of this burn being polluted, is to be ascribed solely to its being a common receptacle of the common sewers of a part of the city of Edinburgh; because it is proved by the evidence, that the rivulet has other sources, and that the water was pure and fit for use when it reached the respondents' grounds, and would be so at this moment, notwithstanding the drain from the city, were it not for the appellants' works. If the drain from the city of Edinburgh were to render the water unwholesome, or unfit for use, the respondents behoved no doubt to submit to it, because it is necessary, and the citizens have a right by prescription; but that is no reason why the appellants should be permitted to increase that mischief to the injury of the respondents.

After hearing counsel, it was

Ordered and adjudged, That the cause be remitted back to the Court of Session, in Scotland, in order that the said Court may inquire how far the rill, called Lochrin burn, or Cross burn, is liable to the service of a common sewer, and to receive the offscourings of houses and other trades, and in what parts built and established, or hereafter to be built or established, and to what extent: Also, how far the actual use made of the distillery in question can be impeached in law as a nuisance of a rill so circumstanced, and by what means, in particular, within the description of the libel, such annoyance is occasioned, and how far the same affects the parks of Mr. Russell, the pursuer (respondent) in the said libel mentioned."

For Appellants,— *W. Adam, Thomas M'Donald.*
For Respondents,— *W. Grant, J. Anstruther.*

NOTE.—The judgment of the House of Lords seems to have been decisive of the question, as no further steps appear to have been taken in the case under the remit.

JOHN PETER DU ROVERAY and Others, Creditors of MACKENZIE of Redcastle, } *Appellants.*

JOHN MACKENZIE and Others, Creditors on said Estate, ... } *Respondents.*

House of Lords, 1st June 1795.

ADJUDICATION—INTIMATION—PROVISION—JUS CREDITI.—If intimation be given in the first effectual adjudication in order that cre-

1795.

DU ROVERAY, &c. v. MACKENZIE, &c.

ditors may be conjoined, it is not an objection to any posterior adjudications, (so as to disappoint them of their proper place in the ranking), that no intimation in terms of the statute was given, the want of such intimation not being a nullity.—By an antenuptial contract, it was provided that the children's provisions should be payable to them at the father's death, and "to bear interest from the majority or marriage of the said children:" Held, in respect the father was bound to pay interest upon the sums so provided, from the time of the children's marriage or majority, that they had a *jus crediti*, and might have used diligence in their father's lifetime.

In the ranking and sale of the estate of Mackenzie of Redcastle, several objections arose to the claims of the creditors claiming to be ranked preferably on the estate. Two classes of heritable debts appeared. Those constitued by heritable bond and infeftment, which were classed first; and those constituted by adjudication, which were ranked in the second place.

Of the latter class, the first effectual adjudication was obtained by George Gillanders of Highfield on June 18, 1788, after which, there followed a variety of other adjudications at the instance of different creditors, all led within year and day, in terms of the act 1661, c. 62, and were ranked *pari passu*, so as to draw equally in proportion to their respective debts. And, in the third place, were ranked those adjudications led beyond the year and day, creditors who, in this case, had very small prospect of getting anything.

Among these was the claim of Peter du Roveray, the appellant, who stated an objection to all the adjudications that were ranked preferably to him, founded on the following enactment regarding adjudications: "That, in order to lessen the number "of adjudications, and, consequently, the expense upon a bank- "rupt estate, the Lord Ordinary officiating in the Court of "Session, before whom any process of adjudication is called, "shall ordain intimation thereof to be made in the minute- "book and on the walls, in order that any other creditors of "the common debtor, who may think proper to adjudge his "estate, and are in readiness for it, may produce the in- "structions of their debts, and be conjoined in the decree of "adjudication; and a reasonable time, not exceeding twenty "sederunt days, shall be given for that purpose, unless "there be any hazard from a delay, which the Court and "the Lord Ordinary shall judge of."

23 Geo. III. c. 18, § 5.

In Gillanders' adjudication, being the first effectual one,

intimation was given, and several creditors appeared, and were conjoined with him, but in all the other adjudications, which had been ranked by the common agent, prior to the appellant, Mr. Du Roveray, this requisite form had been neglected, and he therefore contended, 1st, That in place of being entitled to a preference, they were absolutely void and null. 2. Even if not null, they could only be sustained as regarded the debt of that creditor who had raised a summons of adjudication, not as to the debt of those who had been conjoined without raising any such summons of adjudication; and, 3. That, at any rate, the appellant, who was in readiness to have been conjoined in the adjudications preferred, ought to be ranked *pari passu* with those adjudgers, with whose adjudications he might and would have been conjoined, if legal intimation had been given.

The Lord Ordinary ordered memorials, and reported to the Court. The Court, of this date, repelled the objections to the adjudication of John Mackenzie and others. On reclaiming petition, the Court adhered. * Dec. 21, 1792. Mar. 5, ——

---

* Opinions of Judges:

Lord President Campbell.—"This is a question concerning the intimation of adjudications.

"The clause in the act authorizing intimation is loosely worded, and must be construed in a rational manner, so as to answer the end and object which was in view. 1st, We must inquire whether it was meant that the intimation should be an indispensable requisite in every adjudication. 2nd, Supposing it to apply to all (adjudications), what ought to be the consequence of omissions?

"As to the first, the act (23 Geo. III. c. 18, § 5), itself says not, and leaves a good deal to the discretion of the Judge. It is a strong measure to stop the course of legal diligence, even for a day, or for an hour. The rule is *jura vigilantibus. (vigilantibus non dormientibus, jura subveniunt?)* But, says the act, let other creditors who are ready be admitted, if this can be done without prejudice to you, the adjudger. The only thing meant is to save expense, and to abridge legal proceedings; and, in the case of the first adjudger, this may always be done with safety; for it is clear that he can suffer nothing by the delay of twenty days. In the case of subsequent adjudgers, this is not so clear. There may be some hazard, more or less. The Judge therefore has, for the most part, been in use to dispense with the intimation in that case, and the act gives him a power of so doing. The minute-book, though in general a necessary form, is often dispensed with. If there be any thing ambiguous in the words, the prac-

1795.

DUROVERAY, &c. v. MACKENZIE, &c.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The act is explicit in declaring that every adjudication for debt, without distinguishing between first and second adjudications, requires intimation;

---

tice of the Court ought to go some length in explaining them.—*Vide* the act of Sederunt about Sasines.

"2nd point. The Act neither says nor means that the regulation shall be enforced under the certification of nullity. The sole object of the law being to save expense, and to communicate the benefit of a certain legal diligence at the instance of one creditor to other creditors in a similar situation; this object may be fully attained, and full justice may be done to all without annulling the diligence. This (annulling of the diligence) would be doing great injustice to the party, who, by the common rules of law, is the best entitled to the favour of law, as being the most vigilant. The law does not mean to do any injury to him, but to admit others, in certain circumstances, to participate in that benefit, as in the case of arrestments and poindings. If he has wrongfully omitted the necessary form of giving them notice to appear for their interests, this may bar *him* from any *plea* of *preference* in competition with them, or may entitle them to be put in the same situation as if notice had been given, but never can go farther."

LORD CRAIG, PROBATIONER.—"I think the objection not good. The object of the law was to save the fund for division from unnecessary expense of leading separate diligence. After the first adjudication is led there is a prescription running, and therefore it is dangerous to delay."

LORD JUSTICE CLERK.—"Of same opinion. There is *periculum in mora*."

LORD SWINTON.—"I am for altering the interlocutor."

LORD JUSTICE CLERK.—"I am for adhering. It was not intended to put negligent creditors on the same footing with vigilant. But the petition is well founded in second prayer.—(*Vide* Session Papers). If it be a good objection, the adjudication is a nullity."

THE LORD PRESIDENT.—I am for adhering, except as to the third prayer, (viz., ranking the objectors *pari passu* with those creditors with whom they would have been conjoined had intimation been given)."

LORD JUSTICE CLERK.—"I am now for adhering *in toto*."

LORD ESKGROVE.—"I am of the same opinion. As to the second prayer, (which prayed to annul the rights of such creditors as had been conjoined with the adjudication which had not been so intimated), as the Ordinary has a right to dispense with intimation, he has done so by admitting them creditors without intimation. The third prayer is without the act altogether. We cannot dispense with the law."

Vide President Campbell's Session Papers, Vol. 69.

and the reason for appointing this intimation in second adjudications applies just as forcibly as to the first adjudication, the object of the statute being to put it in the power of creditors to obtain adjudications without the necessity of a previous summons of adjudication, but simply by producing the intimations of debt, conjoined with the first adjudication, when intimation was made to that effect. The statute expressly enjoins intimation as a means undoubtedly of attaining an end, but both the intimation, and the conjoining to which that intimation leads, are part and parcel of one end, namely, the saving expense in leading separate adjudications. And if the adjudications led, without any such intimation, were good at all, it could only be those creditors who had actually raised a summons of adjudication, and not as to those other creditors who had got themselves conjoined, without any such summons, and without any intimation. The adjudication, without intimation, may be good as to the debt, but invalid as in competition with other creditors. And as the appellant was in readiness to have been conjoined with such adjudications, had intimation been given, he is entitled to be ranked *pari passu* with them.

Pleaded for the Respondents.—That the intention of the statute was, 1. To save expense upon the bankrupt estate, by lessening as much as possible the number of separate summonses, and separate decreets of adjudication; and, 2. To introduce in favour of those creditors who were in readiness to adjudge, a privilege of being conjoined in the same decreet of adjudication with the creditor whose summons had come into Court, instead of raising a separate summons, and going through the preliminary forms otherwise required. That the statute did not make this a statutory solemnity, essential to the validity of the adjudication, so much as it was a mere privilege allowed to those who might seek to be conjoined, and who were in readiness so to do. Intimation was not the end of the legislature, so much as it was a means of accomplishing the saving of expense, and thereby benefiting both debtor and creditor, which was the end in view. It was sufficient for this purpose that intimation was given in the first effectual adjudication, and that in practice this had hitherto been deemed sufficient, which practice further confirmed the meaning of the statute to be, that intimation in first adjudications was all that was necessary. But even supposing the statute had required intimation in all subsequent adjudications, it did not follow that the adjudication

1795.

DU ROVERAY, &c. *v.* MACKENZIE, &c.

was in consequence void and null. Every thing done contrary to a statute is not necessarily null. Whenever the legislature intends this consequence to follow, it will say so, but, in the present case, nothing of the kind appears; and therefore there was no ground for maintaining that those creditors who had been conjoined in second and posterior adjudications *not intimated*, were not entitled to be ranked before the appellant, who has shown no evidence that he was in readiness to be conjoined at that date, and no evidence that his debt was then even constituted.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Rob. Dundas, Ro. Cullen, Geo. Daniells.*
For Respondents, *Sir John Scott, William Tait.*

Another objection stated by the appellants in the same case as the preceding, was, that the children of Captain Kenneth Mackenzie, the bankrupt owner of the estate, had been ranked as preferable creditors for a provision of £2000, which they were not entitled to be; because, according to the law of Scotland, children were not entitled to demand payment of their provisions, until all the deceased's onerous creditors were paid, and the question was, Were they creditors for their provision, and so entitled to rank *pari passu*, or to a preference for the same? This depended entirely upon whether they, by the nature of the provision secured, had conferred on them a *jus crediti*?

Their, father, by his antenuptial contract of marriage, bound himself "to make payment to the younger children, "to be procreated of the marriage, of the sum of £2000 "sterling, to be divided amongst them in manner as the said "Kenneth Mackenzie shall think fit, by a writing under his "hand; and failing such division, to be distributed among "them equally, *the said provision to be payable only at the "father's death, and to bear interest from the majority or mar-"riage of the said children*, which ever of them shall first "happen, the said Kenneth Makenzie and his foresaids be-"ing always obliged to give the children education and "aliment." Kenneth Mackenzie's father, Roderick, being then alive and in possession of the estate, was a party to his son's contract of marriage. The children, after their father's death, obtained decreet of adjudication, and ranked both

for their provision and aliment, contending that they had a *jus crediti*, and were entitled to a preference as creditors, that the antenuptial contract was an onerous deed, that the wife's fortune was given as a consideration for securing these provisions to her children, and these being moderate and reasonable, no exception could be stated. That although no *solemnia verba* were necessary to constitute such *jus crediti*—a clear evidence of intention being sufficient, yet here, by the conception of the contract, the provisions were made proper debts. Answered: A man's children are his heirs after his death, but heirs of provision are postponed to the father's onerous creditors, which is the construction, when the father is simply bound to provide a certain sum. When the child is in existence, there is room for saying that something more than a *spes successionis* was meant; but, as a general rule, onerous debts must be preferable to a bond of provision not payable, as in this case, until the granter's death; at least, that a bond cannot compete with onerous debts, unless the father was solvent at the time of his death, which was not the case here.

Of these dates, the Lord Justice Clerk, Ordinary, pronounced this interlocutor: "In respect that by the conception "of the contract of marriage, the father was bound to pay "interest upon the sums provided to the younger children "of the marriage, from the time of their marriage or majo- "rity, though the payment of the principal sum was sus- "pended till the death of the father: Finds it was com- "petent to the younger children to use diligence in their "father's lifetime; therefore repels the objection upon that "head. Finds, that although the father was bound to ali- "ment the younger children according to his circumstances, "which would be implied, though not expressed, yet, in "respect to the state of his affairs, the younger children "cannot compete with onerous creditors for aliment." On two reclaiming petitions the Court adhered.*

June 7 & 9 1791.

Feb. 1, 1792.

June 5, ——

---

* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—"The question is about a provi- June 5, 1792.
sion to children, and whether under it they had a *jus crediti?*

"There is no real difference, in my opinion, between this case and that of the creditors against the children of Dunardry, (Lachlan Mactavish), decided 15th Nov. 1787. (Mor. p. 12922). Attend to the words of the clause:—"And further, with respect to the children to be "procreated of this present marriage, *other than the heir so succeeding*

1795.

DU ROVERAY, &c. *v.* MACKENZIE, &c.

Against these interlocutors the present appeal was brought as a part of the appeal in the previous case.

Pleaded for the Appellants.—Provisions to children payable after the death of the father, cannot compete with onerous creditors, and more especially a general provision to children, *nascituri*, in a contract of marriage. All that the children have during the father's life, is a mere right of succession, not a *jus crediti*. And to give them more in such circumstances, would be unjust to onerous creditors, and there is no decision nor authority in the law of Scotland, entitling children to compete with onerous creditors for their provisions, unless the provision, principal, and interest became due and payable, or might become due and payable during the father's life. And therefore, though provisions to children may be so constituted as to make them proper creditors, yet, as the marriage contract in question is not so conceived as to give the children such a *jus crediti*, the same cannot be sustained.

Pleaded for the Respondents.—It being admitted that provisions to children may be constituted in such a manner so as to make them creditors, or merely heirs of provision, the question is, Whether, by the conception of the contract, they have been made creditors in this case? As heirs of provision they could claim no right as creditors, such giving them only a *spes successionis*, leaving to the father the full right of administration, power to contract debt, and to spend his whole fortune, without they being able to interfere during his life; but the case is different when, by the marriage contract, they are made creditors to the father during his life, because, in that case, the children can take

---

"*as aforesaid*, he, the said Kenneth Mackenzie binds himself to "make payment to the younger children to be procreated of the "marriage, of the sum of £2000 sterling, to be divided among them, "as he shall think fit; and failing such division, to be distributed "among them equally, the said provisions to be payable only at the "father's death, and to bear interest from the majority and marriage "of said children.

"It could not be ascertained which of them were children, other than the heir, or how the division was to be, till the father's death. No claim could be made either for principal or interest during his life. If for interest, it was only in the way of aliment. I am against the interlocutor."

Lord Monboddo, Lord Eskgrove, and the Lord Justice Clerk, for adhering.

steps to secure payment of what is due to them. To produce this effect, no precise form of words have been fixed, and, therefore, whether children have a *jus crediti*, or a mere *spes successionis*, is always a question of construction turning upon the intention of the contracting parties. If from the deed the intention was to confer a *jus crediti*, then this must rule, and the children are entitled to take steps during the father's life, and to rank as creditors on his estate, according to the priority of their diligence. No doubt the provisions here are made payable after the death of the father, but this is immaterial, because it is declared that they shall bear interest from majority or marriage, and whenever either of those events happen, the *provisions become due*, and both or one of these events might happen during the father's life.

After hearing counsel, it was

Ordered that the interlocutors be affirmed.

For Appellant, *Ro. Dundas, Ro. Cullen, Geo. Daniell.*
For Respondent, *Sir John Scott, William Tait.*

WM. CHALMERS, Town-Clerk of Dundee, JOHN PETER DU ROVERAY of London, and Others, the postponed Creditors on the Estate of Redcastle, . . } *Appellants;*

ALEX. Ross and JOHN OGILVIE, for themselves and certain other Creditors of RODERICK and KENNETH MACKENZIE of Redcastle, whose debts were not included in the Trust-Disposition; HECTOR MACKENZIE, and BOYD and HANNAH MACKENZIE, daughters of the said KENNETH MACKENZIE; and JOHN MACKENZIE, of the City of Edinburgh, for self and on behoof of Others, the second and subsequent adjudging Creditors of the said estate of Redcastle, } *Respondents.*

House of Lords, 1st June 1795.

REAL BURDEN, or PERSONAL RIGHT — TRUST-RIGHT.—A trust-deed was granted, conveying an estate, for certain uses, but without declaring these uses real burdens upon the estate. A list of the debts, and names of the creditors for payment of whose debts the