he has attained the natural and actual poſſeſſion of them, *New Coll.* ii. 166.; far leſs can that diligence be uſed in the hands of one who cannot in any ſenſe be conſidered as a cuſtodier or a poſſeſſor; for which ſee *Jan.* 19. 1733, *Hunter*, obſerved in *Dict.* i. *p.* 56.

6. All moveable goods belonging to the common debtor, in the poſſeſſion of third perſons, and all moveable debts due to him, whether pure or conditional, and the arrears of rent or intereſt growing from heritable ſubjects, are arreſtable. Nay, every claim competent upon moveables, though its validity or extent may depend on the iſſue of a ſuit, as it is tranſmiſſible by voluntary aſſignation, may alſo be affected by the arreſtment of creditors. As moveable debts alone were the proper ſubject of arreſtment, no creditor could, by our old law, arreſt a perſonal bond due to his debtor, if it contained a clauſe of intereſt, becauſe that clauſe made it heritable: and this rule continued, even after the act 1661, *c.* 32.; for though that act altered the nature of bonds bearing intereſt from heritable to moveable, it was only in the point of ſucceſſion. But becauſe the leading of appriſings on ſuch bonds was attended with a conſiderable expence, all obligations, though bearing clauſes both of intereſt and infeftment, are declared arreſtable, where ſeiſin has not actually followed upon them, by 1661, *c.* 51. copied after 1644, *c.* 41. In conſequence of this act, the arreſter of an heritable bond which had even been perfected by ſeiſin, was preferred to an adjudger of the ſame ſubject, in regard the ſeiſin was not regiſtered, *Dalr.* 74.; becauſe a ſeiſin not regiſtered is null as to third parties. But this ſtatute 1661 is confined to bonds, contracts, and other perſonal obligations; and ſo does not extend to adjudications, wadſets, or diſpoſitions of heritage, which are not ſo properly debts as rights of land, *Feb.* 22. 1666, *Lockhart.* Whether a wadſet ſum conſigned upon an order of redemption be arreſtable by a creditor of the wadſetter, ſee above, *b.* 2. *t.* 8. § 23.

7. There are ſome ſubjects, which, though they be moveable, cannot be arreſted: *Firſt*, Bills; for theſe being conſidered as bags of money, which paſs from hand to hand, cannot be affected with any burden in the perſon of the poſſeſſor. *2dly*, Sums deſtined by the granter for a ſpecial purpoſe, cannot, by arreſtment, or any other diligence, be inverted, contrary to the granter's intention, to any other uſe, *Jan.* 15. 1674, *Baillie.* Upon this ground, alimentary rights, granted for the perſonal ſubſiſtence of the grantee, are not arreſtable, *Home*, 109.; but the paſt intereſt due upon an alimentary debt may be arreſted by him at whoſe expence the alimony was ſupplied.

ſupplied. No perſon can reſerve any part of his effects to himſelf for his alimony, ſo as to withdraw it from the diligence of his creditors; but a debtor may lawfully exchange one alimentary ſubject belonging to himſelf, for another of equal value, ſo as that ſubject which is ſurrogated in the place of the firſt ſhall not be arreſtable more than the firſt; for the creditors are not thereby put in a worſe condition than before. Servants fees are of an alimentary nature, being given that they may maintain themſelves in a condition ſuitable to their ſervice; and ſo cannot be arreſted, except as to the ſurplus fee, over and above what is neceſſary for their perſonal uſe, *July* 9. 1668, *Boog*. The King's penſions are not arreſtable, becauſe they are alimentary, *St. b.* 2. *t.* 5. § 18.; *b.* 3. *t.* 1. § 37. Theſe are either annexed to offices; in which caſe the grantee is conſidered as the King's ſervant employed in a particular ſtation, (and, on this foundation, the court of ſeſſion have, by ſeveral acts of ſederunt, *June* 11. 1613, preſerved in *Spottiſw. Pract. p.* 228. and *Feb.* 27. 1662, declared their own ſalaries not arreſtable); or if the penſion be merely gratuitous, it is preſumed to have been granted by the ſovereign, from a perſonal regard to, and for the maintenance of the grantee. And indeed all ſalaries annexed to offices, in ſo far as they amount to no more than a reaſonable allowance for the decent ſupport of thoſe who are named to them, though they be granted, not by the King, but by ſubjects, whether communities or private donors, ought on the ſame ground to be accounted alimentary.

8. Neither are future debts affected by arreſtment; that is, debts not due by the arreſtee till after the time of ſerving him with the diligence. It is true, that inhibition, which is a diligence againſt heritage correſponding with the arreſtment of moveables, affects the eſtate afterwards acquired by the perſon inhibited, as well as that which belonged to him at publiſhing the inhibition. But this ariſes from the different ſtyles of the two diligences. Letters of inhibition carry a tract of future time, and ſo include both *adquiſita* and *adquirenda*; whereas the warrant to arreſt is confined preciſely to ſuch debts as ſhall be due at the time of uſing the diligence. This diſtinction hath been probably eſtabliſhed to preſerve the free courſe of trade in moveables, which would be greatly imbarraſſed if debts not yet exiſting might be attached by the diligence of creditors. The only method therefore of affecting debts due after arreſtment is by laying on a new arreſtment, which may be done on the firſt warrant. Claims depending on the event of a ſuit are not, in the judgement of law, future debts; for the ſentence of the judge admitting the claim, when it is pronounced, draws back to the period at which the debt became firſt due; ſee *Falc.* i. *Dec.* 19. 1744, *Wardrop*. The ſame doctrine holds in conditional debts, in which the condition, after it exiſts, hath a retroſpect to the date of the ground of debt.

9. In the arreſtment of debts which carry a yearly profit to the creditor, it is the paſt and current rents, or intereſt only, which can be affected by that diligence; all that falls due afterwards is accounted future debt. By current rent is underſtood that debt which has begun to run from the term preceding the arreſtment, but which cannot be demanded from the debtor till next term, *ubi dies ceſſit, licet nondum venerit*. An arreſtment, for inſtance, uſed before the term of Whitſunday in the hands of a tenant, not only affects the paſt rent due to the landlord, but that which does not become payable till the Whitſunday next enſuing the arreſtment: for though that rent cannot be exacted till Whitſunday, its term is current, as the lawyers expreſs it, becauſe it has begun to run from the preceding term, and therefore is accounted a preſent debt. But though the diligence of arreſtment be valid with regard to the current rents, yet the full execution of it muſt be ſuſpended; ſo that no forthcoming can be purſued upon it, till the

the debt become actually demandable. Though in annuities due to widows, there is truly no current term, *dies nec cedit nec venit* till the next term; becauſe the queſtion, whether any annuity ſhall fall due to her after the laſt term? depends on her ſurviving the next, *b.* 2. *t.* 9. § 64.; yet arreſtment before the term, uſed by a widow's creditor, was, from the favour indulged to the creditors of liferenters, ſuſtained to carry the annuity that became due and payable at the term next after the arreſtment, where the widow actually ſurvived that term, *Fount. Jan.* 31. 1705, *Corſe.* * In obligations of this ſort, the effects of the arreſtment are more or leſs limited, according to the different nature of the obligation. If the obligation itſelf which conſtitutes the debt be arreſtable, *ex. gr.* a bond of borrowed money, or even an heritable bond not perfected by ſeiſin, the whole of it is carried by the arreſtment; becauſe in that caſe the full *jus debiti* is affected, not only the paſt intereſt due on the bond, but the principal ſum, and the whole intereſt that may afterwards fall due till payment, as an acceſſory of the bond itſelf. But where the obligation which creates the debt is not arreſtable, *ex. gr.* a diſpoſition of lands, or an heritable bond completed by ſeiſin, it is only the intereſt on the bond or diſpoſition, that had either fallen due, or was current, at the time of the arreſtment, that can be affected with the diligence; for the future intereſts are accounted a debt not yet exiſting, and ſo cannot be carried by it. This doctrine holds alſo in the arreſtment of rights not falling under the *jus mariti*, tho' they ſhould be moveable in the article of ſucceſſion. Thus the arreſtment of a moveable bond due to a wife, laid on for a debt due by the huſband, carries only the paſt and current intereſt; becauſe no more falls under the *jus mariti*; for the bond itſelf belongs to the wife, whoſe property cannot be carried off by the creditors of the huſband, *Jan.* 19. 1739, *Cred. of Clunes*, obſerved in *Dict.* i. *p.* 55.

10. All debts in which a debtor is perſonally bound, are grounds upon which the creditor may arreſt his moveable eſtate. Stair indeed affirms, that no creditor in a debt properly heritable, can uſe arreſtment againſt his debtor, *b.* 3. *t.* 1. § 27.; becauſe there ought to be an analogy between the nature of debts arreſtable, and of thoſe on which arreſtment may proceed. But, by the ſame reaſoning, inhibition, becauſe it ſtrikes only againſt heritable ſubjects, ought not to be uſed but by creditors in heritable debts; whereas it is a rule, grounded not only on law, but on the higheſt equity, that a creditor, whatever may be the nature of the debt due to him, ought to have acceſs to ſecure it, by affecting every right belonging to his debtor, whether heritable or moveable. This doctrine ſeems nevertheleſs to be taken for granted in two later deciſions, *Fount. Jan.* 18. 1695, *Fraſer*; *June* 17. 1712, *Ker*. But theſe judgements are grounded upon an erroneous ſuppoſition, that the act 1661, *c.* 51. prohibits arreſtment to proceed on heritable debts; whereas the words of the act, *arreſtable at the inſtance of any creditor*, appear, on the contrary, to authoriſe ſuch arreſtments. It muſt however be allowed, that where a bond contains no perſonal obligation on the granter, as in the caſe of heritable bonds conceived after the old form, there the lands are accounted the only debtor; and conſequently the creditor, though he may uſe all diligence on his ground of debt, proper to affect theſe lands, has no right to arreſt the goods of the granter of the bond, who is not the primary debtor. Arreſtment cannot, in the common caſe, proceed on a debt, whereof the term of payment is not yet come; for it is preſumable, that the debtor has got the term of payment poſtponed, from a view that he may, in the intermediate time, have the free adminiſtration of his whole eſtate, and thereby raiſe a fund ſufficient for the payment of his debts. But if the debtor be *vergens ad inopiam*, declining in

* See *New Coll.* iii. 36.

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his circumſtances, it were hard to tie up the hands of a lawful creditor from uſing diligence for his own ſecurity, while his debtor is ſquandering his funds, or while others are carrying them off by diligence, *July* 17. 1678, *Lo. Pitmedden*; *Kames*, 106. Where one has a ground of credit, not for a ſum of money, but for the performance of a fact, or where he has a depending action, merely declaratory, without any concluſion of payment, ſuch claims are not proper grounds for arreſtment, *Dalr.* 33.; *Feb.* 26. 1712, *Roſs*.

11. Arreſtment being a ſtep of diligence, renders the ſubject litigious, ſo ſoon as it is uſed, before it be perfected by forthcoming, in the manner to be ſoon explained; and therefore, according to the received rule *in rebus litigioſis*, *b.* 2. *t.* 11. § 7. and *b.* 2. *t.* 12. § 16. it cannot be excluded, either by the poſterior voluntary deeds of the debtor, or by the legal diligence of creditors, unleſs the uſer of the begun diligence hath been *in mora*, or become negligent in proſecuting it, *St. b.* 3. *t.* 1. § 42.; *b.* 4. *t.* 35. § 6. Arreſtment, in ſo far as it is prohibitory, is perſonal to the arreſtee, in whoſe hands the diligence was uſed; for his heir, againſt whom the prohibition was not directed, and who is preſumed ignorant of the arreſtment uſed againſt his anceſtor, is *in bona fide* to pay to his creditor till he alſo be properly interpelled. Stair, *b.* 3. *t.* 1. § 26. and Mackenzie, § 6. *h. t.* ſeem to affirm, that arreſtment contains nothing more than this prohibition; and, conſequently, that it has no effect whatever after the death of the arreſtee. But this opinion, though received univerſally as the law of Scotland for a long courſe of time, ſeems to have been ill founded: for arreſtment, by rendering the ſubject arreſted litigious, has been admitted by all our writers, and by Stair himſelf, *b.* 3. *t.* 1. § 36. 42. to lay a *nexus* upon that ſubject, which intitles the arreſter to a ſubſequent action, by which he may appropriate it to himſelf. Arreſtment therefore, by our preſent practice, continues to affect the ſubject after the death of the arreſtee, ſo as to be the ground of an action of forthcoming againſt his heir, while it remains *in medio*; and hence, ſuch arreſtment, being prior in date, is preferable to one uſed after the arreſtee's death in the hands of his heir, *Home*, 110. On a like principle, the diligence of arreſtment ſubſiſts after the death of the common debtor, in the ſame manner that the diligence of poinding the ground does; and conſequently, an arreſter before the debtor's death, is preferable to one who, after his death, hath confirmed the debt arreſted, as executor-creditor to the deceaſed, *Jan.* 20. 1681, *Riddel*; *Harc.* 94. 95. Far leſs is arreſtment loſt by the death of the creditor-arreſter: for where one uſes diligence, he does it not only for himſelf, but for thoſe who are to ſucceed in the right of the debt; and as the right of a debt goes to ſucceſſors, though they be not expreſſed, the right to a diligence for ſecuring that debt, muſt, as an acceſſory, go alſo to ſucceſſors.

12. Arreſtment may be looſed, and of courſe the prohibition upon the arreſtee taken off, on the common debtor's giving ſecurity for the payment to the arreſter of the ſums arreſted, if they ſhall be adjudged to belong to him. This looſing upon ſecurity may be demanded, in every caſe where the arreſtment does not proceed, either on a formal or on a judicial decree, declaring a debt to be due by the common debtor to the arreſter, *Goſf. Dec.* 19. 1673, *Hume*; or at leaſt upon the regiſtration of the arreſter's ground of debt, which the law as to the article of diligence holds for a decree; ſee *Feb.* 7. 1665, *Graham*: for till decree, it cannot be known with certainty, whether any debt be due to the arreſter by him whom he ſues as the common debtor; and therefore no incumbrance ought to lie upon his effects, if he give ſecurity to make them forthcoming to the arreſter in caſe a debt ſhall appear to be due to him. But arreſtments, if they be grounded, either upon formal decrees, or on regiſtered obligations, cannot

be looſed on caution; becauſe where a creditor's ground of debt is conſtituted by the ſentence of a judge, the debtor can have no pretence to demand a looſing, ſince he ought to make payment, which will effectually diſcharge the arreſtment.——Sundry arreſtments, even upon decree, may be looſed upon caution. *Firſt*, Thoſe where the term of payment of the debt due to the arreſter is not yet come, or where the condition of the debt has not yet exiſted; for a debtor ought to have full power over his effects till he be brought under a preſent obligation to pay. *2dly*, An arreſtment, when it is founded on a mutual contract, though regiſtered, may be looſed upon ſecurity; becauſe debts due by contract are generally illiquid, depending on articles to be fulfilled *hinc inde*, the performance of which cannot appear by the contract itſelf, *Harc.* 88.; *July* 31. 1705, *Macfarlane*. *3dly*, Arreſtment uſed by a creditor whoſe decree is either ſuſpended, or turned into a libel, may be looſed upon caution; for till the ſuſpenſion be diſcuſſed, or the action concluded, it remains doubtful whether the ſum be due, *June* 30. 1675, *Murray*; *Nov.* 20. 1675, *Warden*. But arreſtment uſed before ſuſpenſion of the decree cannot be looſed upon ſecurity, *July* 7. 1733, *Martin*. Arreſtment cannot be looſed, except upon conſignation, where the only ground of ſuſpenſion is double diſtreſs, unleſs it be accompanied with an action of multiple-poinding, that both the creditor and arreſter may be called, *Act Sed. Feb.* 1. 1677.

13. Anciently letters of looſing arreſtment contained a warrant to the meſſenger, to receive the ſecurity that ſhould be offered by the common debtor; and on the meſſenger's reporting, that ſufficient ſecurity was given, the arreſtment was looſed, which he was directed to intimate immediately to the creditor: but as the judging of the ſufficiency of the ſecurity was thought too great a truſt to be repoſed in meſſengers, all bonds of caution in the looſing of arreſtments are now received by the clerk of the bills, and recorded in the books of ſeſſion, 1617, *c.* 17. And ſince the date of this act, the form of intimating the looſing to the arreſter is gone gradually into diſuſe, *Dalr.* 84.; *New Coll.* i. 83. The looſing of an arreſtment has this effect, that the arreſtee may ſafely pay the debt due by him to the common debtor who hath looſed the arreſtment, *June* 21. 1626, *Lo. Balmerino:* for the looſing, as its name imports, takes off that tie or *nexus* which was laid on the ſubject arreſted; and the cautioner is ſubſtituted in place of the arreſtment for the arreſter's ſecurity. Yet the arreſter may, while the ſubject continues in the arreſtee's hands, ſue him to make it forthcoming, notwithſtanding the looſing, *Feb.* 7. 1665, *Graham*.

14. If the arreſtee ſhall, in contempt of the diligence, pay or deliver the ſum or ſubject arreſted to the common debtor, he may not only be ſubjected to penalties upon a criminal trial, of which afterwards; but he may, upon a civil action, be condemned to pay the whole debt a ſecond time to the arreſter, together with his full expences, and a ſum to be modified by the judge in name of damage, 1581, *c.* 118. This doctrine holds alſo in the caſe of arreſtments ſerved againſt the arreſtee, only at his dwelling-houſe, though in fact the execution ſhould not have been notified to him; for the admitting pretences of ignorance might evacuate the lawful diligence of creditors. Nay an officer of the army, in whoſe hands, while he was abroad in the King's ſervice, an edictal arreſtment was uſed at the market-croſs of Edinburgh, and pier and ſhore of Leith, having made payment to his creditor after the date of the arreſtment, was found liable in ſecond payment to the arreſter, upon this medium, That the arreſter had done all in his power to notify his diligence, *Fount. July* 22. 1701, and *Dec.* 16. 1703, *Blackwood*.

15. As an arreſtment is only an inchoated or begun diligence, which of itſelf gives no preference, an action muſt, in order to perfect it, be brought by

by the arreſter againſt the arreſtee, to make the ſums or other ſubjects arreſted forthcoming, concluding, that the arreſtee may be decreed to pay to the purſuer the debt, or deliver him the goods belonging to the common debtor, which he ſtood poſſeſſed of at the time of the arreſtment. This action was, by our older practice, competent only to the court of ſeſſion, or to that inferior judge by whoſe warrant the arreſtment was laid on; becauſe it was thought, that inferior courts, whoſe juriſdiction was confined within their own territory, could not pronounce ſentence on the warrant of any other judge: but Stair juſtly obſerves, *b.* 3. *t.* 1. § 24. that a warrant to arreſt, if granted by a competent judge, muſt be accounted to flow from the ſovereign, from whom all our judges derive their authority, by the ſame reaſon, that a decree given forth by one inferior judge is a ground of action againſt a defender condemned in payment before any other competent court, in whoſe territory he ſhall afterwards take up his reſidence; and our practice has favoured this opinion, *June* 23. 1710, *Dalrymple*.

16. In this action of forthcoming, the purſuer muſt make it appear, *firſt*, That a debt is truly due by the defender, the arreſtee, to the common debtor; for if none be due, there is no ſubject to be made forthcoming to the arreſtee. If the debt arreſted has been conſtituted by writing, the purſuer may, by an incident diligence, recover the ground of it from the common debtor, or other poſſeſſor; and if he cannot prove the debt by writing, he muſt refer it to the oath of the arreſtee: but though that oath be negative, that he owes nothing to the common debtor, it cannot hurt the common debtor in any action he may afterwards bring for payment, ſince the oath was not given on his reference. As the arreſter affects by his diligence the ſubject arreſted, *tantum et tale* as it ſtood in his debtor, with all its burdens, therefore if the arreſtee, whoſe condition ought not to be made worſe by the diligence of creditors, has any juſt defence againſt the debt, whether of payment, compenſation, &c. which would be relevant againſt the common debtor, the ſame defence ought to ſtand good againſt the arreſter, who has no claim but in the common debtor's right; inſomuch that though the debt ſhould be conſtituted by writing, the arreſtee may refer his defence to the common debtor's oath, which will be effectual againſt the arreſter, unleſs the common debtor has been bankrupt when he made oath, *Feb.* 20. 1711, *Horn*; *Kames*, 62. It is otherwiſe in intimated aſſignations, where the oath of the cedent does not hurt the onerous aſſignee. The reaſons of the difference may be, *firſt*, that arreſtment does not diveſt the common debtor of the property of the ſubject arreſted, as an intimated aſſignation diveſts the cedent; but merely lays an imbargo upon it. *2dly*, An aſſignee purchaſes the debt, not ſingly on the faith of the cedent, but he relies alſo on the written grounds of debt conveyed and delivered to him; whereas an arreſter uſes his diligence at a venture upon all debts which he has any ground to think are due to his debtor, and therefore the oath of the common debtor ought to be as effectual to the arreſtee in a queſtion with the arreſter, as it would be in a queſtion with the common debtor himſelf. *3dly*, The purſuer of the forthcoming muſt eſtabliſh and conſtitute the debt due to himſelf by the common debtor, and aſcertain its preciſe extent; for the purſuer can be no farther intitled to the ſubject arreſted, than to the amount of the debt due to him by the common debtor. Upon this account the common debtor muſt be made a party to the action, that he may have an opportunity of offering defences againſt the debt alledged due by himſelf, which muſt, if relevant, and proved, prevent ſentence in the forthcoming. The arreſtee may in this action object, that the arreſtment, on which the forthcoming is grounded, is null; for a nullity in the diligence muſt alſo invalidate any action which proceeds on it. But he cannot plead, that the debt due by his creditor, the common

common debtor, to the arreſter, is paid; ſeeing he has no intereſt in making that plea: the common debtor is the ſole perſon that can have benefit by it, and therefore it is competent to him alone to plead it, *Dec.* 21. 1621, *Hamilton.*

17. Where the ſubject arreſted is a ſum of money, that ſum is by the decree of forthcoming directed to be paid to the purſuer towards ſatisfying his debt; but where it is a certain *corpus*, or conſiſts in goods, the judge, in place of decreeing the arreſtee to deliver the goods themſelves to the purſuer, pronounces ſentence, ordaining them to be put up to a public ſale, and the price to be delivered to him, *Nov.* 12. 1680, *Stevenſons.* This ſentence does of itſelf eſtabliſh in the purſuer a right to the ſubject arreſted, and excludes all co-creditors from poinding it afterwards, *Feb.* 17. 1735, *Muirhead.* The decree of forthcoming, therefore, whatever the nature of the ſubject arreſted may be, is truly a judicial aſſignation to the arreſter of that ſubject, even before the ſentence is carried into execution.

18. The following rules of preference are obſerved in practice, in the competition of arreſters among themſelves. As in all competitions of perſonal creditors the preference is determined by the date of the diligence uſed on the ground of debt, ſo in the caſe of ſeveral arreſtments the firſt in date is preferred, and that though the difference be of hours only, provided the preciſe hours be marked in the executions, and there be ſuch a diſtance of time between the two, that it cannot be miſtaken which was the firſt, *St. b.* 4. *t.* 35. § 7.: but this point is ſeldom truſted to the teſtimony of witneſſes, *June* 28. 1705, *Sutty* *. Since arreſtment is only a ſtep of diligence, which muſt be perfected by a decree of forthcoming; therefore if a prior arreſter ſhall neglect to proſecute his diligence for ſuch a time as may reaſonably infer the abandoning of it, he loſes that preference which it was in his power to have obtained for himſelf; and a poſterior arreſter, who hath obtained the firſt decree of forthcoming, will be preferred. But as the relinquiſhing of diligence is not eaſily preſumed, the diſtance of above two years between the firſt arreſtment and the decree of forthcoming was conſtrued not to infer ſuch a *mora* as to intitle a poſterior arreſter, who had obtained the firſt decree of forthcoming, to a preference, *Jan.* 1724, *Nairn.* By our older practice, he who arreſted on a decree was preferable to him who arreſted on a dependence, and an arreſter after the term of payment, to an arreſter before it, *St. b.* 3. *t.* 1. § 46.; *Mack.* § 7. *h. t.* But theſe rules do not appear founded in the nature of the diligence; for arreſtments, whether on a dependence or on a decree, or whether laid on for debts not yet due, or for debts already due, are all of the ſame kind, and lay an equal foundation for the arreſter's preference. If indeed an arreſter upon a dependence ſhall not have got his debt conſtituted by decree, when the preference is to be determined between him and the other arreſters whoſe debts are conſtituted, thoſe other arreſters muſt be preferred to him from the nature of the debt itſelf: for one who has not yet made it appear that any ſum is truly due to him, can claim no preference; and in the ſame manner, if the term of payment of a debt on which arreſtment has been uſed, be not yet come at the time of the competition in the forthcoming, the creditor in that caſe can have no preference; nay, he could not obtain a forthcoming, though there were no competition, becauſe no creditor is intitled to payment till the term of his payment be come: but where the dependence is cloſed by a decree, or where the term of payment of the debt is paſt, before the iſſue of the competition, there the arreſtments are, by the preſent practice, preferred according to the priority of the ſeveral dates, without any regard to

* In a competition between two arreſtments, whereof one was certified in the execution to have been laid on between the hours of ſix and ſeven, and the other between ſeven and eight, the Lords preferred the former; *Jean Cameron contra Thomas Boſwell, February* 28. 1772.

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the condition of the debts at the time of uſing the diligence, *June* 14. 1710, *Brodie*; *Kames*, 100.——Sundry regulations were eſtabliſhed with regard to arreſtments and poindings by a temporary act of ſederunt, *Aug.* 10. 1754; but as the term of that act is now elapſed, without being prorogated, it may ſuffice to refer the reader to the act itſelf.

19. The order of preference in the competition of arreſtments with aſſignations may be compriſed under the three following rules. *Firſt*, An aſſignation granted by the common debtor, and intimated before arreſtment, is preferable to the arreſtment. Nothing can be arreſted but what belongs to the arreſter's debtor at the time of the arreſtment. An intimated aſſignation fully diveſts the cedent of the property of the ſubject aſſigned: of courſe it cannot afterwards be attached as his property by the diligence of his creditors. *2dly*, Where the aſſignation is granted by the common debtor before arreſtment, but not intimated till after it, the arreſter is preferred to the aſſignee; becauſe the arreſtment renders the ſubject arreſted litigious, after which that ſubject cannot be affected by any voluntary deed of the debtor, either granted after the arreſtment, or not completed till after it; and as no aſſignation can be complete before intimation, intimation is accounted part of that voluntary deed. From theſe two rules a *third* ariſes, That where the intimation is of even date with the arreſtment, without expreſſing the ſeveral hours in which they were made or uſed, they are to be preferred *pari paſſu*; for ſince it is uncertain which of the two is prior, the matter cannot be otherwiſe extricated. In the caſe of commiſſions of bankruptcy in England, iſſued by the Chancellor, aſſignees are named by him for receiving the bankrupt's effects in truſt for his creditors, after which no creditor can uſe any diligence that will affect the right of the legal aſſignees. Queſtions of competition have been once and again moved, betwixt the bankrupt's creditors who had arreſted ſuch of the bonds due to their debtors as were granted by perſons then reſiding in Scotland, according to the directions of the law of Scotland, and theſe aſſignees. Where the bonds arreſted were drawn after the Engliſh form, and made payable in England, the court of ſeſſion, conſidering them as Engliſh debts, ſituated in ſome manner in that country, and ſubject to the juriſdiction of the courts of England, found they were properly veſted in the legal aſſignees, ſo that they could not be affected by any poſterior diligence, and upon that ground preferred the aſſignees to the arreſters, *New Coll.* i. 133. But the arreſters of debts payable in Scotland, and due by perſons reſiding there, were preferred to the legal aſſignees. Thoſe conſidered as Scottiſh debts were found not to fall under the commiſſion of bankruptcy, which cannot have effect beyond the juriſdiction of the court of chancery, *New Coll.* ii. 179.——It may be obſerved, before finiſhing the doctrine of arreſtments, that the expreſſion of *arreſting of goods* is made uſe of to denote their actual ſeizure in act 1672, *c.* 5. which makes it lawful for the magiſtrates of royal boroughs to arreſt ſuch goods as cannot be bought or ſold but by freemen of royal boroughs, if they ſhall be found in the poſſeſſion of unfreemen without the bounds of the borough, and to get them declared eſcheat by any lawful judicature. Theſe words are ſo explained as to mean no more, than that the magiſtrates may apply to the proper judge for a warrant to ſeize the goods, in order to their being eſcheated, *New Coll.* i. 189. No prohibited goods, therefore, that are not actually ſeized in the hands of unfreemen, are liable to confiſcation.

20. Poinding is that diligence by which the property of the debtor's moveable ſubjects is transferred directly to the creditor who uſes the diligence. It has been long known in our law; and the deſcription given of it in 2. *Attach. c.* 49. differs but little from our preſent practice.——Poind-

ing may be divided into real and perſonal.— Real poinding, which is to be explained *b.* 4. *t.* 1. § 11. proceeds on thoſe debts which are *debita fundi*, and ſo affects the ground of the lands poinded; for which reaſon it gets the name of *poinding of the ground*.— Perſonal poinding is uſed by creditors in perſonal obligations. It paſſed anciently on brieves of diſtreſs or compulſion, which were writs iſſuing from the chancery, directed to the ſheriff, or other judge-ordinary, to judge in the debt recited in the brief; and the decree pronounced in conſequence of that brief was the warrant of poinding, *Hiſt. Law-tracts*, *App.* N° 6.; though Stair, *b.* 3. *t.* 2. § 13. ſeems to underſtand, by the brief of diſtreſs, not the writ which founded the action, but the decree proceeding upon the writ. Perſonal poinding may proceed, either on letters iſſuing from the ſignet of the ſeſſion; and indeed letters of horning for payment of debt have uſually contained a warrant for poinding ſince 1661, *c.* 29.; or on the decrees of inferior judges, to the extracts of which, a precept of poinding is always ſubjoined. In the laſt caſe the diligence can have no effect beyond the territory of the judge who pronounces ſentence, and is commonly executed by the proper officers of the inferior court. But when poinding proceeds on letters from the ſignet, it may be uſed, not only in execution of the decrees of the ſupreme court, from whence the letters iſſue, but of thoſe of inferior courts. It reaches to the debtor's goods in whatever part of the kingdom they may lie; and can be executed by meſſengers only.

21. No perſonal poinding can be carried into execution till the debtor be firſt charged to pay or perform, and the days of the charge be expired, under the pains of ſpuilzie, by 1669, *c.* 4. This ſtatute was enacted to put a ſtop to a former rigorous practice, of poinding the goods of debtors, without giving them the leaſt notice that their bond, or other ground of debt, was regiſtered, by which perſons of entire credit were frequently affronted. Poindings againſt vaſſals for the arrears of feu-duty are expreſsly excepted from the act. But the exception is improper; for the act itſelf is confined to perſonal poinding; and therefore no poinding of the ground fell under it, though there had been no exception. As all creditors had, before this act, a right, by the common law, to poind without any previous charge, that right could not but be competent to landlords; who, it appears by 1469, *c.* 35. might have poinded their tenants for the payment of their rent immediately after it fell due, except where the terms of payment were the feaſts of Whitſunday or Martinmas. And, agreeably to this cuſtom, ſeveral deciſions are quoted by *Balf. p.* 398. *c.* 9. 10. ſuſtaining poindings againſt tenants, where the arrears were liquidated by the ſentence of the baron-bailie, without the leaſt mention of the neceſſity of a previous charge. This ancient right is ſtill reſerved entire to the landlord by the aforeſaid act 1669, *c.* 4. from the preſumption, that a landlord will not, without the moſt urgent neceſſity, break his tenant's credit, and lay his own grounds waſte. And, in conſequence of this reſervation, barons may, by the preſent law, poind their tenants for the arrears of rent fixed by decree, not only without an antecedent charge, but even *inſtanter* after pronouncing the decree, without waiting the expiration of the days, which are ordinarily indulged to debtors when a charge is given them upon a decree, *Home*, 5. A debtor's goods may be poinded by one creditor though they have been arreſted before by another; for arreſtment being but an imperfect diligence, leaves the right of the ſubject ſtill in the debtor, and ſo cannot hinder a creditor from uſing a more perfect kind of diligence, which may have the effect of carrying the property of the goods directly to himſelf.

22. Growing corns may be poinded; for they are truly moveable: and their

their prices and quantities are as capable of being fixed before their ſeparation from the ground as after it, *Fount. June* 15. 1709, *Ballantyne*. And as they may be attached by diligence, it was found, that a ſale of them fairly made by a perſon inſolvent to certain creditors who were ready to poind, transferred the property, excluſive of other creditors who had neglected to uſe the proper diligence *debito tempore*, *New Coll.* ii. 154. It is an obvious principle of equity, that no creditor has a right to poind any goods but thoſe which belong to his debtor. Our ancient uſage, which, contrary to this rule, authoriſed the poinding of the goods of tenants for the debts due by their landlord, was in part corrected by 1469, *c.* 37. which confined ſuch poindings to the amount of the rent due by the tenant to the landlord, *ſupr. b.* 2. *t.* 8. § 33.; and now of a long time no poinding has been uſed againſt a tenant, even to the leaſt extent, for a perſonal debt due by his landlord. The only method competent to a landlord's creditor for affecting the rent due by his debtor's tenant, is by arreſtment in common form. By the Roman law, *l.* 7. 8. *C. Quæ res pign. obl.* no plough-ſlaves, plough-oxen, or inſtruments of tillage, could be ſubjected to any right by which creditors might carry them off, leſt the culture of lands ſhould ſuffer. This law is, with ſome reſtrictions, made ours, by 1503, *c.* 98. which prohibits all officers of the law to poind horſes, oxen, and other goods pertaining to the plough, at the time of labouring the ground, either where the debtor hath other moveables that may be poinded, or where he has lands that may be appriſed. But the laſt part of this act, relating to the appriſing of lands, has been long in diſuſe; and now plough-goods may be poinded where the debtor hath no moveables, though he have lands, *Fount. Dec.* 7. 1692, *Turner*. By the time of labouring mentioned in this act is underſtood, that time in which the tenant whoſe goods are to be poinded, is tilling the ground: for the law was enacted, that tenants, by being ſtripped of the inſtruments of tillage, might not be brought under the neceſſity of letting their farms lie waſte; which reaſon ceaſeth, as to the tenant whoſe tillage is finiſhed, though his ſeaſon of ploughing may have been earlier than that of his neighbours, *Nov.* 22. 1628, *Watſon*. For the ſame reaſon, a debtor's plough-goods cannot be poinded, if his own ploughing be not over, though that of the neighbouring tenants be finiſhed. But this exemption does not reach to the caſe where the tillage for immediate ſowing is finiſhed, though the tenant ſhould be continuing to plow for ſummer fallow, *June* 20. 1712, *Arnot*. The poinding of plough-goods in contravention of this act, if as many of the other goods of the debtor as are ſufficient for the debt be expoſed to the meſſenger's view, infers a ſpuilzie: but if the meſſenger has been to blame only in not making a thorough ſearch for moveables, the debtor is intitled to reſtitution only, *Fount. July* 20. 1703, *Lawſon*. If a meſſenger in his ſearch find ſome moveables, but not enough for clearing off the debt, he may lawfully proceed in the execution of the poinding, *March* 1684, *Goodfire*, cited in *Dict.* ii. *p.* 94.—This exemption from poinding was, by an old deciſion, *Balf. p.* 400. *c.* 20. extended by analogy to the bucket and wand of a ſalt-pan, which can at no time be poinded if the debtor has ſufficiency of other poindable goods.

23. In the execution of poinding, the debtor's goods muſt be twice valued or appriſed; firſt on the ground of the lands where they were firſt laid hold on, either by the ſtated appretiators or birleymen of thoſe lands, if the debtor ſhall demand it; or otherwiſe, by appretiators named for that purpoſe, and ſworn by the meſſenger or other officer who executes the poinding. After this it behoved the meſſenger, by our former practice, to carry the goods to the market-croſs of the county-town, or other ſeparate juriſdiction; and if they could not conveniently be driven or removed, ſamples

ſamples or parcels of them muſt have been carried thither, and there valued a ſecond time by the ſtated appretiators of that juriſdiction; and in default of them, by perſons named and ſworn by the meſſengers. But now, by the late juriſdiction-act, 20° *Geo. II.* they may be carried to the market-croſs of that royal borough, or borough of barony, or even of that borough of regality, though this juriſdiction be now aboliſhed, that lies next to the place where the poinding was begun. This is declared to be as ſufficient as if the goods had been carried to the market-croſs of the county-town. This double appriſement was introduced, that if the goods ſhould happen to be eſtimated too low by the firſt appretiation, the debtor might have a chance of getting the miſtake rectified by a ſecond valuation; for which reaſon, the birleymen in the two valuations muſt be different perſons, and the poinding muſt proceed againſt the debtor according to the ſecond appriſement, *Falc.* ii. 244. — In the following caſes, however, poinding requires only a ſingle appriſement. *Firſt*, That which is uſed by miniſters for recovering their ſtipend is declared valid, if the goods be appriſed on the ground of the lands where they were ſeized by the meſſenger, 1663, *c.* 21. This privilege is, in the opinion of ſome writers, extended in favour of univerſities, ſchools, and hoſpitals, by 1696, *c.* 14. contrary to the words of the ſtatute, which reſtrict the extenſion to the particulars there expreſsly mentioned. *2dly*, It appears to have been an ancient cuſtom, that poinding by a baron for his rent might proceed upon one appriſement, either on the lands where the goods were firſt apprehended, or upon any other accuſtomed place of poinding within the barony, *Balf. p.* 40. *c.* 10. This privilege has been, by our later deciſions, adjudged to belong ſtill to barons, in poinding for arrears of rent, as far down as *Dec.* 1735, *Macqueen*; and is juſtly extended by Stair, *b.* 4. *t.* 47. § 30. to all poindings proceeding on baron-decrees, whatever the ground of debt may be; ſince no baron can give his officer a power of carrying a debtor's goods through the territory of another judge to the next county-town.

24. After the meſſenger hath made public intimation of the appriſed value of the goods by three Oyeſſes, he muſt require the debtor to make payment of his debt, including the intereſt and expences. If the debtor ſhall offer payment to the creditor, or, in his abſence, to his lawful attorney; or if, upon their refuſing to accept of payment, he ſhall conſign the debt in the hands of the judge-ordinary, or his clerk; the goods muſt be left with the debtor, and the meſſenger muſt make mention of this conſignation in the execution of poinding. If no offer be made of payment or conſignation, the meſſenger ought to adjudge the goods to the creditor at the appriſed values, and deliver them over to him; which adjudication and delivery veſts the creditor with the full right of them, and completes the diligence. The meſſenger ought alſo to deliver to the debtor, after the poinding is completed, a copy of the warrant and its executions, containing a full note of the appriſed values, as a voucher to the debtor, that his debt is ſatisfied, in whole or in part, by the goods poinded.

25. Corn is ſometimes poinded ſymbolically, by rips, or parcels, which are drawn from the ſtacks; and this ſort of poinding is effectual to creditors, when proceeded in regularly, ſo that the uſer of it is preferable to another creditor who ſhall conſummate a poinding before him, by getting the grain legally appriſed, and its quantity aſcertained, *Fount. Dec.* 22. 1698, *Cathcart*; *June* 1727, *Macwhirter*; becauſe it is the ſentence of the meſſenger, adjudging the ſubject poinded to the creditor, which transfers the property. But if a creditor poinding in this way, by rips, take poſſeſſion of the corns before their price be legally fixed by a ſworn appriſer, and the quantities ſettled, either by ſworn threſhers, caſters, and meaſurers,

rers, or at leaſt by the tenants from whom the creditors received them, *March* 11. 1707, *Erſkine*, he will be liable in a ſpuilzie. If the debtor's goods be within lockfaſt doors, to which the meſſenger employed in executing the diligence cannot get eaſy acceſs, he ought to return an execution, ſetting forth that fact; on which a new precept will be directed of courſe for making open doors: but if the meſſenger ſhall, before obtaining this ſecond precept, attempt to break up any lockfaſt place, he may be lawfully reſiſted. If the meſſenger be poſſeſſed of letters of caption directed againſt the debtor, he may lawfully force open lockfaſt places; becauſe letters of caption by their uſual ſtyle contain a warrant to make open doors, in caſe acceſs ſhall be refuſed. Poinding, though it be ſometimes accounted the ſentence of a meſſenger, is truly the execution of that decree on which the diligence proceeds. Though letters of caption, which is a diligence merely perſonal, may be executed at any time of the day or night; yet where the execution imports the transference either of property or of poſſeſſion, it muſt be gone about between ſun and ſun, *Fount. Nov.* 10. 1703, *Gordon*. This rigour however is ſomewhat abated in poinding, which, if begun before ſunſet, is ſuſtained, provided it be finiſhed before the going off of day-light, *Feb.* 11. 1675, *Douglas*. The meſſenger employed in the poinding, who is intitled to the ſheriff-fee for executing his office, *ſupr. b.* 1. *t.* 4. § 38. may, without decree, reſerve it to himſelf out of the value of the goods poinded; and this ought to be expreſſed in his execution.

26. As the property of moveables is preſumed from the poſſeſſion of them, a creditor may poind all the moveables in his debtor's poſſeſſion: nor will the debtor's allegation, even upon oath, that the goods to be poinded belonged to another, ſtay the diligence. If a third party ſhall, before the poinding be completed, offer to make oath that the goods are his; the meſſenger, who is veſted with a judicative authority in this matter, is authoriſed to take his oath, and put ſpecial interrogatories to him, in order to diſcover in whom the property is truly veſted; and if, by the claimant's anſwers, it ſhall appear to him, that the claim is patched up and colluſive, he may proceed in the poinding, *St. b.* 4. *t.* 30. § 6.; *b.* 4. *t.* 47. § 26. It might be naturally concluded, that ſince the meſſenger has legal authority to judge whether a claimant's oath proves his colluſion with the debtor, he ought to be veſted with the ſame full authority in an article of no higher diſquiſition, viz. Whether a written conveyance of the goods to be poinded, granted by the debtor to a third party *retenta poſſeſſione*, be colluſive? By the general opinion of our writers, however, ſupported by ſeveral deciſions, the meſſenger, where a claimant appears, ſupported by the title of a written conveyance, hath no cogniſance of the validity of that claim, if the claimant ſhall make oath on the verity of it, but muſt leave the poinding unfiniſhed, *Fount. July* 22. 1687, *E. Breadalbane*. He ought however, in that caſe, to expreſs in his execution the reaſons that prevailed with him to ſtop ſhort in the diligence.

27. Where a meſſenger is obſtructed in the execution of a poinding by a claim, let it be ever ſo groundleſs or lame, or is deforced by violence from completing it, the property of the goods is not transferred to the uſer of the diligence: for ſundry ſolemnities are by law accounted neceſſary and eſſential in poindings, in order to transfer the property: and conſequently ſuch imperfect poindings cannot bar any co-creditor upon whom the violence which occaſioned the interruption was not chargeable, from uſing that diligence. But if the deforcement is imputable to the creditor, he will be caſt in the competition *perſonali objectione*. Hence, where a poinding was forcibly ſtopped by the poſſeſſor of the goods, under pretence that they had been before arreſted in his hands by another, the poinding

was held for completed in a queſtion with the prior arreſter, *Home*, 14. from a preſumption, that the arreſter, whoſe diligence was uſed as an handle for ſtopping the poinding, had been privy to the deforcement. All who ſtop a poinding, whether by violence, or by a claim under a colluſive title, are liable, not only criminally in the pains of deforcement, *inf. b.* 4. *t.* 4. § 32. 33. but civilly in the value of the goods which might have been poinded by the creditor, *Dalr.* 112.; *July* 6. 1727, *Niven*, obſerved in *Dict.* ii. *p.* 342.; ſee *Edg. June* 10. & 23. 1724, *Gordon.*

28. This title may be concluded with a ſhort account of a ſpecies of poinding much differing from common poindings, viz. the poinding of horſes, cows, or ſheep, found in fields of corn or graſs, plantations, or other incloſures, by the proprietor or poſſeſſor. This poinding does not transfer property, and was intended merely as a ſpur to tenants to keep a watchful eye over their cattle, and as a compenſation to him whoſe corns, graſs, or plantations, have ſuffered by the treſpaſs. The poſſeſſor of the grounds on which the cattle were ſeized might, by our moſt ancient cuſtom, carry them off *brevi manu*, without a ſentence, to any houſe or field belonging to himſelf, and detain them there for twenty-four hours. If the owner of the cattle did not, within that time, appear, and make his claim, the poſſeſſor might inſiſt to have a value fixed by the ſtated appriſers of the barony, of the damage he had ſuffered, comprehending the maintenance of the cattle from the time they were ſeized; and might retain one or more of them for himſelf, in proportion to the appriſement, reſtoring the reſt to the owner. This right was confirmed by 1686, *c.* 11. appointing winter herding; by which the owner of the cattle is ſubjected in payment to the party ſuffering, of half a merk *toties quoties* for each cow, horſe, or ſheep, beſides the damage done to the corn, graſs, or plantation; and it is declared lawful to the poſſeſſor of the ground to detain the whole, till he be paid of the ſaid half-merk for each, and the expence of their maintenance. Though the act does not give expreſsly a right of detention for the damage, yet as that right was competent to the poſſeſſor by our uſage prior to the act, it may be ſafely concluded, that that right continues in the poſſeſſor; as the plain intention of the law was, not to weaken, but on the contrary to ſtrengthen the poſſeſſor's rights. If he who poinds in this way do not put the cattle into a poind-fold, or other place where they may have fodder and water, he is liable in a ſpuilzie, *Goſf. Feb.* 13. 1676, *Kid.*

TIT. VII.

Of Preſcription.

IN treating of the ſeveral ways of acquiring rights, we delayed explaining the doctrine of preſcription, becauſe it is alſo a way of loſing rights or obligations. Preſcription muſt therefore be conſidered in this title, under a double view, not only as a method of extinguiſhing property, but of eſtabliſhing it. Both kinds have their effect by the courſe of time; but the one by which property is ſecured to us, is called *the poſitive preſcription*; the other, *the negative*. The law of preſcription hath been by many writers cenſured, as hardly agreeable to the law of nature: and Stair ſeems to favour this opinion, when he ſays, *b.* 2. *t.* 12. § 9. that it is of poſitive inſtitution, and founded on utility rather than on equity. Thus far muſt be admitted, that it is not deducible directly from natural law, and that it hath received all its forms from ſtatute: but it is alſo certain, that the nature and ends of ſociety

ſociety have made preſcription neceſſary; and that it has been introduced, after the example of the Romans, into moſt nations of Europe, though under different limitations, as beſt ſuited the genius and conſtitution of the ſeveral ſtates. The great reaſons for the law of preſcription are the two following: *Firſt*, For fixing and aſcertaining property, *l.* 1. *De uſuc.* the improvement of which muſt have been greatly neglected, and the minds of poſſeſſors laid under continual fear and anxiety, if they had been for ever expoſed to the effect of obſolete claims, which perhaps had not been heard of for a century of years backwards. *2dly*, For preventing forgeries, 1617, *c.* 12. which muſt have been exceeding frequent, if deeds of the moſt ancient dates, though they had never been uſed, ſhould have any legal effect given to them, as the difficulty of diſcovering the falſehood at a great diſtance of time, and conſequently the hopes of impunity, would afford ſtrong temptations to the commiſſion of that crime. This policy is not only profitable to ſociety, but moſt conſiſtent with the eſſential rules of government; for the ſupreme magiſtrate of every ſtate hath an inherent power to limit the natural rights of his ſubjects by proper reſtraints, and to puniſh, by forfeiture itſelf, the negligence of proprietors, when the great purpoſes of government demand it. Preſcription is therefore grounded on the proprietor's relinquiſhing or abandoning his right; which the law takes for granted, or preſumes, from his forbearing to exerciſe it for the whole term of preſcription.

2. Poſitive preſcription is generally defined by our lawyers, as the Romans did uſucapion, the acquiſition of property by the continued poſſeſſion of the acquirer, for ſuch a time as is deſcribed by the law to be ſufficient for that purpoſe: but it ought rather to have been defined, the eſtabliſhing or ſecuring to the poſſeſſor his right againſt all future challenge; for both the Roman law and ours require an antecedent title in the poſſeſſor, capable of transferring property: and therefore it may be obſerved, that our ſtatute eſtabliſhing the poſitive preſcription, 1617, *c.* 12. does not once mention the acquiſition of property; but ſuppoſes the perſon, whoſe right is ſecured by that preſcription, to have been formerly the proprietor.

3. The poſitive preſcription was firſt introduced into the law of Scotland by 1617, *c.* 12. which enacts, that whoever ſhall have poſſeſſed his lands, annualrents, or other heritages, by himſelf or others, in virtue of infeftments, for the ſpace of forty years continually and together, ſubſequent to the dates of the ſaid infeftments, peaceably and without lawful interruption, ſhall not be troubled or diſquieted therein by his Majeſty, or any other pretending right to the ſame. Though the act requires forty years poſſeſſion enſuing the dates of the infeftments, yet if a preciſe proof of ſuch poſſeſſion were required univerſally, no preſcription could be received upon rights of ſo old dates as to exceed the memory of man: if therefore continued poſſeſſion ſhall be proved as far back as memory can reach, that poſſeſſion is by the preſumption of law carried backwards from thence to the date of the right. Under the word *heritages* are included, wadſets, fiſhings, and all other ſubjects or rights that can be called heritable; and all privileges annexed to heritable ſubjects, *fundo annexa*, as patronages, fairs or markets, &c.; and all ſervitudes or other real burdens affecting lands belonging to our neighbours, *Feb.* 10. 1666, *Miniſt. of N. Leith.* Though the ſtatute mentions in general terms ſeiſin, as neceſſary to preſcription; yet rights admitting no ſeiſin, or which may be perfected without it, if they be heritable, as tacks, ſervitudes, &c. have been by repeated deciſions adjudged to fall under the ſtatute, as ſubjects capable of preſcription: for actual ſeiſin cannot with propriety be required as a title of preſcription, in rights which either do not admit ſeiſin, or are complete without it. Upon this ground,

a decree of adjudication, even without ſeiſin, has been ſuſtained as a good title to acquire a right of tithes by preſcription, *New Coll.* ii. 120.: for though tithes may be, and frequently are, tranſmitted by ſeiſin; yet they admit of being completely carried by a perſonal right, *ex. gr.* when they have never been eſtabliſhed in the proper feudal manner by ſeiſin: and conſequently a bare adjudication, with poſſeſſion upon it for forty years, will give to the adjudger a full right to the tithes, though the decree ſhould have been led againſt one who had not the leaſt ſhadow of right to them. Tho' it would be hard to affirm, that ſubjects incapable of continual poſſeſſion, are alſo incapable of preſcription; yet as the act requires the poſſeſſion to be continual, it may reaſonably be doubted, whether a perſon, even ſuppoſing him ſtanding infeft for forty years in a right of patronage, without challenge from any other during that whole period, can, in a competition with one claiming under a preferable title after the forty years, plead the poſitive preſcription, though he ſhould have exerciſed his right by once preſenting an incumbent upon the only vacancy which happened during the courſe of the preſcription. A ſingle act of poſſeſſion cannot with any propriety be called continual poſſeſſion; and the law of preſcription might on good grounds be taxed with iniquity, if a ſingle inſtance of negligence in the patron ſhould infer the forfeiture of his property, and transfer it to him who hath without a title preſented an incumbent to the benefice, though the effect of that preſentation ſhould laſt for a whole courſe of preſcription; if, for inſtance, the preſentee ſhould continue incumbent in the church for full forty years. What number of acts of poſſeſſion may be requiſite to eſtabliſh ſuch preſcription, is an arbitrary queſtion: but this can hardly admit a doubt, that in a right of patronage conſtituted without ſeiſin, as is ſometimes the caſe, the grantee's exerciſe of the right for ſuch a time, and by ſuch a number of acts, as ought by the intendment of the ſtatute to be deemed continued poſſeſſion, will ſecure his right againſt all future challenge, even without ſeiſin, *St. b.* 2. *t.* 12. § 23. The poſſeſſion muſt by the ſaid act be held for the forty years without any lawful interruption; *i. e.* he who is to eſtabliſh his right by preſcription, muſt not only continue to poſſeſs during that whole period, but he muſt not be diſturbed in his poſſeſſion by any act of interruption, made either by a notorial inſtrument or *via facti*.

4. The ſtatute requires, that the poſſeſſor ſhall produce, as his title of preſcription, a charter of the lands, under which is included every deed of alienation, whether by diſpoſition, or even by a bare procuratory of reſignation, with the ſeiſin proceeding on it, and dated previouſly to the forty years poſſeſſion; and where there is no charter or diſpoſition extant, ſeiſins one or more, ſtanding together for forty years, and proceeding on retours or precepts of *Clare conſtat*. This hath given riſe to a reaſonable diſtinction, obſerved in practice, between the preſcription of a ſingular ſucceſſor and that of an heir. Singular ſucceſſors muſt produce for their title, not only a ſeiſin, but a charter or diſpoſition, either in their own perſon, or in that of their author: but more favour is ſhown unto heirs, who poſſeſs *titulo univerſali*, and who therefore need only produce ſeiſins, one or more, connected together for forty years, without producing the relative charter. If the ſeiſins themſelves labour under no nullity, and are grounded either on retours or on precepts of *Clare conſtat*, the preſcription obtains in favour of the heir, tho' he ſhould not produce theſe retours or precepts; nay, tho' they ſhould appear to be informal or defective, *Feb.* 15. 1671, *E. Argyle*; *Feb.* 9. 1739, *Purdie*, obſerved in *Dict.* ii. *p.* 103. And in the ſame manner, after preſcription is run in favour of a ſingular ſucceſſor, the charter and ſeiſin, if they be formal deeds, will of themſelves ſupport the preſcription, without the neceſſity of producing

producing the grounds of the charter; or even though, if extant, they were reducible upon nullities. And as preſcription cuts off all grounds of preference, which, if inſiſted in before the expiration of the forty years, would have excluded the preſcriber; a charter, though granted *a non domino*, by one who himſelf had no right, is a good title of preſcription: ſo that if the title be a fair genuine writing, and proper for the tranſmiſſion of property, the poſſeſſor is, after the years of preſcription, ſecure by the ſtatute; which admits no ground of challenge except falſehood, the length of time ſtanding in the place of all other requiſites, 1741, *Ged.* From this rule another may be deduced as a corollary, That a poſſeſſor, after he has acquired a ſubject by the poſitive preſcription, cannot be affected by the alledged preference of any title in his competitor antecedent to the commencement of the preſcription, more than he can be by the legal defects of that charter, or other title on which his own right of preſcription was grounded. If he, and his authors, have had ſuch poſſeſſion as the ſtatute requires during the whole courſe of forty years, he is fully ſecured againſt all diſturbances upon pretence of antecedent titles, though they ſhould be unqueſtionably preferable to his own. A right or ſubject may be carried by preſcription, though it be not expreſſed in the preſcriber's charter, if he ſhall have poſſeſſed it for forty years as part and pertinent of another ſubject ſpecially mentioned in it. This obtains, though his competitor ſhould have been ſpecially infeft in the ſubject in diſpute, unleſs he has alſo taken care to preſerve his right, either by acts of poſſeſſion, or of interruption, within the years of preſcription, *Nov.* 27. 1677, *Grant*; *Feb.* 22. 1711, *E. Leven.* But if the ſubject cannot by its nature be accounted a pertinent of the lands in which he who claims the preſcription is infeft, preſcription cannot be admitted; an inſtance of which has been already given in the caſe of a bounding charter, *ſupr. b.* 2. *t.* 6. § 3.

5. Poſſeſſion muſt, by the ſaid ſtatute, be continued through the whole courſe of preſcription, upon the title of ſeiſins. No part therefore of the poſſeſſion of a ſingular ſucceſſor, upon a bare perſonal right, as a charter or diſpoſition, can be computed to make up the years of preſcription. And this is alſo the caſe of an heir's poſſeſſion before he hath completed his titles by ſeiſin; becauſe ſuch poſſeſſion by the heir is grounded barely on the right of apparency, and not upon ſeiſins, *St. b.* 2. *t.* 12. § 15.; *Feb.* 15. 1671, *E. Argyle.* The poſſeſſion of tenants, adjudgers, wadſetters, life-renters, and others who have temporary rights on the ſubject derived from him who claims the preſcription, is, both by the nature of poſſeſſion, *ſupr. b.* 2. *t.* 1. § 22. and by the words of the act, accounted the poſſeſſion of the preſcriber; and ſo muſt be computed in order to complete the courſe of preſcription, in a queſtion with third parties, *June* 19. 1713, *Murray*; *Edg. July* 28. 1724, *E. Marchmont.* Though the ſtatute requires, in the caſe of an heir, ſeiſins founded either on retours or on precepts of *Clare conſtat*, yet a ſeiſin by haſp and ſtaple in burgage-tenements is deemed equivalent to one proceeding on a precept of *Clare conſtat*; becauſe the bailie, by the conſtant uſage of boroughs, receives heirs upon a ſummary cognition of their propinquity; and if this manner of entry were not accounted ſufficient for preſcription, the act 1617 could be of little uſe in burgage-tenements, *Dalr.* 65. On the ſame ground, a ſeiſin of burgage-tenements, bearing reſignation to have been made in the hands of a bailie, is a good title of preſcription; becauſe, by the borough-forms, the reſignation and ſeiſin are contained in one inſtrument, without either charter of reſignation or precept of ſeiſin, *Dalr.* 68.

6. An account hath been given of the titles required in the preſcription of ſalmon-fiſhing, *ſupr. b.* 2. *t.* 6. § 15.; and in that of ſervitudes, *b.* 2. *t.* 9.

t. 9. § 3. 4. & 29. In all preſcriptions of the regalia, a charter, even from a ſubject, is deemed a ſufficient title; becauſe poſſeſſion for the forty years, upon the title of ſuch charter, creates a *præſumptio juris et de jure*, that the right of that ſubject was originally granted by the King, *Dec.* 2. 1679, *Farquharſon*; *Jan.* 13. 1680, *Brown*; *Dec.* 22. 1731, *Tarbat.* Forty years poſſeſſion, without any title in writing, is ſufficient to eſtabliſh a right to a private road through the grounds of a neighbouring proprietor, *Fount. July* 17. 1700, *L. Bennochy.* Real rights of annual preſtations, as tilling the ground, leading manure, &c.; and the caſualties and perquiſites of ſheriffs, and other ſuch public officers of the law, may be alſo conſtituted by a poſſeſſion of forty years, without any ſpecial clauſe in the charter or grant, *March* 11. 1634, *Sher. of Galloway*; *July* 11. 1672, *E. Callender*; *Dec.* 27. 1709, *Cuningham.* Where one's poſſeſſion of heritage may be ſupported on two different grounds or titles, the moſt ancient of which contains limitations on the poſſeſſor or his heirs which the latter is free from, it is lawful for the poſſeſſor to eſtabliſh his right upon the unlimited title, and aſcribe his poſſeſſion thereto; which poſſeſſion, if it is uninterrupted for forty years together, will intitle him to the benefit of the poſitive preſcription, and ſecure him and his ſucceſſors againſt any attack from all ſuch deſerted infeftments or claims fettering his right, upon which no legal ſtep had been taken during that period. By this rule, an eſtate which hath been poſſeſſed for a whole courſe of preſcription under titles deſcendible to heirs of line, becomes an unlimited fee in the poſſeſſor, diſburdened of every limitation formerly conceived in favour of heirs-male, even though all the heirs who enjoyed the eſtate during that period were the heirs-male as well as heirs of line, *Home*, 126.; *New Coll.* i. 59.; for the poſſeſſor is, in the preciſe terms of the ſtatute 1617, ſecured from the effect of all prior infeftments. And if the law ſtood otherwiſe, that ſtatute of preſcription could afford little ſecurity to purchaſers: for though the proprietor had poſſeſſed upon unexceptionable titles for a double courſe of preſcription, ſtill, if any burdens or limitations ſhould appear in any charter, dated perhaps ſome centuries ago, theſe burdens would, by that doctrine, continue effectual to perpetuity, not only againſt the heirs, but the ſingular ſucceſſors of that proprietor.

7. There is no ſtatute eſtabliſhing a poſitive preſcription in moveable rights or ſubjects: nor indeed was one neceſſary; for ſince the property of moveables is preſumed from poſſeſſion alone, without any title in writing, the proprietor's neglecting for forty years together to claim them, by which he is cut off from all right of action for recovering their property, effectually ſecures the poſſeſſor.

8. The negative preſcription may be defined, the loſs or forfeiture of a right, by the proprietor's neglecting to exerciſe or proſecute it during that whole period which the law hath declared to infer the loſs of it. This kind of preſcription, by the running of forty years, had been made part of our law long before the poſitive, by two ſtatutes, 1469, *c.* 29.; 1474, *c.* 55.; which enact, that all creditors by obligation ſhall follow forth their right, and take document upon it within forty years; otherwiſe that the right ſhall preſcribe. Theſe acts were at firſt ſtrictly interpreted, and confined to ſimple obligations, *Feb.* 26. 1622, *Hamilton:* but they were ſoon extended to mutual contracts, *Nov.* 27. 1630, *L. Lauder*; to marriage-contracts, even when they were ſupported by ſubſequent marriage, *Dec.* 23. 1630, *Ogilvie*; and to actions concerning moveables, though they were grounded on rights of property, *Dec.* 7. 1633, *Min. of Aberſharder.* The act 1617, by which the poſitive preſcription is eſtabliſhed, hath alſo amplified the negative, which was underſtood formerly to be limited to moveable rights, and

and hath extended it, ſo as to ſtrike againſt all actions competent on heritable bonds, reverſions, contracts, and others not ſued upon within forty years after their date. It was, on this clauſe of the ſtatute, adjudged, that actions founded on rights of property of land, cannot be loſt by the negative preſcription, unleſs they be excluded by a poſitive right in him who objects it, *Dec.* 24. 1728, *Presb. of Perth*, obſerved in *Dict.* ii. *p.* 98.; and there had been a deciſion nearly ſimilar ſome years before, *Edg. July* 20. 1725, *Paton*. Both judgements proceeded on the ſame medium, That the negative preſcription of heritable rights of property cannot be pleaded, even by one who hath a title in himſelf proper to be the foundation of a poſitive preſcription, if it be not actually eſtabliſhed in him by that preſcription; becauſe the negative preſcription confers no right on him who pleads it, but barely extinguiſhes that which is in the adverſary; and, conſequently, that none but he who hath in himſelf a full right of property in the lands, can have any intereſt to plead againſt his party, that he has loſt his by the negative preſcription, ſince, by that plea, his adverſary's right cannot be transferred to himſelf.

9. The right of ſetting aſide any deed upon extrinſic objections, which do not appear *ex facie* of the writing, but require a ſeparate evidence, *ex. gr.* the right of reduction *ex capite lecti*, is loſt, if not exerciſed within forty years. But objections ariſing from intrinſic nullities fall not under the negative preſcription. Thus a bond, or inſtrument of ſeiſin, without ſubſcribing witneſſes, cannot become valid by any lapſe of time. This doctrine holds alſo in diligences uſed againſt heritable ſubjects, as adjudications, which, if intrinſically null, may be ſet aſide, even after the years of preſcription, *July* 25. 1738, *Ainſlie*, cited in *Dict.* ii. *p.* 99. But where the adjudger hath eſtabliſhed a right to the lands adjudged by the poſitive preſcription, he is ſecure againſt all ſuch challenge.

10. Certain rights are *ex ſua natura* incapable of the negative preſcription; at leaſt where ſtatute does not interpoſe. *Firſt*, *Res meræ facultatis*; powers which one may exerciſe or not at his pleaſure; *ex. gr.* a power or faculty to burden lands with a certain ſum, or to revoke a right granted, &c.: for it is the nature of theſe, to lie over; ſo that they may be exerciſed *quandocunque*, at any time. Hence, where one ſubjected to thirlage had got a power from the proprietor of the dominant tenement to build a mill on his own property, that power was adjudged not to be loſt, though neither he nor his anceſtors had uſed it for an hundred years together, *March* 14. 1707, *L. Bimmerſide*. Hence alſo the right inherent in every proprietor, of building, or uſing any other act of property on his grounds, cannot preſcribe by any length of time, though a neighbouring landholder ſhould ſuffer ever ſo much by the exerciſe of it. A right of reverſion, when not limited in point of time, is juſtly ranked in this claſs of things; for it is a faculty reſerved to the reverſer to redeem his lands at any time that he ſhall think convenient, at whatever diſtance of time that may happen to be from the conſtitution of the right. From hence it follows, that reverſions would not have fallen by the negative preſcription, if the act 1617 had not expreſsly declared, that that preſcription ſhould ſtrike againſt all actions competent upon reverſions. This enactment was neceſſary for the ſecurity of purchaſers and creditors, who could not poſſibly be ſecured if ſuch reverſions as were latent, or could not be known to ſingular ſucceſſors, had continued effectual, without being limited by ſome period of time. From the general enactment in the ſtatute extending the negative preſcription againſt reverſions, are excepted all ſuch reverſions as are either incorporated in the body of the infeftment, which is uſed by the poſſeſſor for his title, or regiſtered in the books of the clerk-regiſter: not merely becauſe all ſuſpicion

ſpicion of falſehood ceaſeth as to theſe, which is the reaſon aſſigned in the act; but alſo becauſe reverſions which are either regiſtered in a public record, or expreſſed in the body of the purchaſer's right, are eaſily diſcoverable by him. Such reverſions are not only ſecured by this act to the reverſer againſt the negative preſcription, but they are an effectual bar againſt any perſon from pleading the poſitive, *Kames*, 92.

11. As to the queſtion, Whether exceptions or defences competent to a defender for eliding any action, can be loſt by the negative preſcription? the following diſtinction may be made. Where the exception eſtabliſhes no right in the excipient, but tends merely to exempt him from a demand that may be made on him by another, it cannot be loſt *non utendo*, but muſt operate as long as it is poſſible for the other party to proſecute his right; becauſe the negative preſcription ſuppoſes ſome right or claim in a perſon, which is underſtood to be abandoned or deſerted, by not inſiſting upon it within the time limited: and beſides, exceptions which relate, not to the conſtitution, but to the extinction of a claim, not being intended to have any farther operation, are ſeldom productive of an action, and ſo cannot be founded on till the perſons having right to them be ſued upon the claim. An exception therefore ariſing from the diſcharge or acquittance of a debt, or from receipts of money reſtricting the debt to a fixed ſum, muſt be perpetual. Nay, if the debtor ſhould, for his farther ſecurity, bring an action after the years of preſcription for declaring the debt to be paid off or reſtricted by theſe vouchers, it cannot be objected to him, that his right of action is preſcribed; ſince the intention of it is not to rear up any demand or claim againſt the defender, but barely to extinguiſh an obligation which was once due by himſelf. Hence alſo a decree of valuation or of ſale of tithes, cannot be loſt *non utendo*; becauſe ſuch decree eſtabliſhes no right or claim of tithes in the obtainer of it againſt another, and can be uſed by him no otherwiſe than as a defence againſt the claim of the titular, *June* 7. 1710, *La. Cardroſs*. Upon this ground a decree by which any final adjuſtment of differences is made between the parties, *ex. gr.* a judgement ſettling the boundaries between two conterminous landholders, muſt, notwithſtanding the longeſt ſilence of either party, remain as a perpetual ſettlement of their ſeveral rights. But where the exception is founded upon ſome claim of the defender againſt another, which is of its own nature productive of an action, *ex. gr.* compenſation, it may be loſt by preſcription; becauſe ſuch right ought to have been inſiſted in within the years of preſcription, *Kames*, 17.

12. The right of bringing an action of improbation on the head of falſehood or forgery, is not loſt by the negative preſcription. This proceeds both from the rule, *Nunquam præſcribitur in falſo*, and from the expreſs words of the act 1617. No right can be loſt *non utendo*, or by diſuſe, unleſs the loſs of it to him who neglects to exerciſe it ſhall eſtabliſh ſome poſitive right in another. From this principle the rule ariſes, *Juri ſanguinis nunquam præſcribitur:* for though the right of blood ſhould be loſt to one, no other can take it up. A perſon may therefore, at the greateſt diſtance of time from the death of his anceſtor, ſerve heir to him, if no other has been ſerved during that period; for as that right is proper to him who is veſted with the character of heir, no intereſt can be eſtabliſhed in any other to found an oppoſition. A vaſſal cannot preſcribe an immunity from the feu-duties, ſervices, and caſualties of ſuperiority, due to his overlord, though he ſhould not have made payment of them for forty years; and conſequently the ſuperior's right to theſe cannot be loſt by his ſilence or neglecting to exact them; for the right of feu-duties, and of feudal caſualties, being inherent in, and eſſential to, the ſuperiority itſelf, or *dominium directum*, is accounted

a right of lands, which does not ſuffer the negative preſcription, except in favour of one who can plead the poſitive, *ſupr.* § 8. This the vaſſal cannot do, who has no title of preſcription in him, his only title being a charter from the ſuperior, which, in place of being a ground of the poſitive preſcription, directly excludes it. This doctrine is not applicable to a right of ſervitude, which is in no ſenſe a right of lands, or a neceſſary concomitant of property, but is extinguiſhable; and therefore he who is ſubjected to that right may plead an immunity from it, by the non-uſage of him who is intitled to it, though he himſelf ſhould have no poſitive title of preſcription in him, or even though the ſervitude ſhould be expreſſed in that very charter by which he holds the ſervient tenement, *Feb.* 7. 1735, *Graham*, cited in *Dict.* ii. *p.* 100.; for *bona fides* is not neceſſary to the long negative preſcription, *infr.* § 15.

13. The above-mentioned rule concerning feu-duties holds alſo in tithes, the right of which cannot be loſt by the negative preſcription. But here we muſt diſtinguiſh between parſonage and vicarage tithes. The laſt are not due univerſally out of all lands; they are only payable, at leaſt the leſſer vicarage-tithes of herbs and roots, where the right hath been eſtabliſhed by uſage. That right therefore may be extinguiſhed totally by a contrary non-uſage, or more properly by a diſuſe of payment; agreeably to the rule, *Nihil tam naturale eſt, quam unumquodque eodem modo diſſolvi quo colligatur*, *Nov.* 24. 1665, *Biſh. of the Iſles*. But the obligation to pay parſonage-tithes is founded on the public law, which hath impoſed this burden upon all lands that are not ſpecially exempted: for the tithes of all lands were appropriated originally to the church. And even ſince the Reformation, that burden is ſtill continued in favour either of the church or of a laic titular; ſo that every proprietor of a land-eſtate muſt know that his lands are ſubjected by the law to the payment of parſonage-tithes; and conſequently no courſe of time can ſopite or extinguiſh the obligation to pay them. But though neither the ſuperior's radical right to the feu-duties, nor that of the titular to the tithes, can be loſt by the negative preſcription; yet ſuch of the feu-duties or tithes as have been due for upwards of forty years, without any demand made by the ſuperior or titular for all that time, fall under preſcription, *Dec.* 15. 1638, *L. Grandtully:* for the claim of theſe hath no ſuch neceſſary connection with the radical right of the ſuperior or titular, but that the laſt may ſubſiſt without the firſt; and every year's obligation for the feu-duty, or for the tithe, is conſidered as a ſeveral or diſtinct right, which muſt therefore run a ſeparate courſe of preſcription. Much like to feu-duties and parſonage-tithes are bonds of penſion, or other obligations of an annual preſtation, which ſubſiſt by themſelves without any relation to a capital ſum or ſtock; for theſe admit not of a total preſcription, though no diligence ſhould be uſed on them for forty years together, ſeeing ſuch obligations cannot be paid at once, but year after year; and preſcription cannot commence againſt a debt till it be payable. Put the caſe, of a bond of penſion to an advocate, on which no diligence has been uſed for upwards of forty years; doubtleſs the arrears incurred before the forty years, which were never demanded, ſuffer preſcription; but the bond itſelf ſtill ſubſiſts during the grantee's life, not only as to all future penſions, but as to thoſe which fell due within the years of preſcription, *l.* 7. § 6. *C. De præſcr.* 30 *vel* 40 *ann.*; *July* 1730, *Lockhart*. But in a bond which carries a yearly intereſt, of which no demand is made by the creditor for the years of preſcription, not only the intereſt which had become due before the forty years ſuffers preſcription, but the bond itſelf and all its conſequences; for there the obligation is but one, and can be performed at once, and the intereſt growing upon it is an acceſſory to or quality of that one obligation.

14. Sundry rights are incapable of the poſitive preſcription. Thus things

ſacred or public could not by the Roman law be acquired by uſucapion, becauſe they were exempted from commerce: and this reaſon, being founded in nature, muſt extend to all countries; for whatever is incapable of becoming one's property is alſo incapable of being acquired by the poſitive preſcription, ſince preſcription is one way of eſtabliſhing property. Tithes fell under this claſs of things before the Reformation; for till then they were appropriated to the ſervice of God: but now they are *privati juris*, except in ſo far as they are deſtined for the ſupport of the clergy; and accordingly they have been granted by the crown to lay titulars, and may be bought and ſold as any other ſubject of commerce. A proprietor of land therefore, if he has an habile title of property to his tithes derived from the laic titular, and under that title ſhall have poſſeſſed them for forty years by charter and ſeiſin, eſtabliſhes an irrefragable right to them by the poſitive preſcription, though he cannot loſe that right by the negative. Things ſtolen, or poſſeſſed by violence, were in the Roman law underſtood to have received ſuch a *vitium*, or noxious quality, by the theft or robbery, that they could not be acquired by uſucapion, even in the perſon of a *bona fide* poſſeſſor, § 2. *Inſt. De uſuc.*; but this, and all other grounds of challenge, ſeem to have been cut off by the *præſcriptio longiſſimi temporis*, *l.* 3. 4. *C. De præſcr.* 30 *vel* 40 *ann.* Neither is there any thing in our ſtatute 1617 that makes them incapable either of the poſitive or negative preſcription; for it makes no exception of actions for the reſtitution of goods ſtolen, or carried off from the owner by violence.

15. Mackenzie, § 5. *h. t.* affirms, that *bona fides* is not requiſite either in the poſitive or negative preſcription of forty years. And it is certain, that as to the poſitive, the ſtatute 1617 takes *bona fides* for granted, rather than requires it: for continued poſſeſſion for forty years, proceeding upon an habile title of property, not chargeable with falſehood, ſecures the poſſeſſor againſt all other grounds of challenge, *ſupr.* § 4.; and ſo infers *bona fides præſumptione juris et de jure*, *Nov.* 27. 1677, *Grant.* All our lawyers are agreed, that in the long negative preſcription, the creditor, barely by his ſilence for the whole courſe of preſcription, is underſtood to have abandoned his claim, and ſo loſeth his right of action, without the neceſſity of *bona fides* in the debtor. Hence if a creditor who has made no demand within the years of preſcription, ſhould afterwards offer to prove, by the debtor's own oath, that the debt ſtill ſubſiſted, even that offer would not ſave the debt from being extinguiſhed by the elapſing of the forty years; though it is obvious, that the debtor's conſciouſneſs of the ſubſiſtence of the debt excludes *bona fides*, *Fount. Dec.* 7. 1703, *Napier.* Though in the general caſe rights are not loſt by the negative preſcription in leſs than forty years, it has been thought reaſonable to eſtabliſh by ſpecial ſtatutes a ſhorter preſcription in ſundry debts and rights, in ſome of which *bona fides* is required on the part of the debtor.—Theſe ſhorter preſcriptions fall next to be explained.

16. Actions of ſpuilzie ſuffer a triennial preſcription. Spuilzie is the taking away or intermeddling with moveable goods in the poſſeſſion of another, without either the conſent of that other, or the order of law. When a ſpuilzie is committed, action lies againſt the delinquent, not only for reſtoring to the former poſſeſſor the goods, or their value, but for all the profits he might have made of theſe goods had it not been for the ſpuilzie. Theſe profits are eſtimated by the purſuer's own oath, and get the name of *violent*, becauſe they are due in no other caſe than of violence or wrong. The words of the ſtatute 1579, *c.* 81. limiting the duration of actions of ſpuilzie to three years after the commiſſion of the fact on which the action is grounded, would, if underſtood in its full extent, cut off all right of action

tion competent to the perſon deſpoiled againſt the delinquent after that period. But by theſe words is only meant the action of ſpuilzie, as it includes the privileges of the violent profits, and of proving the extent of the purſuer's damage by his own oath; a ſpecies of evidence rejected by the common rules of law. Action for ſimple reſtitution of the goods, and ordinary damages, therefore, is competent againſt the deſpoiler at any time within forty years, *March* 16. 1627, *Hay*. This ſtatute alſo limits actions of ejection, and others of that ſort, to a triennial preſcription. An action of ejection is competent to a tenant, or other lawful poſſeſſor of an heritable ſubject, who is violently turned out of poſſeſſion, againſt him who hath ejected him. By the general words, *and others of that ſort*, may be underſtood, all ſuits grounded upon acts of violence or wrong committed by the defender, where the purſuer is intitled to a proof of damages by his own oath *in litem*; *ex. gr.* an action of intruſion, which is competent to a tenant or others having intereſt, againſt thoſe who have intruded into the void poſſeſſion of any heritable ſubject which the purſuer was poſſeſſing *animo*, *i. e.* which he had been poſſeſſed of for ſome ſhort time before, and had left with a preſumed intention of returning to it. This act contains a reſervation or exception in favour of minors who ſhall purſue within three years after their majority. The ſame exception is expreſſed in ſome other ſtatutes eſtabliſhing the ſhort preſcriptions, 1669, *c.* 9. &c. but left out in moſt; which intimates, not obſcurely, that the ſhort preſcriptions run againſt minors in the general caſe, according to the rule, *Exceptio firmat regulam in non exceptis*. And though it has been judged reaſonable to indulge minors with privileges in particular caſes, becauſe their intereſts may be neglected by their tutors or curators; yet where ſtatute does not take them out of the common caſe, they muſt be ſubjected to the common rules, *Jan.* 26. 1709, *Brown*; *Dec.* 10. 1712, *Stewart*.

17. A triennial preſcription is alſo eſtabliſhed in actions for ſervants fees, houſe-rents, and merchant-accounts, by 1579, *c.* 83. This triennial preſcription is received, whether the merchant furniſhes the goods directly for the uſe of a private family, or ſells them to another merchant who is again to retail them, *Feb.* 15. 1630, *Ord*. Mention is likewiſe made in the act of mens ordinaries; by which is meant debts due for the entertainment of perſons at board: and then a general clauſe is ſubjoined, *of ſuch like debts*, in virtue of which alimentary debts are ſubjected to a triennial preſcription, *Br. MS. July* 25. 1716, *Hamilton*. The act is, by practice, extended alſo to debts due to artificers or tradeſmen, for their work or wages, *Fount. Dec.* 21. 1692, *Bayne;* and to accounts of writers, agents, procurators, &c. *Dec.* 16. 1675, *Somervel*, becauſe of their near reſemblance to merchants accounts. Nay a particular piece of work performed by an accountant in ſettling accounts between two perſons, by neither of whom he was employed in any other buſineſs, was found to be a debt that was comprehended under that general clauſe, though it did not appear to be the ſubject of a proper account, *Tinw. July* 22. 1755, *Farquharſon*. Accounts alſo which are due to ſurgeon-apothecaries or druggiſts fall under the act. But a phyſician, who is preſumed either to have received his honorary from time to time as he attended, or to have ſerved *gratis*, has no claim againſt the repreſentative of his patient even within the three years, unleſs he can either plead a promiſe, *Br. MS. July* 25. & 31. 1716, *Johnſton*, or ſhall reſtrict his claim to his advice or attendance on the patient on deathbed, that is, for ſixty days immediately preceding his death, *Dalr.* 171.; ſee *New Coll.* i. 134. In explaining this ſtatute, practice has diſtinguiſhed between accounts, and the other particulars mentioned in it; a diſtinction which is founded in the act itſelf. In houſe-rents, ſervants fees,

fees, and alimony, every year's rent, or fee, or penſion, runs a ſeparate courſe of preſcription; ſo that in an action for the payment of theſe, the claim is reſtricted to the arrears incurred within the three years immediately preceding the citation, upon a preſumption that all former arrears have been cleared, *Feb.* 12. 1680, *Roſs*; *Br.* 106.; *Jan.* 14. 1737, *Fergusſon:* whereas in accounts each article hath not a ſeparate preſcription; for a ſingle article cannot be ſaid to make an account: in theſe, therefore, preſcription does not begin to run till the laſt article, *Dec.* 16. 1675, *Somervel;* and the furniſhing of any one new article within the three years interrupts the preſcription, and preſerves the currency of the account, *Nov.* 25. 1709, *Maſon*, *prope fin.* An account is deemed to be current, though part of it was furniſhed to the deceaſed, and the remainder to his heir, when the queſtion is with that heir; becauſe the heir is *eadem perſona cum defuncto*, *Feb.* 26. 1670, *Graham*; and the ſame doctrine may perhaps hold in executors. But the currency of an account between a merchant and a perſon deceaſed, is not preſerved by furniſhings made by the ſame merchant after the debtor's death for his funerals, if theſe furniſhings are made, not to the executor himſelf, but to a *negotiorum geſtor* for him, *Nov.* 11. 1709, *Lo. Juſtice-Clerk.*

18. The debts mentioned in this ſtatute may, even after the three years, be proved by the oath of the debtor, or by any writing ſigned by him; ſo that the triennial preſcription of theſe is confined barely to the mean of proof, and does not import a total loſs of the claim. After the expiration of the three years, it behoves the creditor, if he inſiſt, in the terms of the ſtatute, to prove the debt by the debtor's own oath, to refer to him, not only the conſtitution, but the ſubſiſtence of it, *Fount. Dec.* 22. 1702, *Nicolſon*; for a debt cannot be ſaid to be proved by the debtor's oath, when he depoſes merely that a debt once exiſted, without alſo acknowledging, that he is ſtill debtor in it. As for the debtor's writings, by which theſe debts may be proved after the three years, writings, though not ſtrictly probative, are ſometimes held as ſufficient for that purpoſe. Thus a book of accounts regularly kept by the debtor, in which he hath charged himſelf with the particular debt in queſtion, will fix that debt effectually upon him, though theſe books would not be received as evidence in the debtor's favour. But the books of the creditor, or of the furniſher of the goods, let them be ever ſo fair and regular, make no evidence, after elapſing of the three years, that the debt is due; though joined with the cleareſt proof by witneſſes.—— Actions for removing tenants from their poſſeſſions, preſcribe alſo, if they are not ſued upon within three years after the warning, by 1579, *c.* 82.; that is, as it is explained by practice, within three years after the term at which the tenant is by the warning required to remove, *Feb.* 6. 1629, *La. Borthwick.*——Under this head of a triennial preſcription may be ranked the loſs or forfeiture of the property of ruinous houſes within borough, declared by 1663, *c.* 6. By which ſtatute, the magiſtrates of royal boroughs, where houſes have been ſuffered to go to ruin, and uninhabited for three years, have a power given them to warn the proprietors to rebuild them decently within a year; and in default thereof, to cauſe value them by ſworn appriſers, and put them up to public ſale, and deliver the price to the proprietors. If no purchaſer ſhall offer, the magiſtrates themſelves are authoriſed to rebuild the ſame, after payment or conſignation of the price, for the behoof of the proprietors; and the ſtatute ſecures both purchaſers and magiſtrates againſt any action at the ſuit of the ſaid proprietors.

19. Where one was retoured heir erroneouſly to an anceſtor deceaſed, as not being next in blood to him, all right of action competent to the true heir, preſcribed, or was loſt to him, by our ancient law, 1494, *c.* 57. in three

three years; not only as to the inqueſt, who were, after the running of that ſhort preſcription, ſecured againſt the penalty of returning a falſe verdict, but as to the perſon ſerved, whoſe retour could not be afterwards ſet aſide upon the head of error. As this was judged too ſhort a preſcription in a matter of ſuch importance, it is made lawful to the righteous heir or next of kin, by 1617, *c.* 13. to bring his proceſs of reduction of the erroneous retour, notwithſtanding the firſt ſtatute, at any time within twenty years from the date of it. This laſt act aſſumes the appearance of a declaratory law, and explains the former act 1494, as if it had only meant to ſave the inqueſt from an aſſize of error after the three years, without meaning to cut off the heir's right of ſetting aſide the erroneous retour. But, by the expreſs words of the firſt act, the privilege of reducing the retour is declared to be loſt after the courſe of that ſhort period; and for that reaſon, the laſt act 1617 contains a ſalvo or exception, in favour of thoſe who had before the date of it acquired a right to lands *bona fide* from perſons retoured thereto, that they ſhall enjoy their rights according to the former law. Mackenzie, *Obſerv. on ſaid act* 1617, gives his opinion, that the preſcription of twenty years obtains only in the caſe of a competition between the different kinds of heirs among themſelves, as between the heir of line and the heir of tailzie, without excluding the clear intereſt of blood, where, for inſtance, a younger ſon is retoured to the prejudice of an elder. But this opinion has no ſupport from the act, which enacts in general, that all erroneous retours whatever ſhall be free from challenge after elapſing of twenty years; and therefore he has ingenuouſly retracted his firſt opinion, in a ſupplemental note ſubjoined to that treatiſe. It is however certain, that the preſcription, as ſtated in both acts, is to be limited to retours in favour of one who is not the righteous heir, to the prejudice of the true heir or next of kin: for it appears by the whole ſtrain of them, that they are levelled merely againſt erroneous retours, which may lay the foundation of an aſſize of error againſt the inqueſt, for ſerving one heir who had no juſt title to that character. This preſcription therefore hath no operation againſt the perſon himſelf who is retoured, if he ſhall, after the twenty years, bring an action for ſetting aſide his own ſervice, not on the head of error, but on that of minority and leſion, *Fount. July* 11. 1701, *Lady Edinglaſſy*.

20. Sundry debts and diligences fall under a quinquennial preſcription. The arrears of rent, or, in our law-ſtyle, of mails and duties, preſcribe, if they be not purſued for within five years after the tenant's removing from the lands out of which the arrears are due, by 1669, *c.* 9. This preſcription was introduced ſolely in favour of tenants, natural poſſeſſors of the land, who, from their ruſticity, or ignorance in buſineſs, ought not to be overtaken, though they ſhould not be exact in preſerving their receipts or acquittances for any conſiderable time after they are granted; and ſo is not to be extended to ſuch tenants as cannot juſtly plead the ſame ignorance or ruſticity. On this ground, action was ſuſtained for the arrears of rent backwards for forty years, at the ſuit of a liferentrix againſt a fiar, to whom ſhe had granted a leaſe of all her liferent-lands, and who was not, like a common tenant, admitted to plead the quinquennial preſcription, *Dec.* 9. 1709, *Murray*. Hence alſo a tack of a gentleman's whole eſtate, containing a power of removing tenants, is not deemed a tack of ſuch a nature as was intended to fall under the ſtatute, *July* 20. 1733, *L. Carſin*. By the ſame act, multures, or debts due for the manufacturing of corns, and miniſters ſtipends, preſcribe in five years after they become due. By miniſters ſtipends one might be apt to underſtand ſuch ſtipends only as are due to miniſters; which would exclude thoſe that fall due during a va-

cancy, becauſe ſuch belong to no miniſter: but it has been adjudged, that even vacant ſtipends fall under the ſpirit of the law, becauſe all our ſhort preſcriptions have been eſtabliſhed in favour of the debtors, and becauſe the favour of the perſons liable in payment of the ſtipend is as ſtrong for the preſcription during a vacancy as when there is an incumbent, *New Coll.* i. 77. The ſtipend or revenue of biſhops, or other dignified clergymen, did not fall under this preſcription; becauſe the appellation of *miniſters* is, in common uſe, reſtricted to the inferior or parochial clergy, *Pr. Falc.* 62. All bargains concerning moveables, or ſums of money, which the law allows to be proved by witneſſes, preſcribe by the ſame act in five years after making the bargain. Under this deſcription are included ſales, locations, and other conſenſual contracts, to the conſtitution of which writing is not neceſſary; for theſe are proveable by witneſſes. But it muſt be obſerved, that all the above-mentioned preſcriptions, introduced by the act 1669, relate barely to the manner of proof; for the debts themſelves expreſſed in them may, after the five years, be proved by the oath or writing of the debtor; as to which, *vid. ſupr.* § 18. By the ſame ſtatute 1669, *c.* 9. a quinquennial preſcription is eſtabliſhed in arreſtments, whether proceeding on decrees, regiſtered obligations, or depending actions. Where the arreſtment is uſed on a decree, or a regiſtered bond or contract, the five years are to be computed from the date of the arreſtment; for as the debt due to the arreſter is in that caſe conſtituted previouſly to the diligence, he has acceſs, the moment after uſing it, to bring his action of forthcoming to make it effectual. Where the arreſtment is grounded on a depending action, the preſcription does not begin to run till the date of the decree by which the depending debt is conſtituted; becauſe, till then, the arreſter can have no title to inſiſt in a forthcoming.

21. A quinquennial preſcription of the right of appealing from the ſupreme courts of Scotland to the Houſe of Lords of Great Britain, is eſtabliſhed by an order of that Houſe, *March* 24. 1725; by which, no petition of appeal from any decree or ſentence of any court of Scotland, to be afterwards ſigned, and inrolled, or extracted, is to be received after five years from the ſigning, inrolling, or extracting of it, and the end of fourteen days, to be computed from the firſt day of the meeting of parliament next enſuing the ſaid five years, unleſs the perſon intitled to ſuch appeal be within the age of twenty-one years, or covered with a huſband, *non compos mentis*, impriſoned, or out of Great Britain or Ireland. A quinquennial preſcription is alſo introduced in the caſe of high treaſon, by a moſt anxious ſtatute, *Aug.* 1584, *c.* 2. which falls to be conſidered *infr. b.* 4. *tit.* 4.

22. A limitation of cautionary engagements is introduced by 1695, *c.* 5. which enacts, that no perſon binding conjunctly and ſeverally with or for another, in any bond or contract for a ſum of money, ſhall be bound for longer than ſeven years after the date of the obligation; and that whoſoever is bound for another, either as expreſs cautioner, or as co-principal, ſhall have the benefit of the act, provided he has either a clauſe of relief in the bond itſelf, or a ſeparate bond of relief intimated to the creditor at his receiving the bond. This limitation having been eſtabliſhed by a public law, to prevent the fatal conſequences of raſh fidejuſſory engagements, which had proved the undoing of many families, the benefit of it cannot, before elapſing of the ſeven years, be renounced by the party intitled to it, *Edg. Feb.* 19. 1724, *Norie.* But this act has fallen ſhort of the purpoſes for which it was intended: for money-lenders, that they may elude its effects, take all the obligants bound as co-principals, without any clauſe of relief in the bond; the relief from the proper debtor to the other obligants being granted in a paper apart. The creditor's private knowledge that there

there was a bond of relief granted by one of the obligants to another, is not ſufficient to bring the caſe within the ſtatute, *Feb.* 14. 1727, *Bell*; for it requires expreſsly, that the ſeparate bond be intimated to the creditor at his receiving the principal obligation. Yet the creditor himſelf being the writer of the bond of relief to the co-obligant, joined with his ſubſcribing as witneſs to it, is juſtly deemed equivalent to a perſonal intimation, *Dalr.* 108.

23. This act, being corrective of our former law, hath received a moſt limited interpretation. Hence a bond granted by ſeveral perſons conjunctly and ſeverally, though it contained a clauſe of mutual relief, was adjudged not to fall within the ſtatute; becauſe the act was to be underſtood of thoſe bonds only in which one or more of the co-principals became bound to relieve all the other obligants, *Jan.* 21. 1708, *Ballantyne:* nor bonds of corroboration; becauſe in theſe the granter is neither bound as cautioner, nor has a clauſe of relief in his favour, he being intitled to relief only *ex lege*, *Br.* 61.; *Dec.* 15. 1747, *Lady H. Gordon.* In the ſame manner, one who had by a miſſive letter promiſed to pay a debt due by another, was found not intitled to the benefit of the act; becauſe the miſſive was in effect an obligation corroborating the debt, *Feb.* 16. 1710, *More.* Neither do obligations fall under this act where the condition is not purified, nor the term of payment come within the ſeven years after the date of the obligation, becauſe no diligence can be uſed upon theſe, *Br.* 54. The act itſelf ſeems to exclude all judicial cautioners, as in ſuſpenſions, *Dalr.* 135.; cautioners for the faithful diſcharge of an office, *Fount. Jan.* 5. 1709, *Fleet*; and cautioners *ad factum præſtandum*, *July* 1726, *Steuart*; becauſe the act is confined to perſons engaged for others in bonds or contracts for ſums of money. Neither does it extend to the relief competent to co-cautioners againſt one another, which, like other rights not limited, ſubſiſts for forty years, *Feb.* 1726, *Forbes.*

24. Though, in compliance with the common way of ſpeaking, this ſtatute is claſſed here among thoſe which eſtabliſh the ſhort preſcriptions, it would ſeem that the limitation of cautionary engagements is ſomewhat ſtronger than preſcription, notwithſtanding the deciſions obſerved to the contrary, *Dict.* ii. *p.* 117. The act 1695 provides, not that cautionary engagements ſhall preſcribe in ſeven years, for preſcription is not once mentioned in the ſtatute; but that no cautioner ſhall continue bound for a longer term than ſeven years, and that after that period he ſhall be *eo ipſo* free. This emphatical expreſſion ſeems to be made uſe of on ſet purpoſe to diſtinguiſh the limitation from preſcription, and to make the elapſing of the ſeven years a virtual avoiding or diſcharge of the obligation; with this only reſervation, that the ſpecial diligence uſed againſt the cautioner before the running out of that term, by horning, arreſtment, inhibition, and adjudication, for the ſums then fallen due, ſhall have its courſe after that period. The general rules, therefore, laid down in the matter of preſcriptions, are not truly applicable to this caſe: particularly, no interruption uſed within the time limited, except that alone which is made by diligence, ought to preſerve the obligation from being extinguiſhed at the expiration of the ſeven years; ſo that though the cautioner ſhould have granted a declaration, that he ſtands bound for the debt, or though the creditor ſhould have brought an action for payment againſt him within the ſeven years, and even obtained decree, ſtill the obligation is diſcharged *ipſo jure* by the elapſing of that term. Nay, diligence uſed within that period has no effect in favour of the creditor, but to ſecure the ſpecial ſubjects affected by the diligence. If theſe obſervations be juſt, the ſeven years ought to be computed from the date of the cautionary obligation, according to the letter of the

the ſtatute, without regard to the term at which the debt is made payable: which laſt term, (that of payment), the law can have no reſpect to, but upon the ſuppoſition that the limitation expreſſed in the ſtatute is a proper preſcription.

25. That the kinſmen and friends of minors might not be diſcouraged from accepting the offices of tutory or curatory, on account of the danger that they and their heirs may be expoſed to, during the courſe of forty years, by intricate proceſſes of count and reckoning, it was enacted, by 1696, *c.* 9. that tutorial and curatorial accounts ſhould preſcribe in ten years. This preſcription includes all actions competent either to minors againſt their tutors or curators, or to theſe againſt their minors. The ten years are reckoned from the majority or death of the minor; becauſe, at either of theſe two periods, the office of tutory or curatory expires; and it is not till the expiration of the office that any action of count and reckoning lies, *ſupr. b.* 1. *t.* 7. § 31. The words of the act, that tutorial and curatorial accounts ſhall preſcribe, if not purſued and inſiſted on within the ten years, have been ſo explained by ſome lawyers, as if the preſcription would take place though the action were purſued, if it were not alſo inſiſted on by ſome farther judicial ſtep within the ten years, *Bankt. lib.* 1. *tit.* 7. § 42. But thoſe two expreſſions are merely exegetical of one another. They are conjoined in the ſame manner in the act 1669, *c.* 9. concerning the preſcription of arreſtments; and nevertheleſs, in a poſterior clauſe of the ſame act, which relates to the preſcription of ſtipends and multures, the words *inſiſted on* are omitted, without the leaſt room to conclude, that any diſtinction was intended by the legiſlature betwixt the preſcription of ſtipends and that of arreſtments. As for citations uſed for the interruption of preſcriptions, which, by 1669, *c.* 10. muſt be renewed every ſeven years, *vid. infr.* § 43.

26. By the ſaid act 1669, *c.* 9. holograph writings, *ex. gr.* holograph bonds, where they are not atteſted by witneſſes, holograph miſſives, or books of accounts, &c. preſcribe in twenty years. They loſe not, however, their whole effect by this ſtatutory preſcription. Though they are not by themſelves effectual to infer an obligation againſt the debtor after the twenty years, yet the creditor may, after that period, refer the verity of the holograph writing to the debtor's oath in the terms of the ſtatute; and if he ſhall acknowledge his ſubſcription to be genuine, he will be liable for the debt, though he ſhould deny that the ſum contained in the writing is ſtill due: for it is not the ſubſiſtence of the debt, but the verity of the bond, that is in this ſpecial caſe referred to the defender by the ſtatute, *Br.* 133. It hath been already obſerved, that in the other ſhort preſcriptions, the ſubſiſtence, as well as the conſtitution of the debt, is to be referred to the debtor; but as the debts contained in holograph obligations are conſtituted by writing, the extinction of them ought alſo to be proved by vouchers of payment in writing. Some lawyers have, from analogy, extended this preſcription of holograph writings to obligations without witneſſes, granted for ſums below L. 100 Scots; becauſe, though ſuch obligations have been in practice held for valid, notwithſtanding the act 1540, *c.* 117. yet they ought not to have the ſame duration as obligations atteſted by witneſſes.

27. In the above-cited act 1669, a diſtinction is made between the claims or debts which are there declared to preſcribe, and the actions proceeding upon thoſe debts. Though in the ſhort preſcriptions, the right or ground of action is loſt for ever, if not exerciſed within the time limited by ſtatute; yet when action was brought upon any of the debts before the preſcription was run, it ſubſiſted, like any other right, for forty years. As this

this defeated, in a great meaſure, the intention of the laws eſtabliſhing the ſhort preſcriptions, it was enacted by the ſaid ſtatute, that all actions which ſhould be purſued on the ſeveral kinds of debt mentioned in it, ſhould preſcribe in ten years, if they were not wakened every five years. A depending action, in which no new ſtep has been taken for a year together, is ſaid to ſleep, and cannot be farther inſiſted in till it be wakened by a ſummons within the forty years, raiſed by the purſuer, in the manner to be explained, *b.* 4. *t.* 1. § 62. The words of the ſtatute, that theſe actions ſhall preſcribe in ten years, if not wakened every five years, were ſo explained by the practice immediately ſubſequent to the ſtatute, that the action was adjudged to ſubſiſt for ten years without a wakening: ſo that it was deemed a ſufficient interruption, if the firſt wakening was within ten years, and the wakening renewed every five years after, *Pr. Falc.* 95. But by a poſterior act, 1685, *c.* 14. all ſuch actions are declared to preſcribe, if the firſt wakening be not raiſed within five years after the action which was to be uſed as an interruption, firſt began to ſleep.

28. It is hard to comprehend the meaning of that clauſe in the ſtatute, that it ſhall be without prejudice of any actions that are by former ſtatutes declared to preſcribe in a ſhorter time. There is no former ſtatute limiting the duration of any of theſe actions to a ſhorter period; for in all the acts eſtabliſhing the ſhorter preſcriptions, it is only the right to bring the action that is declared to preſcribe, and not the action itſelf when it is once commenced.

29. Sundry obligations are loſt by the running out of a ſhorter period than forty years, without the aid of any ſtatute, where the nature of the obligation, or the circumſtances of parties, juſtify it. Thus, though there is no act limiting the duration of bills, whether foreign or inland, to a ſhort preſcription, even where they are not proteſted and regiſtered according to the directions of the act 1681; yet as they are not intended for laſting ſecurities, action was refuſed on a bill after a ſilence of thirty years, unleſs it ſhould be proved by the defender's oath, that he had ſubſcribed it, and that the ſum contained in it was ſtill due, *New Coll.* ii. 158.; *Falc.* ii. 48.; which was ſoon after extended by *Falc.* ii. 248. to the caſe of a bill, where the accepter was dead, and which had lain over without diligence uſed upon it for twenty-three years. Thus alſo it was adjudged, that no action lay after twenty-three years againſt a writer who had, in the courſe of his buſineſs, granted to his employer a receipt for certain bills, *Falc.* ii. 74. But it is not yet preciſely fixed by deciſions, how long the creditor in a bill muſt be ſilent before action ought to be refuſed to him; for action was ſuſtained where the bill had lain over only for twenty-one years, the accepter being ſtill alive, and acknowledging his ſubſcription, *New Coll.* ii. 65.; and by a later deciſion, *ibid.* ii. 176. it was alſo ſuſtained even after the death of the accepter, where ſuit was commenced upon the bill near twenty years from the term of payment *. This manner of extinguiſhing obligations is ſaid to be by taciturnity; and ariſes from a preſumption, that the creditor would not, in his own particular ſituation, and that of his party, have been ſo long ſilent, if the debt had not been paid, or the obligation fulfilled: ſo that no general rule can be laid down, at what preciſe times action may be loſt by taciturnity.——Several rights and privileges fall under a ſhort preſcription, which either have been, or are yet to be, explained in their proper places; as the right of reſtitution competent to minors, *b.* 1. *t.* 7. § 35.; that of redeeming appriſings, *b.* 2. *t.* 12. § 3. 34.; and adjudications, *b.* 2. *t.* 12. § 39. 40.; the benefit of inventory, *b.* 3. *t.* 8. § 68.; and of deliberating, *ibid.* § 54.; the right of proſecuting crimes, *b.* 4. *t.* 4. § 109. 110.

* The duration of bills is now limited to ſix years by ſtat. 12° Geo. III.; *vid.* Abſtract of the ſtatute in the Appendix.

30. Preſcription runs *de momento in momentum*. Which may be ſaid in two reſpects. *Firſt*, Every point of time is computed in the courſe of preſcription; not only *tempus utile*, the days which one can avail himſelf of by proſecuting his claim in court, or uſing legal interruptions; but *tempus continuum*, holidays, in which no judicial proceeding can be carried on, *June* 30. 1671, *Beidm. of Magd. Chapel.* Neither are the times of the total ſurceaſe of juſtice, happening from inteſtine commotions or public calamities, diſcounted from the years of preſcription, unleſs the contrary ſhall be directed by ſtatute. Of this one inſtance occurs in 1690, *c.* 40, where the time immediately before the revolution in 1688, in which no courts of juſtice were held, was diſcounted from the years of the ſhort preſcriptions; and a later act of the ſame kind paſſed, 19° *Geo. II. c.* 7. ſoon after the rebellion 1745. *2dly*, The years of preſcription muſt be fully completed, before any right can be either acquired or loſt by it; ſo that interruption made on the laſt day of the fortieth year, will break its courſe: for no perſon ought to be ſtripped of his property by building one fiction upon another; *firſt*, by holding a man to have abandoned his right, from his not having exerciſed it for forty years; and then, by conſidering him to have neglected his property for full forty years, when in truth that term is not completely run. But in this, our practice differs from the Roman law, *l.* 6. 7. *De uſuc.* Where the bond or obligation expreſſes the year in which it was granted, or that in which it was to be performed by the debtor, without mention of the month or term, the laſt day of that year is preſumed to be underſtood in favour of the creditor, *Dec.* 23. 1630, *Ogilvie.* Civil poſſeſſion, of which *ſupr. b.* 2. *t.* 1. § 22. hath the ſame effect as natural, in all queſtions of preſcription, whether poſitive or negative.

31. As the poſitive preſcription was eſtabliſhed, both as a penalty on account of the proprietor's negligence, and from favour to the poſſeſſor, which favour is as ſtrong againſt the ſovereign as againſt any other, it was enacted by the aforeſaid act, 1617, That no perſon who has poſſeſſed upon an heritable title for forty years, ſhould be diſquieted by any perſon, not even by the ſovereign: and accordingly a poſſeſſor for the years of preſcription, of part of a fee holden ward of the crown, was found to exclude the donatary of a gift of recognition of theſe lands which had fallen to the King, though the donatary endeavoured to ſupport his gift by act 1600, *c.* 14. which provides, that the ſovereign ſhall not ſuffer by the neglect of his officers, *Fount. Dec.* 26. 1711, *E. Leven.* It is more doubtful, whether the long negative preſcription of obligations runs againſt the King, ſince the only effect of that ſort of preſcription is, to extinguiſh the debtor's obligation, without giving him any poſitive right to an heritable ſubject by the continued poſſeſſion of it for forty years. Lord Stair ſeems by his reaſoning, *b.* 2. *t.* 3. § 33. to think, that the ſovereign is ſecured by the aforeſaid act 1600, againſt the loſs of any right by the negative preſcription, provided ſuch loſs be imputable to the negligence of his officers; and with him Bankton joins, *b.* 2. *t.* 12. § 9.; though it appears ſufficiently obvious from the whole ſtrain of that act, 1600, that it was meant to ſecure the crown merely againſt the miſconduct or remiſſneſs of its officers in the management of proceſſes, by omitting the proper pleas or defences which were competent to the ſovereign.

32. One might naturally conclude, that neither the poſitive nor negative preſcription runs againſt the church, or againſt hoſpitals; becauſe neither churchmen, nor overſeers of hoſpitals, are proprietors of the church-benefices poſſeſſed, or of the donations to the poor managed by them: for the overſeers of the poor are barely adminiſtrators, and churchmen have no more than a temporary intereſt in their ſtipends or benefices; who therefore ought

ought in no reſpect to hurt their ſucceſſors by their miſconduct or negligence: yet both the poſitive and negative preſcriptions run againſt theſe ſucceſſors, becauſe it was neceſſary that property ſhould not be kept for ever fluctuating, and the act 1617 makes no exception in their favour. Hence, the right of an old glebe of an united pariſh was found to be eſtabliſhed in the proprietor of the adjacent lands, as part and pertinent of them, by a forty years continued poſſeſſion, *Edg. June* 10. 1724, *Crawfurd*; ſee *June* 30. 1671, *Beidmen of Magd. Chapel.* This doctrine is alſo applicable to corporate bodies, as univerſities, *&c. Goſf. July* 14. 1675, *College of Aberdeen.*

33. Our law has however ſo far favoured churchmen, becauſe their rights are more expoſed to accidents than thoſe of other men, through the frequent change of incumbents, that thirteen years poſſeſſion is accounted ſufficient to ſupport a churchman's right to any ſubject as part of his benefice, though he ſhould produce no title in writing to it. But this is not properly preſcription: for preſcription eſtabliſhes a firm right in the poſſeſſor, which ſtands good againſt all grounds of challenge; whereas the *decennalis et triennalis poſſeſſio* confers on the churchman no more than a preſumptive title; his poſſeſſion is preſumed to be well founded, till the contrary appear: and hence the rule is thus expreſſed by the canoniſts, *Decennalis et triennalis poſſeſſor non tenetur docere de titulo;* his title is preſumed from his poſſeſſion; but as it is barely a preſumption, it may be elided by a contrary proof. If therefore the churchman's title be recovered, either out of his own hands or from others, and it thence appear that he has poſſeſſed to a greater extent than his title warranted him, his poſſeſſion will be reſtricted within the bounds of the title thus recovered, *July* 11. 1676, *Biſh. of Dumblain*; *July* 23. 1708, *Repreſentatives of Rule.* This preſumption, relative to a churchman's thirteen years poſſeſſion, bears but little reſemblance to the rule of the Roman chancery, *Triennalis poſſeſſor beneficii eſt inde ſecurus*, That the poſſeſſion of a benefice for three years, under a probable or ſpecious title, ſecures the poſſeſſor; or to that other rule aſſumed by canoniſts, That ten years poſſeſſion of a benefice creates a preſumptive title to it; ſee *P. Gregor. Nov. Inſt. t.* 40. § 19.: for theſe laſt-mentioned rules concern the right to the benefice itſelf; whereas the preſumption firſt ſtated, takes the incumbent's right to the benefice for granted, and ſerves only to aſcertain what ſubjects are to be regarded as part of the benefice.

34. As this thirteen years poſſeſſion has been introduced to ſupply the want of titles in writing, it would probably not be adjudged to extend to the right of vicarage-tithes; ſeeing theſe are not conſtituted by writing, as the other ſtipend is, but regulated by cuſtom; ſo that as to them the reaſon of the privilege ceaſeth. Neither does it obtain in ſubjects which the law hath added to benefices, without making them properly part of the ſtipend, *ex. gr.* in the extent of the miniſter's graſs, *Nov.* 12. 1737, *Min. of Dunipace.* This ſort of poſſeſſion conſtitutes a preſumptive title, not only to the preſent incumbent, but to all ſucceſſors, who are intitled to plead upon the poſſeſſion of their predeceſſors in office. Stair ſeems to be of opinion, *b.* 2. *t.* 8. § 29. that the three years poſſeſſion of a churchman contained in the above-mentioned rule, *Triennalis poſſeſſor*, &c. though it does not avail the churchman's ſucceſſor, yet ſecures the incumbent who has poſſeſſed for that time, in the ſubject ſo poſſeſſed during his life as part of the benefice. And though he obſerves that the deciſions upon this preciſe point are not clear, yet he cites one obſerved by himſelf, *Nov.* 25. 1665, *Peter*, to prove, that by the uſage of Scotland, *ſeven* years poſſeſſion by a churchman of tithes, or of any other ſubject, as part of his ſtipend, intitles the poſſeſſor to the benefit of a poſſeſſory judgement, in virtue of which he may continue his poſſeſſion, though a preferable right ſhould be produced, till his own

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be formally ſet aſide. The rights of churchmen having been expoſed to many accidents at the Reformation, the court of ſeſſion, for ſome time ſubſequent to that period, when no title-deeds appeared, decided queſtions regarding church-lands, according to the poſſeſſion at the time of the Reformation, and for ten years preceding it, and allowed a proof of the poſſeſſion by witneſſes. A proof of this kind, however, having in courſe of time become impracticable, an act of ſederunt was made, *Dec.* 16. 1612, whereby the Lords declared, that in time to come they would decide all queſtions with regard to church-lands, and livings pertaining to churchmen, by their poſſeſſion for thirty years immediately preceding the ſuit concerning them, *Spottiſ. Pr. p.* 190. This right being expreſsly limited to church-lands, is quite different from the thirteen years poſſeſſion, which is ſufficient to eſtabliſh the right of an incumbent to other ſubjects as part of his benefice.

35. Whether the poſitive preſcription of forty years runs againſt minors, has been doubted. The ſtatute 1617, on the interpretation of which this queſtion depends, eſtabliſhes firſt the poſitive preſcription, and afterwards the negative, by two diſtinct clauſes, without deducting in either of the two the years of minority. Then follows a third clauſe in the following words: *And ſicklike, it is declared, That in the courſe of the ſaid forty years preſcription, the years of minority ſhall not be accounted.* As neither of the two firſt clauſes enact any thing concerning minors, and as the reaſon appears ſtronger for ſaving the heritage of minors from the effect of the poſitive preſcription, than for protecting their claims of debt againſt the negative, it was adjudged, *New Coll.* i. 118. that the enactment in favour of minors in the third clauſe, ſhould not be reſtricted to the caſe of the negative preſcription, though that was eſtabliſhed by the clauſe immediately preceding, but ought to be extended alſo to the poſitive. This interpretation ſeems agreeable to the opinion of former writers, *St. b.* 2. *t.* 12. § 18. and *Mack.* § 15. *h. t.* who do not diſtinguiſh in this queſtion between the poſitive and the negative preſcription. The exception of minority, however, does not extend to ſuch hoſpitals for children as have a continual ſucceſſion of minors, one after another, where the children are always diſcharged from the hoſpital before majority; for that is a *caſus inſolitus*, which is preſumed not to have fallen under the eye of the legiſlature; and the admitting of ſuch extenſion muſt have rendered all dealings with orphan-hoſpitals moſt inſecure, *Fount. Dec.* 17. 1695, *Heriot's Hoſpital.* It has been already ſaid, that the ſhort preſcriptions run againſt minors, where minors are not expreſsly excepted in the ſtatutes eſtabliſhing them; *vid. ſupr.* § 16.

36. The negative preſcription begins to run only from the time that the debt or right can be demanded in judgement, or ſued upon; becauſe, till then, negligence cannot be imputed to the creditor, and preſcription is the penalty of negligence. The act 1617 does indeed preciſely fix the date of the obligation to be the period from which that preſcription begins its courſe; and in the ſame manner, the act 1579, *c.* 82. declares, that actions of removing againſt tenants ſhall preſcribe in three years after the warning given to the tenant: but the words of theſe and other ſuch ſtatutes are in practice equitably explained, or rather corrected, into an agreeableneſs with this rule, that the courſe of preſcription cannot by its nature commence againſt an obligation, till that obligation be productive of an action. Hence preſcription runs againſt a bond, not from its date, according to the words of the act 1617, but from the term of payment; becauſe, till then, the creditor can make no demand, *Feb.* 17. 1665, *Butter.* On the ſame ground, where a bond is payable to a huſband and wife, and the longeſt liver, preſcription does not begin to run againſt the wife's intereſt in

in it, till after the huſband's deceaſe; becauſe, while he is alive, the wife cannot ſue upon it, *June* 22. 1675, *Gaw*; ſee alſo *June* 23. 1675, *Bruce*. Hence alſo, in removings, the courſe of preſcription commences only from the term at which the tenant is warned to remove; though the words of the act 1579, *c.* 82. expreſsly warrant the commencement of it from the date of the warning; becauſe the landholder cannot, till the term of removing be paſſed, inſiſt in the action of removing *cum effectu; vid. ſupr.* § 18. *in fin.* In like manner, the years are computed, in the preſcription of an inhibition, not from its own date, nor even from the date of the bond or right granted to the inhibiter's prejudice, but only from the time that ſuch right is made public to the inhibiter, by ſeiſin, or real diligence uſed on it, *Pr. Falc.* 32. We may therefore conclude, that though the act 1617 ſtatutes, that the preſcription of actions of warrandice ſhall run, not from the date of the obligation to warrant, but from the actual eviction, becauſe, before the ſubject is evicted, there can be no room to ſue upon the obligation; yet this is not to be underſtood as the only exception from the rule of the act, That the preſcription of obligations runs from their dates, but rather as an example by which to determine all other caſes of the ſame kind.

37. It is a rule grounded on the ſame principle, That *contra non valentem agere non currit præſcriptio*; preſcription cannot operate againſt one who is under any legal incapacity to ſue; for no man can be called negligent for omitting what is not in his power. When therefore one is barred from proſecuting his right by a forfeiture, againſt which he is afterwards reſtored *ex juſtitia*, the years of his incapacity muſt be deducted from the preſcription, *Jan.* 25. 1678, *D. Lauderdale*. Nay, in ſome caſes, preſcription does not run againſt a perſon, though the impediment which bars him from acting ſhould not amount to an abſolute diſability. Thus, though a wife may, upon application to the court of ſeſſion, be authoriſed to ſue her huſband for performing his part of the marriage-articles; yet if ſhe forbear to inſiſt, *ex reverentia maritali*, from the duty which ſhe apprehends ſhe owes to her huſband, preſcription hath no operation againſt her while ſhe is *veſtita viro*, *July* 5. 1665, *Mackie*. But in all actions competent to the wife againſt third parties, upon bonds or other obligations, preſcription runs againſt her, even during the marriage; ſince the *reverentia maritalis* is no bar to the ſuit; and if the huſband will not concur, the wife may be authoriſed by the ſeſſion; ſee *Dirl.* 297. On a ſimilar ground, preſcription has no courſe againſt one for not bringing an action upon his right, if he can aſſign any juſt cauſe of forbearance; *ex. gr.* if he can have no benefit by the ſuit; for in that caſe his forbearance cannot be imputed to negligence, but to this, that the action would be fruitleſs. For this reaſon, where a creditor who is in the right of two ſeparate adjudications againſt the ſame eſtate, has poſſeſſed for ſome time upon one of them, which is afterwards declared a redeemable right, ſuch poſſeſſion preſerves the other adjudication from preſcribing, without any poſitive ſtep taken by the adjudger for that purpoſe: for it would ſerve no purpoſe for him who already holds a total poſſeſſion of the ſubject upon one title, to bring an action upon any other, ſince the only view of bringing a ſuit is to obtain poſſeſſion; ſee *Nov.* 26. 1728, *Fraſer*, obſerved in *Dict.* ii. *p.* 97. Hence alſo a huſband who has acquired a right affecting his wife's eſtate, is under no neceſſity during her life to uſe diligence for preſerving the right from preſcription; for while ſhe lives, he is poſſeſſed of all the rents of her eſtate *jure mariti*, and ſo can profit nothing by his diligence, *New Coll.* ii. 63. § 1.—There is a caſe which at firſt appears an exception to this rule, but indeed is not. If an entailed eſtate has been poſſeſſed by the immediate heirs, upon unlimited titles, beyond the years of preſcription, a remoter heir cannot urge the plea of *non valens agere*, though the right of the imme-

diate heirs was preferable to his. The reaſon is, that every action founded upon the entail was competent to the remoter heir againſt thoſe in poſſeſſion. He might have brought an action, concluding, That the deed of entail might be exhibited in court, and recorded; that the heir ſhould be ordained to make up titles, as directed by the entail, or even that the contravention might be declared, and the eſtate evicted to himſelf.

38. This title may be concluded with a ſhort account of interruptions, which are ſteps taken by the owner of a right or debt againſt the poſſeſſor or debtor, for preſerving it from preſcription.——In handling this doctrine, it may be explained, *firſt*, negatively, what cannot be deemed interruption; *next*, poſitively, by what acts or deeds, whether written or verbal, preſcription may be interrupted; and, *laſtly*, the effects of interruption, and the ſtatutory requiſites to ſundry kinds of it.—By the expreſſion in the two ſtatutes 1469 and 1474, relative to the preſcription of obligations, that they ſhall preſcribe in forty years, if document be not taken on them within that time, nothing can be underſtood, but that they are loſt, if ſome act be not done or uſed by the creditor before the elapſing of that period, by which the debtor may know that he is following forth his right. It muſt appear therefore from the obvious notion of interruption, that the bare regiſtration of a writing cannot interrupt or break the courſe of preſcription, either poſitive or negative, *Jan.* 12. 1672, *Johnſton:* for though the proprietor or creditor, when he regiſters his ground of right or obligation, does a deed by which he owns his right; and though regiſtration be in ſeveral reſpects accounted a decree, which is the ſtrongeſt of all interruptions; yet no notification is truly given to the poſſeſſor or debtor by regiſtration; and there can be no interruption, without certifying the poſſeſſor of the ſubject, or debtor, that the proprietor or creditor is following forth or proſecuting his right. For this reaſon, no conveyance or tranſmiſſion of a debt can be conſidered as an interruption of the negative preſcription, not even where it is intimated to the debtor: for though the intimation appriſes the debtor of the debt and conveyance, that is barely a form neceſſary for perfecting the aſſignee's title to the debt; but no notice is thereby given to the debtor, that the aſſignee intends to proſecute it, or to demand payment from him. Upon a ſimilar ground, citation againſt the debtor, when it proceeded on a blank ſummons, *i. e.* a ſummons not libelled, *b.* 4. *t.* 1. § 5. could not be looked upon as a certifying of the debtor, nor conſequently as an interruption of the preſcription of any particular debt; ſee *July* 14. 1669, *E. Mariſchal*; becauſe the defender could not, in ſuch caſe, know the ſpecial ground on which the purſuer was to inſiſt. Hence alſo no citation upon a ſummons, though libelled, can interrupt preſcription as to grounds which are not ſpecially libelled upon, *Fount. Feb.* 16. 1699, *Menzies:* And an action upon a debt ſecured by inhibition, though it preſerves the debt itſelf from preſcribing, does not ſtop preſcription of the inhibition uſed upon it, which can only be done by a reduction *ex capite inhibitionis*, *June* 22. 1681, *Kennoway*.

39. The courſe of the poſitive preſcription may be interrupted by any act by which a proprietor of either an heritable or moveable ſubject uſes or aſſerts his right againſt the poſſeſſor; and the courſe of the negative, by acts by which a creditor proſecutes his ground of debt, or uſes diligence upon it againſt the debtor. And it frequently happens, that the ſame act of interruption may preſerve from the negative preſcription the right of him who interrupts, and break the courſe of the poſitive, which is running in favour of his adverſary. More particularly, the courſe of the negative preſcription is effectually broken, *firſt*, By any declaration ſigned by the debtor acknowledging the debt, or by a miſſive promiſing payment: for though

theſe are not the deeds of the creditor, they are in effect corroborations of the debt by the debtor; which muſt preſerve the right againſt any preſcription that may be running in his favour. A new courſe of preſcription muſt run from the date of the acknowledgement. *2dly*, By citation or action at the ſuit of the creditor againſt the debtor, or by any judicial demand of the debt made by the creditor; *ex. gr.* a requiſition uſed upon an infeftment of annualrent: but no extrajudicial demand of the debt is accounted an interruption, if it be not accompanied with ſome acknowledgement of the debt by the debtor, *Fount. July* 4. 1705, *Lo. Pitmedden.* *3dly*, By a charge given by the creditor to the debtor on letters of horning; and, in general, by every diligence uſed on the debt, as inhibition, arreſtment, poinding, and adjudication. The ſimple raiſing and ſigneting, either of a ſummons, or of letters of diligence, makes no interruption; becauſe if the debtor be not either cited or charged thereupon, it is no notification to him: and this holds, though the debtor ſhould offer a ſuſpenſion of the diligence, which is frequently done before a charge be given, *Dalr.* 177.; for ſuſpenſion is a deed, not of the creditor, but of the debtor, which does not import an acknowledgement of the debt. *4thly*, Partial payments made by the debtor interrupt the long negative preſcription; becauſe that long preſcription is grounded on a preſumption, that the creditor has relinquiſhed his claim, which is plainly elided by his receiving the partial payment. But none of the ſhort preſcriptions of debt are interrupted, but on the contrary receive additional ſtrength by partial payments; becauſe the ſhort preſcriptions are grounded on a preſumption, that the whole debt was paid within the years of preſcription; and that preſumption can never be taken off or weakened by a proof that part of the debt was paid during that period, *July* 10. 1729, *Nisbet*, cited in *Dict.* ii. *p.* 118.

40. The courſe of both the poſitive and negative preſcription may be broken off, or interrupted, by a proteſtation taken againſt the poſſeſſor, that his poſſeſſion ſhall not hurt the right of him who proteſts. This is called, in common ſpeech, *civil interruption*, becauſe it is attended with no violence; and in our ſtatutes it gets the name of interruption *via facti*, becauſe it is founded on the extrajudicial deed of him who interrupts; and is analogous to the practice of the Roman law, which admitted of an interruption to any work or building by a *jactus lapilli*, the throwing down of one of the ſtones of the new work, in preſence of witneſſes who were called upon for that purpoſe, *l.* 5. § 10. *De op. nov. nunc.* Interruptions of preſcription being favourable, have been frequently ſuſtained upon citations, decrees, or other vouchers, though not in every reſpect regular; *June* 15. 1666, *Sinclair*; *July* 6. 1671, *Macrae*; *Fount. June* 6. 1696, *Guthrie:* but where the informality of the acts appears more eſſential, the law does not regard them as interruptions, *Pr. Falc.* 78.

41. As it is the creditor in the debt who alone hath any intereſt to interrupt the preſcription which is running againſt it, interruptions can have no effect, if they be not made by the creditor; and ſo the act 1469 expreſſly declares. Yet this has received in practice a liberal interpretation. For, *firſt*, Not only are interruptions uſed by an apparent heir effectual againſt preſcription, provided he be ſerved heir within the forty years after their date, *July* 24. 1672, *Edington*; but thoſe alſo which are made by one who had only a putative or ſuppoſed title; ſo that the true creditor afterwards purſuing, though he derived no right from the ſuppoſed one, was found intitled to the benefit of the interruption uſed by him, *Falc.* i. 136. *2dly*, Interruption by proceſs, by whomſoever it has been uſed, may be pleaded by any creditor, where the bringing of ſuch ſuit has been intended by law to promote the common intereſt of all the creditors. Thus the quinquennial

quennial preſcription of an arreſtment may be interrupted, by an action of multiple-poinding, inſiſted in, not by the creditor-arreſter, but by the arreſtee, againſt the arreſter; for as all the co-arreſters have a common right to appear in that action for their ſeveral intereſts, and obtain decree thereupon according to their legal preferences, it muſt have the ſame effect as if it had been brought at the ſuit of the arreſter himſelf, *July* 20. 1732, *Crawfurd*, obſerved in *Dict.* ii. *p.* 117.

42. Where the poſſeſſion of a ſubject is either voluntarily abandoned by the poſſeſſor, without any intention of reſuming it, or is actually taken from him within the forty years, the courſe of the poſitive preſcription is broken with regard to him who has thus abandoned the poſſeſſion, or been turned out of it; becauſe the law hath ſaid, That in order to eſtabliſh a right by preſcription, the poſſeſſion muſt be conſtant and uninterrupted through that whole period. Though therefore the former poſſeſſor ſhould recover the poſſeſſion, he muſt enter upon a new courſe of preſcription, to be computed from the time of that recovery, *l.* 5. *De uſurp.* Interruptions uſed by proteſtation, or even *via juris*, by proceſs not followed forth to a ſentence, where the poſſeſſion is not inverted, but the poſſeſſor continues to poſſeſs, either by himſelf, or by another in his name, though they are indeed profitable to him who uſes them, have no effect againſt the poſſeſſor in favour of third parties, agreeably to the rule, *Res inter alios acta, aliis neque nocet neque prodeſt.*

43. Interruption of preſcription may be either of real rights, or of perſonal debts, as ſums of money. Some particular forms are common to both kinds; and in others, the two differ. By our more ancient law, all citations to interrupt preſcription, proceeding on libelled ſummonſes, though nothing had followed on them, were effectual to break the courſe of preſcription, becauſe they were vouchers uſed by the proprietor or creditor upon the right or debt within the forty years: but by 1669, *c.* 10. all citations which ſhall be uſed from thenceforth, for interrupting the preſcription, either of real or of perſonal rights, muſt be renewed every ſeven years, otherwiſe they are declared to preſcribe. Minority is excepted from this act, and conſequently citations uſed by minors need not be ſo renewed. This ſtatute relates to all preſcriptions, whether long or ſhort, *Dalr.* 15. * From the limitation of this act to citations, it may be obſerved, *firſt*, that if, upon the citation, there ſhall follow the appearance of parties, or any judicial act, it is no longer accounted a bare citation, but an action, which ſubſiſts, though not renewed, for forty years, *Dec.* 1731, *Cred. of Liberton*; unleſs it be an action whoſe duration is confined by ſtatute to a ſhorter period, as in the caſe of actions on arreſtment, which, by 1685, *c.* 14. are declared to preſcribe, if they are not wakened every five years, *Jan.* 14. 1726, *Gray*, cited in *Dict.* ii. *p.* 131. *2dly*, Obſerve, that interruptions by diligence fall not under the act 1669, but ſubſiſt for the whole courſe of preſcription, without the neceſſity of being renewed, *Fount. Feb.* 15. 1704, *Johnſton*. The difference between interruptions by citation and by diligence, lies in this, that where a creditor falls from his citation, without carrying it the length of an action, it looks like a paſſing from it; and therefore the ſame force ought not to be given to that ſlender degree of notification, as to interruptions by diligence, which leave behind them ſtrong effects againſt the debtor's perſon and eſtate.

44. It was alſo common, by our former practice, to all kinds of interruption, that the citations for interrupting might be given, not only by meſſengers, but by the officers of inferior courts, who were generally a-

* See *New Coll.* iii. 55.

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mongſt the loweſt claſs of ſubjects, and might be more eaſily corrupted by bribes or promiſes, to antedate their executions. As the repoſing ſuch a truſt in theſe officers tended to render the rights of land-eſtates precarious, all interruptions of real rights by citation are, by another clauſe of the ſaid act 1669, ordained to be executed by meſſengers, who give ſecurity at their admiſſion for the faithful diſcharge of their office. That ſingular ſucceſſors in heritage may be certified by the public records, what acts of interruption have been uſed againſt the ſubject of their purchaſe, it is provided by 1696, *c.* 19. that all ſummonſes uſed for interrupting the preſcription of real rights, ſhall paſs on a bill under the ſignet, and ſpecify all the grounds on which they proceed, and be regiſtered, with their executions, within ſixty days, in a particular regiſter to be kept at Edinburgh, otherwiſe that they ſhall be ineffectual againſt ſingular ſucceſſors: and that no interruption of real rights made *via facti* ſhall be of force againſt them, if an inſtrument be not taken on it, and regiſtered within the ſame time, and in the ſame record, as is required in the caſe of interruptions by ſummons.

45. Interruption has the effect to cut off the courſe of preſcription; ſo that the perſon preſcribing cannot avail himſelf of any part of the former time, but muſt begin a new courſe, commencing from the date of the interruption in the negative preſcription, and from that of the recovery of poſſeſſion in the poſitive. Minority therefore is truly no interruption, tho' it gets that name in vulgar ſpeech; for it is no document or evidence taken by the minor on his right, which is the deſcription given of interruption in the acts 1469, *c.* 29. and 1474, *c.* 55. It is no more than a perſonal privilege competent to the minor, that he ſhall not ſuffer by the elapſing of time, while he continues minor. Neither does it, like a proper act of interruption, break the courſe of preſcription; the years of minority are only diſcounted from it: ſo that its operation is indeed ſuſpended during the minor's nonage; but how ſoon he becomes major, the preſcription, which had commenced before the minority, continues to run, and the years before the majority are conjoined with thoſe after it, in order to complete the term of preſcription. This doctrine is applicable alſo to the privilege ariſing from one's legal incapacity to act. The minor is intitled to this privilege of ſuſpending the courſe of preſcription, not only when the right againſt which it is running is veſted directly in himſelf, but when it ſtands in the perſon of a truſtee for his behoof, *New Coll.* ii. 63. § 1. By the ſaid ſtatute 1617, no minority is to be diſcounted from preſcription, but that of him againſt whom the preſcription is uſed and objected. The act expreſsly ſays, that the years during which the parties againſt whom preſcription is objected are majors, ſhall be counted; there is no inſinuation, that they may avail themſelves of the minority of third parties, from whom they derive no right: and if this privilege of minority may not be uſed without authority from the minor, ſtill leſs can it be made to operate againſt his intereſt, or what may be preſumed to have been his deſire. For inſtance, one cannot, with a view to elide the effect of preſcription run againſt his title, plead another's minority, in order to defeat the minor's own title, or ſubject him to limitations and fetters which it was evidently his intention to get free from. A deciſion, however, is obſerved in 1756, *New Coll.* i. 214. where the court ſuſtained the plea of minority under theſe circumſtances; but that judgement was upon appeal reverſed by the Houſe of Lords.

46. In an obligation, where the right of the creditor is unlimited, extending equally againſt all the obligants and ſubjects which it affects, if the right itſelf be ſafe from preſcription, the whole of it is preſerved; ſince, as the right continues *unum quid*, one part of it cannot be ſeparated from the other. On this ground, diligence uſed by an annualrenter, whoſe right is

conſtituted on two ſeparate tenements, againſt any one of them, even after the right of the two has gone to different perſons, or payment of annual-rent made by the proprietor of one of the tenements, preſerves from the negative preſcription the whole right of the annualrenter, which cannot be weakened by the proprietor's making over one of the two in favour of another, *June* 22. 1671, *Lo. Balmerino.* But whether ſuch diligence can alſo hinder the poſſeſſor of the other tenement under a ſingular title, from the benefit of the poſitive preſcription, may be doubted: for no interruption can be ſaid to be made by the diligence, which we have ſuppoſed to affect only one of the tenements, againſt the poſſeſſor of the other; and if he continues to poſſeſs without interruption for the forty years, he ſeems to be preciſely in the caſe of the act 1617; unleſs the two tenements ſhould be parcels of the ſame barony; in which caſe there is no doubt that the interruption would be effectual as to the whole. *Baronia* being *nomen univerſitatis*, it is quite eſtabliſhed, that interruption againſt the poſſeſſor of a barony, by arreſting or levying the rents of any part or tenement, covers the whole from preſcription; *vid. ſupr. b.* 2. *t.* 6. § 18. In the ſame manner, diligence uſed upon a debt againſt any one of two or more co-principals, preſerves the debt itſelf, and ſo interrupts preſcription againſt all of them; and diligence uſed againſt a cautioner, interrupts preſcription as to the principal obligants. Thus alſo, by our former law, a partial payment made by the principal debtor, interrupted preſcription from running in favour of the cautioner, *Dec.* 18. 1667, *Nicholſon:* but ſince the ſtatutory limitation of cautionary obligations by 1695, *c.* 5. the cautioner is free, barely by the elapſing of ſeven years, notwithſtanding any diligence uſed againſt, or even partial payments made by the principal debtor, within the ſeven years.

47. In obligations where the right of the creditor is divided into diſtinct parts, either originally, or by voluntary conveyance from the firſt creditor, it may well happen, that part of the right may be preſerved from preſcription, while another part falls under it. Thus, where a creditor in a bond aſſigns part of it to another, he divides the right between himſelf and the aſſignee; and therefore interruption made by the aſſignee, though it preſerves the part aſſigned, cannot avail the cedent, as to the part which he retained to himſelf; nor, *e contra*, will interruption uſed by the cedent preſerve the aſſignee's part. Thus alſo, in the caſe of a bond of proviſion by which two or more children are provided, each in a ſeparate ſum, interruption uſed by one of the children is not available to the reſt, for preſerving to them their reſpective ſums which they had neglected to demand during the currency of the preſcription.

48. Queſtions are frequently moved concerning the preſcription of debts due to foreigners, and demanded in this country, whether the deciſion ought to be governed by the law of Scotland, where the judicial demand of the debt is made by the creditor, or by the *lex loci contractus*, or by what other rule of law or equity. Civilians differ upon this point. Some hold, that the law of the country where the ground of debt, and of the action competent upon it, had its riſe, that is, the *lex loci contractus*, ought to be regarded: but others maintain, with greater probability, that the queſtion is to be regulated by the law of the place where the action itſelf is inſtituted againſt the debtor, or, in other words, by the law of the defender's preſent domicil; becauſe debtors can be ſued before thoſe courts only to whoſe juriſdiction they are ſubjected, and all courts muſt judge by their own municipal laws. Hence an Engliſhman who has furniſhed goods in England to a Scotſman, need not diſquiet himſelf about the laws of our preſcription, ſo long as his debtor continues to reſide where he contracted the debt: and indeed, though the debtor ſhould return to Scotland after

after the expiration of three years, but before the Engliſh limitation of ſix years has taken place, the creditor ought not to be cut off from his claim upon our triennial preſcription, unleſs he ſhall have delayed to commence a ſuit for three years after the debtor's return home; *firſt*, becauſe our ſtatute eſtabliſhing that preſcription, though expreſſed in general terms, cannot by a juſt interpretation be extended to foreign contracts, (for England is in this queſtion a foreign country to us), unleſs the debtor has afterwards reſided in Scotland for that whole term of three years; *2dly*, becauſe it is inconſiſtent with equity, that a debtor's fraudulent device to diſappoint his creditor by changing domicils, ſhould have the ſame effect as a diſcharge of his obligation, without any negligence that can reaſonably be imputed to the creditor. If in the caſe of an Engliſh debt, which is in their law limited to a ſhort preſcription, but not in ours, an action ſhall be brought in Scotland by the creditor for payment, after the years of the Engliſh limitation ſhall have elapſed, the Engliſh ſtatute, which is of no proper authority in the courts of Scotland, cannot be regarded as an extinction of the claim: nevertheleſs, it ought in equity to be received as a preſumption that the debt is paid, if the creditor ſhall not elide it, either by direct evidence, or by ſtronger contrary preſumptions. It is hard to quote any deciſions of our ſupreme court, in ſupport of what has been obſerved on this head, to which contrary deciſions may not be oppoſed: but theſe and other rules relating to it are laid down with great preciſion, and the contrary judgements cenſured by the author of Principles of Equity, *p.* 125. 283. By the lateſt deciſion on this point, *New Coll.* i. 156. the court of ſeſſion have made the law of Scotland the rule of their judgement *.

49. Queſtions concerning the preſcription of heritage, muſt be governed by the law of the place where the heritage lies, and from which it cannot be removed.

TIT. VIII.

Of Succeſſion in Heritable Rights.

PERSONS who have right to a ſpecial ſubject in virtue of a conveyance *inter vivos*, are called *ſingular ſucceſſors*, *b.* 2. *t.* 7. § 1. That ſort of ſucceſſion having been already handled, it ſtill remains to conſider how eſtates, whether heritable or moveable, deſcend on the death of the proprietor to thoſe who ſucceed in his place. This kind of ſucceſſion is called *univerſal*; and may be defined, the right of an heir or executor to enter upon the eſtate which belonged to a perſon deceaſed at the time of his death.

2. Succeſſion may be divided into proviſional, or by deſtination, and legal. The firſt reſts on this foundation, that if one hath, in conſequence of his property, a power to transfer his eſtate to another by a preſent deed of alienation, he muſt alſo have the leſſer power of ſettling it upon whom he will, by a deed which is not to take effect till his death. If the proprietor ſhall not exerciſe this power during his life, the law confers the right of ſucceſſion upon him whom it is preſumed the deceaſed would have appointed his heir in reſpect of the proximity of blood, had he made a deſtination; which is called the legal ſucceſſion. Hence, the heir appointed by the deſtination, or expreſs will of the deceaſed, muſt be preferred to the legal heir, who derives right only from his preſumed will; for conjecture or

* The ſame has been found in ſeveral later caſes; *Randale contra Innes*, *July* 13. 1768; *Jean Ker contra E. Home*, *February* 20. 1771; *Barret contra E. Home*, *February* 1772.

preſumption