No 86.

How long time is necessary to have that effect, has never been fixed, only cases have been determined as they have occurred; and the shortest time that has been sustained to infer such *mora* is six years, in that case observed by Spottiswood, Hamilton against M'Culloch, No 78. p. 8383. And here, though Wallyford had pursued a mails and duties in 1699; yet it then slept, not only to 1706, when Sir Robert Blackwood's heritable bond was granted, but has never to this hour been wakened, the adjudication not having been heard of till it was produced in this process.

Fol. Dic. v. 3. *p.* 391. *Kilkerran,* (LITIGIOUS.) *No* 1. *p.* 339.

*** D. Falconer's report of this case is No 71. p. 2832, *voce* COMPETITION.

1764. *July* 26. DUCHESS of DOUGLAS and WALTER SCOT, Competing.

No 87.
The subject being rendered litigious by the citation in a process of adjudication, how long does it continue litigious?

IN July 1747, an adjudication was deduced by the Duke of Douglas against the estate of Lord Cranston his debtor, for the accumulated sum of L. 516 Sterling. In June 1750, Walter Scot merchant, having lent L. 400 Sterling to Lord Cranston, obtained an heritable bond, upon which he took infeftment without delay. And in about three years after a ranking and sale of Lord Cranston's estate was raised. The Duchess of Douglas, who had right to the said adjudication from her husband, *insisted* to be preferred before Walter Scot upon the following ground; That by the Duke's adjudication the subject was rendered litigious, so as to bar every voluntary deed by the debtor in prejudice of the Duke's diligence. It was *answered*, That the Duke had lost his privilege of litigiosity by a *mora* of near three years between his decree of adjudication and the heritable bond granted to Mr Scot, during which period he had done nothing to complete his diligence, not even a charge against the superior. Which answer was sustained by the Court, and Mr Scot was preferred upon his infeftment; to which interlocutor they adhered 20th November 1764.

With respect to litigiosity, there is a remarkable difference between a citation in a proces of adjudication, and a decree of adjudication with or without a charge. In the former case, there is no necessity nor reason for barring the defender from granting voluntary deeds, except as long as to afford the pursuer sufficient time for obtaining a decree; and, therefore if he once allow his process to sleep, he ought no longer to enjoy the privilege of litigiosity. But a decree of adjudication ought to have a more extensive effect with respect to this privilege, according to what is pleaded in the decision Wallace of Cairnhill, No 85. p. 8388. In the present case, the Duke's adjudication is within year and day of a former, upon which the superior was charged; and it is understood, that after infeftment or charge against the superior by one adjudger, it would be rigorous in the other adjudgers to proceed to infeftment, as loading both themselves and their debtor with expenses; consequently, an ad-

judger in the Duke's situation could not be *in mora* for delaying to take infeftment during the legal. No 87.

If this be not sufficient to bar voluntary deeds during the legal, a charge against the superior by the Duke would not have put him in a better situation; for supposing the superior to have been put *in mala fide* by this charge, if he should think of granting infeftment to a disponee, yet infeftment *de facto* granted, must have been effectual to the disponee if he was *in bona fide* to receive it. Therefore, if the interlocutor preferring Mr Scott upon the Duke's supposed *mora* be well founded, no adjudger hereafter can be secure against the voluntary deeds of his debtor without taking infeftment, were there a hundred of them, which will prove an intolerable burden, both upon the adjudgers and upon their debtor. Whereas, by continuing the litigiosity during the legal, no harm is done to the debtor but the depriving him of a power to borrow upon heritable bonds, which at any rate he will be deprived of if the adjudgers be obliged to take infeftment.

One way to prevent the unhappy consequences of this judgment, is, that each of the adjudgers shall take out an inhibition against their debtor. Another way is, that every one of the adjudgers should charge the superior conformable to the above mentioned decision Wallace of Cairnhill; finding, in effect, that an adjudication with a charge is effectual to bar voluntary deeds during the legal. Though, as observed above, it seems not agreeable to principles to make any difference with respect to this matter, between an adjudication with a charge, and an adjudication within year and day without a charge.

Fol. Dic. v. 3. *p.* 391. *Sel. Dec. No* 222. *p.* 287.

*** See this case as reported in Faculty Collection, No 72. p. 2833, *voce* COMPETITION.

DIVISION V.

Litigious by Infeftment.—By using an order of Redemption.—By Inchoate Inhibition.

1631. *March* 8. LORD CLACKMANNAN *against* LORD ALLARDICE. No 88.

A PARTY who had wadset his lands, and taken a back tack containing a yearly duty more than the legal interest, did grant an infeftment of annualrent over the same lands to another creditor; and lastly, discharged the said back-tack. In a competition betwixt the wadsetter and annualrenter, it was