1685. *November.* BURNET *against* VIETCH.

No 12.
Adjudication in relief, competent, before payment by the cautioner.

THERE being a query proponed by Mr Roderick M'Kenzie clerk, ſhowing that Robert Burnet writer, being cautioner for Veitch of Dawick; and, being diſtreſt by regiſtration of the bond, and horning thereon, but had not made payment of the debt; the ſaid Robert, upon the clauſe of relief of the ſaid bond, had entered an adjudication of Dawick's lands, that he might come in *pari paſſu* with other adjudgers. The queſtion being, Whether, (albeit he was diſtreſſed, yet not having made payment,) he might adjudge for relief?——THE LORDS found, That he might adjudge; and that the adjudication was equivalent to an infeftment of relief; and was only to take effect for ſuch ſums as Robert Burnet ſhould happen to pay, by virtue of the ſaid diſtreſs; and that from the time of his payment: And therefore, ordained the decreet of adjudication to be extracted, bearing the foreſaid proviſion.

Preſident Falconer, No 102. *p.* 72.

1686. *January.* WILSON *against* The MAGISTRATES of Dyſart.

No 13.
The emoluments of the hand-bell of a town, carried by an appriſing of the common-good.

AN appriſer of the common-good of Dyſart, purſuing for the tack-duty of the hand-bell; it was *alleged*, That theſe obventions and emoluments being of a moveable nature, did not fall under adjudication.

Anſwered: Theſe are the conſequences of a real right, and belong to the purſuer; as the profit of fiars would fall to the compriſer of a barony.

THE LORDS decerned in favours of the adjudger.

Fol. Dic. v. 1. *p.* 10. *Harcarſe,* (COMPRISING.) *No* 317. *p.* 77.

1705. *June* 26.
ALEXANDER STUART of Torrence *against* WALTER STUART of Pardovan.

No 14.
An heritable bond is adjudgeable, even before the term of payment, though no infeftment has followed.

WALTER CORNWALL of Bonhard having, upon the 27th of February 1700, granted an heritable bond to George Dundas merchant in Leith, for the ſum of L. 10,600, payable at Lammas thereafter, with annualrent, commencing from the preceding Candlemas, and in time coming after the term of payment, upon which no infeftment followed; Walter Stuart of Pardovan, a creditor to George Dundas, did raiſe ſummons of adjudication of that money, which was executed 6th July 1700, and obtained decreet 20th February 1701. Alexander Stuart of Torrence, another creditor, arreſted it 9th July 1700, and obtained a decreet of furthcoming upon the 9th July 1701. There aroſe a competition betwixt theſe creditors, each of them claiming to be preferred upon his diligence.

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The first ground of preference *urged* for Torrence was, That his arrestment had been laid on before the term of payment of either principal or annualrents, at which time the bond was purely moveable, and not affectable by adjudication. Because, if George Dundas had died when arrestment was used, or at any time before Lammas that year, the sum had not gone to heirs, but to executors and nearest of kin, as being moveable in the construction of law, 29th June 1624, Smith *against* Anderson's relict, (*See* HERITABLE and MOVEABLE.) Or if he had been denounced to the horn before Lammas, and his escheat duly gifted and declared, the donator would have had right to it: Bonds, heritable by a clause of annualrent, being moveable to all intents and purposes, before the first term of payment of the annualrent. And the reason is, because till then, they are not considered as *jura fixa*, but rather as so much money in the creditor's hands unsettled. Now, if the creditor had intended to have the bond in question debord from the common nature of bonds bearing annualrent, he would either have secluded executors expressly, or taken infeftment before the term; and, seeing he did not what he might have done, Law presumes, his design was, the bond should continue purely moveable, until the first term of paying annualrent.

Answered for Pardovan, That by the 32 act, 1 Parl. Cha. II., declaring all bonds moveable, except where they contain an obligement to infeft, or seclude executors, the nature of bonds bearing annualrent was not changed, but they are only made moveable, by way of privilege, as to nearest of kin, executors, and legators; and therefore, where the question is not betwixt heirs and executors, bonds bearing annualrent retain still their nature of heritable, and adjudgeable as before the act of Parliament 1641. 2*do*, The bond in question was heritable in terms of the 32 act, Parliament 1661, in so far as it contained an obligement to infeft, which imported the creditor's design to have the sum heritably secured; and albeit the 51 act of that same Parliament declares, bonds bearing annualrent, whereon infeftment never followed, to be arrestable; it provides at the same time, That this shall no ways change the nature of the said sums, nor prejudge any persons as to their heritable rights to the same. It matters nothing that neither the term of payment of the sum, nor of the annualrent was come: For the bond, of its own nature, by the conception of it, was as much heritable in the sense of law, the very minute it was subscribed, as if actual infeftment had then been taken. In which case, it could not have been controverted, but that the same was adjudgeable, even though the creditor had died the very next day. But whatever might be pretended in the case of a creditor's dying before the term of payment, that does not meet the present question: For the reason why sums in that case are found moveable is, because the clause adjected for payment of annualrent at the term, does not take effect in the defunct's own time, so as to make it profitable to his heir. Whereas, here the creditor is still alive, and the bond carried annualrent from the date; and so being essentially heritable, it matters not though the term was not come, at the time of the citation upon the

No 14. adjudication. This is confirmed by deciſions, January 8. 1624, Bairns of Colonel Henderſon *againſt* Murray, (*See* HERITABLE and MOVEABLE); July 31. 1666, Gray *againſt* Gordon, (*See* ESCHEAT). And albeit, the citation upon the adjudication was before the term, the day of compearance was after. Therefore, the bond was certainly heritable at the obtaining of the decreet of adjudication.

Replied for Torrence, There is no ground in law or cuſtom for a diſtinction betwixt heritable and moveable bonds, as to the effect of ſucceſſion, and as to the effect of creditors diligence; for, it is certain, that all bonds whereupon infeftment hath not followed, are moveable before the term of payment, or firſt term's payment of annualrent, *quoad creditorem*. 2*do*, As to the caſe of Colonel Henderſon's Bairns *againſt* Murray, January 8. 1624, the ſame reſpects only the term's annualrent of the ſum, falling due after the creditor's death, where there had been infeftment on the bond before: for elſe there had been no controverſy, ſeeing the current term's annualrent is certainly moveable. And, in the deciſion, Gray *againſt* Gordon, the bond did only bear annualrent after the term, which was caſt at the diſtance of ſome years from the date, and the creditor's deceaſe; and was found to be heritable in favours of an aſſignee, againſt the fiſk and donator of eſcheat, who is odious. 2*do*, The act of Parliament 1661, whereby debts not ſecured by infeftment may be either arreſted or appriſed, is not to the purpoſe, for it does expreſsly preſuppoſe an heritable ſubject, which in former times was not arreſtable, and allows the ſame to be arreſted now; without prejudice to thoſe that have a mind to compriſe the ſame in a habile way, viz. after they are become heritable by elapſing of terms. 3*tio*, The whole proceſs and decreet of adjudication muſt derive its force and virtue from the ſummons and citation, which is *primus actus judicii:* Inſomuch, that if the ſubject was not heritable or adjudgeable, then the ſummons and citation were null, and the decreet following thereon inhabile and incompetent; according to the rule of law, *quod ab initio vitioſum eſt tractu temporis non convaleſcit.* Therefore arreſtment uſed by Torrence, while the ſubject was affectable by no other diligence, followed with a legal and formal decreet of forthcoming, muſt undoubtedly be preferred to Pardovan's adjudication, upon a citation when the ſubject was incapable to be affected by ſuch a diligence.

Interlocutor. THE LORDS conſidering, that by the 51 act, Parliament 1661, heritable ſums before infeftment actually taken, were capable either of arreſtment or adjudication; and, that it was the intereſt of creditors to have as many ways as law can allow, to affect their debtors eſtates; therefore, they found the heritable bond adjudgeable before the term of payment, as well as arreſtable.

Effect of citation in an adjudication. *Alleged* for Torrence, That he ought to be preferred on his arreſtment, though poſterior to the citation in the adjudication; becauſe, citations proceeding upon blank ſummonſes, clear nothing of the purſuer's deſign, and put no reſtraint upon the receiver; all their effect being only to render the ſubject litigious; whereas diligence of arreſtment, how ſoon laid on, is a *nexus realis;* the copy bears expreſsly the uſer's intention, and puts the receiver in *mala fide* to diſpoſe of the

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ſubject affected. So that the act of Parliament 1672, declaring citations of adjudication equivalent to a compriſing clothed with infeftment, is only underſtood to take effect in a competition with voluntary rights; and not to prejudge legal diligence, ſuch as arreſtment; 1ſt February 1684, competition betwixt Anderſon and Crichton, (*See No* 6. *p.* 79.) For if a ſummons of adjudication, were a diligence of that nature and efficacy, to draw back the ſubſequent decreet to its date, an adjudger would have right to all the fruits, acceſſions, and profits, from the citation; whereas the decreet carries only right to theſe from the date of it, and is but effectual from that time as to the benefit of year and day, and coming in *pari paſſu* with the firſt effectual adjudication. Arreſtment, on the other hand, doth ſo fix the ſubject of it, as the decreet of forthcoming is always effectual, and carries the profits and conſequences from the time of the arreſtment, whereby the property ſeems to be tranſmitted. For the deſign of a forthcoming, is not ſo much to complete the right acquired by arreſtment, as for declaring, that the arreſter hath not paſt from his diligence, and for certiorating the debtor, in whoſe hands the arreſtment was uſed, and to lay the foundation of diligence againſt him. Yea, an arreſtment uſed before the term of payment, hath been preferred to an appriſing obtained before, and completed by infeftment after the term, before the decreet of forthcoming; July 2. 1667, Litſter *againſt* Aiton and Sleich, (*Stair, v.* 1. *p.* 467. *See* COMPETITION.) Where it might have been pleaded, that the appriſer had the firſt complete diligence, and the arreſter had no benefit of the priority; both arreſtment and appriſing being before the term of payment; but yet the decreet of forthcoming was drawn back to the date of the arreſtment, and preferred to the intervening complete diligence, by appriſing and infeftment. So that the common brocard of *prior tempore potior jure*, and of the firſt inchoat and firſt complete diligences, are not to be mentioned here; for theſe take only place in competition of diligences of the ſame kind, that are effectually completed after the ſame manner. 2*do*, As Torrence's decreet muſt, for the reaſons forefaid, be conſidered in law, as of the ſame date with the arreſtment, and therefore, prior to the decreet of adjudication; ſo he was *in curſu diligentiæ* from the laying on of his arreſtment, and *per eum non ſtetit*, that his decreet of forthcoming was not obtained before the other's adjudication; and, if the courſe his forthcoming required, took up more time than Pardovan's adjudication; that ought not to prejudge him, a lawful creditor, who was never *in mora*.

Anſwered for Pardovan, The citation, upon the adjudication, is a diligence affecting the ſubject, as really as arreſtment doth that which is arreſted. And, an execution of arreſtment, is a general arreſting all ſums of money or goods in ſuch a perſons hands, due, or belonging to the arreſter's debtor, for ſatisfying the debt, which was the ground of the arreſtment. The notion, that arreſtment lays on a *nexus realis*, has no foundation in our law; and, the contrary is clear from many inſtances; as a creditor may poind, notwithſtanding of a prior arreſtment; a ſecond arreſter, inſiſting with diligence, in his forthcoming, is pre-

No 14. ferable to the firſt, who has been *in mora*; and, arreſtment upon a depending action, may be looſed upon caution. But an arreſtment is only a legal prohibition, to alter the condition of the thing arreſted, or to pay the arreſter's debtor. And if the perſon, in whoſe hands arreſtment is laid on, happen to die before complete diligence by forthcoming, the arreſtment falls to the ground, and the defunct's ſucceſſor may ſafely pay and diſpoſe of the ſubject arreſted; which ſeems inconſiſtent with the nature of a *nexus realis*. 2*do*, The act of Parliament 1672, makes a citation upon a ſummons of adjudication, equivalent to an ap-appriſing with an infeftment thereon; ſo that the citation in the adjudication, was a complete diligence without the decreet, at leaſt preferable to the inchoat prohibiting diligence of arreſtment: Which is clear from the 51 act, Parliament 1661, that introduces the privilege of arreſting heritable debts, not ſecured by infeftment: For there it is expreſsly declared, that the act is without prejudice to the compriſing of heritable ſums, by ſuch as think not fit to arreſt; whence it follows, that every ſtep of diligence, in the compriſing or adjudication, prior to the other diligence of arreſtment, is alſo preferable. The ſingle deciſion 1684, does not meet the preſent caſe. For there arreſtment was laid upon the bygone rents of lands, in the hands of tenants, and was certainly prior to the citation upon the ſummons of adjudication: Seeing the Lords found the citation ought not to prejudice the arreſtment. But our queſtion is about the ſtock or ſubject itſelf, and not concerning rents or profits; and the decreet of adjudication is prior to the ſentence of forthcoming. It avails not, that the arreſter was *in curſu diligentiæ*, and could not, by the courſe of the rolls, bring in his action ſooner: For *ſibi imputet*, that his forthcoming was not decerned as ſoon as the adjudication; ſeeing the former might have been ſummarily diſcuſſed as the latter was, upon application to the Lords, repreſenting that the common debtor, had not *perſonam ſtandi*, by reaſon of hornings and captions. Now, adjudication being a proper diligence for affecting the ſubject, and the legal ſteps of form being obſerved; if it fell to be decerned before the forthcoming could be brought to a period, it is a privilege allowed by law to the uſer of that way of diligence; and, the arreſter, who choſe rather to proſecute his claim by a more tedious method, has himſelf to blame, if he find not his account in the procedure.

Replied for Torrence: Arreſtment is certainly a more fixed and ſpecial diligence than a ſummons of adjudication, which mentions no ſubject, tells neither where nor by whom due, and differs ſomething from a denunciation of appriſing. The *nexus realis* of an arreſtment is not carried ſo high, as to be like a real infeftment upon lands, but is only pleaded as a piece of diligence, effectual to draw back the decreet of furtheoming to the date on it, *tanquam ad ſuam cauſam*; which effect a ſummons of adjudication has not. Though a creditor might poind without regard to a prior arreſtment, that does not weaken the *nexus*, as to the other effect in a competition with an adjudication: but only argues. that poinding is a diligence of a diſtinct nature from both; being a decreet and preſent exe-

cution at the ſame time, whereby the ſubject arreſted is taken away, that it cannot be made furthcoming. But where the ſubject continues extant in the debtor's hand, it muſt be made furthcoming, *cum omni cauſa*, from the date of the arreſtment: And, if a ſecond arreſter be preferred to the firſt, it is becauſe the firſt has been negligent; which cannot be charged upon Torrence. Nor is his arreſtment loſable upon caution; and, if it were, then caution comes in place of the ſubject, as an equivalent. Arreſtment muſt be renewed upon the death of the perſon in whoſe hands it was uſed, that the arreſter may not want a party; and, as there is no repreſentation in ſucceſſion to moveables, ſo they are not ſo permanent as to continue affected by diligence, commenced againſt a predeceſſor. 2*do*, There is no imaginable diſparity betwixt the preſent caſe, and that of the cited deciſion, 1684. It is true, the mails and duties were arreſted, and here a ſum of money: But that difference was not the *ratio decidendi*, nor had any influence upon the deciſion, which plainly expreſſes, that citations can only hurt voluntary rights; and there is no ſpeciality as to one ſubject of arreſtment, more than another. No 14.

THE LORDS finding Pardovan's inchoate diligence, by citing on his adjudication, to be prior to Torrence's arreſtment, and the conſummated diligence by decreet of adjudication alſo prior to the decreet of furthcoming: They preferred the adjudication. Interlocutor.

A third ground of preference inſiſted on by Torrence was, That, beſides his arreſtment, he had alſo the firſt decreet of adjudication, which was a complete diligence finally denuding the debtor, and excluding all ſubſequent adjudgers; the ſubject adjudged being a liquid bond, never clothed with infeftment: And therefore Pardovan's adjudication, though within year and day, could not come in *pari paſſu*. Becauſe, the act of Parliament, 1661, does only relate to compriſings, or adjudications of ſubjects, whereupon infeftment has followed; that is, adjudications which want to be completed by infeftment. For an effectual compriſing being there ſtated, as the rule and meaſure of preference, that determines who ſhould come in *pari paſſu*: Where that ſtandard is not found, the law cannot take place. 2*do*, As Torrence is founded in the preciſe words of the ſtatute, which reſpects only compriſings whereupon infeftment followed, or the ſuperior was charged: He is alſo founded in the analogy of law, which conſiders adjudications as legal diſpoſitions. For, as a voluntary diſpoſition would have carried the ſubject in controverſy, and made a complete right, without neceſſity of infeftment; a legal diſpoſition will more certainly do it. Effect of a decree of adjudication.

Anſwered for Pardovan. To ſingle out one inſtance in a law to exemplify and illuſtrate the ſame, and make that inſtance to influence the whole againſt the main deſign and expreſs terms, does contradict common reaſon, and the known rules of interpretation. Now that all adjudications led within year and day ſhould come in *pari paſſu*, is clear, both from the expreſs words of the ſtatute 1661, while it ſpeaks of compriſings effectual by infeftment, or otherwiſe, and from the reaſon and narrative of it. And, if it were not ſo, the deſign of the act, which is cal-

No. 14. culated to introduce equality, as much as poſſible, among creditors, would moſtly be eluded: For a perſon, better acquainted with his debtor's circumſtances, or nearer the place where he reſides, ſhould prevent and hinder the other creditors of the benefit of affecting the common debtors' means by an accident, that cannot be attributed to them. And to allow this, becauſe, forſooth, their debtor has not taken infeftment on his right, is not only againſt the common principle of law, but would give occaſion to debtors to prefer what creditors they pleaſe. 2*do*, That the act is to be underſtood of all rights adjudgeable, as well as thoſe whereupon infeftment follows, is not only clear from the plain and general words of, *It is ſtatute and ordained, That all compriſings*, &c.; but alſo from the particular word *eſtate*, made uſe of to ſignify the ſubject affectable, which comprehends diſpoſitions, heritable bonds, and other rights adjudgeable, whereupon no infeftment has followed. 3*tio*, The exception, in the act of ground-annuals, and other *debita fundi*, confirms the rule as to all other caſes not excepted. 4*to*, The effectual compriſing by infeftment is expreſſed *exempli cauſa*; and there was alſo this reaſon for naming it, rather than any other, That ſince poſterior appriſings, within year and day, of him who wared out his money in ſecuring his right by infeftment, were brought in equally with him, it was juſtly ordered, That they ſhould pay him his expences, as a ſort of recompence.

Replied for Torrence. Where the ſtatutory part of an act, eſpecially a new and correctory one, is clear, *caſus omiſſus habetur pro omiſſo*, and the act is not to be extended to caſes not expreſſed, by virtue of arguments drawn from the narrative, and imaginary view or reaſon of it. For is it not rational to ſuppoſe, that the legiſlators were not ſo liable as we to miſtake the reaſon and view of the law? It was juſt upon this ground, that the Lords of Seſſion refuſed to extend againſt adjudgers, the act of Parliament, ordaining a year's rent to be paid to the ſuperior by compriſers, till a new law was made for it; albeit the thing was equally reaſonable in both caſes: In regard the act 6, Parl. 23. James VI., anent compriſings, allowed the compoſition of a year's duty to the ſuperior; and the ſubſequent act, concerning adjudications, made no mention of it. 2*do*, As to the exception of ground annuals, infeftments of annualrent, and other *debita fundi*, the brocard, *Exceptio firmat regulam in caſibus non exceptis*, holds good; but Pardovan miſapplies it. For here the rule is only concerning appriſings, whereupon infeftment needed to follow, for denuding the debtor; and the exception of *debita fundi*, does indeed confirm that rule, as to all other appriſings, that behoved to be completed by infeftment. But Torrence's adjudication is a complete diligence, without neceſſity of either infeftment or charge againſt the ſuperior; and ſo is not to be conſidered as the firſt effectual adjudger in the ſenſe of the act of Parliament, to the effect of others coming in *pari paſſu* with him, but muſt carry the whole ſubject adjudged, and the other adjudgers have only right to the reverſion of his adjudication, and to redeem upon payment.

Interlocutor. THE LORDS found, That the clauſe of the act 62, Parliament 1661, being ge-

neral, comprehending all appriſers and adjudgers within year and day, Pardovan and Torrence ſhould come in *pari paſſu* *. (*See* ARRESTMENT.) No 14.

Fol. Dic. v. 1. *p.* 10. *Forbes, p.* 12.

1725. *February* 9.

SARAH CARLYLE, Relict of William Lyon, younger of Eaſter Ogle, *againſt* his CREDITORS.

No 15.
Adjudication with a charge againſt the ſuperior, excludes not the terce.

WILLIAM LYON died inveſted in fee of an eſtate about L. 900 Scots of yearly rent; of his creditors only one had an infeftment of annualrent, anſwering to the principal of L. 1000 Scots: There were adjudications deduced againſt him, before the marriage with Sarah Carlyle, to the extent of L. 11,900 Scots, whereof ſome were with charges againſt the ſuperior during the marriage; the other adjudications, extending to L. 10,700, were without year and day of the former.

Upon theſe rights, it was for the creditors *alleged*, That the widow conld pretend no right to a terce, becauſe the huſband was, at the time of the marriage, *obæratus*; and, as he could by no voluntary conveyance or writing, have provided his wife in prejudice of his creditors; neither could he, by his marriage, prejudge them, eſpecially ſince the wife had brought no tocher.

It was *anſwered*, That a wife is not excluded from a terce by her huſband's bankruptcy; but in that matter, there is in law a diſtinction made of the quality of the debts, if ſecured by infeftment, or not; for perſonal debts prejudge not the terce: In which all our lawyers agree; *ſee* Stair, lib. 2. tit. 6. § 18. 'Terces 'are burdened by all *debita fundi*, but with no other debts of the defunct, being '*perſonal*, though they be *heritable*, and have a proviſion of infeftment.' And though the huſband had been really inſolvent at the marriage, it would make no alteration; for, ſince the law forbids not a perſon inſolvent to marry, the proviſion of law muſt take place in favours of his wife.

It was *2do alleged* for the creditors, That ſuch of the adjudgers as had charged the ſuperior before the huſband's death, muſt be preferred to the tercer; becauſe an adjudication with a charge is equivalent to an infeftment.

Anſwered, That a charge by the act 1661, is made equivalent to infeftment, in the competition only of adjudgers one with another; but not with other rights: That though in that ſpecial caſe a charge is made equivalent to infeftment, for reaſons ſpecified in the ſaid act, in other caſes it is not: For that act has not ſaid, that a charge againſt the ſuperior conſtitutes a real right; far from it, an adjudication remaining ſtill a perſonal right till infeftment. Hence it would be an er-

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* This caſe is alſo reported by Preſident Dalrymple, and by Lord Fountainhall.—The report by the one will be found under COMPETITION: By the other, under ARRESTMENT.