

The Stair Society

A Supplement to Baron Hume's Lectures

Edited and annotated by
the Editor of the Printed Volumes

1957

Table of Contents

A. Certain mainly historical paragraphs on certain branches of the Law of the Feudal Investiture and of the Superior's Estate (see Lectures Vol. IV, Part IV, Chs. I and II).

1. The Feudal System
2. Registration
3. Military Tenure including Grand and Petty Sergeanty
4. Soccage Tenure
5. Superior's Security for Feu Duty
6. Escheats of disclaimation, Purpresture and Recognition
7. Denunciation, Casualties of Wardship and Marriage
8. Right of Succession of Vassal's Heir – Non-entry Retour Duties
9. Casulty of Relief, including Herezeld
10. Casulty of Aid

All the paragraphs were omitted in later years.

B. The opening pages of Vol. IV, CHIII – The Vassal's Estate –

Rules of Construction of Extent of Grant: Subjects passing including Share of Area of Church; Family Burial Place, Patronage, Teinds.

These pages were omitted in later years. The passage in double square brackets is another MS. Version.

C. A Chapter which the Editor has entitled “Heritable Bonds”, and which is in the MS.

Has no title, relating to the Bond of Annual-Rent. (See Vol. IV, at p.386.) This was omitted in later years.

D. The rest of the Chapter on “Service of Heirs” See Vol. V at p.162.

This comprises the following matters:

(a) Circumstances necessary to make a service effectual.

i. Service applicable only to a case of succession.

ii. Service to person last duly vested.

iii. Person serving must be truly heir to subject.

Meaning of terms ‘heir’, ‘children’, ‘bairns’, etc. in deeds

iv. Party served must be retoured under that particular character in which he had right to subject.

(b) Precept of *Clare Constat*

(c) Burgage subjects

(d) Adjudication on trust bond

(e) Where settlement in favour of heir-at-law but deficient in procuratory and precept.

(f) Passive titles:

i. Heir of line

ii. Heir of conquest

iii. Heir male

iv. Heir of provision

v. *Nominatim* substitutes in bond

vi. Relief from movable debts

vii. Relief *inter haeredes*(g) *Gestio pro haerede*(h) *Preceptio haereditatis*

(i) Passive title under Act 1695 c. 24.

(j) Service *cum beneficio inventarii*.

(k) Competition of diligence between creditors of heir and those deceased.

E. A Chapter on 'Bankruptcy'. This came in immediately before part V in vol. V. It was not used apparently after about 1800. It consists of a commentary on the Acts 1621 c.18 and 1696 c.5 and on the early Bankrupt Acts.

Editor's note: Where passages have had to be taken from student's notes (as in section A.1 and E and D) those passages have been put in square brackets.

THE FEUDAL SYSTEM

[To enter into any enquiry as to the origin of this system, with the manner in which it was introduced into this country and the particular period of its introduction would be nugatory. It is a subject which has engaged the pens of the best historians, lawyers and antiquarians, to whose works it is sufficient to refer. The subject has been ably handled by Sir Thomas Craig in his work *De Feudis*, Dalrymple in his *Essay on Feudal Property*, Kames in his *British Antiquities*, Lord Hailes in his *Annals*, Montesquieu in the *Spirit of the Laws*, Dr. Robertson in his first volume of *Annals*, John Millar in his *View of the English Government* and on the distinction of ranks, and by Mr Walter Ross in his *Lectures upon the Law of Scotland*.]

[With regard to the nature of that system, it is only necessary at present to mention it created a divided interest in immovable subjects between two persons – the superior and the vassal, which last held the property under various burdensome conditions, and especially that of military service in the field, as his man and servant, by which his right was much impaired. The whole landowners in the kingdom were thus in a state of regular subordination connected with each other; and the king as the source from which all landed property in the kingdom flowed was at the head of the class. It is said that the Feudal Tenures were at first precarious, resumable at the superior's pleasure – afterwards were bestowed for the vassal's lifetime and then by progression to heirs of all different descriptions.¹ So much concerning the Institution of Tenures. We shall have occasion to speak more on this subject in the course of the following detail.

In considering the peculiar modifications of the Feudal System in the law of Scotland, we have to attend to four things, namely 1st, the form and mode of our Feudal Investiture, 2ndly the interest remaining with the superior, 3rdly the interest arising to the vassal and 4thly the means of voluntary alienation of those rights or either of them *inter vivos*.

¹ Spelman, 4–6, Ross, ii. 33, 34–5, Craig, i. iv.5 etc. (l. 55 etc)

First, then, with regard to the Form of our Feudal Investitures. This can only be in one way – by Grant from a superior who is vested with the subject. Occupancy is excluded entirely by Feudal tenures, according to which no subject can be a *res nullus*, for in default of owners it belongs to the sovereign, from whom it is presumed to have been derived. This rule is universal and without exception even of the udal rights of Orkney and Shetland, though these are in a privileged condition. These Islands were no part originally of this country, but were ceded to it by Denmark, by certain contracts with James III and IV, in which it was stipulated, that they should be governed by their ancient laws and customs as they were when under the Danish Sovereign.² What these were we cannot now tell; only this we know, that they were not feudally regular, and that the evidence of their rights of property did not depend upon writing, but that a proof of witnesses of immemorial possession was held sufficient.³ The last practise still remains, except as to these lands, brought under the common rule, by taking out a charter from the crown – but that institution does not depend on the notion, that the lands were at first acquired by occupancy, and that the long possession was a continuation of the original right. This idea has long given way to the presumption, that the immemorial possession proves an ancient grant from the Sovereign at a time when written titles were not in use in that part. Whence if an udal proprietor die without heirs, his fee like any other would revert to the king to the exclusion of the first possessor.

The plan of Feudal investitures in all countries has been agreeable to the Law of Nature, which requires two things: the donor's dispositive will, and an act of delivery in pursuance of it. As to the fashion of delivery, there is some difficulty in managing this matter in that easy and expeditious way as in the transmission of movables. So we find that in very ancient time no notion was entertained of a transference of land without a

² 1567 c. 48, record ed., A.P.S., iii. 41. Stair Society I. 449.

³ Stair II.iii.11, Ersk. II.iii.18. Stair Society I. 453.

complete removal of the donor, his flocks, herds, etc., and bringing the donee himself and his effects to the lands. In Normandy it was a vice in the transmission, if a single beast belonging to the donor remained. But when in a more cultivated state, such transmission became more frequent, this behaved to be a very troublesome and inconvenient mode, and hence the notion was suggested of substituting some single act of real power, which might be considered in questions of right a satisfactory evidence of the acquisition, and as an introduction to all the rest. Many acts might be adhibited in that vein, such as the donor's personal induction of the donee into the lands, the donee's plough going along a ridge of the lands or his bringing cattle upon the lands etc.

Among the Swedes the custom was in the presence of the parties and witnesses, that a clod should be thrown upon the donee's cloak extended upon the ground.

These acts are to be considered real rights and not symbolical, as most think, as if the one act was meant to come in place of the other, but as themselves undoubted acts of real possession. In one point of view indeed they may be considered symbols,⁴ namely, in so far as one single act determined the question of right; but on the other hand the donee, having exercised a right of property, in the act of taking up the soil, it was to be considered as an introduction to what might follow.

With us in Scotland, if anything positive can be delivered, the progress seems to have been nearly as before described. Thus, the *Leges Burgorum*⁵ mention, that the form of delivery of a house, was, by the seller's coming out, and the buyer (all others having gone out), entering and barring the door, on which act, instruments were taken by a piece of money in the hands of the magistrate of the Burgh, who attended for the purpose. This entry is evidently not symbolical but actual. This practise of delivery within burgh was

⁴ Sec Ross ii. 89, 91, 93, 100, 105–7, 133–4, 138.

⁵ C. 56 Ross, ii. 93, Craig II.vii.1 (l.486)

almost universal on the Continent even for five centuries before *Leges Burgorum*, and, on account of its easy application, remained long in use, so that traces of it were observable even in Craig's time. In the delivery of fortalices and castles, indeed, it was the prevailing mode in his time,⁶ as appears from the sasine given to James IV's Queen, of the Castles of Edinburgh, Dumbarton and Stirling, when, the garrison having marched out, the Queen's troops entered and shut the gates and let down the portcullis and drawbridge.⁷ A vestige of this practise remains to the present day by the infetment within Burgh, by hasp and staple. With regard to land it was thought even by Craig, Bk. II ch. 2 §§13, 15, 16, 19 and 21⁸ that there could be no complete investiture without possession.

The form then was a simple and simultaneous act without writing, and sufficient by the donor's making present delivery of the lands and removing his goods from them. Fealty and homage were also adhibited by the vassal to the superior at this period,⁹ of which this was the form. The vassal appeared before the superior with his head uncovered, his spurs off etc., and, kneeling with the greatest reverence, engaged himself in the superior's service, searing the oath of Fealty – 'I become your man' etc. (a copy of which is preserved by Skene¹⁰). In some cases the more humiliating parts of the ceremony were dispensed with, as with churchmen and women.¹¹ The practise in France was that the woman, instead of kneeling, gave the superior a salute called *courtoisie de buchee*,¹² whence it became known by the name of the Tenure of Courtesy, and hence the term of courtesy known in France, England and this country, expressing the husband's right to a liferent of part of his wife's property, is probably derived. This was the mode practised

⁶ Craig, *supra*, Ross ii. 94.

⁷ Ross ii. 133–4.

⁸ Clyde's Translation I. 377–85.

⁹ Craig I.xi.10, II.xii.22, I.ix.16, 21, 23, I.xii.19–22, xi. 2–5, 6–8, v.2. (I.181–2, 629, 625–9, 126–7, 128–9, 129–30, 584–6, 441.

¹⁰ *De Verb, Signif.*

¹¹ Craig I.xiv.2, 10, II.xii.20, xiv.1–3, (I.258, 264–5, 627–8, II.667–71) Ross, ii.150.

¹² Howard, *Ancion Loix*, i.52.

when the *pares curiae* had a share in the ceremony. A mode was afterwards fallen upon, by which the transmission was separated into two parts – the act of conveyance being given at one time, and possession at another. The form of it was this. The superior sitting in his *curia*, and in presence of the *Pares Curiae*, declared his purpose in favour of the vassal, and gave his orders to put him in possession and received his oath of fealty. And farther he publicly delivered some corporeal symbol, to be kept by the vassal, in testimony of the grant, – in case of his right being challenged. It would no doubt necessarily happen that in the great variety of such symbols used, some might be taken from the land. Thus, the lands of Swinton were granted by King Edgar and his brother David to the Church of Durham, and the grant was confirmed by the offer of a turf taken from the ground.¹³ And in the Chartulary of Aberbrothock there is a similar confirmation by Willelmus Auceps.¹⁴

Many symbols were used in this manner quite of an arbitrary nature, void of any connection with the land, and meant merely as testimonies of the deliberate act of the donor, such as a spear, a knife,¹⁵ a cup, an arrow, or a sword, as in a charter of the lands of Arnprior in 1227.¹⁶ Staff and baton were more commonly used, which was a Roman form. In England frequent use was made of a horn, particularly there is one preserved in the Cathedral at York among other titles.¹⁷ And the family of Pews in Berkshire have a horn among their titles with an inscription upon it, testifying that it was given in evidence of the grant of certain lands to the family by Canute the Dane. In a question concerning

¹³ Ross ii. 115, Lawrie, *Early Scottish Charters*, Nos. 20, 26, 27, Anderson, *Diplomata* X. As to turf, see Ross ii. 89, 100, Kames, *Tracts*, 107. *Chron. Picts & Scots* 187 (1867 ed. By W. F. Skene). *Reg. Prioratus Sancte Andree*, (1279) (caspitum). See Cosmo Innes, *Scotch Legal Antiquities*, 85.

¹⁴ vol. I, No. 144, p. 100 – *terra ecclesie de Maringtona. Liber S. Thom de Aberbrothoc* (Bannantyne Club), *Liber Vetus* fol.

¹⁵ Raine, *North Durham*, 77, Ross ii. 90, 105.

¹⁶ Ross ii. 115, Hailes iii. 377, Menzies, *Conveyancing*, 541, *Red Book of Monteith* (Fraser, 1880) i. lxxiv–v. See to in *Accounts of Chamberlain of Scotland*, (Davidson) App. (1771). Cosmo Innes, *Legal Antiquities*, 87.

¹⁷ Ross i. 259 note, ii. 106, 115, Kames, *Tracts*, i. 152.

the right of these lands, the original horn was produced before judge Jeffries and received as the identical horn, by which the lands were conveyed nearly 700 years before.¹⁸ See Dr Hick's work.¹⁹ The horn and inscription were not a complete investiture, as he seems to think, but merely a confirmation of the superior's order. See Craig Bk. II. Ch. 2 §§9 and 19.²⁰

This was the original state of the feudal investiture but it was attended with two disadvantages. 1st, there must have been a great difficulty and delay in obtaining a full and undisputed real possession. 2ndly, the whole transaction being committed to the memory of the *pares curiae* as witnesses was liable to be forgotten or mistaken. The first of these inconveniences was remedied by a single act of apprehension being reckoned sufficient – the delivery of earth and stone of a part of the lands, as it now is. In evidence that delivery of part of the ground was not a symbolic act, the words of the ordinary sasine may be restored to – ‘actual, real and corporal possession’. And the same thing was more accurately expressed in old sasines ‘*et in corporalem possessionem introduxa*’. Craig says that this form was introduced in the reign of James I, in 1430, Bk. II. Ch.7, p.2.²¹ In this, however, he is mistaken, as we have older sasines extant, but the form was enforced by James.

The other defect regarding the evidence of the right, as it was sooner felt, so it was earlier remedied. It could not be expected that the *pares curiae* would long remember the particulars of the grant – as the boundaries of the land – the heirs to whom it would descend etc. This suggested the propriety of having a written certificate of the will of the donor and of the circumstances of the transmission called a *breve testatum*. These were at

¹⁸ Ross ii. 106, 115.

¹⁹ *Antiquae Literaturae Septentionales*, Bk. I. (1705). See Pref. Facing p.viii for inscription on horn. See too *History of Berkshire*, Cooper King, (1887), 222. Ross ii. 106.

²⁰ Clyde's translation I. 374, 383.

²¹ I. 486, and II. ii.18, (I.381–2)

first very rude and short, containing simply the boundaries, destination etc. and the better to authenticate them, they were sealed by the donor and the *pares curiae*. They were not put into the hands of the grantee till after his right was completed by sasine, because he did not till then acquire a real interest in the lands granted. In some instances we find both charter and sasine included in one writing; and hence, as Spelman observes,²² we may account for the beginning of charters in the present day – ‘*Noveritis nos concessisse*’.

But in the multiplication of these grants of a different order came to be introduced. It would not always be in the superior’s power to attend personally and give sasine, and hence delegations of the duty came to be given to their *vice comites* or baillies, who, however, could not proceed without the superior’s written authority. In what form this authority or mandate was at first given, we cannot now tell, probably there were various ways, – it was given by the donor to the done himself to be produced by him to the sheriff. Afterwards the grant and mandate were in one writing and the sasine in another. This practice originated in the king’s chancery, but soon became universal, and the mandate was called a precept of sasine – this, too, was at first directed to the ground officers and Baron baillies of the superior, but further improvement took place by leaving a blank on the precept for the baillie’s name, and allowing the done in like manner to constitute a procurator for him to receive the sasine.

In Craig’s time²³ the procuratory was formally given and passed the seals, but afterwards it came to be presumed in favour of any person possessed of the grant. Relief can be had if sasine be given to a person without his authority, as a proof of his not having given the order will be allowed. These alterations could not fail to produce some variations in the style of the grant: for when the superior ceased to give his personal attendance, the *pares*

²² *Reliquiae*, 244.

²³ ll. vii. 4, (l.488) Ross ii. 131.

curiae did the same, as they did not owe attendance to his officers as to himself. The testificate of delivery now introduced was a memorandum of the baillie, or his seal being appended to the superior's precept. But thought this might answer very well when the baillie was servant to the superior, who might then come to be acquainted with his hand and seal, it could not be continued after the baillie's name came to be left blank in the precept of the sasine, for here the superior might be imposed upon. It therefore became necessary that the truth of the facts should be certified by an impartial and credible person, who had at the same time a knowledge of business, to take notes of the delivery and thus a notary public was called in also, with witnesses to authenticate it. Their presence at first was introduced as the only receivable probation of the fact, but a regular Instrument of Sasine extended by him came in course of time to be indispensably necessary. Now thus three writings were necessary – the Charter itself, the Precept and the Instrument of Sasine. One change more reduced the matter to its present form, *viz.*, the making of the charter and precept in one deed,²⁴ and the instrument of sasine in another. This was established by the Act 1672 ch. 7²⁵ as to Crown Charters, but the practice was introduced by subjects superior long before, for Craig says it was done in his time and forty years before.²⁶

²⁴ Ross ii. 130–1, 161, Craig II.iii.1, iv. 12, (I.395–6, 431–2).

²⁵ 12 mo. ed., c.16 record ed.

²⁶ II. ii. 16 (I. 380).

REGISTRATION

It is very obvious, that notwithstanding full compliance with the law in all the particulars already adverted to, which in themselves had nothing much to attract attention, and which the parties, if so disposed, might manage in a very secret manner, it was I say, obvious that the fact of feudal investiture, especially if it was a base investiture, might continue absolutely unknown for a period to all but the parties in the transaction. Whence resulted great opportunities of fraud, on the part of the land owner and great risk of deception and damage to those, who either as creditors or purchasers, had occasion to deal with them about their property, in some cases the subject itself being absolutely evicted from them in virtue of a prior but latent alienation, and still more frequently being charged with such clogs and burdens of the same sort, as entirely or in great measure cut off the expected benefit or security of their transaction. To this, which of itself was a fruitful source of controversy, we have to add the great mischief of false or fabricated titles (which seems to have been no uncommon thing in this country), and which at a distance of time were very difficult of detection, and antiently were not excluded by any prescription. Taking these two evils together, we must confess, that the commerce of this most valuable sort of rights was on so loose and insecure a footing, as strongly demanded the attention of the legislature (if by any expedient they could), to reform it.

The first thing that had been thought of as a remedy was perhaps of too violent a nature, being no less than entirely to disregard the act of seisin, unless it were followed with actual and real possession, by labouring and reaping, or by levying the rents. This was the corrective which was applied by the Statute 1540, ch. 105,¹ as far as it went. It enacted that a posterior public infeftment, followed by real possession, as above said, for a year, should be preferred to a base infeftment, though prior in date, on which no possession had been. 'Tis true, that this case of competition, and this only, was provided for by the

¹ 12 mo ed., 23 record ed.

Statute (being probably one of the most grievous and most frequent); yet we know that the rule of judgement thus started was also in a great measure extended to the competition of base and public rights, one with another; whence ensued such inconveniences, and such uncertainty of the condition of investitures as were little less troublesome than these evils which were meant to be avoided by this new course. Because after this plan of judgement, all was to depend, not on any short and simple fact, but upon proof of real possession, a thing so various in kind and degree, and so difficult to be learnt with certainty, as made this rule truly very unsuitable to the ends of business, or of this sort of commerce.

It was not, however, till the year 1599, that any other plan, or any more effectual measure for certiorating the lieges, was adopted. It is very true, that before the year 1540, and in that very year, and in some after years,² various ordinances were promulgated to enforce the bringing in of the notarie's protocols to the Clerk Register, and even an entry of seisins with the Sheriff Clerk, who at certain periods was to transmit his notes of them to Exchequer, there to remain and be preserved. But all these (beside that no one of them seems to have met with much attention in practice), were chiefly calculated for the collection of the King's Revenue, or his better knowledge of his vassals; or at most, any public accommodation that was in view was merely that of preserving memorials of the seisins, from which their verity and tenor might be instructed, in case of alleged falsehood, or the instrument renewed and transumed, in case of amission of the original. The first notion of a regular Record of Seisins, for the purpose of publication, and as a part of the Law of Investiture is in an unprinted Act of the 1599,³ and another, also unprinted, of the year 1600 ch 34,⁴ which proceed on the narrative of providing a means

² See Ross, ii. 201 *et seq.*, Craig II. vii. 23 (l. 506).

³ A.P.S.iv. 184, See Ersk. II.iii.39, Bell *Comm.* i. 717, Ross, *Supra*.

⁴ A.P.S.iv.237, c.36. See Ersk., Ross, *supra*. It was repealed by Act 1609 c. 40, A.P.S. iv.449.

‘whairin all parties may find resolution of the Estate of ony Land wherewith they mean to contract’, and in that view they establish a separate Register for Sasines and certain other writs, under care of the Secretary of State, – and require all seisins to be entered there at large, within 40 days from their date, under pain of nullity at all hands. To facilitate the thing, it farther divides the country into certain Districts, and appoints a place of Record for each. This act is recorded in the Books of Sederunt 3d Novr. 1599, and ordered to be solemnly proclaimed; and it is again confirmed by Act of Sederunt, 6 Janry. 1604.⁵ But it happened to it nonetheless, as to a great many of other well intended laws, that no manner of regard was paid to them in practice.⁶ It appears that very few seisins were entered into the Secretary’s record, and as the Statute in some aspects, to which we shall bye and bye advert, has gone rather too far in its certification a new enactment was framed in the 1617 ch. 16⁷ of that year, which made the proper alterations and improvements, and laid the foundation of that eminent security, which attends land rights in this part of the United Kingdom.

⁵ A.S., (1790 ed.) p.35. See Ersk., *Bell Comm.*, Ross, *supra*, Bell § 772.

⁶ See *Bell Comm.*, *supra*.

⁷ 12mo., and record eds.

MILITARY TENURE

With respect to the nature and extent of the military service, this, if we may believe the feudists (whom however I must needs suspect of having sometimes affirmed more than they knew with any certainty), was originally very little subject to any limitation. The vassal, we are told, was to take the field whensoever he was required, even though the superior was not personally in arms; he was to serve at his own charge; had to perform whatever sort of service was required of him; and how long soever the expedition lasted, he was on no account to quit his Lord's Banner, without leave asked and obtained.

I do not think, that some of these points are entirely beyond a question. But what is better established is this, that it behoved the vassal to perform the service in person, and not by means of any substitute; because none such, nor any number of them, was to be held equivalent to the man of the superior's own choice, in whose counsel, as well as prowess, he was presumed to have had special reliance. Not to mention, that in the whole of this connection of vassalage, that there was a certain lowliness and personal respect inherent, which was as much considered as the real profit of the service, and which nothing but personal attendance could properly fulfil. Hence the vassal forfeited his fee, if he put on the religious habit as a monk; '*eo quod desiit esse milos seculi, qui factus est miles Christi*'.¹

On the other hand it is, I think, admitted by all the feudists, that there were exceptions of certain situations to which the obligation of service could not reach – as to where the superior was in arms against his Sovereign, or against the vassal's more antient superior – or in opposition to a just sentence, that had been passed upon him.² Indeed, in describing the general obligation of service, the feudists take care to qualify it, as only relating to the

¹ Books of Feus, II.21, Clyde's Translation, II. 112.

² Craig, IIxi. 16–17, Clyde's Translation, I. 595–7.

case of a just man, or cause of a quarrel; and from thence (as Craig says p.287 No. 12)³ *‘licet non sit proprie feudalis quaestio, tamen ... ne quid intactum relinquunt’* – they proceed to enquire concerning the sort of quarrels, which may fairly be entitled to that appellation. The upshot however of their investigation on the whole seems to be, that the vassal, who is in a manner a soldier, having his lands for pay, ought not to be too nice and curious in searching the justice of his superior’s quarrel, but out rather to rely on the superior’s better discernment in that matter, and fulfil his own engagement, as becomes him – *‘Nequs enim hie crassa vassalli ignorantia est excusanda: ... neque diligentiam curiosam in vassallo, omnino probo’*.⁴

In whatsoever state it might be at first, we know that the vassal’s obligation, in times with which we are better acquainted, was in most countries considerably lighter than above described, in more respects than one. In England the annual period of service can to be limited to 40 days⁵ - and if the vassal continued longer in the field it was of his own choice, and at the expense of his superior. This too was the period of service for a proper knight’s fee, a fee, that is, which yielded £20 of yearly rent: for if the fee was only half that value, then it only owed demi-service, – or 20 days’ attendance, – and so on, in proportion with lesser fees.

In like manner, the personal attendance, from being dispensed with in certain necessary cases – as in the case of a female, or a churchman, or a person disabled, – came to admit of commutation for service by a substitute, as matter of right. And afterwards it admitted of a pecuniary commutation, termed scutage, in total default of service; which, if it was still a wider deviation from the primitive contract, did, however, equally well answer the

³ 1732 ed., II. xi. 12, Clyde’s Translation, I. 592.

⁴ Craig, II. xi.10, Clyde’s Translation, I. 590.

⁵ Blackstone *Comm.*, 15th ed., ii. 62, Holdsworth, *History of English Law*, iii. 31, 33. See Pollock and Maitland, *History of English Law*, 1st ed., i.233 questioning it.

superior's purpose; as with the money he procured himself an army, of as hardy, and better disciplined, and more obedient soldiers.

It is certain also, that long before the full accomplishment of this revolution, the military service, from being indefinite and at large, had in a great variety of instances, come to be limited by special compact to a particular sort, or single act of duty – such as the defending of a certain fortress, – or the winding of a horn when the Scots should cross the border, – or the bearing of the lord's banner, the holding of his stirrup, or girding on of his sword on the day of battle; all which, and many others that might be mentioned, were species of what came in England to be denominated tenure by Grand Sergeanty,⁶ and was reputed a sort of improper military tenure. Tenure by Petty Sergeanty again had a still more distant relation to the military service; for the prestation of this tenure was not of a personal nature at all, but consisted merely in the render of something that might be subservient to warlike uses, such as a lance, a cross bow, or a sheaf of arrows.⁷ Of this sort, in later time, was the grant which the Lord Baltimore had of the province of Maryland, for which he yielded five Indian arrows to the King at every Christmas.⁸

The feudists further inform us, that in some instances Grand Sergeanty still more defrauded from any alliance to the military tenure, and came to admit of mere civil services; which if they were of a dignified and honorary sort, were held to raise the holding to the same rank as proper knight's service, and make it a species of the improper military holding. Of this character were all the services to be performed about the King's person on occasion of his Corporation; for instance the holding of the towel or bason,

⁶ Craig, I. Xi. 12, III.i.4, Clyde's Translation, I.182–3, II. 889–90. Blackstone *Comm.*, 15th ed., ii.73, Littleton's *Tenures*, 153–8, 161, Halsbury's *Laws of England*, vol. xxvii, 578, Pollock & Maitland, i.282 *et seq.*, Holdsworth, iii.39 *et seq.*, ii.65, 159, 205.

⁷ Craig I. Xi.17, Clyde's Translation, I.186. Pollock & Maitland and Holdsworth, *supra*, Blackstone *Comm.*, ii.82, Littleton, 159–61.

⁸ Sullivan, *infra*, p.82 (1st ed.), p.74 (2nd ed.). See Cal. Of s State Papers, Col. 1574–1660, p.152; Neill's *Sir George Calvert*, Lord Baltimore, and George Calvert in *Dict. Nat. Biography*. The grant was on 20 June 1632.

while he washed before dinner, – or the furnishing of a globe for his right hand;⁹ which seems to have been the *reddendo* of the manor of Farnham. Indeed these, and the like honourable services about the person of the King, seem not only to have raised the fee up to the same degree with a military holding but even to have been reputed of a noble and distinguished nature, to which only persons of a certain rank were worthy to be preferred. Thus, at the coronation of Richard the 2nd, William Turnival, owner or the Manor of Farnham, was not permitted to present the globe for the King's hand until such time as the King had dubbed him a knight. And John Wiltshire, Citizen of London, who claimed to hold the towel, being thought of too low degree, to officiate in person, made Edmund Earl of Cambridge his deputy to officiate for him. Sullivan page 80.¹⁰ I shall not prosecute the history of this tenure in the neighbouring Kingdom any farther down. After various schemes for modification of this sort of property, which was the subject of much dissention and abuse, and from the time when money was accepted in lieu of the actual service, was attended with no real advantage, it was at length entirely abolished by Statute of the 12th of Charles the 2nd.

With us here in Scotland, as elsewhere, the military tenure, or wardholding, was the ordinary and primitive holding, and the favourite of the law, and this in vassalage under subjects, equally as between subject and sovereign. And though it does not appear that the terms of grand and petty sergeant ever found establishment in our law (for Craig says¹¹ that in the single instance where a charter occurred with the tenure of petty sergeant the Court referred to case to Parliament for advice), yet, the thing itself, and sort of service, we were well acquainted with. Thus Hume of Aitoun held certain lands for the service of

⁹ See Craig I.xi.12, Clyde's Translation, I.183.

¹⁰ *An Historical Treatise on the Feudal Law and the Constitution and Laws of England with a commentary on Magna Carta* being lectures by Frances S. Sullivan, LL.D., Prof. of Common Law in Dublin University, (1772), also p.72, 2nd ed. (1776).

¹¹ I.xi.17, Clyde's Translation, I. 186.

bearing the King's lance and buckling his armour.¹² The chief of the name Scrymgeour (or Skirmisher for that is the original name) held certain lands and the Constabulary of Dundee by charter from Sir William Wallace, as *custos Regni*, at the time, for the service of carrying the King's Standard in battle;¹³ and among Anderson's *Diplomata*,¹⁴ we have in like manner a charter of Alexander the 3rd. granting a Castle and an Island, for the service of guarding the Castle, and hospitably entertaining the King Therein upon his coming.¹⁵

With regard, however, to out peculiar modification of this tenure, I must remark on the one hand, that this system of military tenures never was digested with us into so strict and regular a shape as in the neighbouring Kingdom of England.

¹² Craig I.xi.12, III.i.4, Clyde's Translation, I.183, and II.890.

¹³ Craig, *supra*. Anderson's *Diplomata*, XLIII. See Rodger, *Feudal Forms*, p.81, Innes, *Scotch Legal Antiquities*, p.86.

¹⁴ This should be Douglas, *Baronage of Scotland*, (1798) 419 n. *Cal. Reg. House Charters*, vol. I, No. 55. *Chiefs of Clan Macnachten and their Descendants* (1951).

¹⁵ Charter of 12 Feb. 1267 of Frechelan (Fraoch Eilan) in Loch Awe to Gilchrist McNachtan (MacNaughton).

SOCCAGE TENURE

and which, as to its rise and history, has divided the opinions of the antiquaries of that country. According to some, the Socage tenure was at first a base and servile tenure – a tenure for plough services – to be performed on the superior's tenement, as the term 'socage' shews (they say), being taken from the sock of the plough. But this, say their antagonists (among them Mr Somner¹ and Judge Blackstone²), is absolutely a mistake, for socage comes from the German 'soc', which was privileged or free; and the socage say they was in truth a privileged and free tenure and the remains of that still higher state of freedom, in which property had been held before the Norman conquest. You will not expect that I should pretend to decide on this debate, towards which the history of our law furnishes no materials for elucidation. Sir Thomas Craig affirms, that no man alive had ever seen a socage charter of a Scots tenement;³ and though in this he appears to have gone too far (since there are some few instances of the thing⁴), yet still his authority is evidence sufficient of this at least, that the socage was not in his time a frequent or ordinary holding.

If in fact, as pretended, it was a tenure by plough services, this one may venture to affirm, that it was a troublesome tenure to the vassal, and far from being equally profitable to the other party; and therefore, as soon as any sort of improvement took place on husbandry, it could hardly fail to be converted into tenure for a certain rent in grain, or money – that is into a feu holding. This, accordingly, is taken notice of in the oldest of our authentic

¹ *A treatise of Gavelkind*, 2nd. ed., 1726, 133 *et seq.*

² *Comm.*, 15th ed., ii.80 – 'a free and privileged tenure'. See Skene *D. V. S.*, *Socage*. See Coke on Littleton, 1818 ed., i. 332 referring to this dispute.

³ I.xi.1, Clyde's Translation, I.174.

⁴ See Ross, ii.61.

treatises,⁵ and indeed it is specified in a charter (still extant) of the Reign of Alexander the 2d.⁶

In this holding, the vassal has to deliver his rent, when payable in kind, at the superior's manor place, or other place by him appointed, provided it be a place that is within the barony, or tenement of which the feu makes part. The *reddendo* is exigible also, at any time within 40 years from the day when it falls due. This, however, is with the exception of those extra-services which are sometimes stipulated, of reaping grain, carrying feual, and the like; and which, being matters of regular annual demand, at certain seasons, are held to be dispensed with, if they are not exacted within the year.

⁵ *Reg. Maj.* II.27, Stair Society, vol. Viii, 140–1. Also in *Reg. Maj.* At II.21, II.28, 2, 41.4 and 47. See Ross, ii.61 and Ersk. I.i.35.

⁶ In Ersk. App. I. See Ross ii. 61 referring to this charter.

SUPERIOR'S LIST FOR FEU-DUTY

With respect to the superior's security for his feuduty in case of the vassal's refusal or delay to render it – this, at first, seems to have been one of the most effectual kind, – namely by assumption of the lands themselves in property, as forfeited by the failure. This, I think, is very distinctly laid down in the *Leges Burgorum* ch. 136,¹ under this reasonable modification only, that by making payment of the whole arrears, within year and day after judgement given for the superior, the vassal might recover the fee out of his hands. (No. 8).² And although even with this indulgence, the practice appears to us to be severe, yet it was a regular consequence of the feudal contract, which was broken by such a failure of duty on the vassal's part, just as much as by failure of service in the ward holding. Accordingly, under certain equitable modifications and restrictions, such a forfeiture, as we shall afterwards see, still continues to be part of the law, as applicable to the case where two years' successive feu-duty are in arrear. But beside this extreme the punishment was not so rigorous as it may now appear to us, because the vassal's right was not then, as it now commonly is, a valuable property held for a quitrent, and purchased with the present advance of a sum of money, but more of the nature of a perpetual lease, at a competent or equal rent.

In process of time, however, as was to be expected, a farther indulgence came to be established, and the forfeiture to be limited to those more rare cases of inexcusable failure, where the vassal had run in arrear of three years' duty. By special Statute in 1597, ch. 246,³ this period which our common law seems to have borrowed from the rule of the Roman *Emphyteusis*, was restricted against the vassal to two years; in which state, as we shall presently see, the forfeiture still continues a part of our law.

¹ Skene's Scots ed. (1609) fol. 137–9, Latin ed. 151–2. See A. p.S. i. 358, Frag.c.14, *Ancient Laws and Customs of the Burghs* (Burgh Record Society) 167–8.

² para 8 of ch.136 in Skene's ed., fol. 138 (Scots), 151 (Latin). It is omitted in A. p.S. and Burgh Record Socy edition.

³ octodoc. Ed., c.250, 12 mo. ed., c. 17 record ed. Craig II.iii. 34, Clyde's Translation, I.418–9, Ersk.II.v.26, Bell § 701.

.....

How grievous soever to tenants this condition being thus a regular consequence of feudal doctrine, and essential also to the superior's security, it long maintained possession of our practice. All the Statutes which corrected the abuse of taking pledge by private authority (a practice which had once been common) (Rob. 1st. Ch. 7,⁴ Ro. 3rd. ch.12⁵) were guarded with an express exception of the *dominus terrae pro suis Xirmis*, Ross, p.413, 423.⁶ And when the statute 1469 ch. 36⁷ gave the 'puir men inhabitants of the ground' a protection against distress to any greater amount than their actual arrears, and the current term' rent; still this was only against the personal creditors of the landlord or superior, getting decret for payment, and without a word that could reach the case of even a real creditor, and much less of the fundamental owner of the lands, – the superior, – acting for himself in the exercise of his inherent right.

Nevertheless, the claimant grievance of the tenant's situation, and indeed the real advantage to all concerned of improving his condition, did at length extend the construction of the Statute, and lay the superior also, as it did the real creditors of the vassal under this most equitable restriction.

In the course of progressive authority and civilization, the superior came to be despoiled of that article also of his prerogative by which he might have proceeded in the execution of distress, without the aid of any authority but his own. This came to be thought, as it certainly was, improper; and instead of such a course, and by way of judicial warrant, Letters were issued under the Signet, addressed to messengers, and authorising them to distrain the goods upon the lands, or to poind the ground, as the phrase for it came to be.

⁴ A. p.S. i.108, c.8. Ross, ii.423, i.388.

⁵ A. p.S. i.214, § 9. Kames, *Hist Law Tracts*, i.226–8, 241, 243, Ross, i.388–9

⁶ vol. ii

⁷ 12 mo. ed., c. 12 record ed. Kames, i.233; Ross, ii.256, 428, 477.

These seem to have been obtained (I presume), at first, without litigation or enquiry, on the superior's word, and at his request; and being in this respect liable to abuse, they came afterwards to require the warrant of a previous decree, obtained in a regular action of pointing the ground; which is the procedure now in use; and may be the better understood, through this deduction of its history.

ESCHEATS

Of the two first, I shall just say a word. Disclamation was that offence, which consisted in the disowning or denial of the superior. And as an act of ingratitude as well as personal insult to that benefactor, it was naturally and fitly punished with the loss of everything for which the vassal had been indebted to his favour. So that he was in a manner punished out of his own mouth. It was accordingly received into the law of many countries – and in particular that of Normandy – and of England, (Houard, vol. 2, p.26, 519),¹ as well as ours, where, to judge from the language of our ancient treatises,² it had been fully established. Neither do our later authorities³ teach any different doctrine; yet though it has often been pled, I see no instance of it being actually enforced. ‘Tis true it might be of service in one point of view, as a means of deterring the vassal from captious and wanton challenge of the superior’s title in his actions for the casualties and profits of superiority, and I conjecture that in any other, – it maintained its place in our books.

The escheat of Purpresture was incurred by the vassal, if he encroached upon or usurped any part of the superior’s property; and this, it does appear, was a piece of doctrine, for which some time entered more into practice than the other.⁴ For we have a statute 1477, ch.79⁵ which regulates the jurisdiction in question of purpersion. And Balfour, at p.443,⁶ records a judgement which was given in pursuance of that Statute: as Craig does another (in B. 3. Chap. 5 No. 9)⁷ where the forfeiture was decreed. We have farther a later Statute 1600 ch. 5⁸ respecting purpersion by encroachment on the King’s Common and even Sir

¹ vol. I p.519, *Anciennes Loix Des Francois*, Rouen, 1766.

² *Reg. Maj.* II.63, (Stair Society, vol. XI. 172–4), Balfour, pp. 488–9.

³ Craig, III.v.2–5 (II.999–1003), Stair, II.xi.29, Ersk. II.v.51.

⁴ See Craig III.v.6, 9 (II. 1004, 1007).

⁵ Shene’s ed., and 12 mod.ed., c. 80 Glendook’s ed. *Reg. Maj.* II.74, (Stair Socy. vol. XI.182–3), Balfour pp. 442–4, Craig III.v.6–9, (II.1003–7) Stair, II.xi. 30, Ersk. II.v.52.

⁶ of Purpresture. *Cockburn v. Ramsey*, 10 Nov. 1497.

⁷ Clyde’s Translation, II.1007. *Nisbet and Chirnside v. Hume* – no judgement; *Laird of Spottiswood v. Heirs of Hume*.

⁸ 12 mo., c.13 record ed.

George Mackenzie in his *Observations on the Statutes*, page 85,⁹ speaks of this casualty as a thing which was only then tending to fall into disuse. I think, however, I may venture to say, that there is no great hazard of the superior's right being in any case carried to the rigor now. And indeed even while it was in the best observance, it seems to have applied only in those rare cases of great and manifest encroachment, and obstinately persisted in on the part of the vassal, which indicated an ungrateful and rapacious temper in that person, and left his conduct without any sort of excuse.

The third instance of this sort of Escheat, was the Casualty of Recognition; and this was a forfeiture of the fee, which accrued upon the vassal's attempt to alienate the lands or the greater part of them without permission of his superior. This was a peculiar casualty of the military tenure.¹⁰

How such a forfeiture should have been known in the law, you can be at no loss to discover, after what has been said of the escheat on failure of heirs, and of the general notion of the feudal connection. By the vassal's alienation of the fee, not only was the lawful return of the lands to the superior upon failure of his own heirs cut off: but farther, (which in the estimation of those times was equally material) a stranger thus obtruded on the superior, for counsellor and servant, instead of the blood and race which he had chosen and specially relied on. The conveyance therefore behoved to be absolutely null and void at all events; and this we shall afterwards see was the case in all tenures whatsoever¹¹ But in the proper military holding, where the connection of parties was stricter, and more of a personal nature, even this was not thought sufficient.¹²

⁹ See Ersk. II.v.52.

¹⁰ Craig III.iii. 8 *et seq.*, (II.953 & c.), Stair II.xi. 10, 16, Ersk. II.v.10–17.

¹¹ *infra*.

¹² Craig III.iii.30, (II.972) Ersk. II.v.10.

The very attempt to do his superior and benefactor such an injury was here considered as an act of ingratitude, and injustice, towards that person, and in short as a breach of his due loyalty of a vassal, which was to be attended therefore with the entire forfeiture of his benefice and condition.

Accordingly, the Books of the Feus reprobate such a measure in severe terms; and beside denouncing pains against the very notaries who shall presume to write the instrument of sale, they decree the instant return of the testament to the superior, and deny the purchaser all recovery of the price. '*Prestio, ac beneficio, se caritum agnoscat*'.¹³

The same was made part of the positive Law of England, in that Charter which was obtained from Henry the 3rd in 1225;¹⁴ and this not only with respect to total alienations of the fee, but all likewise of such moment, as should disable the vassal advantageously to do the service of the fee, *de residuo terrae* (as they expressed it) – from what he retained to himself. In Scotland again, the same thing had been enacted before that time, and almost in the same words by a statute of William the Lyon ch.31¹⁵ '*Nullus liber homo potest dare, vel vendere, alicui plus de terra sua, quam de residuo ipsius terrae posit fieri domino feudi, servitum oi debitum*'.¹⁶ *Et si quis oppositum fecerit, si vocetur per foris-factum ad curium, ea de causa, amittet id quod tenet*'.¹⁷ Ross 2. p.256. The *residuum terrae* here alluded to, as sufficient to save from the forfeiture, was in practice interpreted to be half of the lands. But you observe always, that a difference between a great and a small alienation lay in the article of forfeiture only: for in either case the conveyance was null, unless the superior confirmed it; and thus the parcel alienated remained notwithstanding with the seller.

¹³ *Book of Feus*, II.52, Clyde's Translation II. 1140.

¹⁴ Ross, ii. 255–6, Stubbs, *Constitutional Hist.* li. 37, *Select Charters*, 344.

¹⁵ Skene's ed. (1609) p.15, A. p.S. i.367 c. 4. Ross, *supra*, Dalrymple *infra*, 104.

¹⁶ *Et quod pertinent ad feudum*.

¹⁷ *nisi Domini superioris ad hoc habuerit benevolentiam aut confirmationem*.

The course which vassals took in England to get the better of this troublesome restraint, was by the practice of sub-infeudation – the creating that is of a new fee to the purchaser, to be held by him under the seller, and which thus, in appearance, left the original vassalage entire, as in its primitive condition.¹⁸ But it was entire in appearance only and not in substance, because the vassal's ability to do the service of his fee was of course materially lessened by the loss of the property; and farther, because in process of time, the subvassal pretended to maintain his sub-feu as good against the overlord, and to eclude him from possession of the lands, upon those occasions when the condition of his immediate vassal would otherwise have intitled him to enter upon them, and to levy the real rents – that is to say, though the immediate vassal were in wardship, or in non-entry, or had committed felony against his superior, or though his blood and race had failed, in all cases the overlord had right to possess and enter upon the feu, still, (contended the subfeuar) 'the lands are not to be recovered by that person, but to remain in my own hands, I rendering to him that service for them, which is stipulated in my charter of subfeu'.

These, as they would be held, and indeed at that period were, extravagant pretentions of the subfeuar's, were not submitted to on the part of the superiors. And hence resulted perpetual feud and animosity between these different orders of proprietors, each endeavouring to take advantage of the other, and neither having any settled rule to proceed on. They were, however, at length furnished with one, and the strife between them was in great measure composed, by the noted Statute of Edward 1st '*Quia Emptores Terrarum*' – which declared, that every vassal might freely alienate to whom he would, but that this should not be competent to be done in the way of subfeu, but of public right

¹⁸ Ross, ii. 256, Blackst. *Comm.*, ii. 91.

only, to be held under the seller's superior, in all respects, on the same conditions, as the seller himself had held them.¹⁹

These particulars respecting our neighbouring Kingdom I have rather chosen to mention, as it has been pretended, that the course of things was the same here, both with respect to the evils that were experienced, and the remedy that was applied to them. And 'tis no doubt true, that among the Statuta 2do. Of Rot. first, we find one (ch.25 of the collection²⁰), which is a precise transcript of the Statute *Quia Emptores*. But these Stat. 2do. are throughout of very little authority; and if over any such Act did pass (of which other than in these Statutes themselves there is no evidence, Ross, *Contra*, p.257), certain it is, that within a very short time it had fallen into utter desuetude and contempt.²¹ For we find that the old law of William the Lyon is re-enacted in even more precise terms, in the reign of David the 2d. Robert's immediate successor: it is Chap. 34 of his Statutes.²² It is in like manner set down, among other causes of forfeiture, in the Statute of Ro. 3d. Ch. 19, No.4²³ – and *in fine*, we know it for a truth, from all quarters, that the forfeiture of recognition continued from thence forward to be in fresh and constant observance (farther than express Statute interposed); and indeed that it increased rather than abated in severity, being not only held to be incurred by an alienation in subfeu but even by a redeemable alienation in annualrent or wadset, and also by the successive alienation of several parcels of the tenement, if, being put together, they at last amounted to the half of the tenement.²⁴

¹⁹ 18 Ed. I. C. 1 and 2. Ross, ii.256–7, Kames, *Hist. Law Tracts*, i.178, Blackst. *Comm.*, 15th ed., ii.91, Pollock & Maitland i.308, Stubbs, *Constit. Hist.*, ii. 106, 122, 180, Sandford, *Entails*, 19. See Dalrymple *infra*, 60, 103 as to construction put on it excluding immediate vassals of the Crown, and Act Ed. II, ch.6; they were included by ED. III, c. 12.

²⁰ Skene's ed.; See A. p.S. i.39. Ross, ii.257, Kames, *Hist. Law Tracts*, i.178, Sandford, *Entails*, 32.

²¹ Dalrymple, *Essay on Feudal Property*, 3rd ed., 61. Menzies, 583.

²² Skene's ed., A. p.S. i.134§ 9. Dalrymple, 104.

²³ Skene's ed., A. p.S. i.369§ 22. Ross, ii. 258.

²⁴ Ersk. II.v.12. See Craig, II.iii.12 *et seq.*, (I.401 *et seq.*)

I have hinted that express Statute in some measure interposed to relieve from this grievous state of bondage. The first declarations of that sort were by the Statute 1457, ch.71,²⁵ and 1503, ch. 91;²⁶ and they were made in favour of alienation in the way of feuholding, as calculated for the improvement of agriculture, and better condition of the realm. They were followed with a great number of other Statutes, in consequence of which the extent of the permission to subfeu, and of the relief from the restraints of the common law, came to be very different at different periods. These are detailed in No. 7 of Mr Erskine's larger work 5. tit.,²⁷ where those who are called anxious may follow them; and where they will also see, how, by the general Act²⁸ recissory of the Statutes passed during the usurpation of the benefit of the whole of the Statutes was lost, and so the lieges, holders of ward fees were remanded into their primitive state of bondage in this article, just as in the days of David 2d and William the Lyon. In short, it was not till the reign of George 2d,²⁹ or by any gentler measure than the destruction of the military tenure itself that this class of proprietors were emancipated, and raised to the like condition of freedom as other vassals, in this matter of alienation. It is indeed upon record (though one is now rather slow to believe a thing which is so remote from our present condition) that in 1725 an heiress was found to have forfeited her estate, by disposing it in her contract of marriage *nomine dotis* in favour of her husband and his heirs. The case is No.54 of Lord Kames' 1st collection.³⁰

²⁵ 12 mo., c. 15 record ed. Ersk. II.v.7.

²⁶ 12 mo., c. 37 record ed. Ersk. II.v.12.

²⁷ *Inst.*, ii.v.7.

²⁸ 1661 c. 15, 12 mo. ed., c. 126 record ed.

²⁹ Act 20 Geo. II. c. 50

³⁰ *Hall v Craw*, 14 Jan. 1725, Kames *Rem. Dec.* i.105, M.13395–7.

DENUNCIATION AND CASUALTIES
OF WARSHIP AND MARRIAGE

In the third place, denunciation seems competent in one situation more, but in which I believe it is now hardly ever employed. When a person suspected of a crime is out of custody, and is meant to be brought to justice, the ordinary course is to execute a criminal Warrant, or criminal Letters (as they are called) against him. Now the will or charge of these Letters is, – a command to him the accused to come and find caution within 15 days after the charge, for his appearance to stand trial, ‘under the pain of Rebellion and putting him to our Horn’ and then it proceeds, ‘wherein if he failzie, the said 15 days being the first come and bygone, and the said surety not found, nor no intimation made by him to you of the finding thereof, That incontinent thereafter you denounce him our Rebel and put him to the horn, for his Contempt and disobedience’.¹ The old practice accordingly was, as I have seen in the annual records in many instances, that the messenger who gave the charge upon the letters, if he received no intimation of caution being found, did on the lapse of the days straightway denounce the rebel and put him to the horn. But this proceeding was perhaps rather precipitate; and the practice now is not to regard the lapse of these days, but to wait the diet of trial itself named in the letters, and then, if he does not compear, to give sentence of outlawry, which is a warrant for denunciation, as stated in the first case.² At the same time, though not practised, the thing may be permissible: indeed, considering that such is the constant style of the letters, I do not see but it must, and on that account I have made mention of the procedure. This terminates what I have thought it necessary to say of the Casualty of Escheat.

In treating of its different kinds, we have unavoidably encroached on the Second Division of Casualties – those which only encumber the property, or suspend it for a time: for to this class Liferent Escheat belongs. Other two of the same class, and still more

¹ See Hume *Comm.*, 4th ed., II.154–5, 257, Ersk. IV.iv.87, Mack., *Criminal Law*, 235, Forbes, ii.318, *Jur. Styles*, Dallas.

² Hume, II.260.

burdensome in practice were the Casualties of Wardship and Marriage, which we have now got rid of by the abolition of military tenure, to which they were peculiar, and I shall therefore say but a word or two upon them.

By the Casualty of Wardship, the superior had right to the possession and administration – the real rents and profits of the fee – during the nonage of his vassal, if a female till 14, and if a male till 21.³ The Custom of Normandy seems to have fixed it at 20 for both sexes. *G. Coutumier*⁴ Fol. 54. But if the Duke was superior, 21 Fol. 55; if the woman vassal married under 20, that took her out of wardship. Fol 55. At present we are apt to consider such a right as iniquitous and oppressive; but, judging by the manner of old times, and according to the notion of feudal property, this and no other was the necessary consequence of a situation, where the vassal, being disqualified by his age, either for counsel or for service in the field, could not render the true return for his lands, or perform his part of the feudal contract. 'Twas fit, therefore, that the superior should have the keeping of the lands in the meantime to enable him to provide a substitute in his stead. And farther in every point of view, it was no less fit (and this too was part of the primitive custom, though it afterwards fell into disuse⁵), that he should have the care and keeping of the vassal's person, since it was important to the superior to have him trained up to the knowledge of arms, and in the due habits of gratitude, reverence and attachment to the superior's person; not to mention that the superior was the natural, and indeed bounden protector of his vassal's person, as well as interest, from all injury and molestation. This, however, was the burdensome part of the situation, went sooner into disuse, and left only the profitable, or custody of the lands, subsisting. In virtue of this, the superior acted in all respects as proprietor for the time, under no limitation but one, which resulted from the

³ Craig, II.xx.4, 13, 18, 21, (II.803–5, 811, 814–5, 818–9); Stair II.iv.33, 56; Ersk. II.v.5,9.

⁴ *Le Grand Coutumier du pays et duche de Normandie*, 1539 (Rouen). See too *Coutumes du pays et duche de Normandie*, 1732 (Rouen), pp.46 § 223 and 47 § 227.

⁵ Stair II.iv.34, Ersk. II.iv.3, Montg. Bell, i.564. cp. Craig II.xx.12, 29, (II. 811, 823).

very notion of his right, – that his acts and deeds, – such as tasks or securities, – were only effectual for the period of the wardship, and no longer.⁶ On the other hand, while it lasted, as little was his right affected or impaired by any voluntary deed of the deceased vassal, His tenants were liable to be removed, and his heritable creditors to be ejected, if the superior were so disposed.⁷ Upon the whole this casualty was certainly a grievance; and it was happily put an end to, by the Act so often mentioned,⁸ which took order for the decreeing of a compensation, as in No.12 (small work⁹).

The same statute took the like order, (as was equally necessary) with respect to the Casualty of Marriage – the nature of which was this; – that the vassal, if he were unmarried at the death of his predecessor, had to pay him in all events two years' rent, and in one case three years' rent of his estate.¹⁰ The situation in which he had to pay this higher sum was, if he refused the wife whom the superior offered him (being a suitable match and not in disparagement¹¹), and chose to take the woman of his own choice, instead of her.¹² The other and lower compensation he had to pay equally in three different situations. – 1st where he married without the superior's consent, though that person had not himself made him any offer of a match. 2dly where the superior made him offer of a match, and he refused, and continued single. – 3dly where he continued single, no match having ever been offered him by the superior.¹³ I have now been expressing myself, as if this had been a casualty peculiar to the situation of the male vassal; but in truth (how much sooner this aggravated the grievance and indecency of the exaction) a

⁶ Craig II.x.1, xi.29 (l. 573–4, 605), Stair I.vi.25, II.ix.3, Ersk. I.vii. 16.

⁷ Craig II.xx.19, (ll.816–7), Stair II.iv.35, 36, Ersk. II.v.8, Montag. Bell, i.564.

⁸ 20 Geo. II. c. 50.

⁹ Ersk. *Prin.*, II.v.12

¹⁰ Craig II.xxi. 4–5 (ll. 833–4), Stair II.iv.37–8, 43–5, 47, IV.xi.4, Ersk. II.v.18, 20, 21.

¹¹ Craig II.xxi. 25–7 (ll. 847–8), Stair II.iv.59, Ersk. II.v.21

¹² Craig II.xxi. 18 (ll.843), 22 (ll. 844), Stair II.iv.38, 54, 58, Ersk. II. v.21.

¹³ Craig II.xxi. 4–5 (ll. 833–4), Stair II.iv.38, 54, Ersk. II.v.19.

woman vassal was subjected to the same hard necessity.¹⁴ And indeed there seems great reason to believe, or rather it is as well instructed as one can expect in a matter of such antiquity, that the casualty originated in considerations relative to the case of a female vassal, and applied at first to her situation only. The primitive notion was, that the superior should have the choice of husband for his woman vassal, because this husband was to be his counsellor and servant, and because the heiress, if left to her own discretion, might introduce one to that station, whom the superior might see strong reason to disapprove, and of whom and even of his descendants after him, no loyalty or zeal in the superior's service was to be expected. The marriage in short was in effect an alienation of the fee to a new race; and was not therefore to be made without the superior's consent any more than an alienation in the way of sale.

In the one case, as in the other, the penalty of alienating *inconsulto domino* was at first total forfeiture of the fee.¹⁵ Afterwards it was mitigated into a pecuniary composition, as already mentioned; but while mitigated in point of kind, it was at the same time, by the influence of superiors, and in the consolidation of the feudal system, very much aggravated in point of application, being now applied to the case of a male heir, and to all the different situations which I have mentioned, instead of applying to the single case of marrying without the superior's consent.

¹⁴ Craig II.xxi. 3 (II. 832), 8 (II. 836).

¹⁵ See Craig III.iii. 3, 18, (II. 950, 962–3).

RIGHT OF SUCCESSION OF VASSAL'S HEIR

As long as feudal grants were in their original or beneficiary state, that of gifts for the lifetime only of the donee, the tenement reverted, of course, on the death of the donee, straightway, into the hands of the superior, from whom the donee's heir, if he were disposed to form the like connection, had to sue for and obtain a renewal of the gift. Not only so, but such continued to be the superior's privilege, even after the custom of feudal grants had come to be in favour of the vassal and his heirs. All the difference this made was, that, instead of depending on the superior's good will, as formerly, the heir had him now under an obligation, if he chose to make his claim.¹ But in the meantime, until the heir brought forward his claim, and made a suppliant proffer also of his person, ready to do his fealty and homage for the fee, and to form the feudal contract with the superior, that person and he only, the primitive and fundamental owner of the lands, had any pretension to the immediate possession.² Besides, as we shall see, another and more difficult condition was annexed to the renewal of the grant in favour of an heir – namely the rendering of a certain present or prerequisite to the superior – which, therefore, as well as the fealty and homage, was necessary to be proffered and received in order to purify and fix the superior's obligation of renewal.

Moreover, it might sometimes happen that their heir of the investiture, to whom this claim of renewal should otherwise have belonged, had lost his right by means of offences against his superior, or the public. He might be a felon, or a traitor, or an outlaw, and disqualified for the trusty and honourable station of a vassal. Or, perhaps, it might be a doubtful point, and matter of investigation, whether this pretender to the succession were or were not the true heir of the investiture, and the person to whom the claim of renewal of right belonged. And this matter the superior before complying was entitled to have

¹ Craig II.xix. 2 (II. 782), Ersk. II.v.29, Bell § 706.

² Craig, *supra*, Ersk., *supra*, Bell § 705.

ascertained to his satisfaction. In short, in every point of view, the return of the tenement to the superior for the time, was a natural and unavoidable incident of feudal holding.

But this in some countries was not the full extent of the superior's right on such occasions. The same reasons which had at first induced the superior to dispose of his lands in vassalage, might dispose him to do the like again; and it was not fit that now, on their return, he should be obliged to keep them, for a length of time, unemployed in his own hands in expectation that the heir of the deceased might possibly some day or other appear to claim them. It was reasonable that a limited and moderate period of time should be allowed him for that purpose, on the issue whereof his claim should extinguish, and the lands remain with the superior as his own. This, accordingly, was a provision, which the law of some countries is known to have made. It allowed the vassal the space of a twelvemonth to claim his entry; wherein if he failed, he was held to have derelinqushed his right, and was thenceforward a stranger to the fee.³

Lord Kames has conjectured, – but I do not think it is by any means proved – indeed it is only as a conjecture that his lordship gives it – that our antient custom was acquainted with this same effectual expedient.⁴ But whether we over went that length or not, certain it is, and appears among other testimonies, from the Laws of Robert 3d ch. 19th⁵ and 38th,⁶ that our custom allowed the superior, summarily, and of his own authority, to enter upon and possess the lands for the time, leaving it to the heir to establish his right of inheritance and redeem or sue them out from this condition in due form of law.

But, in process of time (though I do not observe that any of our antiquaries very accurately marked the period of the change), the growing strength of the vassal's right,

³ Craig, *supra*, Dalrymple, *Essay*, 48–9.

⁴ Kames, *Statute Law Abridged*, 439–40

⁵ Skene's ed. A. p.S. i.369.

⁶ Skene's ed. See A. p.S. i.39. And see Kames, *supra*, at 352, *Hist. Law Tracts*, i.274 *et seq.*, Dalrymple, 49.

which naturally followed on his family's long possession of the subject, naturally drove the superior out of this privilege, and turned the balance in favour of the heir, who was now allowed to continue his ancestor's possession in the meantime, and thus the superior was constrained to the use of a process at law for declaring his right, and making effectual his re-entry to the lands.⁷

This too, though in itself considerable, was not the only advantage which the vassal's heir derived from the altered course of proceeding. He gained, in addition, the benefit of a very light and favourable way of accompting to the superior, for the bygone profits of the lands, as far as concerned the period before commencement of the superior's action of declaratory of his right. When the superior came now to sue him for those, the bygone fruits and rents, his action figured as an ungracious sort of action brought to make the vassal refund revenues which he had already lived upon and consumed and was nothing the richer for being in possession of the lands: the heir now appeared in all respects, externally, as owner of them; and stood in the favourable situation of a defender and possessor, pleading to retain and enjoy his own, against a stranger who claimed upon such grounds as were more of an artificial and an historical rather than of an equitable nature; whereas formerly, the vassal, himself as a stranger had to pursue for the establishment of his connection with the lands, which the superior had in the meantime possessed and enjoyed as of proper right.

Hence a rule came to be fixed in practice, distinguishing the amount of the superior's right, as it related to the period before or after his declarator of monentry. After citation in the declarator, the heir still delaying to take his entry was of course without excuse; and therefore the superior had right thenceforward to the possession and real rents of the subject; but in calling the heir to accompt for the bygones preceding citation, the superior

⁷ Craig II.xix. 10 (II. 787).

was obliged to content himself with what are called the Retour duties – that is, certain very low and trifling payments, which, by a supposition most favourable to the vassal, came to be held and taken and passed for the rents. These therefore, are now the rule in blench holdings. Bn V. 1.623.⁸ In feu holdings the feu is the retour so that till declarator the superior gets nothing. Erskine No. 38.⁹ In blench under the Crown, as coming in place of ward 1 per cent of valued rent is taken in place of the retoured duties. *id.* No. 39¹⁰ For a full explanation and history of these, I remit you to Lord Kames' *Tract* concerning old and new extent, where the subject is treated with that author's usual ability and research.

⁸ Bankt. II.iv. 17.

⁹ II.v.38.

¹⁰ II.v.39. Bell § 706.

CASUALTY OF RELIEF

Being thus a frequent and customary thing, this present passed in turn into a stated perquisite of the superiority, which was to be due on renewal of the grant, whether it were or were not expressly bargained for between the parties. Farther the superior did not lose his title to this emolument, when by the change in the custom of feudal grants, they came to be made expressly in favour of the donee and his heirs. In granting such a charter, all that the superior had done was to abandon his power of absolute refusal of the heir and to lay himself under an obligation of renewal if required. But still (as he had said nothing to the contrary), it was to be held, that this was a qualified and conditional obligation, – upon proffer only of the customary fee or acknowledgement on such occasions. We find accordingly that, in Normandy, and in England, and indeed in most countries which had received the plan of feudal tenures, some presentation of this nature was early and well established.¹ It was so with us as far back as we know anything with certainty in our customs; and it remains a part of our Law at the present day though materially mitigated as to its amount and way of application. For, instead of a year's real rent of the lands, which was once the rule, in the military holding, it was long ago reduced to the new extent or retour duties (see *Juridical Styles* v. 1, p.320²) unless where the heir was minor in which case, being in possession as wardator and keeper of the estates, the superior continued his possession for another year, and thus drew the whole fruits of the fee (Craig, p.401, No. 33³).

In some countries it was not even confined to the case of feudal property, but, either from imitation of that case, or by reason of the dependent condition of the lower orders of men in former times, it was extended to certain other situations. For instance, by the Laws of William the Conqueror, the heir of a tenant paid a year's rent for liberty to remain in his

¹ See note 117 vol. IV. p.222.

² 1st ed.

³ II.xx.33 (II.826)

possession, and the heir of a lesser tenant, or country man, rendered the best beast upon the ground.⁴

Such also with us in Scotland was the nature of what was called the Right of Herezeld,⁵ which entitled the master to receive the best beast upon the ground from the heir of any tenant, who had possession without a written tack. This is now in a great measure obsolete, and only due by special custom in some narrow districts of the country;⁶ but the law still recognises, and keeps up, equally as in antient times, the casualty of relief in favour of the superior of feudal property, though it does not apply the same rigorous construction at first with respect to the computation of the amount of it.

The Norman relief appears to have been rendered at first in arms, military habiliments, or some sort of warlike gear, which too was the nature of a perquisito, which was levied on the same occasion in the Dane—Saxon times (at least upon the death of certain considerable persons), and was distinguished by the name of a Heriot.⁷ In default of these, and afterwards, whether there was any such default or not, a pecuniary commutation was exigible, which being at first arbitrary, and therefore a means of abuse,⁸ was at length settled by the Great Charter⁹ and other ordinances, at 100 sh. For a knight's fee, 100 merks for a barony and 100 pounds for an earldom. The same authority provided, that where the heir was a minor, and had previously been in wardship, he should not at all be liable in relief, because it was thought that in this case his means had already been sufficiently encroached on. If we were to trust the information of the *Regiam*,¹⁰ we should

⁴ c.20. Dalrymple, 54 & c., Pollock & Maitland, i.314.

⁵ *Reg. Maj.* IV.17 in A. p.S., Stair Society, vol. XI.286. Stair II.iii.80, Bankt. II.ix.69, Hope *Major Practicks*, III.xxxi (Stair Society, vol. III, 271), Skene D. V. S., Kames, *Statute Law Abridged*, Hist. Notes, 15, Dalrymple, *supra*.

⁶ Ersk. II.vi.10.

⁷ Spelman, *Reliquae*, 31–2, Pollock & Maitland, i.312–4, Dalrymple, *supra*, Books of Feus V.1, Bankt. II.iv.7–8.

⁸ See Glanvill, IX.4., Stubbs, *Const. Hist.*, ii.284.

⁹ Ch. 2.

¹⁰ See *Reg. Maj.* II.71 (Stair Socy., vol. XI.179), Stair II.iv.27, Ersk. II.v.49; and *Reg. Maj.* II.68 (Stair Socy., vol. XI.177).

say that the same equitable Limitations had found a reception into our Law. But if ever any such ordinances were promulgated (for which the *Regiam* is the single authority), this at least we know for certain, that they proved to be mere blank letter, and were no wise regarded in practice. The amount of the casualty was with us *de jure* a year's rent of the lands. If the superior had been in possession as wardator, he continued his possession for another year and did himself justice. If not, then, by a favourable sort of computation, of which we have already seen another instance in the case of non-entry, his right to a year's rent came to be limited to the new extent or retour duties. (Craig p.401, No. 333).

CASUALTY OF AID

There was at one time another casualty, known as Aid.¹ This was originally a present given by vassals to their superiors out of their gratitude and benevolence to them. And it was given on three occasions, – when the lord's son was to be knighted or his daughter to be married or when his own person had to be ransomed – occasions marked with much pomp and festivity. These, as has often been remarked, were nearly the same occasions wherein by the custom of the antient Romans, a client was obliged to assist his patron with a present.

Like other customary presents, they did not long continue upon this footing of pure gratitude and freedom, but soon passed to be matters of legal obligation, and of penalty in case of non-performance:² insomuch, that by the Books of the Feus, the vassal's neglect to ransom his lord, when he could, seems to have been attended with an absolute forfeiture of the fee (*F. LIB. 2T.24*³). We likewise find, that in England, the vexation of the aid, both in respect of the sum taken, and the increased number of the occasions when it was demanded, had become a subject of remonstrance, and produced certain ordinances in restraint of the imposition.⁴ It was provided by Magna Charta with respect to the Sovereign, that he should exact no aid but by consent of Parliament; and, as to subjects, that they should be limited to the three antient occasions of marriage, knighthood, and ransom.⁵

¹ See on this subject, Dalrymple, *History of Feudal Property*, 61 *et seq.*, Kames, *Law Tracts*, ch.XIV.

² *Reg. Maj.* II.73 (Stair Society, vol. XI, 180–1). Fordun, *Annals*, chs. 3 and 21. The number of occasions was increased.

³ § 7, Clyde's Translation, II. 1114.

⁴ Pollock & Maitland, i. 349–50.

⁵ c. 12., Glanvill, IX.c. 8. See Pollock & Maitland, i. 350.

In the time of Edward the 1st. and 3d., the amount of the aid was fixed, in the two cases of knighthood and marriage, at twenty shillings for a knight's fee:⁶ in the case of ransom no rule could be fixed, because the sum wanted was itself variable and unknown.

To come to our own custom – a duty of the same kind with this of aid is mentioned, both in the *Regiam* 2 and in other more authentic records, Bower in like manner, the continuator of Fordun's history, and who wrote before the middle of the 15th century, about 1440, enumerates a variety of cases, beside those above mentioned, in which it was in his time held lawful for the superior to levy an extraordinary aid from his vassals.⁷ Craig too, though by no means disposed to rely on the *Regiam*, admits (p,291. No. 22⁸) that this made part of our antient Law, and was in his time commonly so reputed; he adds, that in as far as related to the portioning of the lord's daughter, the thing still in observance in the Highlands.⁹ And from this, says he, it has come *inde inolevit, ut Reges pro (omnibus) filiabus elocandis possint populum tribute gravare*.⁸ There is, however, no need of recurring to Craig's authority for the fact, since the history of our different extents, or valuations of land (which you are by this time acquainted with from Lord Kames' Tract¹⁰) is nothing but a series of instances, wherein the Sovereign, the superior paramount of the Kingdom, did, on the proper, feudal occasions, exert his right of calling on his vassals, for an aid. Thus, the extent of Alexander the 3d was made on occasion of an aid of payment of his daughter, Margaret's, portion, to the King of Norway. The extent of 1424 was struck for payment of what was called the alimony of James 1st in England, but which, under that name, was truly his ransom from captivity. Again, before that time, David the 2d. had been ransomed by the same means. And besides these instances, we

⁶ Statute of Westminster I (3 Ed.I.c.35) 25 Ed.I. and 25 Ed.III. Stat. 5.c.11. See Blackst. , 15th ed., ii.63–4, 86, Pollock & Maitland, i.351, Bankst. II.iv.6 (English law).

⁷ Walter Bower or Bowmaker, Abbot of Inchcolm, 1447, *Scottichronicon*, viii, ch.73.

⁸ 1739 ed., II.xi.22 (I.600). And see II.xi.24 (I.601).

⁹ Craig II.xi.22 (I.600), Dalrymple, 87. Bankst. *Supra*, says they were not in use with us within memory of man.

¹⁰ Ch. XIV.

may notice that Alexander the 2d. in 1224 levied an aid of £10,000 from the lands of his sisters.¹¹ 'Tis very true that these aids were levied from the landholders indiscriminately, not from the immediate Crown vassals alone. But this was a difference in point of form only, and not of substance: for wherever any one had been assessed in aid, for the whole lands in his grant, he was on feudal principle intitled to a proportionate relief from his subfeuars, so that in applying to the whole landowners directly, the King did but simplify the mode of collection, without at all adding to the burden. See Norman Customs.¹² No question such general assessment, in whatever view at first made, was of the nature of a subsidy, and thus paved the way, as Craig remarks,¹³ for the direct imposition of subsidy on that and other occasions. This, when well established, of course, put an end to the levying of proper aids from the Crown vassals exclusively. Owing to which, and to the other causes which tended to unfetter the right of property, Crown vassals also discontinued the taking of aids from their feudatories; and thus the casualty went wholly into disuse.¹⁴

¹¹ See these instances noted in Kames. And see *Thomson's Memorial*, Stair Society, vol. X. Ersk. II.v.31–2.

¹² See *Le Grand Coutumier*.

¹³ I. Xvi. 16 (I. 310).

¹⁴ Dalrymple, 87.

THE VASSAL'S ESTATE

The estate vested in the vassal by the feudal grant, though more profitable and substantial than that of the superior, is however, (and indeed for that very reason), of a more simple and uniform nature, and will occupy our attention therefore for a very much shorter period of time. Every person sees indeed, and knows at once, with respect to the general account of the vassal's estate and interest, that when he has it in fee simple – upon the footing of common law that is, without special limitation through covenant or settlement – he enjoys the whole profits of and powers over the tenement – farther than his superior's interest encumbers and restricts him: so that in settling the boundaries of the one, we have in great measure described the other, and have only left for this place a few special articles and points, which may deserve to be more particularly taken notice of.

One of the enquiries which first lies in our way, is, concerning the rules of construction, which serve to ascertain the extent of the grant, or the limits of the tenement, which has been conveyed. Now, as to this; if the conveyance has been made in the form of a bounding charter – one which describes the subjects, by natural or fixed landmarks – there is, of course, but little room for controversy on the subject. All that is within those limits, is conveyed, if the granter himself had right to it; and with respect to any thing that lies beyond those limits, not only no present right is bestowed by such a charter, but no title even to acquire by prescription in time to come.¹ The reason is that, instead of raising a presumption of *bona fides* in the possessor (which the law means in requiring a title of prescription) such a charter utterly subverts any such opinion, and operates as a perpetual interruption against him. He cannot therefore acquire in fee and property any subject which lies beyond the limits of his charter. He may however certainly establish in that way, rights of servitude and other subordinate or accessory rights over subjects so situated; because the bounding of the charter has relation to what is disposed in vassalage

¹ Rankine 101–2.

and property only.² It is therefore only when the tenement is no otherwise conveyed than by its general name and designation and that there is need of any constructive rule upon the subject; and here, in any competition that might arise for a spot or parcel of ground, there are two things to be attended to and laid together – the state of possession, and the state of the titles of parties: for these two circumstances very materially modify and affect each other. In the first place, if the spot of ground in question is not specially mentioned in the titles of either party, but each claims it as part and pertinent merely of his tenement, of such a name or general designation – here, the controversy must be decided by the state of possession, and sort of exercise of right. According to which, as it turns out stronger for the one or other party, the parcel shall be adjoined as a pertinent to the tenement or the other.³ Or, if it turns out (which however cannot be of frequent case), that both parties have had possession, and this an equally advantageous possession, then the parcel shall be adjudged as a common property to both parties.⁴ There is, you observe, in these circumstances, no special and positive written right in the titles of either of the parties, that is valid or preferable of itself, without possession, to aid and confirm it. (Stair p.247⁵

State the case, in the second place, that one of the parties claims the parcel as pertinent of his tenement or as falling under some general words merely in his charter and the other claims it as situated within the written limits of his bounding charter, or as expressly enumerated and described by natural marks as among the parts of which his tenement consists (see Stair No. 26, p.215⁶). Thus far the latter of the two is of course in more advantageous situation, his infeftment being express in every part so enumerated, and

² Rankine, 102. These must be possessed with the principal subject. *Lord Advocate v. Hunt*, 1867, 5 M. (H.L.) 1.

³ Bell § 739, Rankine 203–4.

⁴ Ersk. II. vi. 3, Bell § 739, Rankine 203–4.

⁵ 3rd ed., II. iii. 73.

⁶ 3rd ed., II. iii. 26

every thing that lies within those bounds. And this party shall prevail accordingly if there is no more in the case.⁷ But suppose on the other hand, that this person who has the stronger title in itself – has not at all possessed the spot of ground in question, and that this spot is contiguous, adjacent, to the lands of the other party – and that this other party has in fact possessed it for 40 years, as part and pertinent of these other and contiguous lands, the property is then fixed by prescription in favour of the possessor on the title of part and pertinent, vague and general as that title happens to be.⁸ The same shall hold, and a prescriptive right to this contiguous parcel shall be obtained, although the competitor thus out of possession should produce even what is stronger than I have yet stated – a separate and several infeftment of that thing or parcel, as a tenement *per se*, and described by a particular name. Though such had truly been the original or more antient condition of that piece of ground, it is still true, that, by possession for 40 years, it may become and be annexed as part and pertinent of another subject, at least if that subject be contiguous to it. 20 Febr. 1675, *countess of Moray v. Wemyss*;⁹ 17 Novr. 1671, *Young v. Carmichael*.¹⁰ The Lord found (in *Moray*'s case) that the prescription by possession of 40 years as part and pertinent was relevant, albeit before that time the lands so possessed had been several tenements. In these instances, the party, who had the stronger title in itself, had been long and entirely out of possession. But it may also happen, that in a case where one title is naturally stronger than the other; both parties have had possession, and much of the same lot and degree: and here the result shall be in the establishment of a common property to both.⁴ Of this there was an instance in the competition for Loch Rannoch between *Sir John Menzies v. Robertson of Strowan*. One of these parties had an express grant in his charter, of the Loch and the Island '*Insulam de Loch Rannoch, Lacus de*

⁷ Ersk. II. vi. 3, Bell § 739, Rankine, 102, 202.

⁸ Bell § 739, Rankine, 202–3.

⁹ M. 9636, Stair II. 325. Bell §§ 739, 746, Rankine, 202–3, Montg. Bell, i. 606.

¹⁰ M. 9636. Ersk. II. vi. 3, Bell *supra*, Rankine *supra*, Montg. Bell, i. 597.

*Rannoch et Erachie, et omnes lacus et insulas infra dictas terras.*¹¹ The other party had only a grant of his Barony of Strowan generally ‘*cum silvis piscariis et lacubus.*’¹² But upon these titles, one of them naturally much weaker than the other, both parties had enjoyed long and seemingly equal possession of both sides of the Lake, by fishing, navigation, floating of wood and so forth. And therefore the Loch was found to be a common property to both, 14th Decr. 1798.¹³ As I have already more than once hinted, one circumstance, too, which is allwise of some weight in this class of questions, is that of contiguity or discontiguity to the main tenement of which the thing in dispute is alledged to be a pertinent or appendage. That discontiguity is utterly exclusive of the plea by part and pertinent, that a parcel of land cannot be annexed, by means of possession, as part and pertinent of a tenement to which it is not contiguous, that would be a strong and, I take it, too broad a position. Balfour has said on the contrary at p.175¹⁴ ‘That lands may be pertinent and pendicles of uther lands, albeit they may be not contigue to the samin’ – And in this opinion he is joined by Sir Thomas Craig, who in B.2. Ch.3, No.24¹⁵ has confirmed it with a judgement,¹⁶ which he had known to be given in his own time. You find likewise, collected in the Dictionary, v.2,¹⁷ under the Title of Part and Pertinent, a variety of judgements to the same effect. But though this be true in a strong and decisive case on one hand, it must be yielded on the other, that where the things are discontiguous, the more pregnant and weighty must the proof of possession be, to annex the parcel as a pertinent; and the greater shall be the influence of any circumstances of formal or civil separation between the subjects: such as a several seisin, a special appellation, a different

¹¹ In a charter of James VI. of 1591, R.M.S., 1580–93, No. 1987, p.673.

¹² In a charter of Charles I. of 1636, R.M.S., 1634–51, No. 517, p.187.

¹³ Not reported, *Hume Sess. Pap.*, vol. Lxvii, No. 32. Adhered 2 July 1799. The case is referred to in a sequel to it, *Menzies v. Macdonald*, 1854, 16 D.827, 1856, 2 Macq. 463. See Montg. Bell, **XX** 603.

¹⁴ Of Pertinents of Lands, c.1.

¹⁵ Clyde’s translation I.411. Rankine, 204, Ersk. II.vi.3, Bell § 739, Montg. Bell, i.605.

¹⁶ *Earl of Angus v. Hume of Polwarth*, not reported.

¹⁷ P.26. *Forsyth v. Durie*, 1632, M.9629, Durie 626; *Lady Boyne v. Tenants*, 1627, M.9628, Durie 310; *Laird of Lugton v. Somerville*, 1628, M.9628, Durie 391; *Young, supra*; *Countess of Moray, supra*.

superior, or a difference of tenure. Balfour at p.175¹⁴ and Stair at p.240 No. 60¹⁸ and p.247 No. 73.¹⁹ Seem to go to the length of saying that some of these circumstances are utterly exclusive of acquisition on the title of part and pertinent. I cannot affirm that later practice has confirmed that doctrine in its broadest extent; but certainly the acquisition is more difficult in all such cases, and will require the stronger proof of possession. In short, I think I ought not to leave this subject without saying that though the rules which you will find delivered on this subject in our Law Books, and especially in Erskine,²⁰ may be right and good generally speaking, yet they are not by any means of that absolute and unpliant nature, which you might conjecture from the terms there made use of, but, on the contrary, are very liable to be modified and affected by the particular circumstances of the case. Among others, the sort of possession which the subject allows is a matter of some weight. If it is a waste and unprofitable subject, of which little use can be made, the want of possession by him in whose titles it is mentioned is less material than in the case of an arable and profitable spot of land.²¹

[In the first place, then, put the case, that the spot of ground in question is not specially mentioned in the titles of either party – but each claims it as part and pertinent merely of his tenement, of such a name, or – general designation; here, the controversy must be decided by the state of possession, and sort of exercise of the right: according to which as it turns out stronger for the one or other party, the parcel shall be adjoined as a pertinent, to the one tenement of the other. (W.M.) Or, if it turns out (which however cannot be a frequent case) that both parties have had possession, and this an equally advantageous

¹⁸ 3rd ed., II. iii. 60.

¹⁹ 3rd ed., II. iii. 73.

²⁰ II. vi. 3.

²¹ [It may be observed that something will depend on the nature of the spot, and of the kind of use of which it admits. In the case of waste and barren ground capable of being put to a very trifling use, the party infeft may maintain himself in the right, though his neighbour may have taken the principal use of it. As to a piece of arable land, though in a person's titles, if he never labour it nor use it, but allow his neighbour to do so, it is not likely that he can be the true owner.]

possession – then the parcel shall be adjudged as a common property to both parties. There is, you observe, in these circumstances no special and positive written right in the titles of either of the parties, that is valid or preferable, of itself without possession to aid and confirm it – Stair, p.247.⁵

Let us now state the case, in the second place, that one of the parties claim the parcel of land merely as a pertinent of his tenement, or as falling under some general words in his charter – and that the other claims it as situated within the written limits set down in his bounding charter – or as expressly enumerated and described by natural marks, as among the parts of which his tenement consists (see Stair, p.215, No. 26⁶). Thus far, the latter of the two is, obviously, in the more advantageous situation, his infeftment being express in every part and thing so enumerated, and in every thing and article that lies within those bounds. If there is no more in the case, that party shall prevail accordingly.⁷

But, suppose, on the other hand, that this person, who has the stronger and more powerful title in itself – has not, however, at all possessed the spot of ground in question – and, put the case, that this spot is contiguous - adjacent to the lands of the other party – and that this other party has in fact possessed it for 40 years, as part and pertinent of these other and contiguous lands of his: the property is then fixed by prescription, in favour of the possessor, on the title of part and pertinent, vague and general (loose and indefinite) as that title must be admitted to be.⁸

The same shall hold, and a good prescriptive right to this contiguous parcel shall be obtained, although the competitor who is thus out of possession should produce even, what is stronger than I have yet stated, a separate and several infeftment of that thing or parcel, as a tenement *per se*, and described by a particular name. (W.M.) Though such had truly been the original or more antient condition of that piece of ground, it is still true,

that by possession for 40 years, it may become and be annexed as part and pertinent of another tenement, at least if that other be (as I have put the case) contiguous to it. To that effect you have precedents, in 20 Feby. 1675, *Countess of Moray v. Wemyss*;⁹ 17 Novr. 1671, *Young v. Carmichael*.¹⁰ The Lord's found (in Moray's case) 'That the prescription by possession of 40 years, as part and pertinent was relevant, albeit before that time the lands so possessed had been a several tenement.' Again in the case of *Hay McKenzie v. Sir Hector McKenzie*, 26 Novr. 1813.²² The fact here was that a certain grazing, of some extent, had been possessed for a length of time, as part and pertinent of contiguous lands, which were indeed encompassed in it. There had also been possession, but a much more slender possession, by occasional pasturage of this grazing, on the part of the estate situated at the distance of some miles, but in the titles of which estate this grazing was expressly enumerated as a pendicle. In this competition, the Lords preferred the former party – the contiguous heritor, in respect of the contiguity and the stronger possession.

In these instances, the party who had the stronger title in itself, had been long and entirely out of possession. But it may also happen, that in a case where one title is naturally somewhat stronger than the other, both parties have had possession and much of the same sort and degree: and here also the result shall be, in the establishment of a common property to both.⁴ Of this there was an instance, in the competition of Loch Rannoch between *Sir Jogn Menzies v. Robertso0n of Strowan* (14 Decr., 1798) not reported.¹³ One of the parties had an express grant in his charter, of the Loch and the Island '*Insulam de Loch Rannoch, Lacus de Rannoch et Erachtie, et omnes lacus et insulas infra dictas terras*'.¹¹ The other party had only a grant of his Barony of Strowan generally '*cum silvis pescariis et lacubus*'.¹² But upon these titles one of them naturally much weaker than the other, both parties had enjoyed long, and seemingly equal possession, on both sides of the

²² Not reported. S.L. *Old Sess. Pap.*, vols 273, No. 8, and 486, Nos. 8–9, affirmed, H.L., 18 March, 1818, 6 Pat.376. Rankine, 203. There had been a possessory judgement too in the case.

lake, by fishing, navigation, floating of wood and so forth. And therefore the Loch was found to be a common property to both.

As I have already more than once hinted, one circumstance, which is allwise of some weight in this class of questions, is that of contiguity or discontiguity to the main tenement, of which the thing in dispute is alledged to be a pertinent or appendage. That discontiguity is utterly exclusive of the plea of part and pertinent – that a parcel of land cannot possibly be annexed, by means of possession, as part and pertinent of a tenement of which it is not contiguous – that would be a strong, and, I take it, too broad a position. Balfour has said on the contrary, at p.175,¹⁴ ‘That lands may be pertinent and pendicles of uther lands, albeit they be not contigue to the samen’. And in this opinion he is joined by Sir Thomas Craig, who, in B.2 ch.3. No.24,¹⁵ has confirmed it with a judgement,¹⁶ which he had known to be given to that purpose in his own time. You find likewise collected in the Dictionary, under the Title of Part and Pertinent, a variety of judgements, which are, on the whole, to the same effect. But, though this be true in a strong and decisive case on the one hand, it must, however, be yielded on the other, that where the things are discontiguous, the more pregnant and weighty must the proof of possession be, to annex the parcel as pertinent; and the greater shall be the influence of any circumstance of formal or civil separation between the two subjects – such as a separate seisin – a special appellation – a different superior, or a different tenure. Balfour at p.175¹⁴ and Stair at p.240 No. 60,¹⁸ and p.247 No.73¹⁹ seem to go to the length of saying that some of these circumstances, which I have now mentioned, are utterly exclusive of acquisition on the title of part and pertinent. I cannot affirm, that latter practice has confirmed that doctrine in its broadest extent, but certainly the acquisition is more difficult in all such cases, and will require to be sustained by the stronger proof of possession. In short, I think I ought not to leave this subject, without saying, that though the rules which you find delivered on

this matter in our Law Books, and especially in Erskine,²⁰ may be right and good, generally speaking; yet they are not by any means of that absolute and unpliable nature which you might conjecture from the terms there made use of. On the contrary they are very liable to be modified and affected by the particular circumstances of the case; and among others, the sort of possession which the subject allows is always a matter of some weight in such discussions. If, for instance, it is a waste and unprofitable subject, of which little use can be made by any one, the want of possession on his part in whose titles it is mentioned, is plainly less material than the case of an arable and fertile portion of land.]

[There are certain subjects which though neither contiguous to nor homogenous with the lands disposed are understood to pass and be conveyed as parts and pertinent. Among the first of those subjects is the share or portion of the area of the church which has been allotted to the lands conveyed at the division of the area. Under the conveyance of a rural tenement there passes, though no special notice of it is taken in the deed of conveyance, that share of the area of the Parish Church which has been assigned in the division of it to those lands.²³ That point was decided in the cases *Duff v. Brodie*, 29 June, 1769;²⁴ *Pede v. Mags. of Paisley*, 21 Novr. 1770;²⁵ *Swan v. Mckenzie*, 19 June, 1801, not reported;²⁶ *Vernor v. Skirving*, 21 June, 1796.²⁷ Although an heritor, while he retains his estate, may let out his own part or portion of the area for hire to the inhabitants of the Parish,²⁸ yet he cannot ultimately separate the right of the two subjects. He cannot do so either by a sale of the areas themselves²⁹ nor when he sells the lands can he retain the seats.³⁰ The

²³ Ersk. II.vi.II, Bell § 744, Rankine, 186, 188, Montg. Bell, i. 605, Menzies, 515, Duncan, 161.

²⁴ M. 9644, Hailes, 297.

²⁵ M. 9644.

²⁶ Hume Sess. Pap., vol. lxxxii, No. 39 (2), v. *Duncanson* and *MacKenzie*.

²⁷ M. 7930, Hume SEss. Pap., vols lxxxix, No. 20, and lxxxvi, No. 85, cit. *Skirving v. Vernor*.

²⁸ See Rankine, 188, Duncan, 162–3.

²⁹ Per Ld. Monboddo in *St Clair*, *infra*, 2 Hailes, 740.

principle of this is, that, if such a separation were allowed, the whole seats in the church might come into the hands of strangers to the total exclusion of the inhabitants of the parish contrary] to the principles on which the allotment of shares to the several lands in the Parish has been made.³¹ This privilege passes, alike, in the case of a partial as of a total sale of any tenement; supposing always that the sale is not of a mere plot or pendicle of land, which pays no cess, and has no corresponding valued rent.³² Probably too as long as a heritor retains the mansion house and contiguous lands, he shall be allowed to keep his family seat in the same quarter, or station of the Church as formerly though not to the same extent.³³

This doctrine is suited, however, to the situation only of landward parishes; where the expence of the fabric is defrayed by the several heritors on the same principle and in proportion to the valued rents of their several estates.³⁴ In Royal Burghs, where the church is built at the expence of the Corporation,³⁵ that the body may also have in consequence the property of the area; and let it out to the inhabitants for hire; or, if they do alienate parts of it to individuals, having residence and property in the town, yet still, in these acquirers, this is a separate and independent property – which shall not pass, without mention, under conveyance of that person’s house in the Burgh, and may be sold, with consent of the Kirk session always, to any person who is an inhabitant of the town.

³⁰ *Ure v. Ramsey*, 1828, 6 S. 916 at 918, per Ld. Cringletie.

³¹ Ersk. II. vi. 11, Bell § 744, Rankine 188, *Peden, supra, Ure supra*, at 918.

³² [In the case of such partial sales or feus of the lands, each purchaser gets a right to a portion of his author’s right corresponding to the valued rent of the portion bought (*Rankine*, 187), though, if for any length of time any particular heritor has been allowed to possess a larger proportion than he ought, he has an interim title to possess as usual until a due allotment is made. To that purpose judgement was given in the case *Alexander v. St. Clair*, 21 Nov. 1776 (M. App. Kirk, 1, Rankine 187).]

³³ See *Lithgow v. Wilkinson*, 1697, M.9637. [I may mention also that the same rule holds for the time at least even among the heritor’s tenants in question with each other. The heritor has it not in his power to bestow an improper portion of the area to the tenant to the exclusion of another. He must allow each a proper share and cannot give one too much. A complaint of such a wrong was sustained in the case *Vernor v. Skirving*, 21 June, 1796(*supra*, Bell § 1224, Rankine, 187).]

³⁴ Rankine, 753.

³⁵ Rankine, 183, 184. See Duncan, 167.

In those parishes again which are partly landward, and partly within burgh or village, the church is erected at the expence of the heritors of lands and of houses according to their real rents or some other equitable rule, such as is suitable to the case,³⁶ *Parish of Peterhead*, 24 June 1802;³⁷ but here also, as I understand, the house and seat do not necessarily go together. The seat may be reserved, when the house is sold, and it shall not pass without mention; and with consent of the Kirk Session, it may be sold separately to any inhabitants of the Parish.³⁸ There is, in short, a more general annexation of a portion of the church to the town or burgh, but none of the several seats to the several feus or properties in the town.

With respect to a family burial place or distinct portion of the church yard – it is Mr Erskine's opinion³⁹ that this, like the portion of the church area itself – shall pass along with the estate to which it had been conjoined. And this may seem to be reasonable, provided it be understood, as I presume Erskine meant it – of a total alienation of the estate, manor place and all, such as entirely takes the family from out the parish.⁴⁰ For otherwise, if the manor place and the contiguous lands are retained; and for certain if the alienation is not of the main estate or barony, but only of separate farms and portions, a communication of this sort of property will not be understood to be intended. Neither is it quite clear, that a person selling the whole estate, may not, by an express bargain, with consent of the Kirk session at least, retain the right of the burial place to himself and his race forever.⁴¹

³⁶ Ersk. II. vi. 11, Rankine, 185, 187.

³⁷ H.L., 4 Pat.356, *cit. Harlow & Ors v. Govs. of Merchant Maiden Hospital & Ors*, reversing Ct. of Session, 15 Jan. and 10 Feb. 1802, Hume Sess. *Pap.*, vols. Lix, No. 15, and lxxiii, No.54. Ersk. II. x.64, note to 5th ed.

³⁸ Ersk. *Supra*.

³⁹ *Supra*. Rankine 191, Montg. Bell, i.605; see Duncan, 208–9

⁴⁰ Rankine, 192, Duncan, 208–9.

⁴¹ See Rankine, 189–90.

There is another franchise, in some measure of an ecclesiastical nature, which according to the opinion of one at least of our Lawyers is to be added to this class, as appendant on a tenement of land. I mean a patronage or right of presentation; of which Lord Bankton says at p.596 V.1 (No. 174⁴²) that with us as in England it will pass with the tenement as pertinent. But on this head, though Bankton has the support of a passage in Craig *de Feudis*, B. 2, Tit. 8, No.37,⁴³ (but his position of his Lordship's notwithstanding that he has the authority of Craig, seems to be liable to such objections as may make us hesitate at least, about adopting it for Law), I rather think there is room for a distinction. If the patronage has a different sett of titles in the family of the seller, and has always devolved and been transmitted in that way, it is, I think, not disputable, that like every other subject in that situation, it shall not pass without express mention.⁴⁴

Where, again, a certain land estate and a patronage have devolved for generations in the same family, and were both bestowed on it at first by the same grant; yet still, if, in this family, that patronage has always been in the use of being delivered by its own proper symbol, and with special mention thereof in the instrument of seisin and retour of service and so forth – it does not occur to me that regularly or consistently with ordinary rules on the subject any purchaser can be feudally vested with this patronage without the like separate delivery, by the peculiar symbol, can be made to him without a special mention and warrant for that purpose in the disposition and precept of seisin. 'Tis true, that circumstances may show, that the patronage, though not mentioned in the disposition, was truly intended to be conveyed, and so may found process at instance of the disponent to obtain a supplementary disposition bearing the patronage; but still it cannot pass, or be actually vested, under the disposition of the lands only, which does not take any notice of

⁴² II.iii. 174. And see too II.viii. 57, viii.24 (England) See Blackst. *Comm.*, 15 ed., II.22, Coke, Littleton, 120, 307.

⁴³ Clyde's Translation I. 540–1.

⁴⁴ See Ersk. II.vi. 19. The symbols were different, Ersk. II. iii. 36.

it, and bears no warrant for delivery of the symbols for a patronage. A third case is, where a patronage has come into a family along with certain lands, and so has descended along with them, being mentioned in the settlements and retours, but has never been feudalised by special mention and delivery of it in the seisins. And here the question may be more doubtful; but I incline to think that even in these circumstances, without special mention in the conveyance, it shall not pass out of the family of the seller; which is a much stronger and more difficult step than the transmission *intra familiam*. It is true that in the case of *Lord Haddington*, 30 June, 1778,⁴⁵ a patronage was found to pass under a charter from the Crown which did not make use of that term, but disposed ‘the Priory of Coldstream with the Benefice thereof’. The reason was, that the right of patronage here was a result and consequence only of the Crown’s right to the Kirk or entire benefice, with its teinds and other emoluments whatsoever.

With regard to the conveyance of the teinds of lands, it is not disputed that no conveyance of the lands will carry them,⁴⁶ at least without⁴⁷ the help of special and peculiar circumstances, to show that teinds were meant to be conveyed (such evidence of intention was sustained in the case of the *Earl of Moray v. Campbell*, 9 July, 1777⁴⁸), and have only been omitted *per curiam* to be expressed in the disposition.

Our next inquiry will be, how far all things are conveyed which be within the limits of the charter, and seem naturally to be parts of the subject; and how far the things which are conveyed, may be put by the vassal, to all their natural and proper uses: – for in both these respects, and especially in the first of them, there are certain exceptions, which encroach upon and in some measure lessen, the vassal’s profit in the feudal grant. To

⁴⁵ M. 9940, v. *Officers of State*.

⁴⁶ Ersk. II. x. 40, Bankt. II.iii. 174, Bell § 737, Montg. Bell, i. 608.

⁴⁷ [special mention in the charter, or without]

⁴⁸ M. 15694, App. Teinds, 4, *cit. Campbell v. Earl of Moray*.

judge from what the older authorities have said, there was a doubt formerly, with respect to mills, and fortalices, and forests, whether these would pass under any ordinary conveyance of lands, unless they were either expressly mentioned there, or the tenement were a barony or lordship, or other dignified fee, whereof the conveyance, as an *universitas*, might be of more than ordinary power.⁴⁹ Such doubts, I believe, are now no longer entertained.⁵⁰ A fortalice shall certainly pass with the tenement, like any other ordinary building:⁵¹ as shall a forest also, unless it has been known and distinguished as a separate subject or tenement or been made the subject of a separate seisin, which however is, I presume, the ordinary situation of forests.⁵² And in regard to a mill, as Mr. Erskine says,⁵³ it is now in any case entirely a question of intention, and like others of that class to be decided upon evidence whether it shall or shall not pass under the conveyance. In this place, I may mention also, with respect to mines of coal, that these, as far back as the time of Craig,⁵⁴ have been reputed, as an undoubted proper part of the lands themselves, so as to pass without special mention, under any common conveyance.⁵⁵]

⁴⁹ See Craig II.viii. 3, 5 (II. 514–5, 517), Stair II.iii. 65–6, 67, 71, vii, 5, Ersk. II.vi. 16, 17, 18, Bankt. II.iii. 91, 94, 110, Bell § § 670, 743, Mack., *Works*, p.300.

⁵⁰ Ersk. II. vi. 17, 18.

⁵¹ Ersk. II. vi. 17. See Bell § 752, Rankine, 248.

⁵² See Ersk. II. vi. 14, Bell § 670. And see Rankine, 162.

⁵³ II. vi. 5. See Bell § 743. *Rose v. Ramsey*, 1777, M. 9645, App. Part and Pert., 1, Hailes 756.

⁵⁴ II. viii. 17, Clyde's Translation, I. 525–6.

⁵⁵ Bell § 669.

HERITABLE BONDS (1)

In this day's lecture, we are to enquire concerning the nature of a Heritable Bond, or Disposition in Security: [The form of Wadset, or feudal impignoration, by which the creditor is put into the actual possession and management of the lands, in the character of interim *dominus*, has now for a good while been more employed as a mode of freehold qualification than as an instrument of assurance for a common and real loan of money. In that capacity, its place has long been supplied, by the forms of Heritable Bond or Disposition in Security (for the two terms are often used indifferently); and which may I think be described, as a feudal hypothec, or real security upon a subject which continues the property of the debtor, and in his (the debtor's) own management and administration; Now this] which sort of lein, though in the specific form which it now takes, it is of modern introduction, is, however, an improvement only, and successor of certain other more antient sorts of security: insomuch, that we can scarcely understand the frame and operation of the present securities, without tracing the history, which connects them with their predecessors.

Of these, the simplest, and the most antient, seem to have been of that kind of which Lord Kaimes has given us two examples, in his Tract concerning Securities upon Land – the one granted by Simon Lockhart of Lee, in 1323, the other granted in 1418, by James Douglas, Lord Balveny.¹ What is chiefly to be attended to in the first of them, is this; that, on the face of the writings, the transaction in no wise bears the form of a loan at interest, nor at all exhibits the parties in the character of debtor and creditor; but in those of seller and buyer of a certain rent or annuity, which is to be taken out of certain lands, belonging to the seller. Simeon Lockhart (the seller) for a certain price received from William de Lindsay (in reality the sum borrowed), alienates to that person a yearly rent of £10 st., to be taken out of the lands of Caitland and Lee; and, at the same time, he personally binds

¹ Pp. 242–3, App. II, and III. Ross, ii. 323.

himself in payment of this annuity, or rent, at two terms of the year. This is the substance of the transaction; in which no mention is made of principal debt nor interest; no obligation is undertaken to repay the sum on one part, nor is any power given to call up the money on the other. There is merely the grant and acquisition, at a certain price, of a fixed and independent yearly rent, which has no relation to any capital sum, and which the granter obliges himself to pay in all time to come.²

The buyer does not trust entirely to this personal security. The second thing to be remarked is this, that the annuity is specially covenanted to be taken out of certain lands, which (as well as Simeon Lockhart personally) are bound to the seller after the following fashion – ‘And goods and chattels upon the same to a distress, at instance of the said William Lindsay, his heirs and assignies in case he (the granter) his heirs and assignies shall fail in payment’. Here, you observe, the mode of the real security was, by binding the lands to a distress at instance of the annuitant.² And what the meaning of this was (if we had not been acquainted with it otherwise), we are very explicitly informed in the other deed, by Lord Balveny, which binds his Lordship’s Lands of Sawlyne and Dunsyre to be distrainied ‘at the will of the creditor, his heirs or assignies, till they be paid of the forementioned sum, in the same manner that he or they might distrain their own proper lands for their own rents, without the authority of any Judge civil or ecclesiastical’.

The nature of the annuitant’s privilege – or real security – was therefore neither more or less than this: – It was a conveyance by the heritor, of the right which he himself enjoyed, by the custom at that time (as formerly explained in treating of the landlord’s hypothec³), *brevi manu*, and of his own authority, to distrain the produce and stocking of

² Ross, *supra*, and i. 40.

³ *Lectures*, vol. IV, p.9.

the lands; for payment of his rents.⁴ This right, which the master had, he by such a deed made over, *tantum et tale* in favour of the annuitant; who thus, to the extent of his annuity, came between the tenants and their landlord: was their landlord *quoad hoc*; – and was vested with the same privileges as his author, of summary detainer – recovery – and action against intruders, to the extent which the Law and Custom of the land allowed him in those times. Ross p.418–19.⁵ This, we know, was high; and the real security seems thus to have been of a sufficiently firm and effectual kind. If both rent and annuity were payable in kind, the annuitant put forth his hand, and paid himself, by taking the grain into his possession: if they were payable in money, he laid hold of the crop or stocking, and detained them, till the tenant paid; or else he sold them, as his property, to pay himself.⁶

This form of security was, however, afterwards laid aside, for a new sort of lein, which was termed a Right of Annualrent, and which seems to have been a sort of feudal hypothec;⁷ – a hypothec constituted in the feudal form of infeftment;⁸ – the form to which in those times there was a disposition to reduce every sort of transaction and estate. At bottom, the covenant of parties was the same as that above described; the purchase and sale that is, of a yearly rent out of lands. But then, the rent thus alienated, was disposed to the purchaser in the form of a separate and corporeal tenement; to be held, like an estate, by the purchaser as vassal, under the seller as superior (though sometimes under the seller's superior), in like manner, and with all the accompaniments of *reddendo* and casualties, and so forth, wherein the property of the lands was held by the seller himself.

To effectuate this object, the purchaser had investiture given him of the annualrent

⁴ Kames, *Law Tracts*, i. 243.

⁵ *Lectures*, vol. ii.

⁶ See Bell § 908, *Comm.*, i. 713.

⁷ Ersk. II. ii. 5. Cp. Craig, I. x. 37 (I. 170).

⁸ Stair II. v.1, Ross ii. 418, 377.

disponed, by infeftment taken of it on the lands, through the symbols of earth and stone, and a penny money, or a handful of grain; as the rent was of the one kind or the other. This addition was also made to the transaction, that the annual rent was now commonly made redeemable at pleasure of the seller: or in other words there was a stipulation of repurchase – a *pactum de retrovendo* – on repayment on the price received, and at pleasure of the seller, upon notice given in a certain form: but still the buyer – or lender – had no power, more than before, to compel this reconveyance; or in other words to call for repayment of his money. (See Ross, p.329).⁹

In the next place; in point of effect and operation – the annualrenter's security was still mainly through the produce and stocking of the lands; but this after somewhat a different form and fashion, and upon different principles, from those upon which he had enjoyed it, under the original sort of annuity. The land, you observe – the soil itself – by means of the infeftment of annualrent, was now hypothecated to him for his annuity;¹⁰ and so of consequence, to that extent, was the produce of the land, through which only it exerts itself and is profitable; and also the stocking thereupon, which are maintained upon, and draw their value from that produce. The right of annualrent was therefore a feudal hypothecation of the land and fruits. And hence there resulted to the annuitant, or *creditor hypothecarius*, thus infeft, a right to distrain and hold these subjects – the fruits and stocking – until payment of the arrears of annuity, which might at any time be due to him. This, there seems reason to believe, that he had originally right to do, by his private authority, in the same manner as an annuitant, assigned to the heritor's right of distress.¹¹ Ross p.422, 448.⁴ But in later times, of which we have a credible or authentic record, the King's aid was in use of being craved or interponed, by Letters (as they were called) of

⁹ vol. ii. Ersk. II. ii. 5, Bell § 98, *Comm.*, i.713.

¹⁰ Ersk. II. viii. 31.

¹¹ Kames, *Law Tracts*, i. 243.

poinding; being a warrant to messengers, to assist the annuitant in the seizure of his hypothecated fund.¹² These, it appears, had issued at one time straightaway upon production of the infetment of annualrent; but afterwards, more properly, they were to be obtained under authority only of a solemn decree, in an action instituted for the purpose.¹³ Ross, p.423.⁴

Ross says that at first they were only taken in pledge. But if this was once the case it has at least now ceased to be so: for I see no vestige in late authors of any difference 'tween this and other poinding – they are appraised to a certain value. If the tenant will take them at that value and pay, to be sure he stops the execution as any other does, but otherwise things are appraised and delivered in property. (p.424)⁴

When obtained, in this case as in that of a superior using them for his feuduty, they were effectual for all future terms and years, notwithstanding a change of both heritor and tenants (30 June 1624, *Ker v. Hepburn*¹⁴). And with respect to the subjects which his right affected, it seems to have been held, at least it was more than once decided, either for the sake of preventing fraud, or as a consequence of the hypothec of the land, that the poinding affected alike the *invecta et illata*, the goods of any stranger brought upon the lands, as those of the tenants themselves – (11 July 1628, *Lady Ednam v. The Laird*,¹⁵ Hope *M. Practicks*¹⁶ – See Dict. 2. p.96¹⁷). Nor indeed was the contrary well settled till the case of *Collet v. Balmanna* 6 Febr. 1679.¹⁸

¹² Ross, ii. 422–3, 448, Stair II. v. 8, Ersk. II. viii. 32, Kames, i. 253.

¹³ Kames, i. 253.

¹⁴ M. 10544, Durie, 132, *cit. Keir*. Ross, ii. 426, Ersk. IV. i. 12.

¹⁵ M. 8129, 10545, Durie, 387, 1 B.S.265, 376. Ross, ii.428.

¹⁶ *Major Practicks*. So too Ross, ii.424–5. The case is reported in Kerse Law Repertorie Fol. 201 (MS. Adv. Lib. 6.1.2) and is *Paterson v. Adamson*, M.10543. See v., 28 June 1622 *contra* cited by Kerse.

¹⁷ *Ednam and Paterson, supra*.

¹⁸ M.10550, Stair ii. 688, *cit. Master of Balmerinloch*, Ersk. IV.i.12.

Again, as to the extent to which the crop and stocking might be poinded. Thus far was clear, that if the heritor, granter of the annualrent, was himself in possession of the lands, there could be no limitation, other than to the amount of the arrears of annualrent that were due at the time. The heritor did wrong in failing to pay the annualrent; and in so far as the annualrenter took the fruits and moveables, he disencumbered the lands themselves, of the debt that lay upon them¹⁹ – Ross p.420.⁴ The like was still good law, though the lands had passed even to a singular successor;²⁰ because though that person had not personally contracted to pay the annuity, yet still he had taken the lands under a previous incumbrance in favour of the annualrenter, who seised their fruits as such, in whatever hands produced.

Ross argues that it should have undergone the same limitations as the master's hypothec or distress. But it never did, p.419.⁴ His notion is that an annualrenter should not more than a landlord have preference over the tenant's creditors for more than a single year. But answers – a master is allwise at the head of the ground – he should see the tenants paying – this is not so with a creditor: it would be against the debtor's interest to force him to take instant possession.

With respect again to such lands as were under tenantry; – here to his privilege, for long, seems to have been unpliant and rigorous. We have heretofore had occasion to remark,²¹ that so much were the crop and stocking in the tenant's hands considered to be the master's property, that even his personal creditors could poind and attach them for his debt; and this without any regard to the amount of the arrears which the tenants actually owed.²² This, we had occasion also to learn,¹⁷ was corrected, in as far as concerned the

¹⁹ Ross, ii.438.

²⁰ Ersk. II.viii.32, Ross, ii.438.

²¹ Lectures, vol. IV, p.9.

²² Stair II.v.8, Ersk.II.viii. 33, IV.i.11.

personal creditors of the landlord, by the Statute 1469 ch.39²³ which limited this diligence to the amount of the tenant's arrears and the rent of the current term. But it is certain both from the words of the Act, and the construction of it in practice, that this protection was nowise intended to the prejudice of real creditors, who having the land itself hypothecated, were intitles, in strict principle, to the like real lien on its produce and stocking in the hands of whatsoever persons, to the amount of their arrears of annualrent, how much soever these might exceed the arrears which the tenant owed. On these heads see to the same effect Notes on Stair.²⁴ This was expressly found as late as 1628, on 11 July, *the Lady Ednam*;¹² and it appears indeed, that the contrary was not well established till Lord Stair's time, see Stair p.636 No.16,²⁵ – in 1674 or thereby (see Dict. p.96)²⁶ – when the equity of the thing at last prevailed over the strict principle, and gave the tenants a protection against the annualrenter too: limiting his diligence to the current term's rent, and arrears due by the tenant at the time.²⁷ Ross, p.432–3.⁴

What caused, I presume, this diligence of poinding of the ground to be more rigorously followed out was this, that it was a manner, for long, the single way in which the right exerted itself or could be made effectual; for it does appear (how natural soever the thing may seem to us), that with respect to the sustaining of personal action against intromitters with the goods and fruits, by reason of this real lien on them, it was till Durie's time either not at all, or very imperfectly recognised. This appears from the Decisions in Durie's own collection. With respect to tenants, for instance, whom we should think it was natural for the annualrenter to sue directly for arrears of rent in their hands, as holding both these which were the return for the crop, and also the crop itself which the annualrenter might

²³ 12 mo. ed., c.12 record ede.

²⁴ Elchies *Annotations*, 197, 198–200, under reference to Stair, *supra*.

²⁵ 3rd ed., IV. xxiv, 16.

²⁶ vol. II, *Ld. Pouriefotheringham* (otherwise *Fotheringham of Powrie*) v. *Ld. Balmerino*, 14 July 1676, M.105499, cited by Ross, ii. 432–3.

²⁷ Stair II. x. 9, Ersk. II.viii.32, 33, Kames, i.234–5, Ross ii. 437, Rankine, 706.

have pointed, we find it expressly decided in the case of *Gray v. Tenants*, 24 March 1626,²⁸ that he had no such action. The case here was, that a personal creditor of the landlord's had arrested the rents and pursued forthcoming; in which action compares an annualrent infert before the arrestment, and craves to be preferred. The arrester answers in substance – that the rights of the two parties are not *circa idem* – that the operation of the annualrent was by pointing the ground, which he might use in spite of the arrestment – but his infertment would never give him right to rents, nor action against the tenants – with which his bare infertment, without other diligence, gave him no connection. And this plea the Lords had thought good: for they preferred the arrestment, and repelled the annualrenter's claim. See Ross p.426.⁴ The first decision to the contrary seems to have been in the case of *Hamilton v. Tenants of Hamilton*, 15 July 1629,²⁹ where, in a competition for the rents, between an annualrenter and a singular successor in the lands, the former was preferred; but this it would appear only in respect of the special circumstances in the annualrenter's favour – that he had already in his hands a decree of pointing the ground, to which the landlord had been called as a party. And this Durie thinks it proper to advert to, as the ground of the Judgement. I think I may also refer you to the following judgements, as bearing indications of the weak and imperfect conception which even after this period our courts had of this, as it seems to us, natural consequence of the right – 20 July 1633, *Earl of Annandale*³⁰ – 15 March 1637, *Guthrie v. Earl of Galloway*;³¹ 29 Jan. 1635, *Hamilton*.³² Indeed the first case where the annualrenter can be said fairly to have been allowed the use of a direct personal action for the rents, without

²⁸ M. 565, Durie, 197. Kames, i. 251–2.

²⁹ M. 566, Durie, 462. Ross, ii. 429–30.

³⁰ M. 567, Durie 688, v. *Earl of Nithsdale*. See Ersk. II.viii. 32 note.

³¹ M. 567, Durie 836. See Stair II x 13. Ross, ii.431–2, 440.

³² M. 14105, Durie, 745, v. *Wilson*.

the aid of other diligence either done or preparing, is the case of *Ker v. Hunter*, 20 Decr. 1676.³³

What marks the weak and wavering notion which even at an after period was entertained of this right of action, is, that the annual renter was in use of resorting to additional, and sometimes not very suitable expedients, to aid and sustain it. In which view you may attend to the case of *the Earl of Annandale v. Earl of Nithsdale* (20 July 1633)³⁰ where the annualrenter, distrustful of his right to sue the tenants directly, had thought it advisable to raise and use arrestment in virtue of his sasine, and then insisted against them, not in a common action, but in a forthcoming as arrestees; which device, though somewhat incongruous, was allowed to have effect. In short I do not find that the annualrenter was fairly permitted a direct personal action (without aid of other diligence done or prepared), before the case of *Ker v. Hunter*, 20 Dec. 1676.³³ A farther mark of the same difficulty and embarrassment is this, that we find styles of annualrent in which it is an express clause, taking the granter bound to cause his tenants enact themselves in some Court³⁴ to pay their rents to the creditor. Ross p.382.³⁵

In like manner, as to other intromitters with the goods, or the rents that were paid on account of them – we do find action sustained against a singular successor in the annualrented lands, who had intromitted with the rents – in the case of *Guthrie v. Earl of Galloway*, 15 Mar. 1637.³⁶

Before quitting this article, it is farther to be attended to, that, down to the last, a right of annualrent never was allowed to sustain what is properly called a decree of mails and

³³ M. 569, Durie 200. Stair, *supra*, Ersk. II. viii. 32.

³⁴ [Sheriff, sometimes the Baron Court].

³⁵ vol. ii. He mentions that the point is stated by Spotiswood, p.92.

³⁶ *Supra*. Ross ii. 432. [But then observe, the annualrenter had previously obtained a decree of poinding of the ground; and we farther find the Lords resolving on it as a new Judgement, that they would follow the same rule, in all other cases of the kind.]

duties against the tenants – a general decree that is, ordaining them to pay their current rents, and rents in all time coming during their possession to the pursuer. The reason was, that the annualrenter was not a landlord in possession, and having a general personal connection with the tenants by their contract. He was vested with an incumbrance only upon the lands and fruits, and a title of real execution against them – whence arose a personal claim against such into whose hands the fruits should happen to come, and to the extent which at any time they should actually have in their hands, but which claim, depending entirely on this fact of actual intromission, could not found any decree or proceeding whatsoever, that had a view to future terms or crops (see Ross, p.439–40⁴).³⁷ This indeed was expressly found in the case of *Kinloch v. Rochhead*, 5 July, 1701.³⁸ As to any higher privilege, or power of property respecting the lands, such as letting a tack, or removing a tenant – an annualrenter had certainly no just pretension to it. It was found he could not remove, on 9 March 1630 – *Auld v. Yule*.³⁹

I think it is needles to enter more at large into a discussion of the right of annualrent: we have already seen sufficient, to gain a general notion of the plan of it, to be satisfied, that, in more respects than one, it was an awkward and inconvenient mode of security for money⁴⁰ – most of its faults were the result of the anxiety, which was natural at that time, to cover up the real transaction of a loan at interest;⁴¹ which having afterwards becoming a lawful transaction, certain alterations in the style of the writ did soon after take place, though not so considerable as might perhaps have been expected, owing I presume to the influence of the long established styles and forms of business. The changes that took place were chiefly three. In the first place, the annual rent sold and made over was no

³⁷ Ersk. IV. i.11, cited by Ross, ii. 439.

³⁸ M. 569, Fount. ii. 117, referred to by Ross ii. 439. See Kames i. 251–2.

³⁹ M. 570, Durie 603, v. *Yule and Auld*.

⁴⁰ Kames, *Law Tracts*, i. 247–8. Stair, More's notes U.p.ccxx.

⁴¹ Stair II.v.2.

longer a fixed and settled annualrent, but such as then did, or should afterward correspond, to the principal sum or price – according to the rate of interest at the time. In the 2d place (but this did not come so early in fashion) the annualrenter, for his more easy access to the rents, got an assignation to the mails and duties – see Dallas p.696, where it is a clause;⁴² to as much of them, that is, as would pay the annual rent, whereby he gained a title straightaway to convene the tenants personally for their rents. And 3dly, the lender of the money now obtained, what under the antient annualrent he had nowise enjoyed, a right of calling for and taking up his money; as the borrower had a right to redeem and pay it up if so disposed.⁴³

This last however the debtor did by no means submit to, in that free and ample form which he reasonably might have insisted on; but in case only of requisition being made in a certain solemn manner, and upon certain *induciae*; in which if there was any failure or inaccuracy, the obligation to repay the money did not arise, nor could any diligence ensue against the person of the debtor. 18 Janry. 1665, *Stuart*.⁴⁴ But what was more inconvenient still, and to us seems very strange (but was a point settled in Law down at least to the time of Lord Stair, and indeed even later), the effect of using this requisition and begetting the personal obligation of repayment was, that the real security for the money extinguished and came to an end: so that from thence forward no poinding of the ground, nor other real diligence as upon a *debitum fundi*, could be used upon the right.⁴⁵ And this, you will observe, did by no means happen (though it was sometimes argued to that effect – see 25 June 1672 – *Execrs. Of Seaton*⁴⁶), upon the notion that by his requisition the creditor has indicated his *animus* to make the sum moveable; but upon the

⁴² 1697 ed. Ross, ii.373, Kames, i.252.

⁴³ Ersk. II.ii.5, Bell § 908, *Comm.*, i.713, Ross ii.342.

⁴⁴ M. 5587–9, Stair i. 251–2, cit. *Stewart v. Stewarts*. Stair II.i.4.

⁴⁵ Ross, ii. 349, Stair *infra*, Ersk. II.ii.16.

⁴⁶ *Seaton's Sisters and Exors. V. Seton*, M.5572–4, Stair ii.89. See Stair, II.i.4, x.22, Ersk.II.ii.16.

notion of an absolute incompatibility between the two species of right. It was not conceived (whatever the reason of the notion was), how at one and the same time there could be a principal sum, or debt, in a moveable condition – an obligation to repay the price – and yet a real estate of annualrent subsisting, and having operation through and by reason of the advance of that very sum of money. There could (they argued) be but one estate in the case, which must necessarily be of a determinable nature one way or another – either an obligation for money – or a real right of annualrent. Whatever might be the source of this doctrine, it was at least a very inconvenient one; in as much as the creditor was forfeited of his security from the day of requisition, and before actual recovery of his money. And farther, even if the money was not paid at the term required, in which case the real security was more material than ever, still the situation was the same, until either expressly, or tacitly, by receiving farther annualrent, the creditor passed from his requisition.

Practitioners endeavoured accordingly to obviate the inconvenience, by inserting in the deed an express provision to the contrary, and which allowed the annualrenter, as often as he should see cause, and without any change in the condition of his right, to revert from the one security to the other, or use the proper execution to both, together, the one without prejudice of the other; – to poind for the annualrent, and apprise for the principal sum (which Stair says would be effectual, p.633⁴⁷). But this device, as far as appears, was not allowed to have effect, until such time as the opinion of lawyers about the concurrence of personal and real diligence had come in some measure to alter; and the compatibility of the two to be considered as at least a possible thing – (see Ross, p.350, 51 *et seq.*⁴⁸)

⁴⁷ 3rd ed., IV.xxiii.5. See Ersk. II.ii.16.

⁴⁸ Ersk. *Supra*.

When this notion came to be taken up, a material variation was made in the form of transaction. What men of business now did was, entirely to throw out the clause of requisition, and in lieu thereof to insert an obligation on the debtor to repay the original sum with interest, at a stipulated term, or at any other term thereafter, when it should be asked; whereby without any form or trouble, the annualrenter might take up his money, and do diligence of every sort, to recover it, when he pleased.⁴⁹ At the same time, the deed personally bound the debtor in payment of the lawful interest of that principal sum, so long as it should remain in his hands. And lastly, for farther and better security of that interest, the deed obliged the debtor to infest the lender, in such an annualrent, to be taken out of certain lands, as did at the time or might afterwards effeir to the said sum received. It was in this form only, that the transaction came first to assume its proper shape of a Loan or Bond, and the parties to bear ostensibly, their real characters of creditor and debtor, and the real security to be tabled, not as an independent purchase of an estate, but as an assurance and dependency only of the personal obligation to repay.⁵⁰

Still however this sort of Heritable Bond (for so it was now called from its quality in succession), this sort of heritable bond, in the old fashion, was defective in this respect – that the infestment which it gave warrant for, was in the annualrent only of the sum;⁵¹ And of course it secured to more, but left the principal sum, however large upon the footing of a pure personal claim; for which the creditor had no access to poind the ground, or to sue the tenants for their rents. Having levied his annualrent for the year, the land, with its fruits and stocking, was disencumbered for the time till another year's annualrent fell due. Now to obviate this inconvenience practitioners contrived an heritable bond in another and a more ample form (see Ross, p.379⁴), Which in this chiefly differs

⁴⁹ Ross, ii.372, 378, Ersk. II.ii.5, Bell *Comm.*, i.713, Bell § 909.

⁵⁰ See Dallas, 694–8, 701.

⁵¹ Bell, *Comm.*, i.700. The annualrenter had no preference for his penalty. *Do.*

from its predecessor, that it gives warrant to infest the creditor, not only in the annualrent out of the lands, but in the lands themselves,⁵² for security of annualrent, principal sum and penalty.⁵³ Under which form, you observe, the creditor has just the same access to the rents and to a poinding of the ground, for recovery of the principal sum and penalty, as for the yearly interest: and having entered to possession, either in one way or the other, he imputes what he receives, in payment, accordingly. At the same time it is to be observed, that if the lands were sold, they could not be disburdened of the annualrent but by payment of the principal sum, or price; so that the difference only lay in what has been said. (See Dallas p.696. Clause 9.)

⁵² Ross, ii. 382.

⁵³ Bell, *Comm.*, i. 701.

SERVICE OF HEIRS

[I proceed now to inquire concerning the circumstances which must concur in order to make a service effectual for transmission. The most material of these seems to be – 1. A service is proper and applicable only to the case of succession. That is where some interest is to pass or may pass and devolve from a person deceased to the heir. The right to be taken up by a service must be a *heriditas*, or some succession descendible to the heir. No matter though there should be some subject or right *in XXXmedio*, still if the party receiver takes that right not as heir and as taken through the person who last had the fee of the subject, but as disponee under the form of a gift or settlement or transmission *inter vivos*, a service is inept and quite inapplicable. A service is out of the question when one has right as institute under a deed of settlement bearing a precept of sasine or procuratory of resignation: no matter though the settlement makes its first appearance in the repositories of the deceased. Suppose that an entail is found in a person's repositories at his death in favour of John, *nominatum*, as institute, and **XXXto** a series of substitutes – now in this case John is not an heir but a disponee. As such he cannot be regularly served and even if an inquest should do so *per incuriam*, the service so expedite can give no title to the entailed lands and consequently all deeds executed by John would be null. No doubt in substance and effect the institute is heir, but in form he is a disponee and singular successor only and therefore cannot claim to serve as heir. It is true that a general service or a special service could do no harm but neither could they do any good.

In what I have now said I have had in view the case of an absolute and immediate conveyance. The same form of title, however, is applicable alike where the disposition is conditional depending on a certain event. Put the case that a person disposes his estate as follows – ‘I John in the event that I die without issue of my body do dispoise such and such lands in favour of my brother James’. Or ‘I John, failing me and the issue of my body, do dispoise to my brother James’, etc. Under such a settlement James is a

conditional disponee. He, James, has a direct and immediate right to the estate only in the event specified as a conditional institute and on that event he vests himself with the lands straight-way by means of the procuratory or precept and has no occasion for a service as heir. You observe that, if issue of John actually do come to exist, they would be under the necessity of serving as heirs of line to John, their father, and could not make up their title under the settlement, for that settlement does not dispose to them – it takes notice of their failure only as the condition of the disposition to James. Even if issue of John came to exist, still the form of James's title would be the same if those issue happened to die in the lifetime of John. The conveyance is not to James through the heir of the disponent's body, but to James in the event there be no issue. Now James cannot serve heir to them. If the issue had survived the father, then the deed would have been thrown aside. This was the ground of the judgement in the case of *Menzies v. Menzies*, 25 June, 1785,¹ though that does not appear from the printed Report. Here the disposition was in the following terms: 'I hereby with and under the burdens etc. after specified and failing heir male of my body do dispose to B my Grandchild etc'. And it was found that the person who took up the lands as grandchild was not an heir but was disponee under a settlement and as such required no service. That judgement was affirmed in the House of Lords.² Again, *Mitchelson of Middleton v. Mitchelson*, 2 March, 1820,³ where a gentleman had four daughters and conveyed his estate to trustees for behoof of the eldest daughter and made heritable provision for the younger daughters. He married a second wife and enacted the estate to the heirs male of that marriage without mention of his previous daughters and it was found that the daughters had no need of service.

¹ M. 15436, Hailes 969.

² 1801, 4 Pat. 242 remitted, 1811, 5 Pat. 522 affirmed.

³ Not reported (vol. cxxxi, No. 44).

Thus much of that description of cases on the one hand. On the other hand, the case is different and a general service as heir of provision is indispensable wherever the deceased by his deed of settlement assigned and disposed for new infeftment in favour of himself or of himself and his issue whom failing in favour of James. Under such a form the first dispositive act is in favour of the maker of the settlement and his issue. The issue, if they did exist, would be intitled to take up the procuratory of resignation by a general service under and in terms of the settlement, and so would invest themselves with the estate. Or the maker of the settlement might proceed to take out a new investiture to himself and his issue whom failing to James. In such case the issue would require to make up titles by a special service. So standing the case James has no direct and immediate right and can be no other than an heir substituted to the maker of the settlement and he, of course, has occasion for a service. Judgement was given accordingly in the case *McLeod v. McCulloch*, 10 July 1731 – Dicty. 2.368.⁴ I refer also to the case of *the creditors of Johnstone*, July 1727, Dicty. 2. 396.⁵ The like law was applied in the case of *Marion Gordon v. Clementina Maxwell*, 15 Janry. 1817.⁶ The question here was under a deed of entail which disposed the lands with procuratory and precept, first in favour of the maker himself whom failing in favour of Alexr. Maxwell, his eldest son existing at the time *nominatum*. Now here the party Alex. Maxwell ought to have made up titles by general service as heir of tailzie. Instead of doing so, however, he took up the precept as a precept granted direct to himself, and was infeft on it, and granted a bond of locality to his wife. That bond of locality was set aside as proceeding *a non habente*. In our practice a service as heir is regarded not in the light of evidence of the fact of relationship, but it is considered the means and solemn instrument of the transmission of some right in the way

⁴ M. 14366.

⁵ M. 14855.

⁶ Hume 875 (vol. cxxvi, No. 30).

of succession from the dead to the living. It is very true that in obtaining service, the party pursuer of the brieve must lay before the jury evidence of his propinquity with the deceased. But when obtained the retour of service is not regarded as evidence only but as the public assumption of the particular character of heir and the solemn instrument of the transmission of a right from the dead to the living. Accordingly a service is required in some instances where there is no need of evidence. And in other cases where it would answer the purpose of evidence only our practice does not consider the service as necessary. Thus put the case that a person in his contract of marriage becomes bound to ware and lay out a certain sum of money for the benefit of his younger children, but that he fails to do so and encroaches on the sum by gratuitous deeds. If the younger children mean to insist for payment against the heir, or in the reduction of the gratuitous deeds, they have no need of a service to establish their right to do so. The right of challenge vests in the children ~~XXX~~*suo jure*, being established under the contract of marriage. The father could not reduce his own deeds and therefore, if a service was required in these circumstances, it would be required not to transfer any right from the father, but as evidence that the pursuers are the persons provided for by the contract of marriage. Take the case of an heir of entail who has contravened and has become liable to an action of declarator of irritacy. To enable the substitute to institute that section a service is not necessary. That right of action belongs to him, and the whole substitutes as a creditor under the deed of entail. And if his character be disputed, it will be necessary for him to substantiate it by evidence before the Judge in the action of declarator. Where the nearest heir of entail or provision at the time has served heir, and where a nearer heir is afterward born in whose favour the other must denude, this nearer heir is entitled to insist that the other denude without service. By obtaining the decree of declarator the pursuer is not vested with the estate and is not at once enabled to obtain infeftment. If the defender,

however, refuses to comply with that decree, the pursuer is entitled to adjudge in implement in common form. A service might be useful and advantageous to substantiate the state of relationship, yet it is not really necessary or indispensable. In the case of a tailzie which provides that a certain estate shall not be united with the estate settled, but that it shall pass from the heir in the event of that other devolving on him, here, the next heir may, without the form of service, forgo or compel the possessor to denude. In these cases a service would be harmless enough but it is not necessary, because the right to be carried into effect is already in the claimant. This on the one side. Now, on the other hand, the right of the party called by the deed of succession may be truly a substitution. A substitution is only a title of succession, and, wherever he is a substitute, there must be a service, and such will not be dispensed with even where he is called *nominatim*. Here all attempts to save the necessity of several services by infesting all the substitutes in existence at the time are to no manner of purpose. Obviously there cannot be several fiars or owners of the same subject *in solidum* at the same time. A judgement was given the other way as to an heritable bond payable to a father and his two sons after his death in the case of *the Laird of Lamington*, 23 July 1675.⁷ There is, however, a series of later precedents more worthy of reliance on the other side. I may refer you to the case *Kerr v. Howieson*, 11 Feby. 1708, Fount.;⁸ to the case of *the creditors of Johnstone*, July, 1727, Dicty. 2.396.⁵ I may next notice the case of *Lord Napier v. Colonel Livingstone*, 3 March 1762,⁹ the judgement in which was affirmed on the 11 March 1765.¹⁰ The Countess of Callander in her contract of Marriage disposed certain lands, her own property, in favour of herself and her husband in conjunct fee and liferent for his, the husband's, liferent use allennarly, and also to James Livingstone and his heirs male. Under this form of words the

⁷ M. 4252, v. *Moor*.

⁸ ii. 429, M 14357–9.

⁹ M. 15418, 15461, Bell Ca. 184, 5 B.S. 885.

¹⁰ 2 Pat. 108, 2 Ross L.C. 425.

fee of the lands vested in and returned to the Countess herself and on her death, when the succession opened to Livingstone, he ought to have served heir of provision to the Countess. In place of this, however, he expedite a charter on the procuratory of resignation and was infeft. And that infeftment and the right of a purchaser were found null. That judgement was affirmed. I may notice also the case of *James Hay v. Sir Charles Hay*, 30 June 1758.¹¹ The fact here was that sir James Hay had disposed and conveyed a certain estate to his son John Hay and the heirs male of the marriage the son was about to enter into, whom failing to the heirs male of any other marriage which the son should contract; whom failing to the testator himself, Sir James Hay. The succession opened to Sir James Hay, in consequence of the death of the son without male issue, and it was found necessary for the father to invest himself by service to his son just as a stranger, as the fee had passed out of his person by his own deed. Last of all, I refer you to the case *Gordon v. McCulloch*, 23 Feby. 1791.¹² In that case the question arose from the disruptive clauses of a deed of entail, which disposed the lands to the entailer and to 'David McCulloch, my only son'. By this form of words the son was made fiar of the lands along with the father, but it was obvious that there was no intention to create a conjunct fee. And it was found that the son on his father's death had made up his titles properly by a service as heir of entail, and that, as heir, he was bound by the limitations of the entail which were directed against him though not against the disponent. Thus much as the first case, namely as to the application of the service.

2d. The second essential to the effect of a service is that it be a service to that person who is last duly vested with the right meant to be conveyed. In this article questions chiefly occur as to the general service, and some of those questions are very open to difference of opinion with regard to the most regular way of making up titles. As to one case there is no

¹¹ M. 14369.

¹² M. 15465, Bell Ca. 180 (vol. xxxv. No. 37 and vol. xxxvi, No. 26).

doubt. I allude to the case of a settlement being found in the repositories of a person deceased bearing a procuratory for resigning the lands to himself, whom failing, in favour of John, the intended heir. Here the personal right to the property was in the person of the deceased at the time of his death. He, the granter, might have obtained a new charter and investiture, and that right is conveyed out of his *hereditas jacens* in favour of John by a general service as heir to the maker. There is no doubt as to this. As little is there any doubt as to the case of a settlement bearing a procuratory for resigning direct in favour of John, whom failing in favour of James under reservation of the granter's liferent and of power to revoke and alter at any period of his life. If the institute John, dies after the entailer and without having taken any measure towards completing his investiture, or having gone the length of obtaining a charter but without having been infeft, it is clear that James, the substitute, must make up titles in the form of a general service as heir of provision and that service must be a service to the institute, John, and not the maker of the settlement. Under that settlement which as far as related to the fee was devised in favour of John, a new charter of the fee could not have been obtained by the maker of the settlement which was in his favour as to the liferent only, and therefore a service to the maker could carry nothing. It is true that the deed of settlement does not put an end to the maker's previous feudal investiture of the lands and, as the feudal right remained in the deceased at his death, it falls into his *hereditas jacens* and out of it may be taken by a special service on the part of the maker's heir at law if he happens to be a different person from the heir of provision. But then the two services are quite different – to different persons and in different characters – though of the same subject. The one is a special service as heir of the line and the other is a general service as heir of provision, and they serve only to put each party in a situation to appear in a Court of Law for a trial of whose right is the best. The question next occurs, what is to be done where John, the institute,

dies before the maker of the settlement? The course to be followed in that case is just the same, namely James, the substitute, must make up titles by general service to John, the institute, provided always that the settlement had been delivered to John, so that he might have proceeded to resign on the procuratory, and thus might have obtained a new charter in his own favour. The right so vested in John cannot be extinguished by his death nor does it revert to the maker. It must pass by service from the institute to the substitute or next heir of provision and when the substitute has got service, he is in the same situation as the institute was. Put the case, however, which differs from this, that John, the institute or disponee, dies during the lifetime of the testator without having obtained delivery of the deed – without perhaps having known of its existence – and that the deed makes its first appearance in the repositories of the maker of it at his death. There is certainly here in point of law some difficulty of expending a general service in the person of James, the substitute, as heir either to John, the institute, or to the maker of the settlement. You observe that in regard to the testator the deed and the procuratory do not stand in his favour, as to the fee and property of the lands but as to the liferent only, and therefore could not have served to obtain a charter of the fee to the maker. It therefore does not appear that a service to the maker would be effectual to vest him with the fee and it does not seem competent to get a service to James as heir to him in the fee.¹³ It is very true that a judgement in favour of such service as heir to the entailer was given in the case *Gordon v. The Creditors of Carleton*, 12 Feby. 1748 (Kilk. 512).¹⁴ The deed of settlement, however, in the case happened to be of a very anomalous and irregular kind, the procuratory being in the first place in favour of the granter's heir male, whom failing to John, whom failing to William, so that no direct right could vest in John, to be carried by William through a service as heir to him, hence it was inferred, it seems, *ex necessitate*,

¹³ See Sandford 494 etc.

¹⁴ Serv. & Conf. 7, M. 14366–8

that the right remained with the granter of the entail himself, and when the title was so made up, doubts were entertained as to its effect. That on the one hand. On the other, there is some difficulty in serving in the character of heir to the disponent or institute, John, who died before the testator and who had never possessed of or known of the deed. He could not have made any use of the deed and he might have been excluded altogether by the testator cancelling the deeds. It, therefore, appears that there was no right in the person of John to be carried by service as heir to him in the person first called. Nevertheless it has been received in practice that a general service to the disponent or institute is applicable in such a case, and in consequence of the general practice such service may probably be sustained. In fact it was sustained in the case *Brown v. Campbell*, 28 Novr. 1770,¹⁵ where a title was sustained made up by general service as heir to the predeceasing disponent. But the report is not in such terms as enable me to state, what the precise view might be that was taken of this service, and whether it was not rather sustained in the way of evidence only of the predecease of the disponent. Suppose the deed to contain a clause dispensing with the delivery of it and that it has remained in the maker's possession unaltered, there seems room to argue that it is in this way virtually delivered and that a beneficial interest is therefore conferred on the disponent which may, by a service as heir to him, be carried to the person called after him.¹⁶ After all, however, some may be of opinion that in such a case it is] safer, and more advisable to have recourse to some of those other and extraordinary expedients, which are resorted to in default of the more regular method by service.

Perhaps, however, where the substitute, James, is a different person from the entailer's heir of line (which the case supposes him to be) it is a more regular and advisable course for James to charge the heir of the line to enter and make up his titles. On the ground of

¹⁵ M. 14949 cit. *Campbell v. Campbell & Brown*.

¹⁶ See Sandford 494 etc.

this general charge or passive title, he raises an action against the heir of the line concluding to have him decerned to dispoise and convey to James in terms of his predecessor's deed; and, in implement of the decree in this action, he adjudges (having first given special charge) and thus obtains his charter and infeftment.

Where, again, the substitute James, is himself heir of line to the entailer, and finds it material (which it may sometimes be) to possess on the settlement only – being perhaps a tailzied settlement – there for aught I can see it is a competent course for James to raise in process of declaration of his right, in respect of the institute's predecease (calling as parties all concerned in the succession), and with the decree obtained in that process, he goes to the superior, and having produced his decree as his title to the procuratory, he obtains thereon a charter of the lands. [Whether that is a proper and competent way of proceeding but united with many others was debated but not decided in the case of *Lady Hood MacKenzie v. MacKenzie* in which a judgement upon a different point was given by the Second Division on the 24 Novr. 1818.¹⁷ No express judgement was needed but in their last Interlocutor the Lords thought proper to expunge certain words from their former Interlocutor (3 Decr. 1816) tending to lead to such a doctrine and upon the whole from the printed report they seem to have entertained doubts of the correctness of the former decisions. The chief exception to the rule we are now speaking of arises from the Statute 1685 anent Tailzies and which in case of contravention by the heir in possession allows the next heir to pass by the contravener and to serve heir to the immediately preceding heir. In such a case the heir supports his title to the lands by producing to the Inquest his decree of declarator of irritancy.

It is, in the third place, no less material to the validity of the service that the person served be truly heir to the subject to which he serves. That is, if *per incuriam* a person, who is

¹⁷ F.C. (vol. cxxx, No. 8 and vol. cxxvi, No. 4) affd. & remitted, H.L., 1822 1 Sh. App. 150.

not the true heir, obtains a service, the case is open to redress by a process of reduction at the instance of the true heir, provided that process be brought within twenty years of the date of the service, the prescriptive period fixed by the Statute 1617 c. 13¹⁸ in place of the term of three years allowed by the act 1494 c. 57.¹⁹ In relation to this Erskine § 19²⁰ justly and properly disapproves of Sir George MacKenzie's opinion,²¹ which is that the benefit of this Statute is limited to the case of a competition between both classes of heirs, that is heirs of blood and heirs of provision. Sir George MacKenzie's opinion would thus go to exclude the benefit of Statute in the case of heirs of blood competing. The truth, however, is that it was the case of heirs of blood competing which the Legislature had in view. But, in practice, as the enacting words are quite general, the Act is applied alike to either description of heirs. In Act 1494 c. 57 there is a reasonable exception in favour of such heirs who are not of lawful age, or who are out of the country, or who are not in a capacity to exercise their right of challenge. The like exception, however, is not made expressly in the Act 1617. The deduction of minority is an article of the general law of prescription and it would likely be allowed in this case. Besides the last statute is not made in repeal of the former one; on the contrary it narrates and is made in amendment of it. Fountainhall,²² in reporting the case of *Lady Edinglassie v. Lord Pourie*, 11 July 1701, says that the Court there was of that opinion – of opinion that the exception of minority was applicable. It is more doubtful whether the exception of the true heir being out of the country would apply. Within twenty years then it is competent for the true heir to set aside the service of a person who is not so. Even where the nearest heir has transacted with and renounced his right in favour of the more remote one, still a service as nearest and lawful heir by the remote heir is not a valid title. The renunciation of the right is a

¹⁸ 12 mo. and record eds.

¹⁹ 12 mo. ed., 1496 c. 6 record ed.

²⁰ III. vii. 19.

²¹ *Obs. on Act*, 1617 c. 13 (1687) p.30.

²² ii. 119, M. 10988–9

matter with which an inquest can have nothing to do. The right by relationship or by settlement is what the jury have to declare. The retour of the service of the remote heir as the nearest heir by blood would be false and by the production of the renunciation to the jury that would be made known to them. It is very true that the person in whose favour the renunciation is made has right to the lands, not in the character of the heir, however, but as singular successor, and, in order to invest him with that right, the nearest heir, who cannot divest himself of his character of nearest heir, must make up titles and then convey the lands to the remote heir.

Mistakes as to the true heir do not so often happen in the case of succession by relationship, as in the case of succession by provision, by settlement in which the destinations are often ambiguous and sometimes inconsistent. It is therefore proper here to notice a few of the rules of construction of some of the words of style which occur in settlements. The general disposition of our practices is to construe all phrases of style, when that can be done without violence, with reference to the order of law. So far as the testator has plainly altered that order his settlement is the only rule; but wherever that settlement employs equal equivocal or pliable phrases, then the settled bias of our practice is to have recourse to the order of succession *ab intestato* in order to discover the probable meaning of the testator. So as to the meaning of the word 'heir' occurring in deeds of settlement. In interpreting this term, the general direction is that the granter shall be presumed to mean the heir according to the order of law. The term 'heir' is not of an invariable construction but it takes its sense from the subject of its application and the circumstances of the case. Thus, when a person provides a land estate to 'the heirs of the marriage', it is not understood that he intended a division among the whole children of the marriage nor even a division among the males. He is held to intend a succession to the children *seriatim* according to the order of law – to the males before the females and to

the eldest male before the younger male, and to the daughter of the oldest male in preference to the younger males. Take the case likewise of a provision in a marriage contract of a land estate in favour of 'heirs male and female of the marriage'. That provision is not of the same import as a provision in favour of the whole children or bairns of the marriage. Under it the children shall take the estate *seriatim* in the order of law – the females in default of the males only; and the eldest male preferable to the younger. Put the case in like manner that a person purchases an estate and takes the conveyance to himself and to his heirs male, and dies leaving an elder and a younger brother. It is the elder brother as heir of conquest who shall have right to the lands (if there is not an express settlement in favour of the heir of heritage), though it is very possible that the purchaser did not attend to the distinction between heritage and conquest. I shall here notice another illustration. Suppose that a person settles his estate on his oldest son by name and his issue male, whom failing in favour of his second son by name and his issue male and so on through the males *seriatim* according to their seniority; whom failing in favour of the females procreated or to be procreated of the same marriage as the sons named. Under that destination to 'heirs female' the daughter of the oldest son is entitled to succeed on the failure of the sons and their issue male in preference to any daughter – the child of the maker of the settlement, the immediate issue of the marriage. The grand-daughter is heir at law to her grandfather, and heir female also, and she is not to be excluded or debarred but by plain and express words which are not found in this settlement. Judgement was given accordingly in the House of Lords in the competition for the estate of Bargany between *Sir Hugh Dalrymple* and *Sir Alexr. Hope*, 27 March 1739.²³ Another case of the like description and which was decided in the same way occurred in the competition in 1739 for the estate of Kinfauns between *Margt. Blair* and

²³ 1.Cr. & Stew. 237, revg. 1738, Elch. Prov. To Heirs, 2.

*Alex. Lyon.*²⁴ The fact here was that by contract of marriage an estate was provided to the heirs male to be procreated of the spouses whom failing to the eldest daughter or heir female. Of this marriage a son and a daughter Mrs Lyon were born. After succeeding to the estate the son died leaving a daughter, Margt. Blair, and a competition for the estate took place between the grandchild, Margt. Blair, and the daughter, Mrs Lyon. The former, however – the grandchild – was preferred, and that judgement was acquiesced in. The case is referred to by Kilk. 463.²⁵ I may also mention that under a destination to ‘heirs female’, males may succeed if they take through females. Put the case that in a contract of marriage an estate is destined failing heirs male to heirs female, and that at the father’s death no sons are alive and the eldest daughter is dead, having left a son. That son is the heir of the provision and takes the estate to the exclusion of the aunts, as representing his mother. Suppose that there are born of the marriage one son and several daughters and suppose that this son leaves a son who also leaves another, and that in this way the succession goes for several generations and no different destination of the estate is made. Suppose that at last the male line comes to a close and that the last heir of this kind leaves a daughter, it would appear that the succession opens to her, and does not revert to the heirs of the daughters of the maker of the original destination. In all these instances the principle is a presumption of the will of the maker, of whom it must be held *in dubio* that he preferred the order of succession appointed by law. This presumption, however, like all others may be overcome by stronger presumptions. The Judge therefore may search for evidence of this granter’s intention, not only in the granter’s deeds but also in the whole circumstances of the case, and if from the evidence thus picked up the Judge upon the whole is impressed with the full conviction that the deceased did intend to appoint an order of succession different from the order of law, he will determine accordingly. That is

²⁴ 1739, 5 B.S. 663. Both cases were followed in *Johnstone v. Johnstone*, 1839, 2 D. 73.

²⁵ See Sandford 65, McLaren i. 446, *Ker v. Ker*, 13 Nov. 1810 F.C. (vol. cix, No. 103) per L.P.

more particular the case in regard to the construction of the term 'heirs' which is a broad, general and pliable term. Stair p.478 No. 12²⁶ says that, 'though such term do ordinarily signify heirs of line, ... yet the adequate signification thereof is not heirs general, but heirs generally, whether of line, male, tailzie or provision'. Thus the eldest son takes up the land estate provided in the contract of marriage to the heirs of the marriage. But if a person in trade and who has no landed property provides a sum of money to the heirs of the marriage, that sum shall divide among all the children equally. The subject of provision was moveable at the date of the contract, and it would be unreasonable to suppose that the party intended to provide only for his eldest son. It shall make no difference then in favour of the eldest son that the sum happens to be invested in heritable property at the death of the father for this may have been done for security only. Upon the whole then, and more especially in the case of a provision of conquest to the heirs of the marriage, and where it is found absorbed in a heritable subject, it is not presumed that the settler meant it all to go to the heir at law, by which the younger children would be left in indigence; it is presumed that he meant merely to secure the property by thus vesting it. In such cases the subject is converted into money at the death of the proprietor and distributed among the children. A provision to the heirs of the marriage of all the sums to be acquired is construed in the same way, namely as in favour of the whole children equally, though it should happen to be vested in heritable property at the father's death. Still, however, as I formerly mentioned, this is not exclusive of the father's power of dividing among his children.

The phrase 'heirs' is then, in our practice, a phrase of various and pliable construction, capable of being applied in favour of different orders of persons, according to the nature of the subject, and according also to the situation of the contracting parties, and the

²⁶ III. V.12.

circumstances and situation in which the deed was made. This may be illustrated in its application to conquest. Put the case that the new acquisition conveyed to a person and his heirs is not a principle and independent right but some inferior right – something accessory and relative to – an appendage of – a subject or tenement which previously belonged in property to the party acquirer, and which subject had been settled on a special order of heirs. Now here the term ‘heirs’ in the conveyance of the new and subordinate right shall not be applied to the acquirer’s heirs of line. It shall be understood as meaning the heirs of provision of the acquirer in the principal subject so as to unite and consolidate the title of the two subjects. This holds in the purchase of tythes or the superiority of certain lands previously belonging to the acquirer, or to the case of a purchase of a right of patronage belonging to lands which had been previously reserved from the original sale of the lands. It may be applied in like manner to a reserved right of forestry or to any heritable right of office. It also holds in the case of a purchase of tacks, servitudes or annual payments out of lands. In all these several instances it is reasonable to think and believe that the party acquirer intended to make the acquisition for the purpose of improving the right to and consolidating it with the principal subject. This was applied in the case *Greenock v. Greenock*, 16 Decr. 1736 (Dicty. 2. 401²⁷). At first there may strike you, as inconsistent, a decision in the case *the Duke of Hamilton v. the Earl of Selkirk*, 8 Janry. 1740 (Dicty. 2. 401²⁸) In that instance a right of property was acquired by a superior and conveyed to him and his heirs whatsoever; and it was found to devolve to his heirs in the superiority of the lands and not to his heir of conquest. This, however, is in truth another illustration of the same principle. Though the valuable part was drawn after the least valuable the result was that the property and superiority were sent into one channel – namely, into the order of succession for the superiority, which was fixed and

²⁷ M. 5612.

²⁸ M. 14935, 5615, 5554, affd., H.L., 1740, 1 Cr. & Stew. 271.

could not be altered. I may refer you to another illustration in the case *Crawford v. Hay*, 16 Novr. 1698, Dalrymple.²⁹ This was the case of a person who had right to the whole teinds of a certain parish by virtue of a long tack in favour of himself and his heirs male. Now it so happened that in subsetting the teinds of certain lands to one of the heritors of the parish he took the tack-duty payable to himself and his heirs whatsoever, and the Court found it not to be held that he had any purpose of altering the order of succession. In like manner when a succession stands limited to a special order of heirs by the old titles of the lands or by a series of settlements, our practice is not disposed hastily or rashly to presume an intention of altering that order of succession though the word ‘heirs’ be employed in later deeds, if such later deeds be of such as have not a settlement of succession for their object or if they are partial, inferior or collateral deeds which may be construed in reference to the former settlement. This is also the case with deeds of which it was not the chief purpose to settle the succession. Put the case that the investiture of a certain land estate has long stood in favour of heirs male; but suppose that a small portion of the estate has for some temporary purpose been vested in the person of a trustee, and that the trustee reconveys it to the truster and to his heirs whatsoever. That conveyance shall not supercede the old investiture of heirs male. The object of it is not to settle the order of succession, but only to reconvey the right to a portion of the lands into the family of the truster; which being done the old settlement carries the succession by the old channels. Or again, put the case that the heir apparent of an estate already destined to heirs male finds it convenient to make up titles by adjudication on a trust bond granted by himself and that in pursuance of the back bond granted by himself and that in pursuance of the back bond the trustee reconveys the estate to the truster and his heirs and assignees generally. Here the old investiture to heirs male shall continue to regulate the succession.

²⁹ 6, M. 14899.

The scope of the conveyance is to give the heir right to make up his titles in his own person to the lands, not to alter the destination of the lands. The trust bond and the adjudication are a substitute only for the service and object of the service is merely to give right to the lands. Besides, as a substitute to the service, the adjudication falls to be applied to the character of the heir male in which the truster must have been served, if that mode of completing the title had been employed. The term 'heirs whatsoever' is just that sort of pliable term, which may be varied in a particular deed for special and secondary purposes. On this principle judgement was given in the case *Skene v. Skene*, July 1723.³⁰ Likewise in the case *Weir v. Steel*, 7 Feby. 1745,³¹ and *Burnet v. Burnet*, 28 June 1765.³² I may also refer to the case *Robson v. Robson*, 18 Feby. 1794.³³ The *species facti* here was that the father quarrelled with his eldest son, he in consequence executed a settlement of his whole estate present or future in favour of the second son. The father afterwards acquired lands and took the conveyance of them in favour of himself, his heirs and assignees generally, and this circumstance the eldest son, after the father's death, pled was an alteration of the previous general settlement to his exclusion in regard to those lands. The Court, however, found that the words 'heirs and assignees' were to be applied as meaning the heirs under the settlement in favour of the second son. Judgement again went on the same principle in the case *Wilson v. the Creditors of Wilson*, 14 June 1811.³⁴ The fact here was that in his contract of marriage a person obliged himself to provide the whole heritable conquest that might accrue during the marriage in favour of the children of the marriage. He afterwards acquired certain burgage tenements and took the conveyance to them in favour of himself, his heirs and assignees. This was held to be in contradiction of the contract. It was held that the word 'heirs' must be taken in reference

³⁰ M. 11354.

³¹ M. 11359, 5 B.S. 224.

³² M. 14939, affd. H.L., 1766, 2 Pat. 122.

³³ M. 14958 (vol. xlvii, No. 110).

³⁴ Hume 534 (vol. cxii, No. 44).

to the destination in the contract and that the whole children of the marriage had right to the lands. Another judgement was given on the same principle in the case *Naismith v. Hamilton*, 16 May 1797,³⁵ which judgement, however, is more open to difference of opinion than any of the others. The fact was that a settlement in the form of a trust deed was executed by a person who at the time had no lawful children, in favour of a natural child. The granter afterwards married, and a contract of marriage, providing a jointure to the wife and sums to the children of the marriage, whom failing to his nearest heirs and assignees whomsoever, was entered into. He died without issue and it was held that the term 'heirs and assignees whomsoever' must be applied so as to mean the heir under the previous deed of settlement.

Thus far the law is tolerably well settled, and, upon the whole, on sound and reasonable grounds. I should, rather, hesitate, however, to go to any greater length and to say, as Erskine does § 47,³⁶ that in every case where there has been an antecedent destination of a subject limiting the succession to a certain series of heirs, the general word 'heir' or 'heirs whatsoever' in all posterior settlements of that subject must be understood as applicable not to the heir at law, but to the heir under the former investiture. There is some difficulty in allowing this doctrine to hold in the case of deeds of a general and comprehensive character which are made as settlements of succession and for the purpose of arranging the heirs. As to deeds and settlements of that description, the presumption is that the words used in them were deliberately considered and, therefore, in so far as they are different from the prior deeds, they must be held as intended to be an alteration of those deeds and to supersede them. Judgement accordingly went the other way in the case of *the Duke of Hamilton v. Douglas*, 9 Decr. 1762.³⁷ I refer likewise to the case *Rose v.*

³⁵ Not reported (vol. lxxvi, No. 2 and vol. lxxiv, No. 40), cit. v. *Cullons*. See again 1798 (vol. lxxix, No. 92).

³⁶ III. viii. 47. Cp. Sandford 80; see McLaren i. 455 note.

³⁷ M. 4358.

Rose, 10 March 1784.³⁸ Although in this case the main object of obtaining the new charter in favour of heirs and assignees whatsoever was to create a freehold qualification with a view to an approaching election, yet there was such a series of prior deeds in favour of heirs male that it was argued that the destination in the charter must be controlled by these previous deeds, but the Court held that the new charter ruled, and its destination governed the succession, so that the term ‘ heirs and assignees whatsoever’ must be interpreted in accordance with its strict and technical meaning without reference to the prior deeds, or the purpose with which the charter had been made. The like view prevailed in the case of *Molle v. Riddell*, 13 Decr. 1811,³⁹ the judgement in which was affirmed on appeal.⁴⁰ It may be remarked generally that the obtaining a new charter of one’s estate on one’s own resignation, and that charter in favour of heirs and assignees, is a strong matter, and very difficult to be got the better of. The charter is a new and regular contract between the vassal and the superior. It is expressive of the vassal’s determined purpose in favour of his heirs generally or of line, and it is the proper and regular course for clearing the field of all previous destinations in favour of other heirs, and it must be presumed to have been gone about with deliberation. When a person resigns for a new charter, he does so for all manner of right that is in him at the time, and agrees to hold the lands in future simply and absolutely under the new charter, which is a fresh contract. In receiving the resignation and granting a new charter to heirs, the superior agrees to receive all heirs whatsoever, and is not bound to receive any other. In such circumstances then I think that all prior titles are superceded. I may here notice one judgement, on the article, in regard to the estate of Croy, in the case of *Yuille v. Morrison*, 4 March 1813.⁴¹

In that instance for the purpose of making a freehold qualification, the *dominium utile* had

³⁸ M. 14955, 5229, affd., H.L., 1787, 3 pat. 66.

³⁹ F.C., 2 Ross L.C. 619 (vol. cxiii, No. 38).

⁴⁰ 1816, 6 Pat. 168.

⁴¹ F.C. (vol. cxix, No. 77, vol. cxiv. Nos. 103, 104 and vol. cxvi, No. 21).

been vested in a trustee and the superiority had been conveyed in wadset. Now the heritor after redeeming the wadset passed a new charter in favour of himself, his heirs or assignees whatsoever and at the same time had the *dominium utile* conveyed to him and his heirs and assignees. And this was found to exclude a previous destination secluding heirs portioners and to make the lands descend to heirs whatsoever. The same effect is produced by taking out a special service in the other character because the succession falls to be regulated by the destination of the last subsisting charter of the land and any service in whatever character cannot alter the order of succession. Suppose John to receive a charter in favour of himself and his heirs male, whom failing to his brother, James, and his heirs male. John dies leaving a son, who also leaves another son and thus the succession goes on for a series of generations, each heir serving heir to his father, all proceeding from the last charter. If, at last, the male line fails and the last heir leaves a daughter, she shall not succeed to her father but the succession will revert to James's heirs male. *Durham v. Durham*, 24 Novr. 1802;⁴² *Snodgrass v. Buchanan*, 16 Decr. 1806.⁴³

Thus much as to the construction of the term 'heirs'. The term 'children' or 'bairns of the marriage' does also often occur in contracts of marriage. The construction of it, however, is different from the construction of the term 'heirs', in as much as the persons provided for are described by their natural quality of issue of the spouses, and which quality belongs to them all equally; whereas the term 'heir' is a term of law applicable to them all *seriatim* only. The construction of the term 'children' or 'bairns of the marriage', therefore, is in favour of all the children equally, so as to entitle them all to share the succession. That construction was admitted long ago where the quality of the subject and the situation of the parties were favourable to the notion of division. Judgement to that

⁴² F.C., M. 11220 (vol. lxii, No. 15), affd., H.L., 1811, 5 Pat. 482.

⁴³ F.C. . M. App. Serv. Of Heirs 1, (vol. xcii, No. 39).

purpose was given in the case *Carnegie v. Clark*, 13 Feby. 1677,⁴⁴ and in *Carnegie v. Smith*, 10 July 1677,⁴⁵ both in Stair. In later times our practice is rather disposed to enlarge than to restrict the application of the rule. We are not, however, to understand that this rule is not liable to exceptions. From circumstances the term may be construed otherwise. The character of all the children was sustained in the case *Herries v. Herries*, 26 Novr. 1806,⁴⁶ where the contract of marriage bound the father to dispone to the children of the marriage. *Young v. Crawford*, 22 May 1817,⁴⁷ which related to a small pendicle of ground which had been long in the family and had been destined to the bairns of the marriage. It was held to belong to them all. Sometimes it has happened that these two terms have been conjoined by devising the provisions the ‘heirs or bairns’ or to ‘heirs and bairns’. Now as to the construction of such a phrase there is more difficulty, and our practice has not been invariable. Of old, the construction of such terms was that the whole children were entitled to share the succession. But of late the construction is the other way. The term ‘heir’ is considered as restrictive of the term ‘bairns’, so as to apply to the heir only who is both heir and bairn. Judgement to that purpose was given in the case *White v. Fairservice*, 17 June 1789,⁴⁸ where the dispositive clause of the deed was in favour of heirs and bairns and all other clauses mentioned bairns only. The like construction was applied in the case *Dollar v. Dollar*, 4 Decr. 1792,⁴⁹ where the provision was to the heirs or bairns of the marriage, and again in the case *Duncan v. Robertson*, 9 Feby. 1813.⁵⁰ No doubt the case is different where the settlement is of money, or of land purchased with money acquired during the marriage: here the subject will go to the whole

⁴⁴ M. 12840, Stair ii. 504.

⁴⁵ M. 12840, Stair ii. 536.

⁴⁶ Hume 528 (vol. xcii, No. 19).

⁴⁷ Not reported, S.L. vols. cccxiii, cccxix, cccxcvii, dv., v. *Crawford-Young*.

⁴⁸ M. 2317, 2 Ross L.C. 286, (vol. xxvii, No.7).

⁴⁹ M. 13008 (vol. xli, No. 20(2)).

⁵⁰ F.C. (cxix, No. 98).

issue notwithstanding the term ‘heirs’.⁵¹ However all the clauses and expressions of the deed must be weighed and attentively considered, and it may happen that such will outweigh this construction. I refer to the case *Wilson v. Wilson*, 1 Decr. 1769,⁵² where the whole issue were admitted in consequence of other expressions in the deed.

Before proceeding to the consideration of another article, I have to notice the construction of clauses of substitution. Where a settlement bears a procuratory of resignation in favour of John whom failing in favour of James, there is more than one sense in which you may construe the words ‘whom failing’. The meaning may be either that James shall have the lands on the death of John in any event whatever – whether he dies before or after the granter and whether he had or had not accepted of the settlement – and in such case James is a substitute. Or the meaning may be that James shall have the lands only in the event that John dies before the testator. There where James is called only in the case of John not surviving the testator James is not a substitute, but is a conditional institute, because James does not succeed John but takes his right conditionally and immediately in the first instance. In this sense these nominations were understood in the Roman law.⁵³ In our law, however, the substitute succeeds on the failure of the institute at whatever time he die. As far as relates to the settlement of lands, as I noticed when treating of Entails, our practice considers such clauses as a substitution. As to moveable subjects, however, they are obviously not so convenient for the subject of entailed succession. When the institute receives payment of the sum of money, as he must do when the debtor insists to pay, that sum is no longer a separate and distinct subject. Accordingly all such provisions of sums of money etc. are considered institutions only, so that if the institute once had right vested in him the right of the party substitute is at an end. It is mentioned, however, by Erskine

⁵¹ McLaren ii. 768, 769, referring to MS. note in Hume *Sess Pap.* In *Fairservice*.

⁵² M. 12845, Hailes 313.

⁵³ *Inst.*, II. xv. pr., D., XXVIII. vi. 36 pr. Ersk. III. viii. 44.

(§ 44⁵⁴) and by Kilkerran (No. 1⁵⁵ and 3,⁵⁶ *Voce* Substitution), that in sundry instances effect was given to such clauses as to money as clauses of substitution, and such must undoubtedly be the case where such appears to be the will of the testator. In *Duncan v. Myles, Lawson &c.*, 27 June 1809,⁵⁷ a substitution in moveable succession was allowed this being evidently the granter's intention. Still, however, the inclination of our practice is the other way – to construe such clauses in settlements of moveable clauses of institution, not as clauses of substitution. Judgement to that purpose was given in the case *Graham v. Graham*, 9 Febry. 1790,⁵⁸ and in *Brown v. Coventry*, 2 June 1792.⁵⁹ *Campbell v. Campbell*, 10 July 1817.⁶⁰ Here a person had executed and entail of an estate in favour of a certain series of heirs, and of the same date a disposition of all debts, sums of money heritable and moveable, &c. In favour of the same heirs who were called to the succession of the entailed estate. It was found that this was not a substitution but a conditional institution only and that the first institute could dispose of it to executors. (In what Erskine says on this subject he expresses himself too strongly). This is the settled distinction in this particular between heritable and moveable provision. We are not, however, to understand that the will of the testator where it clearly appears has not power to break down that distinction and to establish a proper conditional institution in the case of the right to a landed estate. To that purpose judgement was given in the case *Barr v. Stevenson*, 24 June 1784.⁶¹ Suppose that lands are provided in a contract of marriage to the husband in liferent and to the children in fee, whom failing the half of the lands to the wife in fee at the dissolution of the marriage. The special period for making the division

⁵⁴ III. viii. 44.

⁵⁵ p.521, *Campbell v. Campbell*, 1740, M. 14855–7.

⁵⁶ p.523, *Binny's Reps. V. Campbell's Crs.*, 1739, M. 6339.

⁵⁷ F.C. (vol. cii, No. 10 and vol. civ, No. 73).

⁵⁸ Not reported, *Campbell*, *Sess. Pap.*, Bell Ca. 313, 314, afd., 1791, H.L., 3 Pat. 210, cit. v. *Russell*.

⁵⁹ M. 14863, Bell Ca. 310 (vol. xl, No. 33).

⁶⁰ Hume **180 (vol xxxxxxxxxxxx No. 33)**.

⁶¹ M. 14862.

explains the will of the parties as being a conditional institution in favour of the wife in the event of there being no children alive at the death of her husband. If there be a child living at the father's death, then the condition in favour of the widow has failed, and that child's heirs will succeed however soon he die after the father's death. Or suppose that the subject is destined to the husband in life and to the children in fee, whom failing one half to go to the husband and the other to the wife on the dissolution of the marriage. Here the wife shall have no right if the children survive the marriage for however short a time. *Hamilton v. Wilson*, 8 Decr. 1687 (Harc.),⁶² Dicty. Vol. 2, p.396. In the next place, however, suppose that the institute survives the testator and has right, if he chooses, to claim but that he refuses and repudiates the succession. In point of material justice such a measure ought not to have effect upon any interest but on his own, and the right ought to pass to the person called after him as if he were dead. You find, however, that Bankton, 2. 358. 98,⁶³ says that in that case the whole train of substitutions is at an end because the repudiation of the institute makes way for the heir line of the testator. It would, however, require a stronger reason than this to justify such a matter, and to allow the institute entirely to subvert the will of the granter. I do not see any sound ground on which to consider the investiture of the institute as an absolute condition of the right of those persons called in the second place. If the substitution was guarded with ordinary prohibitory clauses against alienating or altering the succession – if the institute made up titles duly and had them conveyed in favour of the testator that deed would have been reduced as a perversion of the prohibition. If the institute stands by and declares that he will have nothing to do with the succession it seems difficult to give such effect to his mere standing by as to alter the order of succession when he had not made any connection with the estate. If he really wishes the heir at law of the testator to have the

⁶² 102, No. 390, M. 14850.

⁶³ III. v. 98.

estate, he ought to make up titles and then convey. Another reason for this doctrine is founded on point of form in the method of making up title. But substantial justice should never be lost for want of a formal method of making up titles. Where such a method is wanting the law should invent a new one, if in justice it is necessary, though it may not be the most regular. In the present case the right of the substitute may be declared by a decree of declarator in the Court of Session, with which decree and the procuratory the pursuer may go to the superior and have his titles completed. Bankton, in support of his opinion, cites the case *Hamilton v. Hamilton*, 15 June 1716 (Bruce⁶⁴) but the report of that case is so very short that it is difficult to discover the ground on which the decision was given. The case of a person who has right only under the deed of settlement repudiating the succession is a rare matter. It is not, however, so rare a matter that the person who has right both by the settlement and as heir at law would choose to make up titles as heirs at law and repudiate the settlement, for by the settlement he may be considerably burdened. But when he so makes up titles as heir at law, he by no means gets free of the burdens of the settlement to third parties. In serving heir to the testator he incurs an universal representation, which makes him liable to implement all the deeds of the testator and, among others, to implement and fulfil all the bequests, conditions etc. of the repudiated settlement.

Let us now put the case of a settlement being made which calls a certain person first but makes no mention of the issue or heirs of that person and calls a substitute. Suppose that the institute, the first person called survives and makes up his title. On his death, leaving issue of his body, who are not expressly called in the settlement, the question is whether the death of the institute, who survived the testator, the succession goes directly to the substitute to the exclusion of the issue, or whether it goes to the issue of the institute who

⁶⁴ li. 2, M. 14929.

are not mentioned in the settlement. Under a free and liberal construction of the intention of the deceased being as favourable to the children of the person whom he first calls to the succession as toward that person himself, there might be room for the plea in favour of the issue. There are reasons, however, to the contrary. As Erskine § 44⁶⁵ observes, it is natural and reasonable to suppose that as in the case of more remote connections being called to the succession, the testator would have expressly mentioned the children of the institute if he had intended them to have right, and in the ordinary case deeds are rather redundant in this expression. It seems now warrantable that the issue of any person, institute or substitute, are excluded where no mention is made of them in the destination of the succession. It is very true that if a settlement is made disposing the lands simply to John without mentioning issue or heirs and as little mentioning any substitute that settlement vests the fee in John descendable not only to his issue but to his heirs whatsoever. It is quite different however when, failing John and without mention of his issues or heirs, another person is called after John. Here on failure of John the person next called will succeed.

Even where a settlement makes mention of the persons who are to take the lands and the terms employed in the deed in calling these persons are known and technical terms – common phrases of style – and such as receive a certain settled construction, still serious grounds of doubt and hesitation will arise from the irrational and inconsistent consequences to which that construction leads and from the circumstances and situation of the granter. Doubts will arise concerning the granter's will or purpose – whether it is to be held to be what the words of style denote or something else which has not been stated owing to the want of skill of the testator. Difficult cases of this sort do arise from time to time, but nothing more can be said of them in a general way than that where technical

⁶⁵ III. viii. 44.

words of style have been used and where these are not of a flexible nature but have a known and settled construction, they are not to be set aside or got the better of in respect of arguments derived from circumstances, relative to the condition of the granter, extrinsic of the deed nor in respect of conjectures or conclusions founded upon or drawn from the words of other deeds or other parts of the deed if those conclusions be doubtful though at the same time matters of probability only. The least arbitrary (discretionary) and of course the better rule is to adhere to the rules of construction established by law. That course, though it may be hard in certain cases where mistakes have really been committed, is attended with this advantage also that it trains men of business and conveyancers to accuracy of expression and thus removes the risk of mistakes. It may further be observed, as to all conjectures and inferences of the testator's intention not drawn from the words made use of in his deed, that all such must be founded on general notions of what is judicious and prudent, but which may be far from being applicable to the case of an individual who might be subject to humours and placed in peculiar situations unknown to the Judges. *Flint v. Murray*, 22 June, 1774.⁶⁶ Judgement was given on this view in the case *Hay v. Hay*, 24 July, 1788.⁶⁷ Here the deed disposed lands *seriatim* to a certain series of substitutes and to the heirs male of the body of each substitute. As to one substitute, however, though without any visible reason, the conveyance was not limited to the heirs male of his body but was made to his heirs generally. It was argued, and reasonably argued, that the testator's intention was to convey to the heirs male only of the body of that substitute as was done as to all the other substitutes. But as the evidence as to this intention was merely conjectural, and, as it was mentioned in this way not only in the dispositive clause but also in the procuratory of resignation, and was thus not supported by any clause, and as the same thing occurred in

⁶⁶ M. 14952.

⁶⁷ M. 2315 (vol. xxiii, No. 39 and vol. xxvi, No. 10), See per Ld. Eldon, 5 Pat. 431 *et seq.*

another deed regulating the moveable succession, the Court did not think it warrantable to give way to that reasonable conjecture and held that the terms ‘heirs male’ are of a fixed meaning and must be applied to the heirs male of every kind. The judgement was affirmed.⁶⁸ On the same principle judgement was given in *Hay v. Marquis Tweeddale*, 20 June 1771, Wallace CollnXXX,⁶⁹ affirmed,⁷⁰ and by the House of Lords in the case *Baillie v. Tennent*, 17 June 1766,⁷¹ where the Court had decided against the words of the deed and according to evidence of the granter’s intention. The House of Lords,⁷² however, gave the words a strict interpretation. Much akin to that case was the case *Suttie v. Suttie*, 19 Jany. 1809, 2nd Div.⁷³ The circumstances were these. A father had disposed and settled certain lands in favour of David, his eldest son of his first marriage, and of John, his eldest son of his second marriage, equally between them and to their heirs and assignees whatsoever, whom failing the part of the party deceasing to accrue to the party surviving. David the eldest son died leaving no issue but survived by two sisters german, who, of course, were his heirs at law. Now under the words ‘heirs and assignees’ the sister of David was found to have tight to David’s share of the lands to the exclusion of John, the brother consanguinean, in whose favour the substitution stood and who pleaded that by the term ‘heirs’ this only meant the heirs of David’s body, not his heirs at law, his sisters. John, therefore, was obliged to cede the subject to the sisters, after having possessed it for sixteen years as his own property. I may also refer to the case *Campbell v. Campbell*, 28 Novr. 1770.¹⁵ Here a provision was made by a person in general settlement of his estate and effects in favour of his only son and his heirs male, probably ignorant of the meaning attached to the words. The son died before the father, and under

⁶⁸ 1789, 3 Pat. 142.

⁶⁹ F.C., M. 15425

⁷⁰ 1773, 2 Pat. 322.

⁷¹ M. 14941.

⁷² 1770, 2 Pat. 243, cit *Chatto v. Baillie*.

⁷³ F.C., (vol. ci, No. 31).

the words 'heirs male' a cousin german of the son was found to have right to the lands in preference to the sisters, the daughters of the testator.

Although, however, such be in inclination of the law in doubtful cases, and most undoubtedly it is the safe one in cases where the evidence of the party's intention is conjectural and extrinsic of the deed, still it does not follow that the same deed shall hold in cases where other clauses of the same deed or other deeds of the same series and by the same party yield clear and undoubted evidence of the testator's intention having been different from what the words employed by the usual construction import. It would not be reasonable to break down the plain intention of the testator for want of the technical expressions by rules of construction which were first made to discover the intention. Such was the case of the competition for the estate of *Roxburgh*, decided 23 June 1807,⁷⁴ where a substitution to a certain person and his heirs male was found to mean heirs male of the party's body only. The granter's intention was explained by a separate but relative deed of the same date made with reference to the settlement, and some attention was also paid to the phraseology of the period when the deed was granted, which then was not so fixed as it is now in distinguishing between 'heirs male' and 'heirs male of one's body'. The Judgement in the case was affirmed.⁷⁵ Where the same deed contains two clauses apparently at variance with each other, the one of which is general and capable of being read in more ways than one, and the other special and capable of being understood in one sense only, the latter shall be preferred. *Tinnock v. McLennan*, 26 Novr. 1817.⁷⁶ Here a person disposed his estate to his grandson and his heirs and successors whatsoever in fee and property, failing whom and the lawful children of his body the estate was to revert to

⁷⁴ F.C., M. App. Tailzie, 13, cit. *Innes v. Ker*.

⁷⁵ 1810, 5 Pat. 320.

⁷⁶ F.C. (vol XXXXXXXXXXXXXXXX

the testator. In these two clauses there was a manifest contradiction. As the last clause was the more special the Court held it to be the true destination.

I may close this inquiry by noticing one particular situation further, where on a reasonable construction of the will of the maker the whole settlement is set aside. I mean the case of a settlement made in favour of a stranger by a person who at the time had no issue but who afterwards marries and has issue. In such a case the settlement in favour of the stranger is entirely evacuated by the event in favour of the children though there should be no condition in it to that purpose. The condition *si sine liberis decesserit* is implied in the settlement. It is not a sufficient answer to this presumption to say that the testator, if he had intended an alteration, would have altered the settlement. It is very true that the testator might have altered it, but human nature is liable to procrastination and, as the presumption is that he intended to alter it, it must be held that his not having altered it proceeded merely from procrastination. Such reasonable presumption, however, must be kept within due bounds. I may notice the case of *Yuille v. Yuille*, 20 Decr. 1758.⁷⁷ The question here related to a deed executed by an old gentleman of four score at the time without issue giving a fourth part of his substance to his brother. He afterwards, however, had issue. But the deed was maintained as it related to a fourth part only of the estate and as it had not been altered during the two years the granter survived the birth of his issue. Also *Oliphant v. Oliphant*, 10 Decr. 1794⁷⁸

I have now called your attention to three circumstances which are indispensable to the application of a service.

4th. In the fourth place in order to have a good title by service, it is necessary that the person served be retoured under that particular character in which he truly had right to the

⁷⁷ M. 6400.

⁷⁸ Bell Ca. 125, 5 B.S. 643 (vol. lxxxiii, No. 28), F.C., xi, No. 45. It is now held to be reversed. McLaren i. 405.

subject. The meaning of this rule will best appear from stating cases for its application. Put the case that John's right to his estate is a personal right in fee simple descendible to his heirs in line without limitation. Suppose that John has two sons and a daughter. The eldest son, I suppose, dies before his father without issue and the father is survived by the younger son James and the daughter. Here the younger son must make up his titles by a general service. But suppose that, instead of serving in the character of heir of line, he serves in the character of heir male. It is true that in the case before us where the eldest son has died without leaving any issue he is heir male as well as heir of the line, but though this is true in point of fact, it is not true of necessity or from the face of the title. The verdict of the jury, finding that he is heir male, is not inconsistent with the supposition that the eldest son having left a daughter, which daughter, and not the youngest son, would be entitled as heir of line to take up the right. James's service as heir male gives him no right to the estate, because it does not connect with the titles of the estate, which are heirs of line, and there may, notwithstanding James's service, be a person in existence who being called to the estate as heir of the line is entitled to the estate. It is no good answer to this that the evidence produced to the jury proved that the eldest son died without issue, and that it sustained the claimant's pretensions to both characters. This must be judged from the face of the retour which is looked upon as the decree of the Court pronounced on the brieve and claim as the libel. From the face of the retour it does not appear that the inquest enquired whether the deceased son left a daughter or not. The only enquiry necessary for the retour was whether the eldest son left male issue or not, and there can be no enquiry as to what was the evidence before the inquest but only as to what the inquest has found. Suppose that the inquest take note of the error in the brieve and claim of service; they have no power to correct that error and retour the claimant as heir of line because they are restricted by the character in the claim

and the brieve to retour in the character of heir male. If, then, James the second son supposes himself to be, by such service as heir male, properly vested, and settles the estate on his issue male, whom failing to his other heirs male to the exclusion of his sisters, and if he dies without issue, his sisters will be entitled to take up the estate to the exclusion of his heirs male, as James had no right to the estate vested in him. *Rose v. Rose*, 10 March 1784.³⁸ The succession being a losing concern is another consideration which would weigh on the side of the party served when the question arises between the heir served and the creditors of the predecessor for payment of the debts as entered. Suppose that John's, the father's funds consisted of personal rights of various kinds, some designed to heirs male and others to heirs of the line, and suppose that the person having both characters in him really intends to repudiate the succession as heir of line and to take the succession descendible to heirs male only; that he serves – claims and is retoured – as heir male only he thus sufficiently shows his intention of representing his father only as heir male. Here it was contended that the service as heir male includes and is equivalent to a service as heir of line; it would follow that he would be liable to an universal representation and would be subject to a representation as heir of line contrary to his declared intention. On this principle several cases have been decided. In one case an estate was settled in a contract of marriage on the heirs male of the marriage, whom failing on the heirs male of any other marriage which the husband might contract, whom failing on the heirs female of the first marriage. Of the first marriage daughters only were procreated. A second marriage was contracted by the husband, of which a son was born, and who, of course, was heir male of provision in the subject settled and disposed in the contract. This son, after his father's death, instead of serving as heir male of provision under the contract as he ought to do, served simply as heir male, without further specification, in reference to any provision of the estate, and afterwards settled the estate

in favour of a stranger. On his death a competition ensued between the stranger disponent and the daughter of the first marriage, who objected to the service as irregular and inept, and the daughter was preferred to the stranger disponent, because it did not appear *ex facie* of the retour of service that the party served had been proved to be the particular heir of provision pointed out by the contract of marriage. In point of fact he had both characters in him, but the service in the character of heir male did not ascertain his right to the other character. There might be a son by marriage prior to either of the two marriages mentioned who would be the father's heir male, but who, notwithstanding, would not have right to the provision of the contract. The service as heir male, therefore, did not show that the person served and no other was the heir of provision under the contract of marriage, and there was no presumption from the verdict that any deed of provision or evidence to prove the propinquity required by the deed had ever been produced at the inquest. The case I allude to is the case *Edgar v. Maxwell*, 21 July 1738, Dicty. 2. 345.⁷⁹ Judgement went on the same principle in the case *Cairns v. the Creditors of Garrioch*, 12 Novr. 1742; Clk. Home;⁸⁰ and more lately the like opinion was delivered in the case *Campbell v. McCallum*, 21 Febr. 1793.⁸¹ In that case a person had served as heir of the line to his grandfather, instead of serving heir of provision under a certain deed, and that service was found to be inept and irregular. I may refer likewise to the case *Colvin v. Allison*, 14 Decr. 1796, not reported.⁸² A person had been cognosed *more burgi* heir of line to his grandfather in place of heir of provision, and it was found that in consequence he had no good right to the property. On this principle judgement ultimately went in the case *Cathcart v. Lord Cassillis*, 24 Novr. 1807.⁸³ The Court in that case had on the 16

⁷⁹ M. 14436, 14015, 2 Ross L.C. 522, 548, 596, 599, affd., H.L., 1742, 1 Cr. & Stew. 334.

⁸⁰ No. 207, p.339, M. 14438–40.

⁸¹ M. 16135 (vol. xliii, No. 21).

⁸² Hume 723 (vol. xc, No. 24, vol. xlix (2), No. 65).

⁸³ F.C., M. App. Serv. Of Heirs 2, 2 Ross L.C. 525 (vol. xcvi, No. 26).

November 1802⁸⁴ found otherwise but on appeal the case the case was remitted for reconsideration,⁸⁵ and, on reconsidering the case, the judgement was altered. The point at issue was whether the general service of David, Lord Cassillis, in the character of lawful and nearest male heir and of line to his brother german implied, and was equal to, a service as heir of provision under a settlement by the brother german calling him *nominatim* to the succession. Now it is plainly fixed that no such inference of a service as heir of provision by deed can be made from a service as heir male or heir of line. *Weymss v. Duke of Queensberry's Executors*, 21 Janry. 1819.⁸⁶ A general service in that character may be obtained without exhibition of a single deed of settlement. In further illustration of this point we shall state another case. Suppose that the infetment of certain lands stands in John and his spouse in conjunct fee and liferent and to the heirs of the marriage in fee. Of this marriage several daughters and one son are born, which son is heir of provision under the destination of the investiture, and should expedite a service in that character. But suppose that, instead of this, he serves nearest lawful heir to the father without specification as heir of that marriage. He possess the estate on this service and having no issue he settles the lands on a stranger, excluding his own sisters. In a competition, however, his sisters shall prevail over the stranger, on the ground that the service of the deceased was erroneous because what the inquest found was merely that he was nearest and lawful heir, but this does not show that he had any right to the lands in question, which were descendible to the heirs of the marriage only. It is obvious that he may have been the nearest and lawful heir to his father, but not of that marriage and so may have had no title to those particular lands. It is no matter though the inquest should retour him nearest and lawful heir and though they should say further that he is the only

⁸⁴ F.C., M. 14447, Campbell Sess. *Pap.*, vol. cvii, see in 5 Pat. 307.

⁸⁵ H.L., 1805, 5 Pat. 1. And see 1810, 5 Pat. 307.

⁸⁶ Hume 727 (vol. cxxx, No. 29).

son, because the provisions were not to the son only but to the heirs of the marriage, male or female, and the daughters of the marriage in question would be preferable to the eldest or only son if he was of another marriage. You will find the same principle illustrated by two cases. The one *Reid v. Wood*, 18 Novr. 1788,⁸⁷ concerning the precept of *clare constat*, the effects of which in this subject are the same as those of a service; the other *White v. Fairservice*, 17 June 1789.⁴⁸ *Ogilvie v. Ogilvie*, 5 June 1817,⁸⁸ where a general service as heir of line was found not to imply a service as heir of provision under a particular contract of marriage. It may be observed that this nice distinction is peculiarly applicable to general service because such has no reference to any special facts – in a special service it is different as it was found in the last article of the last case – the precept of *clare constat* described him as heir of line instead of heir of provision, but the Court considered that a precept in general mentions nothing further but the investiture of the person in the subject. The particular precept which had engrossed in it the fact of the contract of marriage which related to the subject and which made only a mistake in the denomination of the service by the person was held good.

Although sufficiently established in practice these doctrines are considered to be sometimes subject to exceptions. A service in one character has been found sufficient to carry a subject descendible to another character of heir, where the character on the face of the retour naturally implies that the heir is vested with the other character also, excluding the notion of that character being possessed by any other person. Put the case that there is a destination in favour of John and his heirs male, and, in the form of a general service, James, his only or eldest son, is retoured as nearest lawful heir of his father John and is so specially set down or described in the retour. This necessarily shows that James is nearest heir male to his father also, and not only so, but, as the one character is inseparable from

⁸⁷ M. 14483 (vol. xxiii, No. 57 and vol. xxiv, No. 24). It was overruled by later cases. Bell § 1820.

⁸⁸ Hume 724, 2 Ross L.C. 288 (vol. cxxvii, nos. 26, 27).

the other, that retour established James's right to both characters. I hereby refer to the case *Livingstone v. Menzies*, 13 Decr. 1705 (Forbes⁸⁹), the judgement in which was affirmed 22 Jan. 1706.⁹⁰ I refer also to the case *Hawley v. Lord Dalhousie*, 13 Novr. 1712 (Forbes⁹¹). Reference may also be made to the case *Bell v. Carruthers*, 21 June 1749 (Kaimes, 2nd Colln.⁹²), and lastly to the case *Haldane v. Haldane*, 27 Novr. 1766.⁹³ Before leaving these judgements I must observe that, as to some of them, and particularly as to the first *Livingstone v. Menzies*, doubts of their soundness have been entertained.⁹⁴ In all of those cases the intention of the person to serve and to represent in both characters was made perfectly clear by circumstances and the character retoured was not positively heir of line but generally *legitimus et propinquor haeres*, which was thought to be a flexible mode of expression applicable to various characters. An inaccuracy in one part of the retour, however, may be made amends for by expressions in another part of it, and by circumstances. *Durham v. Graham*, 31 Jan. 1798;⁹⁵ *Orr v. Orr*, 6 Decr. 1798, not reported.⁹⁶]

We have now discussed what relates to the regular and solemn mode of transmitting heritable right from the dead to the living. In the case of lands held of a subject superior, we are however acquainted with an easier and more expeditious course of investiture, though not attended with all the advantages of special service and retour, which is in very common use. I mean the course of private application to the superior, who, if satisfied of the propinquity, and willing to indulge the party (for it cannot in any case be claimed as matter of right), grants him what is called a Precept of *Clare constat*, acknowledging his

⁸⁹ 53, M. 14004.

⁹⁰ Forbes 74, M. 14007.

⁹¹ 630, M. 14014, 2 Ross L.C. 292.

⁹² *Rem. Dec.*, ii. 203, M. 14016–9, 2 Ross L.C. 549.

⁹³ M. 14443, 2 Ross L.C. 564.

⁹⁴ See Montg. Bell, ii. 1100.

⁹⁵ M. 15118, 2 Ross L.C. 287 (vol. lxxix, No. 64).

⁹⁶ (vol. lxxxi, No. 26).

title, and containing warrant of infeftment. In strictness, the effect of infeftment so obtained is, in some measure, imperfect, compared with that of infeftment in pursuance of a special service. In point of application it is limited to the very subjects mentioned in the precept; and cannot, like a special service, be held to ascertain the general relationship of the party to the deceased, or virtually to contain a general service within it. If, therefore, the heir thus infeft should on this title pursue for payment of a bond secluding executors, the answer would meet him, that the private deed and opinion of the superior of the lands is not equivalent to the lawful cognition of a service, and cannot stand for a title to the other parts of the inheritance. The debtor in the bond would therefore be entitled to insist on the heir taking a general service. Nay more, even in questions relative to the subjects themselves mentioned in the precept, when they are not questions with the superior and his heirs, but with third parties, who are not bound by the authority of the superior, nor obliged to credit his assertion; the infeftment, properly and strictly speaking, is not such a document of the alledged propinquity in which they are obliged to acquiesce. Suppose, for instance, that the heirs of an annual-renter or the holder of an heritable bond are infeft in this way, and sue the tenants for maills and duties. If a posterior annual-renter makes his appearance in the action and objects the want of service, it is not clear that his plea shall be repelled; at least it shall be listened to, if either the right of the superior, or the propinquity of the competitor, be denied, on any specious or colourable ground. See *Kilk.* p.414,⁹⁷ *Stair* p.488,⁹⁸ *Ba.* 2d. p.353.⁹⁹ In questions again with competitors for the character of heir, it rather appears that the person infeft on precept of *clare* is not so advantageously (favourably) situated as an heir specially served. He can only be secure by a prescriptive right, through 40 years' possession on his precept; whereas in the case of

⁹⁷ Precept of *Clare Constat*, No. 3, *Symmer v. Doig*, 1747, M. 14464.

⁹⁸ 3rd ed., III. v. 26.

⁹⁹ III. v. 99.

a service, by Stat. 1617, ch. 13, all challenge on the part even of the true heirs is excluded by the lapse eve of 20 years. There is farther, you will observe, a disadvantage attending persons thus invested, even as to the power of hindering another person from obtaining a special service in the same subject contained in the precept. If John dies, and James is served his nearest lawful heir in special, and is thereon infeft, any competitor who says that this was wrong, and that he is the nearest lawful heir or that the lands for any reason belong to him, must in the first place take that service out of the way by reduction. He cannot serve himself, because, as formerly observed, the fee is already full and in the regular and legal way. But if James has only obtained precept of *clare*, and is **XXXXXX** infeft, this will not hinder the competitor from serving specially and being infeft straightway: at least, in order to declare and carry into effect his claim to the lands, he is not under the necessity of in the first place reducing the precept of *clare* and infeftment. (W.M.) The private act of the superior does not fill the fee and stand in the way as a public cognition would, to the prejudice of third parties. I may refer to the case 21 Febr. 1793, *Campbell v. McAllum* (reported⁸¹) where this was implied. There is even a certain disadvantage attending an entry by precept in questions with the superior himself. If the infeftment on precept of *clare* be taken after the superior's death, it is **in** that case null and void: because the statute 1693, ch. 35,¹⁰⁰ which first allowed execution of any precept after the granter's death, is limited in that way and does not apply to precepts of *clare constat*.

In some cases, investiture on precept of *clare* seems to partake of the nature of both a private and a public title: namely, where it does not proceed, purely, from the superior's own knowledge, but in pursuance of a service – but that service is not a special service, relative to the particular lands held of that superior; but a general service as heirs of the

¹⁰⁰ 12mo. ed., c. 73 record ed.

line, heir male, or the like. Tis true, that here, the general character and relation is regularly established. But still the inference from thence to the right of any particular feudal subject is the voluntary act of the superior, and the party – the heir – must still have had recourse to a special service, if the superior had declined to comply with his request. The effects of such an entry are not therefore materially different from those of entry on a pure precept of *clare*: so that if a competitor should appear after the 20 years, he would be excluded by prescription from challenging the title as to the personal rights, which are transmitted by the general service, but would have access to reduce the precept of *clare* and infeftment of the special lands at any time within forty years. Ba. 2, p.354.¹⁰¹

This sort of entry is competent to all kinds of heirs; heirs of tailzie and provision of conquest, as well as heirs at law. If, in the precept, he properly specify the claimant's character, and the deeds in his favour, the superior is presumed to have satisfied himself on the point of right, by inspection of these deeds of provision and enquiry as to the state of propinquity. Nay, in a late case (which I should have thought much more doubtful), this was carried so far as to hold, that the superior was entitled to look beyond the face of the last investiture, and to give his precept, not according to the destination of that investiture, but of an after deed which had been made in virtue of a power to alter contained in that investiture. 17 Jan. 1798. *Wood v. Selkraig*.¹⁰²

Let me observe farther, and what indeed is abundantly obvious – that a precept of *clare constat* differs from other precepts in this respect, that it is not assignable, and can serve for the infeftment of no one but the very person to whom the precept is given. It is limited, by its very nature, to the character of the heir, and to the individual who is there owned and recognised as possessed of that character.

¹⁰¹ Bankt., III. v.99.

¹⁰² M. 15115, 2 Ross L.G. 280 (vol. lxxviii, No. 54) cit. *Crichton's Crs v. Socy. for Propagating Christian Knowledge and Wood*.

Farther still; so much is this sort of entry limited to the person and character of the true heir, that if precept of *clare* should be granted to any but him, although with his express consent, and by concert with him, in consequence of some transaction with him, the title would be good for nothing. The superior is acting ministerially only, and as such, in renewing the investiture to the true heir. He would acknowledge a wrong person as the heir of his vassal. To give the property to any other person, he, the superior, must himself be reinvested with it, by resignation made on the procuratory of the vassal, last invested. Thus, if a brother is heir to the deceased, a precept of *clare* granted for infefting the brother in a liferent, and his eldest son in fee, would be null as to the fee, in which the eldest son is not and cannot be heir during the life of his father; and being null at first, this infeftment would not become a good one though the eldest son should survive his father (so found *Finlay v Morgan*, 20 July 1770 – Hamilton¹⁰³), see also 12 June 1752, *Landale v. do.*¹⁰⁴

Where, as sometimes happens, the lands hold of a subject superior, and have been the subject of a number of successive sub-infeudations, by rights and conveyances bearing double modes of holding both public and private – and where the heir of the person last infeft wishes to obtain his entry – the proper course for him seems to be, to apply to the highest of those superiors – and to obtain *simul et semel* a precept of *clare constat* in his own favour; and a confirmation of the whole of those successive base infeftments, so as to render them public holdings, under the superior so confirming. Otherwise, you will observe, there are a set of intermediate superiorities, not obliterated or disposed of, which would render inept the precept of *clare constat* as granted by the highest superior to the heir of a person who was thus not immediate vassal to himself.

¹⁰³ F.C., M. 14480, 2 Ross L.C. 265.

¹⁰⁴ M. 14465–77, 5 B.S. 794, 2 Ross L.C. 253.

I will only observe farther (what to be sure is sufficiently obvious), that this course of investiture – by precept of *clare* – cannot be effectual, unless the superiority has itself been duly vested in the person who grants the precept, so as to enable him to exercise such a power. Tis true, that although not infeft at the date of the precept, or of the seisin taken on it, yet still, if the superior do afterwards duly make up a feudal title – the benefit of this (there seems reason to think) shall draw back, and accresce to the vassal, infeft upon the precept while the vassal who obtained the precept is alive at the time of the infeftment. But, on the other hand, if the superior's title shall not be made up till after the death of the vassal – if the vassal have died in the meantime, while the superior still had not made up his title – there is then no means of repairing the error. The party died here without title to the lands. He might as well not have been infeft, his precept being from one who had no right to grant a precept; and having died in that condition, he could not become infeft after his death. And his heir cannot become infeft in that character. And in consequence all his deeds of disposal or incumbrance of the lands are ineffectual against those who do not otherwise represent him, so as to be liable for his debts and deeds. A person in just such a situation as I have now supposed, had made a settlement of his estate in favour of his natural son. His heir of line, disregarding this irregular infeftment, passed by him, and having made up title by general service as heir to a more remote ancestor the last person who had been feudally invested with the estate, he raised and prevailed in a process of reduction of that settlement. 19 Decr. 1811, *Wm. Beattie v. Ninian Little*, not reported.¹⁰⁵

Thus much as to the peculiar way of making up titles to lands holding of a subject superior. In like manner, within Burgh, and with relation to burgage subjects, the ancient custom has been, that, upon a claim of entry lodged with him, the Baillie of the Burgh

¹⁰⁵ (vol. cxiii, No. 45).

takes evidence of the propinquity upon the spot, by examination of witnesses, or the production of writings – and being satisfied on the subject, he *de plano* and without granting any precept, delivers him seisin by the usual and proper symbols of hasp and staple. Whereupon the Town Clerk, as notary *ex officio*, extends an instrument, relating the whole procedure; not only the infestment itself, but the preceding enquiry, or cognition, with the Baillie's sentence pursuant thereto. And, indeed, in case of failure to mention in the instrument, that the seisin is given in pursuance of such enquiry and cognition, this has been found, and justly, to deprive it of all faith and effect in law, 4 February 1784, *Houston v. Houston*.¹⁰⁶ This instrument compleats the heir's investiture which, upon the whole, seems to be nearly of the same power and virtue with entry on a precept of *clare*; though, as it proceeds on a cognition by a person in office, decisions have paid somewhat a higher regard to it as an ascertainment of the propinquity of the party. Its effects are, however, strictly limited to such matters as are immediately connected with the infestment of the deceased: for even this entry is considered as being out of the regular and ordinary road; and the law accordingly makes no provision for compelling a magistrate to proceed therein if he see cause to decline. The heir in that case must needs obtain himself specially retoured, and proceed against the magistrate, as against a subject superior. See Dict. 2d, p.407.¹⁰⁷ Service *more burgi* is limited also to such rights wherein the ancestor died infest. There is no such thing as a general service *more burgi*. In that way the custom has always been limited, which is the sole authority for this sort of proceeding, 4 December 1783, *Cummine v. Macconochie*¹⁰⁸ – such was the opinion of the Court.

¹⁰⁶ M. 14420.

¹⁰⁷ A Burgess of Stirling, 1668, M. 15021.

¹⁰⁸ M. 14446 cit. *Cuming's Crs*

There are other devices for making up titles, and still more remote from the regular procedure. Thus an heir apparent may grant bond for a sum of money to any confident of his own, who in return delivers an acknowledgement of trust that his receipt of such bond is in trust only: the trustee thereon gives him a special charge to enter; and so he adjudges the estate. Next he conveys the adjudication to the heir, in whose person it thus becomes a title to the lands, a title which subjects him indeed, as in justice it ought to do, universally to the debts of the deceased, if he possess on it, but which at the same time is a valid and effectual title to the estate. As was found in the case *Scott v. Hepburn*, 25 July 1781.¹⁰⁹ It has been allowed in the case even of a strictly entailed estate: the procedure being intended not to adjudge the estate from the heirs of entail but to adjudge it for them to make up their title, 19 Jan. 1808, *Craigie & Home v. Sir James Innes Ker*.¹¹⁰ *Govan v. Skene*, 10 March, 1813.¹¹¹ It is not necessary, though it is ordinary, that the bond itself mention the particular lands be adjudged. Being an obligation for a sum of money, the bond is authority for adjudging every right and interest, that the granter has in any estate whatever (28 Jan. 1791, *E. Crawford v. Campbell*¹¹²). It is, however, regular, and proper, that the charge upon the bond should specify the particular character where it is clear and indisputable, in which the truster has right to succeed, and in which he is charged to enter. But, as this is sometimes a doubtful and ambiguous matter to the truster himself – therefore, to avoid a dangerous mistake, the practice is to charge him in all different characters, in which he has pretensions to the subject – heir of line – of provision – tailzie and so on – which leaves every thing open (*Ibid.* And 1 June 1790, *Henderson v. do.*¹¹³

¹⁰⁹ M. 14487.

¹¹⁰ F.C., M.App. Adjud. 16, (vol. xcvi, No. 48).

¹¹¹ Not reported (vol. cxix, No. 89).

¹¹² Not reported (vol. xxxiv, No. 30).

¹¹³ Not reported (vol. xxxii, No. 88). See M. 15439, 15442, 4415.

to be applied as the right shall be found to be to the particular character in which he has right. *Inglis v. Dunlop*, 29 Feby. 1820.¹¹⁴

You may farther notice that such adjudication is a good title to the estate in the person of the truster, though it should never be followed by actual possession of the estate; nay, though the truster should die before the conveyance of the adjudication to him by his trustee. The claim of – the right to insist for – such conveyance was in him at his death; and his heir can serve to him therein and insist for such conveyance, or he can grant a new trust bond of his own, upon which the first adjudication may itself be adjudged, and so a title connected with it to the right of the subject will be acquired. See *P.L.M. Campbell*, 28 Jan. 1791.¹¹⁵

When this mode of making up titles has been adopted, the truster, the person who uses it as a title, to insist perhaps in a process of reduction – may be obliged, on demand, to instruct and prove some degree of propinquity between him and the deceased, to whom he has been charged to enter: otherwise, parties in possession would be liable to be molested with suits and challenges at the instance of mere usurpers – mere groundless pretenders, who have no sort of title to the character of heir, which they thus assume. Any one person, you observe, the most unconnected with the deceased, can as easily give such a bond to a trustee as the true heir himself. It is his own private and unauthorised operation.¹¹⁶ **XXXXNo footnote ref in copy** If therefore he uses this title in any action against others, 'tis fit and just, that on motion made he should be obliged *in limine*, to show what his propinquity to the deceased is or if bastardy is objected, he must prove his legitimacy – or the like in order that his antagonist may not have to battle with a shadow.

¹¹⁴ (vol cxxxi, Nos. 42, 43) cit. *Inglis Cochrane v. Dunlop*.

¹¹⁵ Petit. *Lady Mary Campbell*, not reported (vol. xxxiv, No. 29).

¹¹⁶ So observed in *McCaig*, *infra*.

Decided upon this principle 20 Jan. 1770 *Gib v. Boyd*.¹¹⁷ Where a person uses a service as his title, no such preliminary proof can be asked of him in the action; because he has already a regular and judicial verdict upon that matter in his favour, and there is no occasion for any other evidence of the propinquity. 28 February, 1789, *McCaig v. Sofflay*.¹¹⁸

I may take notice of another situation, which sometimes occurs in practice – that of a settlement being left by the deceased, and in favour of his heir at law, but deficient in procuratory and precept and the settlement withal of such a character, that is material for an heir to possess upon it only. Here this course has sometimes been taken. The heir at law conveys to a trustee all the lands contained in this settlement – and the settlement itself, with his whole claim in interest under it – binding himself at the same time (which obligation would be implied at any rate) duly to make up his titles in those lands, so as to validate his previous conveyance of them. In pursuance of this obligation, the trustee obtains a decree of constitution against him, ordering him to make up his titles, and convey – and on this he obtains an adjudication in implement – and conveys it to the truster, the heir at law, in whose person it thus serves as a title to the lands. This, though a common mode, is not always a sure one, though it be as good tentative as it is called. Lately the judges approved of such a proceeding in the case of a mere retender – they allowed an adjudication on a trust bond and thought that it was sufficient, *Cochrane v. Dunlop*, 29 Feby. 1820,¹¹⁴ but it is not yet finally decided.¹¹⁹ This case related to an adjudication on a trust bond and one as above in implement. The Court sustained the former but dismissed the latter as improper.

¹¹⁷ Not reported (vol. xxvii, No. 1, vol. xxvi, No. 33, vol. v, No. 1).

¹¹⁸ M. 3989.

¹¹⁹ 24 July 1820 F.C., affirmed H.L., 1824, 2 Sh. App. 115.

[Thus much as several ways in which an heir may invest himself with an active right to the estate or property of the deceased. We have next to enquire concerning the legal burdens imposed by such investiture. That is concerning what are termed the Passive Titles. It is an old rule derived from the Roman Law, by which the heir was considered the same person as the deceased,¹²⁰ that not only the means and the estate of the deceased but also the heir's person and whole separate estate are liable to the last farthing for the payment of the whole debts of the predecessor. This is different from the law of England.¹²¹ It is to be enquired to what extent this doctrine applies in our law. In the first place, there is no doubt of the proposition that an universal representation applies to the heir of line. Indeed it has more colour of truth as to him than as to any other heir. It may be said with great justice that he represents and is the same person as the deceased. He is the most direct ally of the deceased by blood – the favourite of the law, and is endowed with sundry privileges which are denied to other orders of heirs. He takes up even subjects which the deceased has acquired – if they are of proper feudal nature – before the heir of conquest. He also has right to all moveables which are descendible to heirs, in general terms, and even where by a settlement he is excluded from the profits of the succession the law favours him to far as to give him right to everything that is not expressly taken from him. On the other hand, his passive representation is equally broad, and, if, by rashly serving heir, he subjects himself to that representation, it may have the effect of exhausting his whole separate funds by his ancestor's debts. This universal representation is induced not only by a general service as heir of line, which is a direct active title to a certain kind of subject, but is equally induced by a limited special service in the character of heir of line to a certain estate or special subjects. This service as heir of

¹²⁰ See *D.*, XXIX.ii.8. pr., *Nov.*, XLVIII. Pr., *Vinnius, Comm.*, 419. But see *Buckland and McNair*, 120, *Muirhead*, 2nd ed., 68.

¹²¹ *Blackst. Comm.*, 5th ed., ii.243–4, *Stephen Comm.*, 11th ed., i.413, *Kames, Tracts*, ii.114–6.

line, though special, is a general declaration of the particular character, and, as we have seen, includes a special service, whereby the heir has the same right to everything which he would have had by a separate general service. This being the case of the active title the same is the case as to the passive title. The Roman lawyers said this was a consequence which could by no means whatever be avoided.¹²² Although it be made perfectly clear that the person served heir of line truly did not intend to take up any subject belonging to the deceased for his own advantage, but meant the service for the accommodation of creditors, or some other purpose, still he can have no relief from the universal representation. That is illustrated by the case *Ayton v. Ayton*, 7 July 1784.¹²³ If, therefore, a person has imprudently and hastily served heir of line, and afterwards wishes to improve his situation by getting quit of the universal representation thereby induced, it shall not answer his purpose afterwards simply to obtain another service in the proper and more limited character. He must first endeavour to set the former service aside by decree of reduction, and if he accomplish this, then let him serve in the limited character. That was accomplished in the case *Ayton v. Ayton*, above mentioned,¹²³ and in *Marshall v. Brown*, 21 Decr. 1790.¹²⁴ I have now to observe that, in later practice, and, as far as the principle of law will allow, our Judges have been disposed to confine such passive title within due bounds. If a person has not been regularly cognosed heir by general service and retour, but has been cognosed merely *more burgi*, which gives him a limited active title only, and like an inventory ascertains the subjects thereby acquired, then he shall be liable only *ad valorem* of those subjects. So it was found in the case *Blount v. Nicholson*, 26 Feby. 1783,¹²⁵ and by the fourth article of the decision in the case *Maitland v.*

¹²² See *D.*, XXVIII.v.88, *Inst.*, II.xix.5.

¹²³ M. 9732, cit. *Crs of Ayton v. Ayton*.

¹²⁴ Not reported (vol. xxxiii, No. 54).

¹²⁵ M. 9731.

Gordon, 1 Decr. 1757.¹²⁶ Entry by precept of *clare constat*, though in the character of heir of the line, is only a limited active title also, and does not, any more than a service *more burgi*, supply the want of a general service, and I am inclined to think, though I cannot support my opinion by any precedent and Erskine § 71 says the contrary,¹²⁷ that such an entry does not include a representation to a general extent; but *ad valorem* only of the special estate so taken up.¹²⁸

2d. The heir of conquest by service is subjected to the same burdens of representation as the heir of line. He is truly an heir at law, taking the term heir at law in its broad signification as denoting heirs who succeed by the direction of law – *de juris*. Where the circumstances are such that the succession divides into heritage and conquest, the heir of conquest takes up the succession by law *titulo universal* in virtue of his relation as much as the heir of line does the heritage. He is a representative of the deceased in one point of view, as the heir of line is in the other, and his passive representation is equally unlimited as is the passive representation of the heir of line.

3d. At first sight it might occur that the case is different in regard to a general service as heir male though the person be served as heir male in general: as the heir male has no right to any thing by virtue of law but has right merely in virtue of particular destinations made by his predecessor. But then a service in the character of heir male is the ascertainment of a natural quality – the state of propinquity or relationship by blood to the predecessor which no settlement can either give or take away. It is the finding of a special blood relationship – a special character – as the service of the heir of line is, by virtue of which he has right to all the subjects descendible to that character, whatever the number and description of those subjects may be. Whether the heir male shall have any benefit by

¹²⁶ M. 11161. See H.L., 1760, 2 Pat. 43.

¹²⁷ III. viii. 71.

¹²⁸ Kames, *Tracts*, ii.180–1. See Stair III.v.26.

the possession of that character depends indeed on the settlement of the deceased, in the same manner as the advantage of the possession of the character of heir of conquest depends upon the acquisition made by the deceased. Still, however, the character subsists and the person possessed of it is entitled at all times to have it declared whether there be or be not an existing settlement, bearing a disposition to heirs male. If there be any such settlement, then the service as heir male is a broad declaration of his right, and vests him not with one but with every species of right contained in deeds of settlement to heirs male. The active title is general and it, therefore, induces an universal representation.¹²⁹ A special service as heir male has the same effect, as it contains within it a general service in the same character.

The case is very different as to a special service in the character of heir of provision. The character of heir of provision, of tailzie etc., has no relation whatever to connection by blood. It is entirely an artificial character, depending wholly on deeds of settlement. This sort of service, therefore, is not the ascertainment of any fixed character. It is the declaration only of certain facts – that such and such a deed stands in favour of a claimant. The deeds of settlement must be produced to the inquest, and, though it is not indispensable that the deeds be specified in the retour, still in the claim of service and in the Minutes of Court mention is always made of the deeds upon which the verdict of the jury was given. This, therefore, is the source of a distinction in the article of representation between this service and the service of other characters. The active title being limited to the subjects in the settlement, the obligation or passive representation for the debts of the predecessor ought to be limited to the value of those subjects. Our law authorities, however, do not speak accurately as to this. Erskine¹³⁰ adheres to the strict

¹²⁹ cp. McLaren ii.1282.

¹³⁰ III.viii.51

doctrine and appeals to Stair.¹³¹ But I do not find that Lord Stair has delivered any such opinion. Dirleton, p.88,¹³² is of a different opinion and he is followed by Stewart¹³³ and by Bankton.¹³⁴ The point – that a service as heir of provision induces a representation only *ad valorem* of the subject taken up – has however now been fully established in later practice.¹³⁵ So it was found in the case *Baird v. the Earl of Roseberry*, 16 July 1766.¹³⁶

Lastly, as to persons substituted *nominatim* in a bond for borrowed money. Erskine¹³⁰ allows that they are liable *in valorem* only, because they have no occasion for a service. But I would go farther and would apply this opinion also to substitutes who have need of service to make up their titles when called after the fiar.

We have thus seen that the passive title of the heir of line, heir male and of the heir of conquest infers an universal obligation for the debts of the predecessor. The heir, however, most undoubtedly, has relief from the executors of the deceased for all debts of a proper moveable or personal nature, unless the deceased has declared to the contrary and burdened the heir with his debts. The provision of the deceased to the contrary must be in plain and express terms, otherwise it will be held to have been made for the accommodation of the creditor and not for the purpose of loading the heir. Thus, though he has disposed and settled the estate to the heir expressly burdened with the payment of all his debts, heritable or moveable, that is understood to have been done for the purpose of saving the creditors the trouble of setting aside the settlement by reduction in order to get the estate for payment of their debts, and not for the purpose of burdening the heir

¹³¹ III.v.13.

¹³² *Doubts*, referred to with approval by Kames, *Tracts*, ii.172.

¹³³ *Answers* (1762) 212.

¹³⁴ III.v.62, 63.

¹³⁵ McLaren ii.1284, Bell § 1922, *Comm.*, i. 703.

¹³⁶ M. 14019, 5 B.S. 926.

with the debts, without the right of relief. This is illustrated by two cases in Kilkerran's Reports, No. 3¹³⁷ and 4¹³⁸ V. Heir and Executor.

The representation of the heir is also limited in another point of view. It often happens that the deceased has at one and the same time an heir of line, an heir of conquest, an heir male and an heir of provision or several heirs of provision in virtue of several different deeds. Now a creditor of the deceased may recover from any one of those heirs, so far at least as their respective subjects, but it is not to be supposed that the creditor is entitled to lay the burden of the whole debt entirely on any one of them, leaving the others free. On the contrary, there are certain established rules, according to which those different sorts of heirs have relief from each other, and there is also a certain order of discussion established. The person who takes the lead in the order of discussion is the heir of line, the proper heir in general settlement by the deceased. Thus, I have said that in spite of a general settlement by the deceased in favour of another to the prejudice of the heir of line, the law favours the heir of line by reserving for him every subject which does not expressly fall under the settlement. This on the one hand. On the other, however, the law burdens this reserved right before all others with the payment of all the deceased's debts, unless the settlement has expressly laid the burden of debts on the heir of provision by it. The will of the deceased is the great regulator, and the settlement of the deceased has declared an express predilection for the heir of provision by it. It must, therefore, be understood that on him the deceased meant to bestow the estate in the best condition – *tanquam optimum maximum*, free of debts as long as any fund remains for the heir of line. Hence, therefore, the heir of line, if he has served heir to the subject reserved or omitted from the conveyance to the heir of provision as a bond secluding executors or has drawn heirship moveables, he has incurred a passive title and must be discussed before the heir

¹³⁷ p.230, *Russells v. Russells*, 1745, M. 5211–3.

¹³⁸ p.231, *Campbells v. Campbells*, 1745, M. 5213, affd. H.L., 1749XXXXXXXXXXXXX

of provision. The heir of line ought, therefore, to consider well the situation of the affairs of the deceased before he makes up titles to the residue or any part of the estate.

The law is the same in a question between the heir of line and the heir of conquest. *Brown v. Brown*, 19 Novr. 1782.¹³⁹ After the heir of line the heir of conquest is the person who stands next in the order of discussion, because he is another species of general representative established by law, and in circumstances admitting a distinction between heritage and conquest he takes by the order of law as the heir of line does. He falls to be discussed before any person called by the settlement of the deceased.

Among those heirs whose character is created by the deceased's settlements alone, there is an order of discussion established by which the person who is called and succeeds in the character of heir male is made primarily answerable before any other heir of provision called in more specific and definite or more general terms.

I have mentioned already that the heir male, though he takes only in virtue of a settlement, is called by the settlement not individually, nor *nominatim* as son of John or the like; he is called by a general character and description as 'heir male' – in respect that is of blood and natural relationship. In order to explain this, put the case that part of John's estate stands destined to him and to his heirs male whatsoever and suppose that another portion of the estate is destined to John and to the issue of his body whom failing to another person George, a distant relation, *nominatim*. Suppose that John dies without issue, and is survived by a brother. In these circumstances the brother as heir male takes up that portion of the estate which is destined to heirs male, and George takes up that portion of the estate, in which he is substituted *nominatim*, after the issue of the body of John. Now here, the consequence of the rule is that the brother, the heir male, even though he

¹³⁹ M. 5228.

should get by far the least valuable portion of the estate, is liable for the debts of the deceased and must be discussed before George the special *nominatim* substitute, though the consequences be that the estate is thereby completely exhausted. The reason is that he – the brother – is the nearest heir male to his brother, and is called as such, and therefore, is more properly the representative of his brother than George is, for whom the deceased seems to have entertained a higher predilection. He, George, has been pitched upon specially and *nominatim* out of love and favour. He has not been called under a general description, such as heir male, which might apply to him or to another person according to circumstances; but he has been called for special love and favour. The heir male, in short, may be a brother, a nephew or a cousin, or a more distant relation, just as things happen to be at the period of John's death; any person is called heir male to whom the description may apply at the time, but George is called *nominatim* out of favour to himself personally, and, therefore, the law holds him as the favoured person to be free of debt, while the heir male succeeds to anything. It would make no difference in this order of discussion, though the person who succeeds by special provision happens to be a nearer heir to the deceased than the heir male or though he happens even to be heir of line, as the question of relief from discussion must be tried, according to the character under which the person succeeds and not by that character, in which he might have succeeded by a different set of titles. Put the case that John has a daughter and a brother and is survived by both of these persons; that on his death a part of his estate goes to his daughter, in virtue of a special settlement by John's father, and that another part of John's estate goes to his brother, in virtue of the Father's settlement to John and to his heirs male. Here, the brother of John who succeeds and must serve as male heir shall be liable for the debts in preference to the grand-daughter of the testator, who is no doubt heir of line of her grandfather, but does not take the estate in that character but in virtue of the

special destination to her *nominatim* by her grand-father's deed and her title falls to be made up by special service as heir of provision called *nominatim* by that deed. I have next to observe that there is a further rule of discussion of heirs of provision, which protects those heirs of provision called by an onerous contract of marriage, till all the other heirs of provision are discussed. Suppose that one portion of John's estate stands destined in a way which he cannot alter to him and to his issue male of his body whom failing to his brother James and to his issue male and that the other portion of his estate is vested in him in absolute fee; that John marries and in the contract with his bride settles the portion of the estate at his disposal on the issue of the marriage, male or female; that John dies leaving a daughter only who takes up the portion of the estate provided to the issue by the contract of marriage and the uncle James takes the other portion. In such circumstances, James shall be liable, in the first place, for the debts of the deceased, because he is a simple heir of provision, and because the daughter succeeds under an onerous contract of marriage. Dirleton, p.85, is of that opinion, and his opinion is adopted by Erskine § 52¹⁴⁰ and Bankton.¹⁴¹

To illustrate the matter further, suppose that John is possessed of a small landed estate, and that, in his contract of marriage, he settles it upon the issue of the marriage; that he afterwards acquires other heritable estates, all of which with his whole moveable estate he settles on his younger children, leaving the eldest son in the former estate, and that he binds himself to secure his widow in a certain additional annuity, and in so much for house rent. In such case, the younger children, taking the estate by the liberality of their father only, are certainly liable in payment of these additional provisions to their mother before the eldest son who takes the estate as heir of provision by contract of marriage, always under the condition that after the implementing they are not unsuitably provided

¹⁴⁰ III.viii. 52. Cp. Stair III.v.17, Ersk. *Pr.*, III.viii.24.

¹⁴¹ III.v.69. See Montg. Bell i.249.

themselves. To that purpose Judgement was given in the case *Gordon v. Gordon*, 8 Decr. 1790.¹⁴² Nay, suppose that the father has secured these provisions to his widow on the estate contracted to the heir of the marriage, still it does seem that the heir shall have relief from the younger children; as the deceased had no right to burden that estate with such provisions, while he had other funds. *Walls v. Maxwell*, 10 Feb. 1700, Fount.,¹⁴³ where it was found that an heir of provision in a special sum has right to see all other heirs of provision discussed before him.

The cases already stated are all cases of competition among different orders of heirs. It sometimes happens, however, that questions of discussion arise among several heirs of the same description and who have no preference the one over the other by manner in which they are called. Thus, one deed of settlement carries one part of an estate to John and another part to James and another part to George. Now here, there is no good ground for the benefit of discussion. The creditors are entitled to proceed against whom they please – whichever of the parties they find convenient. But the heir who has paid the debt is entitled to relief from the others, and the rule of ultimate liability, however, is in proportion to the value of the estate got by each. To that purpose judgement was given in the case *Stewart v. Stewart*, 10 Feby. 1792.¹⁴⁴

I have hitherto noticed the rules which are established and followed in common cases. The principle upon which they are founded, one and all of them, is a presumption of the will of the party deceased, a presumption in many cases somewhat slender but which upon the whole is sufficiently well founded. The consequence is that the rules are subject to exceptions, whenever there is sufficient evidence to defeat the presumption and show that the deceased had a different intention. Such is the case where the obligation, the

¹⁴² M. 13028 (vol. xxxiii, No. 40), cit. v. *Gordon's Trs.*

¹⁴³ ii. 87, M. 3561.

¹⁴⁴ Bell Ca. 220 (vol. xxxix, No. 20 and vol. xl, No. 3).

ground of the claim, is drawn so as to relate to and concern a particular subject only – such as an obligation to sell and dispose a certain estate or to grant an heritable security over it. The ~~XXXXXXXX~~ who succeeds to that particular estate is the only one who can implement the obligation, and, as the deceased by the obligation has sufficiently declared his purpose, that heir shall be bound to implement it. The contrary opinion prevailed in the time of Sir Thos. Craig, as he states in his treatise *De Feudis* 2.17.19,¹⁴⁵ namely, that the heir of provision to the particular estate was not bound to implement this contract but that the heir of line was bound to pay damages to the creditor for non-performance. That doctrine, however, was quite irreconcilable to the common principle on which damages are due, namely that they are due only when implement cannot be obtained and would not now be listened to. The heir of provision in the particular estate is able and is bound therefore to implement and fulfil the obligation. He is the only person who can implement – the heir of line has no concern with it – and he would be ordained so to do. There is still less room for doubt of this heir's liability when the debt has been secured upon the estate by infestment in the lifetime of the predecessor. That principle was applied in the case *Fraser v. Fraser*, 13 Novr. 1804,¹⁴⁶ which was a question between an heir and executors, but which serves equally well to illustrate the principle in view. Here a person had disposed and settled his only heritable subject in favour of a certain individual, and, in the same deed he had named executors in regard to his personal estate, and had ordered that all his just and lawful debts should be paid by the executors and that the residue of the executry funds should be paid to one of the executors. Now it so happened that the special heritable estate thus conveyed to a different person than the executors was burdened with a heritable bond which was the only debt of the deceased of any consequence, and, the

¹⁴⁵ II. 732–3.

¹⁴⁶ F.C., M.App. Heir & Exor. 3 (vol. liii, No. 3), affd. H.L., 1812, 5 Pat, 642 *sub nom. Fraser v. Spalding*.

executors having paid it, it was found that they were entitled to relief from the disponent of the estate.

But in the next place, what shall be said where the sum in question is not established upon the estate alone, of which the succession is regulated in a particular way, but is established equally on that estate and on another which is descendible to the heir of line? I suppose that this is done at one and the same time by one and the same deed, and that there is nothing else to shew the intention of the deceased. This is a more nice and more difficult question, and was the origin of much difference of opinion on the Bench in the case *Rose v. Rose*, 17 Jan. 1786.¹⁴⁷ By the Judgement of the Court here it was found that the heir of provision was entitled to a total relief of the heritable bond from the heir of line, and such Judgement was given by a small majority of the Court, on the notion that the heir of provision is the favoured person and is not to be burdened but by the granter's intention clearly expressed. That Judgement, however, was altered by the House of Lords,¹⁴⁸ who found that the heir of provision paying the whole debt was entitled to relief only from the heir of line, in proportion to the value of the estate taken by him in that character. On the same principal it was lately found that where a debt is secured on two subjects, each of which is settled upon a different person, different from the heir at law, each person, must pay in proportion to the value of the respective subjects. This was in the case of *Sinclair v. Smith*, 14 Febry. 1798, not reported.¹⁴⁹

Although service and retour as heir is the most regular, it is not the only way of inducing a representation. If, without service, the heir does not abstain from intermeddling but intermeddles with, manages and disposes of the inheritance of the ancestor and conducts himself in short as heir, he is held and presumed to intend to represent the deceased and

¹⁴⁷ M. 5229, Hailes 1011.

¹⁴⁸ 1787, 3 Pat. 66.

¹⁴⁹ Hume 176 (vol. lxxix, No. 75) cit. *Sinclair's Exors. v. Fraser Smith & Ors.*

shall be equally liable for the whole debts of the deceased as if he had made up the titles. This passive title is called *Gestio pro haerede*, and was recommended to us by the Roman Law,¹⁵⁰ the intention to prevent the heir's abstraction of the effects of the deceased. Erskine, in his larger work, insists at great length, and with his usual accuracy and judgement, upon this passive title,¹⁵¹ and to what he has said I refer you to not only because you will there find the doctrine fully stated, but because, though not exploded, this passive title of *gestio pro haerede* does not in later times so frequently form the ground of any plea, or is so strictly insisted in as it formerly was. Of this you have a strong instance in the case *Mowbray v. Blackburn*, 17 Decr. 1802, not reported.¹⁵² In that case it was found not sufficient to infer this passive title from the fact that the heir had disposed a part of the deceased's estate to the widow of the deceased in liferent. Indeed this doctrine will not be applied except in very strong cases.¹⁵³ In this case the relaxation from our ancient rules was considered so great that Sir Ilay Campbell, then President of the Court, said that he should consider it as no longer forming part of our law. I may refer also to the case *the creditors of Blair v. Blair*, 13 May 1791,¹⁵⁴ and *Gordon v. Clarke*, 27 Jan. 1789.¹⁵⁵ More lately still, in the case *Brown v. Campbell*, 26 Novr. 1813, not reported,¹⁵⁶ it was found that the passive title was not incurred.

I propose in the next place to enquire concerning the passive title of *Preceptio hereditatis*. That is incurred by the heir *alioqui successurus*, accepting and taking up in the lifetime of the person to whom he is heir a conveyance of part of the estate which he ought to inherit only at the death of the owner. To shew the propriety of this passive title, I must premise

¹⁵⁰ D., XXIX,ii.20 pr., *Inst.*, II.xix.7.

¹⁵¹ III.viii. 82–86. See too Stair III.vi, Bell § § 1919–20, *Comm.*, i.704–5.

¹⁵² Not reported (vol. lxii, No. 53).

¹⁵³ Ersk. III.viii.83 and Note. See Bell *Comm.*, i.704.

¹⁵⁴ M. 9734, Bell Ca. 482 (vol. xxxvi, No.2), also cited *Jeffrey v. Blair*.

¹⁵⁵ M. 9733 (vol. xxvi, No. 34).

¹⁵⁶ (vol XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

that it is a sort of substitution for the passive title of *gestio pro haerede*, in those situations where that particular passive title will not apply. It is not inferred if an heir enter on his ancestor's estate on a diligence led against it. It is obvious that when the heir obtains a special conveyance to, and enters possession of, the estate, in the lifetime of the ancestor, and continues that possession by the same title after the death of the ancestor, that he cannot be liable on the passive title of *gestio pro haerede*: for he does not possess as heir but as singular successor. There would thus be a plain method of eluding the claim of the creditors, and of securing a part at least of the estate to the heir how great soever the ancestor's debts may be. In order, however, to remedy this, the law called in the aid of the passive title of *preceptio hereditatis*, in virtue of which the heir *alioqui sccessurus*, who receives and possesses on a gratuitous conveyance, becomes liable for the debts of the ancestor, contracted before the date of that right, if he entered before the death of the ancestor, and continues to possess on that right after his death. The view which the law takes of such a transaction is, not that it is a fraudulent one; on the contrary, the law holds the conveyance to be right and reasonable, under the provision that it be taken under the burden of the granter's debts at the time of the transaction. Instead therefore of cutting it down, the law allows the conveyance to take effect under that burden. It presumes that, though they have omitted to say so, the parties truly contracted on the footing that the disponent was to represent the granter and be liable for all the debts due by him at the time of the conveyance. This is the general notion of this passive title, which may be kept in view in the following account of the conditions under which it applies. Thus, if any thing unfair or improper was intended by the conveyance, such intention is defeated.

1st – In order to infer this passive title, the conveyance must be made in favour of the party *alioqui successurus* – that is, the party disponent must be the person who would succeed at the death of the owner as his heir – the person who is his apparent heir. The

notion on which the passive title is founded is that the heir by conveyance takes the inheritance before the due and regular time. It is not, therefore, enough that the party disponent turns out eventually to be the disponent's heir, if at the date of the conveyance he was not actually heir *alioqui successurus*. If at the date of the conveyance, it was dependent on a future event whether the disponent should or should not be heir *alioqui successurus*, this passive title is not inferred.

2d – The conveyance in strictness ought to be of a subject with which the deceased was once actually invested – a subject which had once been actually vested in the person of the deceased himself. But as this rule, if strictly applied, would open a way to fraud, it is dispensed with where justice seems to require such a dispensation. Put the case that, in order to elude the law, a person buys an estate, and takes the conveyance to his heir instead of taking it to himself and then conveying it to the heir. Here the passive title shall reach the heir, upon the death of the father, and, during his life, his creditors have relief afforded them by the act 1621 c.18, either by reduction or by an action of declarator to have it found that the subject was actually purchased by their debtor and that it shall be liable for his debts in the same way as if it had been vested in his own person. *Lamb v. McDonald*, 12 Decr. 1793, not reported.¹⁵⁷ It may be observed, however, that Erskine § 92¹⁵⁸ lays down a different doctrine.

3d – The conveyance in question must be of a tenement or subject to which the party disponent had right in the character of apparent heir. As this passive title is a substitute for a service, it must relate to such a person only as might serve in the character of heir. If, therefore, the subject in question is one to which the disponent has another right than in the character of heir, by some special and different ground of claim as adjudication or the

¹⁵⁷ Hume 428 (vol. xlvii, No. 49).

¹⁵⁸ III.viii. 92.

like, the passive title of *preceptio haereditatis* cannot apply, though he be also otherwise heir apparent generally to the deceased but not in that particular subject.

Fourthly, the right must be gratuitous. If the heir really buy the subject and be really as well as in form a singular successor, then his quality of heir is dropped and the passive title does not apply, but the creditors have no reason to complain as they have the benefit of the price which is received from the heir. Where an unequal consideration has been given by the disponee, he is liable in the amount of the profit of the transaction. If however the consideration has been merely elusory, no attention is paid to it.

Lastly – The deed must be followed by acceptance during the granter's life either by possession or by infeftment taken with the consent of the disponee. If the disponee does not accept till after the granter's death, there is no *preceptio*. On the other hand, according to Erskine § 87,¹⁵⁹ the acceptance of the right, or even the possession on it during the lifetime of the disponer, is not sufficient to incur the passive title, unless the intromission and possession is continued after the death of the disponer. This reasonable limitation of the passive title is not noticed by any of the older authorities, and has been established in the lenity of modern practice only. It has reasonably been considered in later times that, if at the disponer's death when the amount of his debts comes to be known, the heir renounces all further concern with the inheritance, he has not had the same advantage as if he had served heir. If he throws up the conveyance, and further (for that is necessary), if he offer to render a fair and full account of his intromissions during the ancestor's life and account for such, the creditors suffer no prejudice or disadvantage, and it is, therefore, equitable and right that the passive title should not be applied to him, and he may be relieved from the consequences of his engagement. Erskine's opinion, therefore, is just and sound.

¹⁵⁹ III.viii.87.

The result of this passive title when incurred is to make the disponee liable for all the deceased's debts due at the date of the conveyance. It is for the debts due at the date of conveyance, and not at the date of the infeftment, as you might be apt to suppose. The law is so laid down by Stair 513 § 6¹⁶⁰ and by Erskine § 88 'Heritable Succession',¹⁶¹ though Bankton's opinion is different,¹⁶² and so the case *Smith v. Marshall*, 21 July 1780,¹⁶³ was decided, though that does not appear from the report. The plea of the posterior creditors was repelled and only the creditors anterior to the conveyance were found entitled to the benefit. Lord Stair¹⁶⁰ adds a caution, namely, that relief shall be given on reduction of the infeftment 'upon the common reason of fraud' where the disposition is kept up, though the passive title be not inferred.

In speaking of this passive title, I have noticed certain situations in which it does not apply, and in which situations at the same time it would be improper and unjust that the subject should be withdrawn from the creditors without any relief to them. For all such situations our practice has provided a remedy of one kind or another, accompanied to the exigency of the case. Thus, I may have said that the passive title of *preceptio hereditatis* subjects the disponee to such debts only as the deceased happened to owe at the date of the conveyance. If, however, the conveyance is one in point of form only, such as one which reserves the granter's liferent of the subject and a power to alter and revoke the settlement and to burden or sell the lands, it is perfectly obvious that the true and real purpose of such a deed is merely to save the heir the expence of a service. As substantially heir of provision, therefore, the disponee is held liable *in valorem* only for the debts of the deceased, contracted after as well as before the date of the conveyance. I here refer you to the case *Graham v. Abercrombie*, 17 Jan. 1717 (Dalrymple),

¹⁶⁰ III.vii.6.

¹⁶¹ III.viii.88.

¹⁶² III.vii.5. Cp. III.vii.10.

¹⁶³ M. 2332.

Dict.I.p.293.¹⁶⁴ *Creditors of Rusco v. Blair*, 21 July 1724.¹⁶⁵ The case is the same as if the father had disposed the lands to himself, whom falling to his son, in which case the son would have taken up the estate, as heir of provision.

In like manner, no person can be sued upon this passive title during the disponent's life and where the conveyance is to a remote heir, such as a brother, such remote heir cannot be sued on it even after the death of the disponent. Still, however, if the conveyance leaves the disponent insolvent and unable to pay his debts, a reduction of the conveyance upon the act 1621 c.18 is competent, and shall have the effect of reaching the estate itself in the hands of the disponent, and of laying it open to the diligence of all the disponent's creditors, anterior to the date of the conveyance.¹⁶⁶ As to the posterior creditors, they cannot have the benefit of this plea as they did not contract with the disponent on the faith of the estate, which they might have seen was out of his possession. If the disponent continues solvent after the conveyance is granted, there is no reason why the creditors should attach a subject given away at a time when the disponent had enough left besides to pay all his debts. This is one of the circumstances which distinguishes the case of the heir from that of the stranger disponent. The former incurs a passive title, as if he had served, and become personally liable for the debts, as if they had been contracted by himself, while the claim against a stranger heir cannot possibly be sustained for the challenge produces no representation – the law infers no obligation against him in these circumstances. But the law makes amends to the creditors by sustaining process at their instance for setting aside the conveyance so as to restore the estate to their diligence.

All these cases I have stated were cases of immediate and direct conveyance, followed by delivery of the deeds, and by possession of infeftment on the part of the disponent. Now

¹⁶⁴ 229, M. 4110–2

¹⁶⁵ *infra*.

¹⁶⁶ See Hume 429.

let us vary the case and state that the father does not give his eldest son immediate possession or infeftment of any part or portion of his estate, but that he executes a conveyance of a part only of his estate in favour of his eldest son and intended to take effect only at his death, bearing a reservation of his own liferent, and a clause dispensing with the delivery, and let us suppose that such deed of conveyance is found in the granter's repositories at his death and serves the disponent as a title to that part of the estate conveyed by it. In such a case the disponent cannot be reached by the passive title of *preceptio haereditatis*. He only gets right at the death of his father – the proper period for getting right. Still, however, he does not make up titles as heir, but he does so as a disponent by proceeding on the procuratory or precept. Neither of these, however, prevents justice being done to the creditors of the party deceased. If the conveyance happens not to bear a clause burdening the subject with the payment of debts and if the granter leaves no other funds for the payment of his debts than the estate conveyed, the creditors, whether or not the disponent be heir *alioqui successurus*, have action of reduction on the Act 1621 c. 18 of the deed of conveyance. In these circumstances, this process is competent to any creditor of the deceased, whether he was creditor before or only became so after the date of the conveyance. The reason of this is obvious. The conveyance is quite latent, and of no effect till the death of the granter. The day of death, therefore, falls to be considered the date of delivery of the deed. Though, therefore, at the real or written date the granter does not owe a shilling, still, if at his death, his means be not sufficient to pay all his debts contracted during his life, the persons who have become creditors, after the date of the conveyance, have right to reduce that conveyance. The case is more clear if the party disponent reserved power to contract debt. On that point I refer you to the case of *Blair v. the Creditors of Rusco*, 21 July 1724 – Dicty. 1. 292.¹⁶⁷

¹⁶⁷ M. 4117, 3 Ross L.C. 65.

Let us now put the case that such partial conveyance is expressly burdened with the payments of the granter's debts. The case is then altered to this extent, that the creditors of the disponent are relieved from the necessity of bringing a reduction, they in virtue of this clause being entitled immediately to affect the subject with their diligence and even to attack the disponent personally for payment *in valorem*, however, only of the subject disposed. This conveyance being limited – the extent and value of the estate is known, and it cannot, therefore, be supposed that the disponent meant to give, or that the disponent meant to take, the limited conveyance, under the unlimited burden of the payment of all the disponent's debts.

All the cases hitherto have been cases of a partial and limited conveyance. Let us now put the case of a disponent *omnium bonorum* – of all the heritage which the granter has or may acquire at any time of his life, bearing a clause expressly burdening the disponent with the payment of all the granter's debts, and also a reservation of the granter's liferent, and that such deed remains latent and is found in the granter's repositories latent and undelivered at his death. If this question had been stated to lawyers of former times, when the favour shown to latent deeds was lower than at present, they would have decided against the disponent and made him universally liable for the debts of the deceased. In cases of such a nature it makes a substantial difference whether it is a deed in favour of the heir *alioqui successurus*, or is a deed in favour of a stranger. As to the latter situation, it is to be observed that in point of principle the notion of the heir being *eadem persona cum defuncto* on which the whole doctrine of the passive representation is founded is applicable to that person only who is heir by blood and natural propinquity, and who might serve heir, and so formally establish that identity of person if he be so inclined. It is, also, as to such a one, that matters are open to the suspicion of fraud. Now, for these reasons, if the disponent is not heir at law but a stranger merely, our Courts have thought

it reasonable and equitable to construe this general clause, burdening the conveyance with the payment of debts, as intended only to give the creditors more easy access to the estate, so as to make the most of it. By accepting such conveyance, it cannot be supposed that the disponee meant to undertake an unlimited burden, which might ruin him. As to a stranger disponee, who cannot easily ascertain the true situation of the disposer's affairs, it would be unreasonable to reduce him to the dilemma of either accepting the conveyance, which might prove beneficial or profitable to him. Accordingly, in the case *Mercer v. Scotland*, 6 June 1745 – Kilk. 121¹⁶⁸ – it was found that the disponee by disposition *omnium bonorum*, burdened with the payment of all debts, was liable only *in valorem* of the subject in respect the disponee was not heir *alioqui successurus*. Again, another judgement was given in the case *Martin v. Graham*, 12 Decr. 1770.¹⁶⁹ Here the Court altered an Interlocutor of the Lord Ordinary and remitted to him to ascertain the amount of the subject, in view of fixing the disponee's liability. Since the date of that decision in *Mercer* things have been approaching more and more to that side of the question in favour of the disponee in so much indeed that lawyers are divided in opinion as to whether the heir at law, accepting such a conveyance, shall be relieved of the universal liability for the ancestor's debts on giving full accounts and making a complete surrender of all that he has received. I am not acquainted with any judgement to that effect, and there certainly are strong reasons why the heir should not be so relieved. The disposition to the heir apparent does not give him any new right: it alters the form of the title only, and that too more in form than in substance. If he chooses, he may repudiate the position and may take up the estate by service. He thus shall have *annus deliberandi*, and the right of pursuing an action of exhibition *ad deliberandum*, and so he shall be enabled to learn the true state of the affairs of the deceased and have the means of making a sound

¹⁶⁸ Clause No. 4, M. 9786–8

¹⁶⁹ M. 9888.

choice and judging whether he should repudiate the succession or not. Further, if, after all, he shall be distrustful of his situation, he has right to enter *cum beneficio inventarii*, whereby he shall be liable only *ad valorem*. With all these opportunities I do not see why he should be relieved of the universal liability if he accepts the conveyance. The observations formerly made apply to universal dispositions which do not appear till the death of the granter. But suppose that there is a conveyance *omnium bonorum* in favour of the eldest son and that this conveyance is followed with delivery and infestment during the father's lifetime, but reserving the granter's liferent and burdening the right with his debts. In virtue of this burdening clause, as well as on the passive title of *praeceptio hereditatis*, the son is liable for all the debts of the father contracted before the date of the conveyance. But the question arises, if the father goes on to contract debts after the conveyance, shall the son in virtue of the burdening clause be liable universally for these debts, though they amount to more than the value of the succession? Such a case is more favourable to the disponent than that of a latent disposition which appears in the repositories of the granter. In the present case the heir has not the *beneficium inventarii* nor the *ius deliberandi*. But his situation is fixed unalterably in his father's lifetime and before he can learn the amount of his debts. This is of the nature of a contract *inter vivos* between the parties by which the father is relieved of his debts, and it falls to be regulated by the will of the contracting parties, which, as it is not expressed, must be enquired into. As the disponent undertakes the burden of debts in respect of the estates conveyed to him, a limitation of the liability seems naturally to be implied to the value of the subjects conveyed. Had there been no conveyance, the son might have lived and taken the succession at the hazard of seeing the whole estate exhausted by the debts, but it is not to be imagined that the father could mean to give, or the son to accept, the conveyance so as to put it in the father's power to ruin him, the son, by making him liable for all the debts

which the father might afterwards contract. I shall only further refer you to the case of *Smith v. Marshall*, 2 July 1780¹⁶³ – a case in one particular different from any other case and attended with difficulty. It, however, completely settled the point of law at issue in it. The disponent was found liable only *in valorem*, though his right was burdened with all the debts of the deceased. This was, however, a nice case and nearly divided the Court.

I shall now notice one passive title more which is of a limited nature and makes part of the statute 1695 c.24.¹⁷⁰ It relates to the debts of a person who has possessed the estate for a length of time in the character of heir apparent and who has died uninfert. In such a case, at common law, the next heir serving, and passing by this apparent heir incurs no passive title to make him liable for the debts of the apparent heir, who had never formed any regular connection with the estate, and who was, in consequence, entirely disregarded in making up the next heir's titles. As little can the estate itself be affected for the debts of this heir. It had never belonged to him, no person can be charged in special to enter heir to him, and, without this charge, no diligence can be led against the estate for payment of his debts. Here, you observe, there is a kind of hardship on the creditors of this person, who contracted on the faith of the estate being his, and many of whom cannot be expected to have consulted the records at contracting with him. Material justice, therefore, required a deviation from the strict rule of the common law, by making the successor to the heir apparent liable for his debts. The statute 1695 c. 24, therefore, created a passive title *in valorem* of the estate, and as to the debts only of those apparent heirs, who had possessed the estate for three years. In such a case, the creditors of the apparent heir are made personal creditors only of the heir entering and passing by. They are, by no means, real creditors, though they have obtained and been infert on heritable bonds granted by the apparent heir. It was obviously a great stretch to make them personal creditors of the next

¹⁷⁰ 12 mo. ed., c. 39 record ed.

heir; but it would have been a greater stretch – a violence upon the law – to have allowed a precept of infeftment flowing *a non habente potestatem* to establish a real encumbrance. Besides, the Statute says that the heir entering shall be liable for the debts and deeds of the interjected heir, which clearly induces a personal obligation only against the entered heir. If we suppose, therefore, that the deceased apparent heir had granted a heritable bond to his creditor, and that the creditor is infeft upon it; that the heir passing bye also grants an heritable bond to his own creditor, on which infeftment is taken, in a competition, the latter creditor is clearly preferable, as he alone has title from a feudal proprietor. The heir passing bye no doubt is liable to pay the debts of the apparent heir, but that circumstance matters nothing to the heritable creditor. The same doctrine holds equally true as to a tack, which an apparent heir has as little right to grant as he has to grant a precept for infeftment. Put the case that the heir apparent has granted a tack of the lands; that tack shall be effectual against the next heir passing by as an onerous deed in virtue of the Statute, which makes him personally liable for his predecessor's obligations. But suppose that the next heir passing bye sells the lands. In such a case the tack shall not be good against the purchaser, as it is not a regular real right flowing from the owner of the estate. The purchaser may, therefore, remove the tenant, whose only remedy is right of recourse against the seller – the heir passing bye in virtue of his personal obligation under the Statute. I give you another illustration. The apparent heir contracts to sell the lands; the buyer of the lands, as a creditor under the contract, is entitled to compel the next heir passing bye, to implement the contract, by conveying the lands to him. But, though the price of the lands remains unpaid at the death of the apparent heir, it cannot be considered as his or as *in bonis* of him so as to go to his executors. The usual consequence of a sale, therefore, does not follow here, as to the disposal of the price under an onerous contract remaining due in the purchaser's hands. It does not go to the

executors of the seller, but it goes as a *surrogatum* of the lands to the next heir passing bye. So it was found in the case *Braid v. Braid*, 28 Feby. 1812, not reported.¹⁷¹ *Groat v. Emslie*, 25 Feby. 1817, not reported.¹⁷² If the heir dispoone away the estate by gratuitous deed granted in relation to it, the transaction is liable to be set aside at the instance of the heir passing bye.

We shall next attend to the order in which the creditors of the heir apparent come in for payment of their debts. They come in the third and last place only. The Legislature very properly considered that this personal obligation – this passive title – was contrary to the ordinary rule of law, and, therefore, ordered that the debts of the heir serving and passing bye the person last vested and the debts of the person served to shall be preferable to the creditors of the interjected apparent heir, who, therefore, came in the third and last place only and who, if the subject is not sufficient to pay all these creditors, suffers the damage arising from the deficiency. It has been found that the Statute does not apply where the interjected apparent heir had right to the estate only as heir under a strict deed of entail. I mean as to the debts and deeds prohibited by the entail no passive title can be induced against the next heir of entail. The heir passing bye in that case does not make up any fund, which could have been affected by the creditors of the apparent heir if he had made up the titles. Even the creditors of the heir passing bye cannot attach the estate, and as they are preferable to the creditors of the interjected heir so neither can the other creditors be in a better situation. That was found in the case *Graham v. Graham*, 13 May 1795.¹⁷³ *Syme v. Dewar*, 14 Jan. 1803,¹⁷⁴ *Syme v. Ronaldson Dickson*, 24 Feby. 1801,¹⁷⁵ 27 Feby.

¹⁷¹ Hume 199.

¹⁷² Hume 197 (vol. cxxvi, No. 52).

¹⁷³ M. 15439, Bell Ca. 162 (vol. lxxxv, No. 7).

¹⁷⁴ 1 Feb. 1803 F.C., M. 15619 (vol. lxxiii, No. 8).

¹⁷⁵ F.C., M. App. Tailzie 7 (lxxi, No. 58).

1799.¹⁷⁶ Further it is to be observed that the case is quite otherwise, and a passive title is inferred, as to debts and deeds not inconsistent with the entail, for with regard to them the heir served is just on the footing of common law as if there was no entail. The passive title therefore does apply here. Thus, put the case that the deed of entail permits tacks to be let for thirty years and that the heir apparent grants a tack for that period. That tack, when followed with possession, enables the tenant to keep possession, as was found in the case of *Lady Glencairn v. Graham*, 23 May 1800;¹⁷⁷ *Keay v. Marquis*, 8 March 1804.¹⁷⁸

You may attend also to this limitation of the passive title that it relates only to debts and proper onerous deeds, for the plea of favour could only lie with these persons who had trusted to their heir on the faith of his right to the estate as a means of obtaining payment or implement. There is no reason why a mere apparent heir should be enabled gratuitously to alter the destination of the estate by gratuitous deeds. You find accordingly that an infetment of a liferent of a quarter of the estate to the heir apparent's widow was to be considered as an onerous deed though provided by a post-nuptial contract, as in the case of *Lady Glencairn v. Graham*, 23 May 1800, as mentioned above.¹⁷⁷ A mere destination of succession in an onerous contract of marriage would fall under the same rule and be protected by the Statute as was found in the case *Smith v. Oliphant Murray*, 9 Decr. 1814;¹⁷⁹ *Ogilvie v. Ogilvie*, 16 Decr. 1817, not reported.¹⁸⁰ I may notice one limitation more of this passive title. It applies only where the heir apparent's other funds or estate – those in which he died invested – are insufficient for the payment of his debts. Put the case that the heir apparent makes up his titles to one estate but does not do so as to another, and that the two estates descend in different channels of succession. And suppose

¹⁷⁶ M. 15473 (lxxxii, No. 59). Both the decisions were affirmed by H.L., 1803, 4 Pat. 471.

¹⁷⁷ F.C., M.App. Heir App. 1 (vol. lxx, No. 12), affd. H.L., 1806, 5 Pat. 134.

¹⁷⁸ Hume 434 (vol. li, No. 48).

¹⁷⁹ F.C., (vol. cxvii, No. 48).

¹⁸⁰ F.C., (vol. cxxviii, No. 13).

that the estate, in which he is vested, is of itself sufficient for the payment of the debts. In such a case the passive title shall not be inferred against the heir who takes up the other estate. That is, the heir in this estate, if he pay the deceased's debts, shall be entitled to relief from the heir in the other estate as it will go. I refer you to the case No. 75 of Kames's 1st Collection.¹⁸¹ The Court judged on the same principle in the case *Trail v. Trail*, 24 Feby. 1803, not reported.¹⁸² The fact here was that a person had entailed an estate, in which he was infeft, in favour of a stranger, and had disposed another estate, in which he was not infeft, to trustees for the payment of his debts. Now it was found that the heir passing by was not bound to implement this trust and pay the debts of the heir apparent, that the entailed estate was liable, and it was sufficient for the payment.

This passive title is not limited to the case of landed estates of which there is a public possession. It extends also to those heritable estates, such as heritable bonds, which may be possessed in a more private manner. Even, however, as to such heritages, it is requisite that there be a substantial and profitable possession, such as by receiving payment of the sum in the bond or at least, of the annual profit or interest. It was not sufficient that the heir apparent was merely *in titulo* of possession, and that he might have drawn the profits. Judgement was so given in the case *Davies v. Campbell*, 3 March 1790, not reported,¹⁸³ and again in the case *Buchan v. McDonald*, 7 Decr. 1796, not reported.¹⁸⁴ The fact here was that the apparent heir had right to the residue of the price of an estate sold by judicial sale; but he had not got payment thereof and, therefore, it was found that the case was not within the provisions of the act. You will observe, however, that it is not indispensable that the heir apparent possess immediately by himself. It equally serves the purpose that the subject is possessed for him, such as, if he sells the estate and the disponee possesses,

¹⁸¹ Rem. Dec. i.151, *M. Of Clydesdale v. E. Of Dundonald*, 1726, M. XXXXXX

¹⁸² (vol. lxiii, No. 45) remitted 1808, 5 Pat. 239, cit. *Richan v. Trail etc. Trs. Of Stewart*.

¹⁸³ (vol. xxix, No. 109).

¹⁸⁴ M. 9822, Hume, 432, (vol. xc, No. 3).

or, if he establishes a right of liferent, and the liferenter possesses. *McTurk v. Hunter*, 17 Feby. 1819.¹⁸⁵

If a succession of apparent heirs possess the estate, and each of them for more than three years, they do not thus become successively liable for the debts of each of the preceding heirs. The person who at last makes up titles and passes by the whole of the several heirs apparent shall be liable for the debts of all of them who have possessed for three years.

Thus much of the doctrine of passive titles. The harshness of these titles is rendered more unexceptionable by an expedient, through which they may be avoided. This expedient is the service *cum beneficio inventarii*, established by the Act 1695, c. 24.¹⁷⁰ Any heir who is doubtful of his ancestor's funds being equal to the debts may avoid an universal representation, by accompanying his service, with an inventory of his ancestor's estate and effects. This inventory must be exhibited upon oath, signed before witnesses, and lodged with the Sheriff of the county in which the lands lye, or of the county in which the deceased dwelt, if he had no lands. It must also be signed by the Sheriff, and by his clerk, and recorded in the County books within year and a day of the death of the deceased, and, within forty days after the expiration of this year, it must be recorded in the Records appointed for that purpose in the General Record at Edinburgh. When those forms are attended to the heir may proceed to serve and this he may do after the lapse of the year. *Rose v. Baillie*, 5 Augt. 1789.¹⁸⁶ If he do not serve till after the year, or if he intromit with the heritage before service but after exhibiting the inventory, still that intromission shall be held to have taken place under the qualification of the inventory. You observe that the service must take place after the completion of these forms, so that if the heir once serve and incur the passive title, he shall not be relieved from his consequent liability by

¹⁸⁵ F.C.

¹⁸⁶ Hume 427 (vol. xxvii, No. 55).

afterwards exhibiting and inventory though within year and day, for the statute implies that the service shall take place after completion of the form of exhibiting the inventory.

Codington v. Trs. Of Johnston, 11 Feby. 1818.¹⁸⁷

The effect of this kind of service is not absolutely to extinguish the debts of the predecessor in so far as they exceed the amount of the inventory. It has only the effect of hindering a creditor in any case from drawing more than a rateable proportion of the amount of the inventory. If, therefore, the heir shall misunderstand the value of the estate and shall pay a creditor in full, in the belief that there are sufficient funds for the whole, he cannot recover by the *action condictio indebiti*. In like manner, if one creditor outstrip another by his diligence he shall draw the full benefit of it, be the consequence what it may to the other creditors. Judgement to that effect was given in the case *Reid v. Ronaldson* 5 Feby. 1771 (Hamilton¹⁸⁸). Here the heir served had sold the estate and a creditor used arrestment of the price in the hands of the buyer. That arrestment was found to be effectual, and the creditor was found entitled to draw full payment. By the same rule, if, at the death of the deceased, the estate was encumbered with heritable debts to its full value, the personal and postponed creditors shall be excluded altogether. If some of the creditors neglect to give in their claims, those who do apply shall draw full payment. In order to ascertain the value of the inventory, it is competent for the heir after service to raise an action before the Court of Session for ascertaining the value of the inventory, and, for having it declared that he shall not be liable to any greater extent than to the amount of the inventory. The heir thus shall know when to say that the funds are exhausted, and, when he can say that he has properly and legally paid off debts to this extent, the diligence will fall to be suspended and he will be free. All **XXXcasesXXX** and advantages which he may have been allowed in transacting or settling with particular

¹⁸⁷ F.C. (vol. cxxviii, Nos. 4 and 39), affd. H.L., 1824, 2 Sh. App. 118.

¹⁸⁸ F.C., M. App. Arrestment 2.

creditors must not be retained by the heir but must be communicated by him for the benefit of the other creditors. This sort of service does not limit the diligence of the creditors to the estate of the deceased nor does it save the heir from a personal obligation to pay. On the contrary, the common style of the decree against the heir is not declaratory but is a personal decree. Indeed so much is the heir looked upon as the proper debtor that if the claim of debt is prescribed, it may be referred to and proved by the oath of the heir. Judgement to that effect was given in the case *Sym v. Gordon*, 15 Jan. 1789.¹⁸⁹ The heir, therefore, though served in this way, continues to represent the deceased and is personally liable for payment of the debts, which may be made good against his person and his separate funds, only, however, till the amount of the inventory is exhausted, so that whenever he shows that the amount of the inventory is exhausted, he is free and liable no longer to be troubled.

This service is attended with a two-fold advantage. It is beneficial to the heir who possesses the estate of his ancestor without incurring an universal representation, and it is advantageous to the creditors who thus acquire a direct right of action against the heir, to the extent of the estate, to account to them for his intromissions, whereas if the heir lay out unentered, the creditors could draw nothing out of the estate without being at the expence and trouble of doing the regular diligence at common law. In making payment to the creditors, if we trust to the authority of the decision in the case *Veitch v. Young*, June 1733, Dicty. 1. 361,¹⁹⁰ referred to by Erskine § 69,¹⁹¹ in paying the creditors, the heir is at liberty to pay without fraud or partiality to those persons who first apply. Nay, according to the report of that case in the Dicty. 1. 361, the heir might even secure the preference of the creditors who first apply by granting heritable bonds on the estate. I rather doubt,

¹⁸⁹ M. 5354 (vol. xxvi, No. 23).

¹⁹⁰ M. 5345.

¹⁹¹ III.viii.69.

however, whether such is the state of the law. I rather understand that even a decree obtained against the heir is not of itself a ground of preference or warrant to the heir to pay the debt of the person obtaining it. On being cited by any creditor, it is the heir's duty, as holding the subjects in trust for the whole, to call all the creditors into the field by an action of multiple-pointhing that their preferences may be settled according to their diligences, and that each creditor who has not done any diligence may suffer his due proportion of the shortcoming of the funds. Indeed, that such a decree is no ground for preference or payment was found in the case of *the Creditors of McDowall of Crichen*, 28 Novr. 1738, Dicty. 1. 362.¹⁹² It is very true that Lord Kaimes in reporting the case in the Dicty. 1. 362 seems willing to rest judgement on a specialty in the particular form of the decree. But I rather suppose that this is a conjecture of Lord Kaimes' own and was not founded on by the Court, as Lord Kilkerran in reporting the case, No. 2, p.239, takes no notice of the circumstances having had any influence on the Court, and says that the decision settled the general point of law.

To close our enquiry concerning the payment of debt under the doctrine of passive titles there is one article more, which relates to the case of a competition arising between the creditors of the heir and those of the party deceased, both doing diligence for payment against the estate of the party deceased. The question is: How stands the matter of preference in such a case where the estate of the ancestor is not sufficient to pay both his own debts and those of the heir? It is obvious that, in this controversy, the equity of the cases lies entirely with the creditors of the predecessor, those creditors who contracted with him of the faith of that estate in which the party was vested at the time. The prior creditors of the heir have no such equitable plea of preference to advance. They could not have trusted to the estate at contracting as the heir, their debtor, might have happened to

¹⁹² M. 5348–9, cit. *Lawson v. Crs. of McDougall*.

die before the then owner. He might too, have been excluded from the succession by the owner selling, burdening, etc., the estate, so that the creditors of the heir must have had but a very distant and uncertain prospect of advantage from the estate. Further, were the creditors of the heir allowed any preference, there would be danger of fraud by the heir rearing up collusive claims of debt in the persons of his friends, who might attach the estate and impart the benefit of it to the heir. Our Legislature has accordingly enforced this by the Act 1661 c. 24,¹⁹³ of which Statute the enactment consists of three several articles. I shall begin with the consideration of that article which is the last in the order of the Statute, but which I think must be the first for the due understanding of the matter.

1st. The Statute declares that the creditors of the deceased shall not be injured or affected by any conveyance on the disposition of the estate made by the heir of the deceased, if it be made within a year after the death of that person. Put the case, therefore, that within the year the heir sells the estate and that the purchaser is infest on it. Still, by the Act and contrary to common law, it shall be competent to the creditors of the deceased to adjudge the estate, as if it had not been sold. Or, again, put the case that, within the year, the heir dispoone any part of the predecessor's estate in security – grants an heritable bond to a person previously creditor of his own, or that he conveys the estate by trust deed for the payment of all his debts generally. That bond or trust deed is not entitled to compete with any after-adjudication at the instance of a creditor of the predecessor. This is plainly right and reasonable, for, if the heir was in a state of apparency, no creditor could adjudge, till after the *annus deliberandi*, and, even if the heir entered, it is plainly to allow the creditors a reasonable period to ascertain the state of affairs of the deceased. Though, by the title of the Statute, it might seem to be applicable to the case of an apparent heir only, still however, according to the spirit and words of the Statute, it is applicable to the case

¹⁹³ 12 mo. od., c. 88 record ed.

of a sale made by an heir infest, one who completes his title by sasine and infestment, alike as to the case of a sale by an heir in apperency only. That point was settled by the case *McAdam v. the Mags. of Ayr*, 14 June 1780.¹⁹⁴ *Bennet v. McLachlan*, 25 May 1820.¹⁹⁵ The Act applies also to bonds heritable by destination. *MacKay v. MacKay*, 15 Feby. 1783.¹⁹⁶ The nullity introduced by this part of the Statute is an absolute and unconditional nullity, and is equally pleadable by any creditor of the deceased, whether he has or has not already proceeded to do diligence against the estate. Though he has not done diligence, still he has right to set aside the conveyance, and so clear the way for the operation of his diligence. So it was decided in the above mentioned case of *McAdam v. Mags of Ayr*¹⁹⁴ and in several other cases, particularly in the case of *Taylor v. Lord Braco*, Kilk. 150,¹⁹⁷ and in *Bell v. Lothian*, 25 Feby. 1773, Wall. Colln.¹⁹⁸

2d. Having, in this way, provided effectually that the estate shall remain with the heir for twelve months, the Statute proceeds to order that the creditors of the deceased, doing diligence within three years of their debtor's decease, shall be preferable to the creditors of the heir. Take the case of two adjudgers, one a creditor of the heir, the other a creditor of the ancestor. The creditor of the predecessor shall be preferable if he adjudge within three years to the creditor of the heir, though his adjudication happens to be two years posterior to that of the heir's creditor. The words of the Statute are applicable only to those cases of real diligence by adjudication done by the competitors – the creditors both of the ancestor and the heir. The question here arises: How shall the preference be regulated where after the expiration of one year the heir proceeds to grant to his own previous creditor an heritable bond, on which the creditor is infest, and where a creditor

¹⁹⁴ M. 3135.

¹⁹⁵ (vol. cxxii, No. 6), 1826, 4 S. 712, affd. 1829. 3 W. & S. 449.

¹⁹⁶ M. 3137.

¹⁹⁷ 1747, M. 3128–33.

¹⁹⁸ F.C., M. 3134.

of the deceased afterwards, but within the three years, proceeds to adjudge the same lands? Now, as to the case, undoubtedly the Statute has said nothing in plain and express terms. Lord XXXHarcarse, however, remarked, long ago,¹⁹⁹ and his opinion has been followed in later times,²⁰⁰ that it would be absurd and inconsistent that a creditor of the heir should have it in his power to gain a preference by the voluntary deed of his debtor, which he could not obtain by diligence in the regular course, and that, therefore, such heritable bond must be postponed. *Bennet v. McLachlan*, 25 May 1820.¹⁹⁵ This extension of the Statute seems to be a right and reasonable extension. You observe, however, that I have been speaking of the case of an heritable bond granted by the heir to a person to whom he was previously indebted, and who could have done diligence for his interest so as to have attached the reversion of the estate after paying the creditors of the predecessor. It is quite a different case – and I think partly, though I will not say wholly, not to be judged by the same rule – where the creditor by the heritable bond advanced money to the heir immediately on the faith of and in return for the bond, and thus for the first time became creditor to the heir. Such a person is to be considered as in truth a purchaser of the heritable security, and, as it is quite clear that any purchaser of the estate, from the heir, after the expiration of the year, would be secure, it seems to follow that the creditor by such heritable bond is substantially a purchaser of that infestment and should also be secure. There is besides no favour or partiality in such a transaction, and it rather appears that the main object of the Statute was to prevent favour and partiality for the previous creditors of the heir. In the **construction** of this Statute it is held that the widow and the children of the deceased have the benefit of the Statute for their provisions and are preferable creditors to those of the heir, if these provisions are moderate and reasonable and are in place of their legal provisions. In granting these provisions, or in

¹⁹⁹ No. 144, (*Arniston v. Ballenden*, 1685, 2 B.S. 93).

²⁰⁰ Quoted in note to Stair II.xii.29, 3rd ed., by Ersk.III. viii. 102, and by Bell *Comm.*, i.771 note and 772.

conveying the estate to the heir under the burden of such provisions, the father established an obligation on himself and on his heir to make payment. He warranted those provisions as at the date of making them, and in that point of view the persons provided are to be considered creditors. So it was held and decided in the case *Harkness etc. v. Milligan* 19 Jan. 1816.²⁰¹ Here the father, the possessor of several tacks, conveyed all his heritable property to his eldest son, burdened with provisions to the widow and younger children, and declared that he should not enter into possession before he had paid these provisions. A competition arose between the widow and younger children of the deceased and the creditors of the heir when the former were preferred.

There is another case to which it is doubtful if the Statutory rule applies. This is a competition between an heritable bond granted by the ancestor but not followed with infeftment till a year after his death, and a bond and infeftment granted by the heir for an instant advance of money after the expiration of the year. The Statute seems to have been intended for the relief of those creditors who cannot do real diligence; and, as the creditor here is not in this situation, it is doubtful if he can have the benefit of it.

If after the expiration of the year and before diligence, the heir sells to a stranger,, the sale is good, but in a competition between the creditors of the deceased and those of the heir, arresting in the purchaser's hands, those of the ancestor, though not arresting, will be preferred, the price being a *surrogatum* for the estate.

²⁰¹ Not reported (vol. cxxiv, No. 28).

BANKRUPTCY

After this Transference by Succession, we proceed to consider Transference by Bankruptcy, which, like the other, is a mode of transference that is common to every sort of estate, heritage and obligations, and the real right of the *ipsa corpora* of moveable subjects.

At first sight it may not occur to you how this system should operate, or be considered as a transference of property; since it neither is attended with any change of possession, nor implies any act of the bankrupt's will to convey his substance to another. And it truth, when I here class it as a mode of transference, I do not mean to be understood strictly, as if the situation itself, without any judicial act or declaration, vesting the creditors, did actually straight way make them proprietors and masters of what had formerly belonged to their debtor. This, undoubtedly, is not the law. The debtor, although he be bankrupt, continues to be owner in form of all that he had formerly belonged to him; and no power of property can be immediately exercised, by any of his creditors, over any part of his substance.

On the other hand from this we are apt at first sight to conclude, that, being owner, the bankrupt retains all the powers of property notwithstanding his situation of affairs; and that he may administrate, or dispose of, his substance; that he may pay, prefer or secure, any of his creditors, at pleasure; and consequently that any one of his creditors may take from him, as formerly, in the course of diligence and lawful execution.

But on attending a little to this subject, we soon perceive, that though in law and form the bankrupt continues proprietor of his estate; yet the whole equitable concern and interest therein, has truly passed from him (who has already spent and consumed the value thereof) over to his creditors, by whom this value has been furnished on the faith and

credit of those funds. Though not yet vested with the actual right of his estate, those persons are thus substantially, and in justice, purchasers thereof, by their advances made in reliance thereon; and the debtor can no longer be considered in any other light, than as a factor or trustee, who is in possession of it, for their behoof and advantage.

This then being his proper character and station – no longer administrating on his own account, but for others – his former powers of property must of course suffer an abatement; and his conduct fall to be regulated by considerations of duty, to those for whom he manages. Here, therefore, by means of bankruptcy, there is an immediate change of the interest in property, and a suspension of the powers and privileges of ownership in the owner, without the immediate transference of them to any other person.

It is this species of transference, and of restraint, that I now propose to consider.¹ And I shall first notice what natural equity dictates on the subject, and then discuss our municipal rules.

‘Tis obvious then in the first place, that the debtor, from the moment that he knows himself insolvent, and despairs of retrieving his affairs (for this last is requisite to make a bankrupt as well as the other), has no right, in any shape, gratuitously to give away any part of his substance, and that he does a moral wrong in attempting it. If the donee, the receiver of the right, was in the knowledge of his situation, he also is accessory to that wrong in taking the conveyance, and cannot be allowed to hold it: and even if he was ignorant of the situation, still when he has come to the knowledge of it, he cannot in

¹ The following note appears here in the MS.: ‘With respect to what may seem right and just on this subject, considered on abstract principles, I think I may properly refer you for a good account of it Lord Kaimes’ work B.3 Ch. 5, which is one of the most instructive in the work. Wherefore, instead of spending time on this enquiry, I shall proceed to detail the provisions of our own proper municipal practice. One of the most signal and salutary of these is the Act of Sederunt July 1620.’ It is delete in pencil. Hume seems to have been contemplating going straight on from Here to p.184 omitting the intervening pages.

conscience hold by the gift, enrich himself at the expence and to the loss of others. Pl. Eq. p.302,3.²

2dly. The bankrupt is in conscience debarred not only from favouring others at the expence of his creditors, but from favouring any one of his creditors, to the prejudice of the rest, or of another. Not having enough to satisfy them all, yet being equally bound to all, he is called on to deal impartially among them, and to make an equal distribution of his effects to them, so as each may suffer the least possible, and no one come to a greater loss than the rest. He is therefore to abstain from making payment to any one, whether in money or otherwise, and even from granting to any on any preference for his security or relief, which he has not formerly obliged himself to. If indeed any creditor has previously established to himself a preference, whether by diligence or voluntary agreement, while the debtor was solvent; that, being good at first, must continue so in all changes of situation, and him the debtor may and must prefer in his distribution. But farther than this he cannot go. His favour and affection are to be absolutely silent, and the distribution to be made by him, as trustee and manager for all and each.

This is a plain and undeniable proposition. And on the other hand it seems no less evident, that the creditors of the same bankrupt debtor, connected by their common misfortune, and their interest in the same fund of payment, are bound from the time of their knowing his situation, to consider each other, and stand naturally obliged to certain mutual duties. The feelings of private interest do no doubt, at first, strongly prompt each individual in this situation to look on every other creditor as an enemy, and to provide for himself, whatever the consequences to the debtor of his co-creditors. But every one at the same time feels, that there are in nature strong grounds for a bond of fellowship and sympathy among the persons connected by such a common calamity; and, that though the

² Kames, *Prs. of Equity*, 2nd ed. (1767).

sentiments of that tendency are apt to be stifled in the first alarm of danger, yet these are what all impartial persons, and even the persons concerned themselves approve, as calculated for the common benefit, and suitable to the situation and nature of a social being. p.301.². Indeed 'tis obvious, that if the debtor is blameable for attempting to secure for any one more than his proportion, the creditor must be blameable too, who knowing his situation, aids and concurs with him in the execution of his purpose. *ib.*²

Not only so, but the creditor must even be blameable for attempting to take more, without the debtor's aid, by the force of legal execution. For it were strange that the Law and Judges of the land, should countenance and lend their aid to execute a purpose, which justice forbids the debtor to entertain, or compel him to do, what it will not suffer him to do of his own accord.

This, however, you observe only touches those creditors who are in the knowledge of the bankruptcy. Those who are ignorant of that matter may be affected by it, or not, according to the situation they are in. If a creditor has *bona fide* obtained payment in cash, there seems to be no ground of equity for undoing this, and taking it from him. He takes his own, indeed he cannot justly refuse the offer, and he does not participate in any wrong intention. The same holds where he has *bona fide* done compleat legal diligence and thereby (as by a poinding for instance) recovered payment. The case of payment received from the debtor in goods and effects, or conveyances of funds in *solutum* is more doubtful; because this measure is what hardly any man has recourse to till distress, and must be supposed to create an opinion, at least a suspicion of insolvency, in the creditor to whom it is offered. But whatever may be thought of that, 'tis clear that when a creditor, though ignorant of the bankruptcy, has by dint of legal diligence procured to himself, not payment, but a security only, this should not have an effect. Such a creditor is still only *in petitorio*, after obtaining his security, and so soon as the state of things is known, it is

wrong for him to insist in prosecution of it, and wrong for a court to aid him to prosecute it, to the prejudice of the other creditors. p.302.²

It thus becomes of great moment in this department of questions to ascertain the time when the debtor began to despair of his affairs, and the time when his creditors became acquainted with his situation. But this you will easily see, if left open to enquiry and investigation in each case, would lead to infinite and endless litigation; both points being matters of opinion, only to be gathered from circumstances and various indications. 'Tis therefore almost necessary to avoid this by fixing on some presumptive standard in both respects. Some description of situation, in which a debtor shall be held to think himself bankrupt, and to be universally known in the world for such.

I have laid these considerations before you by way of introduction to this subject. They are mostly taken from that Chapter³ of Lord Kaim's work, intituled of the powers of a Court of Equity with relation to Bankrupts, which I must recommend as one of the best in the book, and useful to be read, provided you do not read it as a picture of our actual practice.

Let us now proceed to institute that enquiry – to consider how far these equitable and expedient principles, have been by custom, or the wisdom of our Legislature, adopted into our municipal system.

I shall first lay before you an analysis of the principal Statutes on the subject, and shall afterwards show how far our common law will give relief in situations to which the statutory provisions do not apply. The former is much the more extensive department: for there seems reason to believe (whether owing to our limited commerce or to whatever

³ Book III, ch.V.

other cause) that the Court of Session did not for long apply any effectual check to the devices of bankrupts, eve those of the most iniquitous kind. *P.Eq.* p.306–7.⁴

The first attempt at redress did however proceed (like many others of our improvements) from that Court; which, in virtue of its delegated power to make regulations for the better administration of Justice, did on many occasions, lay down and declare the rules of justice, and point out to the Legislature the Sederunt of the month of July 1620⁵ against unlawful Dispositions and Alienations made by Dyvours and Bankrupts, which being approved of in practice, was adopted by the Legislature, and transmuted into a Statute of the same Title – the Statute 1621 ch. 18th.⁶

This Statute consists of two distinct and independent parts, which are intended for the redress of two several sorts of abuse. The first clause, was meant for the benefit of the bankrupt's creditors generally, by hindering the bankrupt to secure his substance, or any part of it, for his own enjoyment, by feigned and collusive conveyances thereof, to his confidants and familiar friends, to be held by them for his behoof. To that ends the Statute declares, that 'all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true just, and necessary causes, and without a just price really paid, the same being done after contracting of lawful debts (to)⁷ true creditors, To have been from the beginning, and to be in all times coming, null, and of none avail, force nor effect.'⁸

To understand this provision it will be best successively to examine the different circumstances, that must concur in a deed, to bring it within the terms of the Statute.

⁴ Kames, *supra*, 2nd ed. See also p.308.

⁵ 12 July. Stair, l.ix.15, Ersk., IV. i.28, note, Bell *Comm.*, ii 171, Kames, 1st ed., 226/7, 2nd ed. 307/8.

⁶ 12 mo. and recorded ed. Stair, *supra*, Ersk., IV, i.28, Bell *Comm.*, *supra*, Kames, *supra*, 307/8.

⁷ (sic). 'from'.

⁸ Stair, Ersk., Bell *Comm.*, ii.180, 153, Montg. Bell 180.

And, in the first place, it must be the deed of a debtor who is insolvent – of a person, who was either previously incumbered with debts beyond the value of his whole means, including the subject now aliened, or who at least, by this conveyance, becomes unable to discharge them.⁹ This will probably appear to you to be one of the most natural and indispensable requisites to the rescinding of a gratuitous alienation. In as much as, if the debtor continues solvent after his deed, his prior creditors have themselves to blame, if they supercede the use of diligence, by which they may force payment all the time, and trust him longer, till he involve himself in additional debts. Besides, that to rescind the donations of a solvent person, who *ex eventu* only becomes bankrupt, would be to restrain and limit a person in the use of his property where there is no fraud nor wrong intention at the time. See Bell p.105.¹⁰ It does, however, appear, that the *Actio Pauliana* of the Roman law – a remedy somewhat allied to this one – was given to a creditor for rescinding any gratuitous alienation by his debtor, if he afterwards became insolvent,¹¹ and the law does not appear to have been completely settled the other way with us¹² (30 June 1675 *Clark v. Stewart*. Dirlton – No. 139.¹³) till the case of *Fletcher* against *Prestonhall*, 15 January 1712,¹⁴ where the Lords, as Fountainhall tells us,¹⁵ having balanced the inconveniences on all sides, found, that reduction did not lye, as at the date of the deed the debtor had a visible unincumbered estate, equal to all his debts.¹⁶

⁹ Ersk. IV. i. 32, Bell *Comm.*, ii.180, 153, Montg. Bell 180.

¹⁰ *Comm.*, 1st ed., see p.103.

¹¹ *D.*, XLII.viii. See *Inst.*, IV.vi.6 and Moyle ed. note at 547, Sanders at 435–6. Stair, I.ix.15, says the Act was passed in imitation of this *actio*. Ersk. IV.i.28.

¹² At one time Hume referred to the fact of the Act not expressly saying that the debtor must be insolvent, and Dirlton No. 287 (*infra*) noting the difference of opinion on the Bench (at p.140) and giving reasons for a more extensive application than was then applied. Even Lord Stair, p.84 (I.ix.15), he said, says the Act applies though the debtor was not bankrupt as a broken merchant flying and that the debtor, to avoid the Act, should be not only solvent but able to pay readily and possessed of an estate both equal to his debt and clear of all diligence.

¹³ p.139, No. 287. M. 917–9, Stair ii. 336. Bell *Comm.*, ii.180 and note.

¹⁴ M. 924–6, cit. *Prestonhall v. Fletcher*.

¹⁵ ii. 703.

¹⁶ Bell *Comm.*, *supra*.

Thus far however the receiver of the gratuitous deed still lies under a disadvantage (and herein consists one of the benefits and advantages of the Statute, which so far makes a stretch beyond the common law) that whereas solvency is presumed in the common case, here, on the contrary, **XXXXX** the creditor has shewn the insufficiency of the funds at the time of the question occurring, this insufficiency will be presumed, *retro*, to the date of the deed under reduction; **XXXX** it shall lie on the receiver thereof to get the better of this, **XXX** condescending on his funds at the date of the deed, and shewing their sufficiency for his debts at the time. Bⁿ.V.1.p.261.¹⁷ **XXX** was given to that effect in a question with children, **XXX** August 1783, *Creditors of Wardrobe*;¹⁸ and indeed 'tis obvious, that the receiver of the deed, the conjunct or favourite person, **XXXX** the best access to knowledge of any secret funds of his author's, **XXXXX** suffers no injustice in being put to discover them: provided **XXXXX** the creditors bring their challenge within a reasonable time; such as makes the investigation practicable to the other **XXXX**.¹⁹ 7 Decr. 1710 *Daes*, Fountainhall.²⁰

It shall not, however, avail him, though he should **XXXXX** his author's solvency at the date of the deed, if he was **XXX** solvent also at the date, when that deed came to take effect **XXXXX** delivery or otherwise.²¹ If the debtor, for instance, has **XXXXX** his estate to his son, but kept his conveyance latent **XXXXX** undelivered, and continued for years in the administration **XXXXX** enjoyment of it – his solvency must be shown at the time of **XXXXX** surrendering these, and so publishing the deed; because it is **XXXXX** only that the deed properly begins to exist; and the animus **XXXXX** purpose of it must therefore be tried as at that time.²¹

¹⁷ Bankt. l.x.74 Bell *Comm.*, *supra*, and ii.172.

¹⁸ M. 974, cit. *Crs. of Cult (Wardrobe of Cult) v. The Younger Children*.

¹⁹ Bell *Comm.*, ii. 181.

²⁰ ii. 604, M. 921, v. *Fullerton*.

²¹ Ersk., IV.i.34, Bell *Comm.*, i.67, 105, 109, 1st ed., ii. 173, 184, Montg. Bell i.180.

After this, of insolvency, the next requisite in degree is that the deed be gratuitous – or as the Statute expresses it, ‘without true just and necessary causes, and without a just price really paid’.²² The reason of this limitation is in general sufficiently obvious; but the precise meaning and application of the terms in which it is expressed, may require some discussion.

These terms exclude in the first place all deeds, of whatever description, either obligations, securities, or deeds of disposal which are granted in consideration of sums or other beneficial causes instantly advanced. 20 July 1671 *Ld. Birkenbog v. Graham*.²³ The Statute is not applicable to any such; and about this there can be no dispute; But farther ‘tis equally settled (and is indeed equally clear, viewing either these words or the words of the preamble) that they do not authorise reduction of any assignation, disposition or conveyance whatever, to a prior creditor *in solutum* of his debt.²⁴ 1 Febr. 1627 *Scougall v. Binny*,²⁵ 6 Janr. 1669 *Newman*.²⁶ The object of this part of the Act, was not to hinder the debtor’s preference or payment of one creditor before another (for so long as no one of these had touched or prepared to touch his funds with diligence, he could not be blamed for getting rid of the most pressing), but to hinder his favouring himself or his near connections, at the expence of all his creditors whatever. See McKenzie p.72.²⁷ Now a deed of the above sort, in favour of a creditor, has a true and just cause in the pre-existing debt; which he is bound to discharge, and which is, as it were, the price of conveyance. Dict. V. 2d p.66,²⁸ 22 Febr. 1711 *Rule v. Purdie*,²⁹ 13 June 1760 *Watson*,³⁰ 1 Augt. 1760

²² Ersk., IV.i.29, 32, Bell *Comm.*, ii.171, 176.

²³ M. 881, Stair i. 762, cit. *Laird of Birkenbog v. Graham*, where the disposition was in satisfaction of a bargain of victual sold and delivered to the bankrupt about a month before the disposition, and was upheld.

²⁴ Bell *Comm.*, ii.177.

²⁵ M. 879, Durie, 267.

²⁶ M. 897, Stair i.579, v. *Tenants of Whitehall &c.*

²⁷ *Obs.* on 28 Act, 23 Parl. Jas. VI, (1675).

²⁸ *Crs of Campbell v. Newbyth*, 25 Nov. 1696, *infra*, *Moncrief v. Lockhart*, 13 July 1698, (M. 884, Fount.ii.11, also cited *Cockburn’s Crs v. Moncrief*).

²⁹ M. 12566, Fount. li.640. See Bell *Comm.*, ii.180 note, Kames, *Prs of Equity*, 1st ed. 239.

Bean v. Strachan.³¹ See Arg't. 15 Jan. 1788 *McNaughtan*³² – Same was the rule under *Actio Paulianai*.

For the like reasons, this clause is no hindrance to any prior creditor to take a convenience from his debtor in security of his claim.³³ 'Tis true the debtor was not previously bound to give security: but then it cannot be denied, that the security has a just and true cause, in the real pre-existing debt, and in the creditor's delay of diligence for the same; to which we must presume that he would have proceeded, if his demand of security had not been complied with. 25 Novr. 1696, *Campbell*, F. hall.³⁴ See above arg't.³⁵ And Falconer, vol. 2, No. 8.³⁶ Bonds, therefore, granted to children, if they are granted only in implement of the obligations undertaken in their father's contract of marriage, made when he was solvent, and if these obligations are such upon which the children might pursue or do diligence against the father, are beyond the reach of this because of the Statute (Bell, p.81³⁷).

Nay, more, even though the conveyance or security be quite gratuitous, it is still beyond the reach of the Statute, if it is given under a previous obligation to that effect granted while solvent. Such a deed is saved by the words – 'necessary causes' – in the Act, which denotes a deed under previous lawful obligation.³⁸ S.W.M. ag.³⁹ *AvismXXX* Ks. No. 9, p.55.⁴⁰ For instance a solvent person grants another a writing, in which, upon the narrative of love and favour, and for enabling him to educate his family, if he shall have one, he

³⁰ M. 985, v. *Scott's Younger Children*.

³¹ M. 907.

³² Not reported, Hume Sess. Pap., vol. xxii, No. 37, Petit. At pp. 6–7.

³³ Bell *Comm.*, ii.176, 177.

³⁴ i. 736, M. 883, cit. *Campbell's Crs v. Newbyth*.

³⁵ *McNaughtan*, *supra*, Petit. p.9.

³⁶ *Grant v. Crs of Grant*, 10 Nov. 1748, M. 949–953, *Kames Rem. Dec.* li.167, Elch. Fraud, 19, Kilk. 55.

³⁷ *Comm.*, 1st ed., i.688.

³⁸ Bell *Comm.*, ii.176.

³⁹ Sir W. Miller (Lord Glenlee) agrees.

⁴⁰ *Kames Rem. Dec.*, *Meldrum's Exrs. Crs. v. Kinneir*, 11 Dec. 1717, M. 928.

binds himself to grant him a bond upon the birth of his first child for such a sum or binds himself to pay such a sum with his eldest daughter, when she shall be married. Now if a child is born, and the bond is accordingly given, though by that time the granter is insolvent, I do not conceive that the Act 1621 will reach the bond, because it is given in implement of a prior reasonable obligation, upon which diligence might be obtained, to compel performance. Nothing here depends upon his will: the act was compleat in its own terms, while he was yet solvent, and neither he nor his creditors, who as yet have done no diligence against him, can come against it.

There are certain other sorts of deed, of which it may here be proper to take notice somewhat more particularly; both on account of their great frequency, and because, at first sight, they seem to hold a middle place between onerous and gratuitous. Such are provisions to children. Those may be in two situations, being either granted in the parents' contract of marriage, to children *nascituri*, or by bonds or other writings to the children themselves existing. In either case, to make room for the question, we must suppose, that the provisions are so conceived (which is not the common case) as to constitute the children creditors to the father, and not merely heirs of provision to him; in which last case they can only take their provisions out of his free substance at his death. But when they are so conceived; still if the father at the delivery of the bonds in the one case, or at contracting his marriage in the other, was already insolvent; they are held for gratuitous in this question, and are reducible at instance of his prior creditors under this clause of the Act. And this is a just construction of them. For though the father is naturally bound to provide for his children, this is only if he have wherewith, after satisfying all the civil claims against him: so that in setting aside such provisions, the judge does but disappoint the children, of sums, which, in these circumstances, ought never to have been engaged for in their favour. Besides, that this expedient of securing

part of the bankrupt's substance to this issue, is truly the next thing to setting it aside for himself; and (if such provisions were sustained) would doubtless be often resorted to for that purpose. Though then the provisions in a contract of marriage do make the children creditors, to the effect of reducing posterior gratuitous deeds to the prejudice thereof, and that upon this very Statute: still the same are themselves held for gratuitous, to the effect of reduction at instance of prior actual creditors, if the father be insolvent at the time of granting them: for knowing that such is his condition, he does wrong, to undertake any such obligations.⁴¹ 13 Febr. 1736, Falconar – Dict. 1.34;⁴² Rem. Dec. No.72⁴³, Bⁿ. p.262,⁴⁴ Stair p.84⁴⁵.

Provisions to a wife may also be in different situations. If there was an ante-nuptial contract of marriage settling her provision, any addition made thereto by the husband, when *obaeratus*, is a clear, voluntary, gratuitous, and unreasonable act: 10 Feb. 1778, *Campbell v. Somerville*⁴⁶ the parties themselves in their contract having declared their opinion of what was a suitable provision, even to their better circumstances. 3 July 1793, *Mrs Ewing v. Douglas Heron*.⁴⁷

Where, in the next place, the provision is settled by a post-nuptial contract but this for the first time – not in addition to any former provision – her claim is so far less objectionable than in the former instance; especially if she then conveys to her husband any separate fund of hers by way of tocher. It will be there considered, that the husband is under a natural obligation to ailment his wife standing the marriage, and to provide for her welfare afterwards, which obligation is a cause sufficiently just and true, to take his

⁴¹ Ersk. IV.i.34 (see as to this Bell *Comm.*, i.688 note), Bell *Comm.*, ii.176–7, i.688 note, i.682 &c.

⁴² Elchies, Ranking and Sale 4, Aliment 3, Cit. v. *Falconar's Crs.*

⁴³ Kames, vol. ii, *Murray Kinninmond*, 18 June, 1746, M. 990. Ersk. IV.i.33 note.

⁴⁴ I.x.77.

⁴⁵ 3rd ed., I.ix.15.

⁴⁶ M. 1000, 14 Feb. Bell *Comm.*, i.687 note. Ersk. *Supra*, note.

⁴⁷ Not reported, Hume, *Sess. Pap.*, vol. xlv, No. 24.

provision from her under the Statute. But withal, it is remembered on the other side, that the provisions in a post-nuptial contract are not causes or conditions of the marriage; and that the manner and extent of this obligation does also naturally vary with the husband's situation of fortune, and actual ability to discharge it. Creditors have right therefore to insist, that the terms of such contract be strictly equal, and that the wife's provision shall not be a large endowment at their expence, but a reasonable and suitable allowance as things stand at the granting thereof.⁴⁸ There are accordingly many examples of life rents and other provisions restricted in respect of the husband's insolvency Home No. 273⁴⁹ – 12 July 1758 *noble v. Dewar*.⁵⁰ See also R.D. No.72.⁴³ (2 Febr. 1796, *Mrs Ferguson v. Creditors of do.*⁵¹).

The most favourable situation of all for a wife is, where her provisions are given by an antenuptial contract and are never at all **XXXincreased** by any after deed: for here she marries, at least is in law held to marry, in consideration, and on the faith of these provisions. Erskine⁵² accordingly says, that such provisions are accounted strictly onerous deeds, and are not within the Statute: which seems to be a just rule, if we understand it, as Lord Stair seems to have understood it, when he said⁵³ that 'competent provisions to wives or husbands are not (to be) accounted gratuitous, but onerous *ad sustinenda onera matrimonii*, and for other mutual provisions. But, if exorbitant, they will be liable *in quantum locupletiores facti*.' p.113⁵⁴ This limitation is plainly just and salutary. For the very exorbitancy of a provision, granted by one who knows that he is

⁴⁸ Ersk. IV.i.33, Bell *Comm.*, i.687, ii.178.

⁴⁹ p.438, *Lady Auchinbreck v. Campbell's Creditors*, 26 July, 1744, M. 988–9, Kilk., Bankr. No.4, Elch. Fraud, 12. Ersk., *supra*, note.

⁵⁰ M. 15606.

⁵¹ M. 1001, Hume *Sess. Pap.*, vol. lxxxviii, No.16, cit. *Ferguson's Crs v. Swinton*. Ersk. *supra*, note.

⁵² IV.i.33.

⁵³ p.84, 3rd ed., l.ix.15. Bell *Comm.*, ii.176, i.682 &c.

⁵⁴ Kames, *Rem.Dec.*, ii.113, quoting Stair, *supra*, in report of *Crs of Murray v. Murray, His Daughter*, 18 July, 1745, M. 994.

insolvent, is a presumption of fraud in the husband, and even in some measure in the wife, who at the time of her marriage, generally knows more or less of the husband's situation of fortune, and, at any rate, has it in her power, if careful, to discover what it is; whereas the anterior creditors contracted with him while as yet he was a solvent person – I have, therefore, no doubt, that even an antenuptial provision, by an insolvent person, may be set aside so far as it is immoderate, and I observe that this was lately decided in a question even between the widow, and the children of a former marriage; who, though creditors in one view, have certainly not so strong a claim, as persons who actually advance money or other articles to the father. 8 Febr. 1785, *Duncan v. Sloss*,⁵⁵ R.De.p.113.⁵⁶ Indeed the very report alluded to seems to take the right of a creditor to reduce in such a case for granted, and states the question for the children only, as more liable to dispute.

I proceed now to what, in terms of the Statute, is a third and equally indispensable requisite of the deed, namely that it be granted to a conjunct and confident person,⁵⁷ meaning by a conjunct person, one who is so nearly related to the granter of the deed, that he could not be a judge in his cause;⁵⁸ and by a confident person, one who is in a situation of special trust about him; his steward for instance, or clerk, or ordinary man of business, whether agent or lawyer.⁵⁹ As to this article it is said, however, by Lord Stair, p.84,⁶⁰ and the like doctrine is delivered in Erskine,⁶¹ that the Act has always been understood of alienations to any person, if without a competent price or equivalent cause onerous. In

⁵⁵ M. 987. Bell *Comm.*, ii.177, i.683. Also if the husband was known to be insolvent. Bell *Comm.*, ii.177.

⁵⁶ Kames, *Rem. Dec.*, vol. ii, *Murray's Crs*, *supra*.

⁵⁷ Ersk. IV.i.31, Bell *Comm.*, ii.174.

⁵⁸ Ersk., *supra*, Bell *Comm.*, ii.175.

⁵⁹ Ersk., Bell *Comm.*, *supra*.

⁶⁰ 3rd ed., I.ix.15.

⁶¹ IV.i.35.

truth such challenges seem rather to be sustained at common law. See Bell p.99 *et seq.*⁶² Sir George Mackenzie too remarks p.70²⁶ that ‘in Laws introduced for obviating of (frauds),⁶³ extensions are most necessary, because the same subtle and fraudulent inclination, which tempted the Debtor to cheat his Creditors, will easily tempt him likewise to cheat the law, if the wisdom and prudence of the Judge did not’ interpose.⁶⁴ Indeed it is plain, that the previous connection of the interposed person, though it is a circumstance tending to prove or presume fraud, makes no manner of addition to the natural iniquity of the transaction when proven; or rather (if we are at all to distinguish in this matter) it furnished the trustee with some kind of excuse. Any difference then between a stranger, and a conjunct or confident person, receiver of the deed, should only be with respect to the mode of proof against him;⁶⁵ and such we shall presently see is still observed. You are to observe, with respect to the case of a conjunct or confident person, that herein lies another benefit and advantage of the Act 1621, and another difference between the remedy under the Act, and that which might have been had at common law. At common law, you observe, if the receiver of any right was the confidant or the near relation of the granter of that right, this was a circumstance only of evidence – an article of suspicion against the fairness and onerosity of the deed; but, of itself, it was not sufficient to annul or set it aside, as a fraudulent deed even though the granter were insolvent. Whereas, you observe, under the Statute fraud is presumed, *praesumptione juris et de jure*, from the confidence or near relation of the disponent, if the disponent be insolvent at the time unless the defender shall show that the deed was onerous.⁶⁶ And that the disponent was insolvent at the time of his deed, this, as I have already said,⁶⁷ is

⁶² *Comm.*, 1st ed., ii.184, quoting *Mack.*, *supra*, and criticising *Ersk.*

⁶³ *sic.* ‘cheats’.

⁶⁴ Quoted by Kames, 1st ed. 236.

⁶⁵ *Ersk. supra*, Bankt. l.x.76, *Bell Comm.*, ii, 171, 174, 179.

⁶⁶ *Ersk.* IV.i.27, 35. *Bell Comm.*, ii.171, 174–5, 177.

⁶⁷ *Supra*, p.13.

presumed under the Statute (though it is not so at common law) if the disponer is shewn to be insolvent at the time when the question is tried. It is in these two articles of presumption that the Statute aids, strengthens, and goes beyond the common law.

These then are the main requisites to found the challenge, and when these concur in the transaction, it signifies not much what the form of it be. There is the like extension here, from the purpose of the Statute, as in the article last spoken of; and reduction will lie therefore of a gratuitous bond or bill of the bankrupt (as much as of his assignation of a bond due to him); and in like manner, of a gratuitous surrender of any claim, or discharge of any right, from which his creditors might have drawn money; and again of a lease by the bankrupt granted to the trustee at undervalue, in order to his enjoyment of the profits through such trustee P.E. p.315,⁶⁸ Stair 85,⁶⁹ Bn.p.261.⁷⁰; though a lease is no proper alienation. Nay more, Sir G. Mackenzie says, p.23,²⁷ and it seems to be right, that if the bankrupt collusively suffer a decree to go against him for any alledged claim, and withholds a good and competent defence; this also is reducible at instance of any creditor, verifying that defence and showing the collusion. Indeed, it is obvious, that if this were not so understood, it would be easy to rear up collusive and fictitious claims against the debtor's funds, which claims, when thus established, might next be conveyed to the debtor himself, and so a part of the estate be secured to him, for his own enjoyment.

The person's intitled to insist in reduction are of course the granter's prior creditors; for as to all who afterwards contracted with him, when he was divested of the fund or subject in question, they have no reason to complain.⁷¹ See McKenzie on the Act, p.55.6.²⁷ In this question, however, as i most others, the debt shall be reckoned of the date when the

⁶⁸ Kames, *Prs of Equity*, 2nd ed.

⁶⁹ 3rd ed., l.ix.15.

⁷⁰ l.x.75.

⁷¹ Stair *supra*, Kames, 1st ed., 237, Ersk. IV.i.44, Bell *Comm.*, ii.172, ref. to Mack. *Obs.* See, however, Bell *Comm.*, ii.172–3. As to the necessity of an action of reduction, see McLaren 676–7.

ground of obligation arose, and not merely of its constitution by bill, bond or decree, or other written constitution (see Bell, p.68).⁷² Under that limitation all creditors may insist, and even the Fisk as creditor in virtue of the right of single escheat, where the bankrupt was incurred that confiscation. Bn.p.263.⁷³ Conditional creditors, too, have right to insist in such a process, and obtain decree, to operate and take effect, upon purification of their claim.⁷⁴ Nay even gratuitous creditors are not excluded; such that is who have right under an absolute, delivered and irrevocable deed of donation, such as no longer left the obligation in any degree at the pleasure of the donor (Bell 70)⁷⁵ As to the mode of challenge, the Statute says the rights shall be found null whether in the ‘way of action, exception or reply’;⁷⁶ but so far as relates to infeftment, the challenge must be in the way of action, because these cannot be set aside until they are produced, and it is only in the form of action that the production can be enforced. Stair p.83–4.⁷⁷ Dict.V.1. p.69–70.⁷⁸

With respect to the evidence to be by him produced of the gratuitous quantity of the deed under reduction, the Statute has at first sight the appearance of confining the pursuer to the writ or oath of the grantee. But I rather take the true meaning of that part of the Enactment to have been, to bestow a power of proving by the oath equally as the writ of guarantee, which he would not otherwise have had; the matter being in some measure of a criminal nature.⁷⁹ Be this as it may, it has long been settled in practice – indeed as early as the time of Lord Stair (who so lays down the law⁸⁰), that it behoved the grantee, being a conjunct or confident person, to substantiate the onerosity of the deed by evidence on his

⁷² *Comm.*, 1st ed., ii.173.

⁷³ l.x.83.

⁷⁴ Ersk. IV.i.28, Bell *Comm.*, ii.173.

⁷⁵ *Comm.*, 1st ed., ii.174. Ersk. *supra*.

⁷⁶ Ersk. IV.i.40, Bell *Comm.*, ii.181–2.

⁷⁷ 3rd ed., l.ix.15. Bell *Comm.*, ii.182, Ersk. IV.i.40.

⁷⁸ *Lord Loure v. Lady Craig*, 1664, M. 2733, Stair i.222.

⁷⁹ Bell *Comm.*, ii.179. See Ersk. IV.i.35.

⁸⁰ l.ix.15. Ersk., Bell *Comm.*, *supra*.

part, even when it bears (as it generally will when any fraud is meant) a narrative of onerous causes. This, supposing always that the challenge is brought without undue delay; for otherwise the complainer's long taciturnity, which so much increases the difficulty of this proof to the other party, shall cut off the objection.⁸¹ Kⁿ – No. 10,⁸² 13,⁸³ 23 Decr. 1692 *Spence v. Crers of Dick*.⁸⁴ Indeed, at any rate, it will not be required of him, to bring an absolute and indisputable proof of the verity of the narrative (because that at any distance of time is very difficult to be got) but he must astruct and support the narrative by adminicles of evidence, (and both testimony and writs are admitted) in a reasonable manner, so as sufficiently to remove the natural suspicion of collusion *inter conjunctos* 4 Decr. 1787 *Sheddan v. Sheddan*⁸⁵ – Stair 86⁸⁶ Bn. 262.⁸⁷ And this will more especially be required of him where beside the conjunction, there is any other cause of suspicion – as that the conveyance is *omnium bonorum*, or that the bankrupt has retained possession and so on K^s No. 105⁸⁸ – where on contrary the grantee is a stranger, it will still lie on the party challenging to disprove the narrative of the onerous cause; and this he will be allowed to do (though Erskine seems to say the contrary⁸⁹) by circumstances, and written, and even parole evidence, when conjoined with other. See Bell p.99 *et seq.*⁹⁰

With respect to the operation of the reduction this does or does not extend to the purchasers from the conjunct or confident person, according to circumstances.⁹¹ Fraud we had formerly occasion to notice,⁹² is in itself a personal ground of challenge, and does not

⁸¹ Bell *Comm.*, ii.181. Ersk. IV.i.35 note.

⁸² Kilk. Bankr. 10, *Blackwood v. Crs of Hamilton*, 1749, M. 904.

⁸³ Kilk. Bankr. 13, *Elliot v. Elliot*, 1749, M. 905.

⁸⁴ M. 1015, Fount. i.537. Kames, *Prs of Equity*, 1st ed., 244.

⁸⁵ Not reported, Hume *Sess. Pap.*, vol. xxi, No. 45.

⁸⁶ l.ix.15.

⁸⁷ l.x.76.

⁸⁸ *Rem. Dec.*, vol. i., *Skene v. Forbes*, 1728, M. 12572. Ersk. IV.i.35.

⁸⁹ IV.i.35.

⁹⁰ *Comm.*, 1st ed., ii.184 note 2, who rejects Ersk's view.

⁹¹ Ersk. IV.i.36, Bell *Comm.*, ii.182–3.

⁹² *Lectures*, vol. III, p.237.

hinder the transference of property to the person guilty of it – whence it follows at common law, that a third party, *bona fide* transacting with him, and paying a price, may acquire that property from him and retain it. This accordingly the Statute declares – whence, says Stair, p.86,⁹³ ‘tis ‘clear’ that ‘fraud is no *vitium reale* affecting the subject, but only the committer of the fraud and those who are partakers’ thereof – such participation is presumed, where the confidence or conjunction appears on the face of the original right and where, at the same time, the first disponent was under diligence at instance of his creditors, or was a person of broken or suspected credit (see Bell p.95⁹⁴), and it will in that case lye on the purchaser (supposing always the challenge brought within reasonable time) to instruct not only the onerosity of the conveyance to himself, but that of the original right also. Bn. P.264 No. 84,⁹⁵ Janry. 1680, *Crawfurd*.⁹⁶ Where the original right gives no such grounds of suspicion, it will then lye on the challenger in any question with the purchaser, to establish both the gratuity of the deed and the purchaser’s participation of the fraud as best he can.⁹⁷ The privilege which a fair purchaser has under the words of the Statute, which I think are declaratory only of the common law, by no means belongs, either under the Statute or the common law to adjudgers, who do not contract with the disponent on the faith of the particular subject, but take their chance of affecting it with their diligence such as it is in the person of their debtor (see Bell, p.92⁹⁸).

It may here be asked, if the original deed is in favour of a stranger, will the purchaser from him be also liable to the challenge, in case of participation? The reason of which doubt is, that ‘tis even an extension of the Statute, to sustain reduction against the stranger himself when he is the first acquirer. But I have no doubt (this extension being so long

⁹³ l.ix.15.

⁹⁴ *Comm.*, 1st ed., ii.183, note after 4th ed. ‘disponent’ changed to ‘disponer’.

⁹⁵ l.x.84. Ersk.IV.i.36.

⁹⁶ Jan. 24, M. 1012–3, Stair ii.747, Fount.i.76, v. *Ker*, cited by Bankt. And Ersk.

⁹⁷ Ersk. *supra*, Bell *Comm.*, 11.182.

⁹⁸ *Comm.*, 1st ed., ii.182.

and well established) that a purchaser from such a stranger is in the very same situation with another, though it must be very difficult to procure full proof against him. See B. P.262 No. 76.⁹⁹ The creditors of the interposed person, getting voluntary security upon the subject, are in the same situation with purchasers, and are secure if *in bona fide*.

The effect of the decree of reduction when obtained ought naturally to be in favour of the whole creditors (not the pursuer alone) to recall the subject into the fund of their payment, whence it has been unduly withdrawn and to make it accessible to their diligence. Bn. P.265.¹⁰⁰ The Statute, however, has not said this in express terms, and Kilkerran, at p.48, reports a case (No. 1V. Bankrupt¹⁰¹) where it was found that the benefit of the reduction was to the reducer only, so as to make the subject accessible to his diligence, but not to that of the others. (Bell, p.97¹⁰²). There is no need therefore, of such a challenge, where the conveyance is given with the burden of the granter's debts, or bears the power to revoke; because then the creditors have as ready access to the subject as if it remained with the disponent. The reduction operates from its date, or *retro*, in a greater or less degree, according as the defender appears to be in reality guilty of fraud or wrong, or only by the presumption of law. Bn. No.107.¹⁰³

The second Clause of the Statute 1621 is in these words, that 'if in time coming any of the said dyvours, or their interposed partakers of their fraud, shall make any voluntary payment or right to any person, in defraud of the lawful, and more timely diligence of another Creditor, having served Inhibition, or used Horning, Arrestment, Comprising, or other lawful means, duly to affect the dyvours lands, or goods, or price thereof to his behoof. In that case the said dyvour, or interposed person, shall be holden to make the

⁹⁹ Bankt. l.x.76.

¹⁰⁰ l.x.89, 90. Bell *Comm.*, ii.183.

¹⁰¹ *Clerk v. Fergusson*, 1738, M. 2571.

¹⁰² *Comm.*, 1st ed., ii.183.

¹⁰³ l.x.107, p.270.

same forthcoming to the Creditor, having used his first lawful diligence: who shall likewise be preferred to the concreditor, who being posterior to him in diligence, hath obtained payment by the partial favour of the debtor, ... and shall have good action to recover from the said Creditor that which was voluntarily paid in defraud of the pursuers diligence.’ This provision is meant to remedy a quite different sort of abuse from the other, but withal a very common one, namely the debtor’s partiality to one creditor before another.¹⁰⁴ It is obvious with respect to any creditor who has been able, duly and compleatly, to affect any part of his debtor’s estate with diligence that he does not stand in need of any sort of Statutory aid to protect his interest against this partial disposition on the part of his debtor, unduly to prefer other creditors to him for their payment.¹⁰⁵ The diligence itself disabled the debtor so to do, by the common rules of law. If for instance his moveables are actually poinded, or his lands adjudged with all the forms of law, no posterior act of the debtor for conveyance or security to a third person, can undo that real lein. But then it happens with most diligences, that they cannot be compleated *instante*, but consist of various successive steps, which too cannot be taken but at considerable intervals of time. The diligence of inhibition for instance requires a service on the debtor, a publication at the Market Cross, and a registration in certain Books, to make it good and effectual at all hands. In like manner before a creditor can poind, he must give the debtor a charge to pay and let the *induciae* of that charge expire; and very often the warrant of arrestment also of his effects is contained in Letters of Horning, upon which a charge is in like manner given. If, therefore, the debtor were left at freedom to do as he has a mind; on finding that his credit is gone, and that the diligence of his creditors begins to gather upon him, he might naturally take advantage of the first steps thereof, to provide, by

¹⁰⁴ Ersk. IV.i.37, Bell *Comm.*, ii.185.

¹⁰⁵ The following note appears in the margin: ‘This is quite right. Illustrate by Inhibition which has several steps – charge with a view to Poind; charge Horning with a view to arrest. Wm, Mr.’

conveyances and securities, for the interest of his favourites or near connections and thus evacuate the diligence which is *in cursu* of being compleated. It is against such operations, that this part of the enactment is intended;¹⁰⁶ and the principle which it proceeds on is a just an fair one – that a person who is unable to satisfy all his creditors, does wrong in assuming any power of partial distribution, and especially does wrong in distributing to the prejudice of a creditor *qui sibi vigilavit*¹⁰⁷ in proceeding to use the diligence of the law. The debtor's own interest in his effects being really at an end, 'tis his duty to stand by; and forbear to intermeddle; and to let the law dispose of them as it sees cause.

To make way for its operation, the debtor must be insolvent, and so situated as to diligence either done or doing against him, as to be under difficulty, and of broken credit. St.p.85,¹⁰⁸ 7 June 1715 *Tweedie*¹⁰⁹ – Bell, 117.¹¹⁰ His deed must in the next place be voluntary. By which I do not mean that it must be given entirely of his own motion, without any demand on the part of the person who is preferred (for such measures are not frequent, and when they happen they are voidable on the head of the actual fraud) but that it be such as he is not compelled to grant, and what he gets no return or consideration for at the time of granting. This description, excludes of course all sales for a price paid, or securities for a loan made at the time.¹¹¹ But any other operation which, in any degree, or in any manner of way, tends to frustrate the diligence begun by one creditor and to create to another even a *pari passu* preference with him, is held to fall under the prohibition of the Act; which is here liberally construed, so as to reach every sort of transaction which is

¹⁰⁶ Stair I.ix.15, Bell *Comm.*, ii.185.

¹⁰⁷ See *D.*, XLII.viii. 6.7.

¹⁰⁸ 3rd ed., I.ix.15.

¹⁰⁹ M. 1037–9, Dalr.196, v. *Din. Kames, Prs of Equity*, 239.

¹¹⁰ *Comm.*, 1st ed., ii.186.

¹¹¹ Ersk. IV.i.37, Bell *Comm.*, ii.188.

in any wise prejudicial to the competitor's prior diligence.¹¹² For instance, I charge my debtor on a decree with a view to execute a poinding of his effects, and in consequence he goes to John another creditor, but only such by open accompt, and, unsolicited, grants him a bill for the debt, to the end that John may use a personal diligence upon it on the short *induciae* of six days, and so render him notour bankrupt, and by that means evacuate my poinding, as being within thirty days of the bankruptcy; I have no doubt that this act is reducible. For it enables John to do summary diligence, which he could not otherwise have done, and is plainly meant in defraud of my poinding. 29 Janr. 1788 – *Bruce v. Scott*.¹¹³ The same will be held if I renew a bill that was prescribed, or grant a bond of corroboration accumulating prior debts and thus rendering them mere beneficial. 18 June 1793 – *Sir Jas. Grant v. Credrs of Dunbar*.¹¹⁴

You will farther observe, that even a security for a new loan will only stand, when it is really and truly such, made without any view to elude the Statute, and not a new transaction in point of form alone. Suppose for instance that James is a creditor of John's in a certain sum and that John finding diligence begun against him is desirous of giving James a preference. For that purpose 'tis concerted among them, that George shall lend that sum to the bankrupt, and receive a heritable security for it from him to be held in trust for James, and that the debtor having got the money shall repay the sum to James. The security granted in this way shall give no preference. For you observe in this way, James gets security for a new advance indeed, but which advance was never meant to go into the pocket of the bankrupt, or to increase his funds and the possible dividend to his other creditors, but was on the contrary made with the express view of returning immediately into James' own pocket; which in fact it does. The bankrupt then is really

¹¹² Bell *Comm.*, ii.189–190.

¹¹³ Not reported, Hume *Sess. Pap.*, vol. xxii, No.45, ref. to by Bell *Comm.*, ii.190, note, as 'a very strong case'.

¹¹⁴ M. 1027, Hume *Sess. Pap.* vol. xlv, No. 5, cit. *Crs of Dunbar v. Grant*. Bell *Comm.*, ii.190 note.

receiving nothing for this new security, and continuing debtor to James, to the very same amount as before this transaction.

It is not to securities alone for prior debts that the act extends, but to all conveyances *in solutum* of such debts. A conveyance of lands for instance equivalent to the debt due the disponee, and in extinction thereof – or an assignation of bonds – or a delivery of goods, in satisfaction of a prior debt – is unquestionably voidable at instance of the creditor who has been *in cursu* of doing the proper diligence. See Kn. No. 15 *in fine*.¹¹⁵ It is not quite clear, viewing merely the words of the Statute, whether the payment of a debt in cash does or does not fall under the Enactment. It has, however, been found that it does not *Supra* & Faler. 26 Janry. 1751, *Forbes v. Brebner*, Kn. No. 15;¹¹⁶ and this it should seem rightly: because we have no manner of diligence that is calculated to affect cash in the debtor's possession;¹¹⁷ and the Statute plainly supposes, that the creditor, challenging, has begun to do such diligence as if prosecuted would carry the subject that is conveyed away to another. Kn. *Supra*.¹¹⁶ Bn. No. 101.¹¹⁸ In the next place, because a creditor, who receives payment in goods or lands, and not in money, does a thing which he is not obliged to do, and must know from the very offer of payment in that kind, that the debtor is *lapsus bonis*; whereas, against a debtor who makes a payment in money, there is no such suspicion, and indeed the creditor is bound to take and cannot well refuse, a payment that is offered in that kind.

The act or deed must in the last place be in prejudice of a prior inchoate diligence at instance of the creditor reducer. And attending to what has been already said, you will easily see, that it is not every kind of diligence done that will give reduction of every

¹¹⁵ *Infra*.

¹¹⁶ Bankrupt No. 15, M. 1128, Elchies, Bankrupt, 26. Ersk. IV.i.37 note.

¹¹⁷ Bell *Comm.*, ii.188. Elchies, *supra*.

¹¹⁸ l.x.101, p.268. Ersk. IV.i.38.

posterior measure, in favour of another creditor. The law means no more, than to defend the creditor who is proceeding with diligence, against the act of his debtor intended to disappoint it: whence it follows, that the inchoate diligence must be such, which if fully prosecuted would have affected the subject that is conveyed away.¹¹⁹ A creditor adjudger, therefore, cannot challenge a conveyer of moveables, not a creditor poidner a conveyance of lands; because neither can say, that the operation of his diligence has been hurt by that measure. But a creditor who has charged with horning can challenge a conveyance of the *ipsa corpora* of moveables, because the warrant of that diligence is also a warrant for the diligence of poinding. As to arrestment, there may be some room for doubt, see Bell 120.¹²⁰

But farther, it is not sufficient, that the prior diligence be such as, if prosecuted, would have covered the subject conveyed. It is material also, that the diligence be prosecuted, and brought to completion, without an undue delay.¹²¹ The reason of this is plain. On the one hand, it is not fit, that the debtor should be limited and restrained, for an indefinite length of time, on the notion that this creditor may some day or other proceed to bring his diligence to a close. On the other, the creditor challenger has no interest to challenge the conveyance, unless he can say, that were this conveyance out of the way, the subject would **XXXaccrue** to him; and this he cannot say, unless, by his compleat diligence, he has legally affected that subject: so that the only obstacle in his way is the fraudulent alienation. Suppose then that one has charged with horning, and denounced and that the debtor thereafter assigns a debt due to him *in solutum* to another creditor. This *per se* does not intitle the charger to reduce on the Act 1621.

[But a creditor charging with horning may challenge a poinding.]

¹¹⁹ Ersk. IV.i.39, Bell *Comm.*, ii.186–7.

¹²⁰ *Comm.*, 1st ed., ii.187.

¹²¹ Ersk. IV.i.40, Bell *Comm.*, ii.186, 188. There is a note on the margin here: ‘right Wm. Nr.’

The effect of this reduction is not like the former, in favour of creditors at large, but the reducer alone is benefited.¹²² When the subject is more than equal to payment of the pursuer's debts, the defender's right continues to subsist, but burdened with the pursuer's debts. When there are more pursuers than one, their preference is decided at common law. How far this reduction operates against third parties, the Statute does not say, and, therefore, this matter is also governed by the rules of the common law, which do not allow the fraud of the author to injure the *bona fide* successor, unless he partake of it.¹²³

The Act 1621, though it was found very useful, was, in the course of time, discovered to be in some respects defective. Both clauses were imperfect in this respect, that they did not establish any certain character of bankruptcy, or any overt act by which the fact of insolvency was settled, but left that to be determined by an investigation of the circumstances of each particular case.¹²⁴ The second clause was defective in this respect that it only provided for those creditors who had done diligence,¹²⁵ leaving the debtor at liberty to act as partially as he chose to those who had not proceeded so far. Thus, the creditors were induced to be forward and precipitate in their diligence and in this way often made their debtor bankrupt, when the smallest suspicion of his credit was sustained by all coming upon him at once.¹²⁶ After a considerable lapse of time these defects were at last seen and remedied by the Act 1696 ch 5,¹²⁷ which is to be regarded as a supplement of the Act 1621.

In the first place, it supplied the first defect of the former Act – the want of a proper character of notour bankruptcy. It is declared that ‘if any Debtor, under Diligence by

¹²² Bell *Comm.*, ii.190.

¹²³ Bell *Comm.*, ii.191. Cp. Mack. *Obs.*

¹²⁴ Bell *Comm.*, ii.155, 192, Kames, *Prs of Equity*, Bk.III, chap.v.

¹²⁵ Bell *Comm.*, ii.185.

¹²⁶ Ersk. IV.i.41. Kames, *supra*.

¹²⁷ 12 mo. and record ed.

Horning and Captioun, be either Imprisoned, or retire to the Abbay, or any other Priviledged Place, or Flee, or Abscond for his personal security, or Defend his person by Force, and be afterwards found, by sentence of the Lords of Session, to be Insolvent, shall be holden and repute on these three Joint Grounds, viz. Diligence by Horning and Caption and Insolvency, joyned with one or other of the said Alternatives of Imprisonment, or Retiring, or Flying, or Absconding, or Forcible Defending, to be a Notour Bankrupt, and from that time of his foresaid Imprisonment, Retirement, Flying, Absconding or Forcible Defending.’ Two circumstances must then concur to render a man bankrupt: the diligence of horning and caption being used against him: and actual insolvency, and to these must be added one of the five following circumstances – imprisonment, retirement to the Sanctuary, absconding, flight, or defending himself by force.¹²⁸

The Court in interpreting this Enactment have conducted themselves with much attention to its precise terms. It is settled that the mere absconding of a person is not enough to declare him a notour bankrupt, even though in consequence of horning and caption, if he is not likewise in a state of insolvency; and on the other hand, it is not held sufficient that he be insolvent at the time, if there is no caption against him, for both circumstances must be coupled together to have that effect. As the Statute requires horning and caption, imprisonment on a summary act of warding is not sufficient.¹²⁹ But a single horning and caption at the instance of one creditor is quite enough.¹³⁰ On one point a liberal interpretation has been allowed under a Judgement of the House of Lords¹³¹ in the appealed case of *Crs of Woodstone v. Scott*, 18 Feby. 1755.¹³² In that case the defender was apprehended by a messenger, who kept him a prisoner during that night and part of

¹²⁸ Ersk. *supra*; see Bell *Comm.*, ii.158–9.

¹²⁹ Bell *Comm.*, 13, 1st ed., ii.159, Ersk. *infra*, note.

¹³⁰ Bell *Comm.*, ii.160, Ersk. IV.i.42, and cases cited.

¹³¹ 27 Feb. 1756, 1 Cr. & Stew. 614, M. 1104, cit. *Turnbull's Crs v. Scott*.

¹³² M. 1102, 5 B.S. 385. Ersk. *supra*, Bell *Comm.*, ii.160, note.

the next day in a public house, but not in gaol, and was then liberated on making a partial payment. The Court thought that the imprisonment was insufficient, but the House of Lords reversed that Judgement and found that the imprisonment of the debtor was within the true intent and meaning of the Act of 1696. Since that time in the case of *Fraser v. Monro*, 5 July 1774,¹³³ it was found that it was enough that the debtor had been two hours in the messenger's custody.¹³⁴ See also the case of *Macadam v. Macilreath*, 23 Novr. 1771.¹³⁵ Encouraged by this relaxation, an attempt was made to sustain the mere act of apprehending the debtor without having him in custody but this was refused in the cases of *Maxwell v. Gibb*, 17 Novr. 1785,¹³⁶ *Richmond v. Dalrymple*, 15 Jany. 1789, not reported.¹³⁷

There has also been a variation in judgement in another point, namely, the sort of evidence required to prove that the debtor has absconded.¹³⁸ In the case of *The Laird of Cleland v. Kennock*, 9 Feby. 1705, Fount. 2nd vol.¹³⁹ it was found that the debtor's hiding himself from the messenger with a caption was sufficient, though he afterwards appeared publicly and did business in the market. On the other side, in the case of *Finlay v. Aitchieson*, 21 Jan. 1767,¹⁴⁰ where the messenger's execution bore that he had broken open and searched the debtor's house but could not find him, though he had reason to believe he made his escape from a back door, the absconding was not found to be proved, as it was not shown that the debtor had kept out of way *eo intention*.]

The rule on the subject seems to be, that the debtor's insolvency. And diligence against him by caption, joined with the return of an execution of search, bearing that he was

¹³³ M. 1109, Hailes 580. Ersk. *supra*, note. Bell *Comm.*, ii.161 note.

¹³⁴ It was held that there was no room for distinctions of hours in custody.

¹³⁵ M. App. Bankrupt 8, Hailes 453.

¹³⁶ M. 1113. Bell *Comm.*, ii.161 and note, Ersk. *supra*, note.

¹³⁷ M. 1113. Hume, *Sess. Pap.*, vol. xxiii, No. 61, cit. v. *Dalrymple's Trs.* 14 Jan.

¹³⁸ Bell *Comm.*, ii.162–3 and notes.

¹³⁹ 266, M. 1085, cit. *Somervell of Kennock v. Crs of Cleland*. Bell *Comm.*, ii.162, Ersk. *supra*, note.

¹⁴⁰ M. 1106. But this sanctioned a very dangerous doctrine of proof of intention. Bell *Comm.*, ii.163 note.

sought for, and was not found, do form a presumption of his absconding to shun the diligence; but only such a presumption, as may be redargued by a pregnant proof on his part, that his absence was truly accidental, and owing to other causes, and that he afterwards continued to make his appearance in public.¹⁴¹ On this footing went the following Judgements: *Ross v. Chalmers*, 25 June 1782;¹⁴² 8 Febr. 1705, *Credrs. of Cleland*;¹⁴³ 4 July 1783, *Young against Greive*;¹⁴⁴ 9 August 1785, *Sheddan against Donaldson*.¹⁴⁵ It shall not therefore answer the debtor's purpose to prove this simply that he was elsewhere previously, or at the time, unless this be accompanied with decisive circumstances to show that he went thither openly, and without any view to concealment.¹⁴¹ 25 June 1782, *Ross v. Chalmers*.¹⁴² He must clearly qualify and show, that he was appearing in public, and going about his business as usual. You will be sensible of the justice of this, and of a narrow scrutiny into the excuses which may be alledged for the debtor's absence; when you consider that a caption does not come upon the debtor without warning; he has been previously charged upon certain *induciae*, and knows therefore, very nearly, when the caption shall follow; so that it is a fair presumption against him that he is from home on purpose to avoid it.¹⁴⁶ In a late case where the messenger, bearer of the caption, broke open the debtor's door to search for him, and could not find him, and where in the course of a few days after he left the country, the Court presumed that he was absconding at the date of the execution, 21 Decr.

¹⁴¹ Bell *Comm.*, ii.162–3.

¹⁴² M. 1111.

¹⁴³ *Supra*.

¹⁴⁴ M. 1112.

¹⁴⁵ M. 1113, cit. *Spedding v. Hodgson and Donaldson*.

¹⁴⁶ Bell *Comm.*, ii.163.

1797 *Stormonth v. Falconar*.¹⁴⁷ As far as I know the only contrary Judgement is that of *Finlay v. Atchieson*, 21 Jan. 1767,¹⁴⁸ which is not now to be regarded.¹⁴⁹

Though a search by messenger upon the letters of caption seems thus to be requisite for constituting bankruptcy; yet I find no authority which says, that the ~~retXXX~~ of a written execution by the messenger is the only receivable evidence of that fact – where indeed an execution is requisite *de solemnitate*, there the want of it cannot be supplied; but the Statute has neither prescribed this, nor said anything about the mode of proof: so that witnesses seen to be competent to prove it.¹⁵⁰ And indeed, as to some of the alternatives in the Act, such as absconding, or flying the country, one does not well see how they can properly be proved in any other way. 15 Janr. 1789 *Richmond v. Dalrymple*.¹³⁷ So the Court said 16 June 1790 *McEwan v. Galloway*.¹⁵¹ Found 1 March 1791 *McMath*,¹⁵² 15 Jan. 1794 *Walkenshaw v. Muirhead*.¹⁵³

I may add, with regard to retirement to the Abbay, that though the ceremony of entry in the Books of the Baillie of the Abbay, is requisite for giving the benefit of the protection (as was found 15 January 1779, *Grant v. Donaldson*)¹⁵⁴; it does not flow that the same is requisite to make a retirement in terms of the Act 1696. See 3 Decr. 1751, *Dickson*.¹⁵⁵ For the place itself is a protection for 24 hours, to give time for the ceremony booking; and therefore the act of going thither, attended with a proof of proper circumstances, to show that this was done from fear of diligence, should seem to be sufficient.

¹⁴⁷ Not reported, Hume Sess. Pap., vol. lxxviii, No. 47, cit. *Stormonth Ors., Crs of McInnes v. Falconer*.

¹⁴⁸ *Supra*.

¹⁴⁹ See Bell Comm., ii.163 note.

¹⁵⁰ Ersk. IV.i.42 note.

¹⁵¹ Not reported, Hume Sess. Pap., vol. xxxii, No. 43.

¹⁵² Bell Oct. Ca. 22, Hume Sess. Pap., vol. xxxiii, No. 14, cit. v. *McKellar*, Bell Comm., ii.161.

¹⁵³ 15 Jan. 1795, *Walkinshaw & Motherwell, Crs of Wilson v. Muirhead*, not reported, Hume Sess. Pap., vol. lxxxiii, No. 45.

¹⁵⁴ M. 5, Hailes 816. Bell Comm., ii.463.

¹⁵⁵ M. 4, D.Falc.ii.282, *Dickson v. Mitchell's Reps.* Bell Comm., ii.163, note, ii.463 note. Bankt. IV. xxxix. 2. The Court in *Grant* approved the distinction.

You will in the last place observe, that the Statute means to fix the notour bankruptcy absolutely to a point: so that if the Statutory requisites, insolvency, and imprisonment or the like do once occur, the debtor is from thenceforward a bankrupt, and all his deeds are to be judged of accordingly. It is not requisite, that he continue in prison at the date of the deed sought to be reduced; nor is it even of any moment, tho' the debt on which he was imprisoned, have been paid or discharged before the time when the question occurs. Having once made him bankrupt, in terms of the Statute, the creditor therein has no power to affect the interest of others, or to defeat the right thence arising to them.¹⁵⁶ 1 Mar. 1791 *McMath*¹⁴³ I did not observe that this was doubted though little has passed about it. The contrary had once been somewhat hastily found, in a case referred to by My Erskine, No. 42,¹⁵⁷ and by Bankton (No. 113¹⁵⁸) Kn. No. 3¹⁵⁹: but this error (for such it plainly is) was soon corrected – Kilkerran, No. 14,¹⁶⁰ Also *McMath*, 1 March 1791.¹⁶¹ I conceive then that bankruptcy being once fixed, the legal consequence can in no way be taken off, but by a proof on the part of the bankrupt that he was afterwards restored to a state of full solvency.¹⁶² For then, to be sure, it may reasonably be pleaded, that those creditors who do not take the opportunity of recovering their debts when they may, but choose to run the risk of future misfortunes, have none but themselves to blame, and cannot claim the extraordinary remedy of the Statute. If he has paid a composition to his creditors and got a full discharge from them, or if he has obtained a discharge under the Bankrupt Acts, or perhaps if he has got a decree of *Cessio Bonorum*, either of these seems no doubt to be equivalent.

¹⁵⁶ Bell *Comm.*, ii.169.

¹⁵⁷ IV.i.32, who, however, cites *Hopeton*, *infra*.

¹⁵⁸ I.x.113.

¹⁵⁹ Bankrupt, p.49, *Crs of Hamilton v. Henry*, 9 Feb. 1743. M. 1092–3, Elchies, Bankrupt 17, and Notes 46–7, who was of contrary view.

¹⁶⁰ Bankrupt, p.59, *Earl of Hopetoun &c. (Crs of Johnston) v. Nisbet & Innes*, 9 Nov. 1750, M. 1190, 1098–9, Kames *Rem. Dec.* li.241.

¹⁶¹ *Supra*. See all these cases referred to by Bell *Comm.*, ii.169 note.

¹⁶² Bell *Comm.*, ii.169, citing *McMath*, and see ii.170 note.

The Statute having thus fixed, who is a notour bankrupt, proceeds to declare ‘Which being found by Sentence of the Lords of Session, at the Instance of any of his just Creditors, ... His Majesty, with Consent of the Estates of Parliament, Declares, (That) all and whatsoever voluntary Dispositions, Assignations, or other Deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid Dyvour or Bankrupt, either at, or after his becoming Bankrupt, or in the space of 60 days of before, in favours of his Creditors, either for his satisfaction, or farther Security, in preference to other Creditors, shall be void and null’.¹⁶³ In this clause it supplies another material defect of the Statute 1621, which guarded the interest of those creditors only, who had done diligence;¹²⁵ leaving the debtor entirely free to prefer and give security as he had a mind, among those who had done none. This Enactment on the contrary, hinders any partial preference even among these;¹⁶⁴ and this not only from the date of the notour bankruptcy, but during a space before it; a still more suspicious period perhaps for such operations, and which the Statute limits to 60 days.

With regard to the extent of this provision – the words of the Statute are ‘all voluntary Dispositions, Assignations or other Deeds’ which terms plainly cannot be made to reach a payment in cash Dic. p.82.3;¹⁶⁵ an operation which is not included even under the word ‘payment’ made use of in the Act 1621. This exception is, however, itself confined within very narrow limits. The indorsation of a bill, for instance, to a prior creditor in payment, falls under the law, as much as the assignation of a bond.¹⁶⁶ 10 Augt. 1780 *Campbell v. McGibbon*,¹⁶⁷ 16 June 1790 *McEwan v. Galloway*.¹⁵¹ The Court seemed to have no doubt

¹⁶³ Ersk. IV.i.41, Bell *Comm.*, ii.194.

¹⁶⁴ Ersk. *supra*, Bell *Comm.*, ii.194–5, Kames, *supra*, Montg. Bell.i.181.

¹⁶⁵ vol. 1, *Campbell v. Graham*, 16 Jan. 1713, M. 1120–2, *Durward v. Wilson*, 2 Feb. 1700, M. 1119, *Brugh v. Gray*, 1 Jan. 1717, M. 1125, Ersk. IV.i.41, Bell *Comm.*, ii.196, 201–2, *Forbes v. Brebner*, 1751, M. 1128, Elch. Bankruptcy 26, Notes 50, Kilk. 62.

¹⁶⁶ Ersk., IV.i.41, note, Bell *Comm.*, ii.197.

¹⁶⁷ M. 1139. Bell *Comm.*, ii.197–203.

of reducing in such circumstances. 29 Jan. 1794 *McHutcheon v. Welsh*.¹⁶⁸ The delivery of goods to a creditor *in solutum* has in like manner always been held a deed reducible,¹⁶⁹ Dic.V.I. p.83.¹⁷⁰ and was likely so found 25 June 1783, *Young v. Johnston*;¹⁷¹ 22 Novr. 1797, *McIssac v. McNab*.¹⁷² So found *John Buchan v. Alexr. Anderson* – where cattle deliverd in a public market to a creditor *in solutum* of his debt, and sold the same day by that creditor to a third party who paid for them to the bankrupt, who instantly handed over the money to this creditor, 7 March 1800, *John Buchan v. Alexr. Anderson*.¹⁷³

The Statute farther describes these dispositions, assignations or other deeds as granted ... in favour of a creditor, ‘either for his satisfaction, or farther security in preference to other Creditors’. Thus, the grantee must have been previously a creditor;¹⁷⁴ and is therefore safe, if he either buy the right from the bankrupt at a fair price, or then lends his money and gets a security for it, thus becoming a creditor for the first time.¹⁷⁵ Kn.No.16.¹⁷⁶ This is both clear by the words of the Act, and is just in itself, because the bankrupt’s funds are not impaired by such a transaction, but altered only in their nature. It must however always be supposed that this advance is made *bona fide* without communication or concert with any previous creditor, or any view to elude the Statute in his behalf. Suppose for instance in this case, that John is a debtor in various sums to a Banking House, who insists for a security. John accordingly agrees to grant it for a certain sum, being the amount of his former debt, and of a further advance to be then made him by the House. It is farther communicated to them, that this additional advance shall go to pay a certain

¹⁶⁸ 20 May 1794, not reported, S.L. *Old Sess. Pap.*, vol 199, No. 7, *Gordon, Tr. for Grant*.

¹⁶⁹ Ersk. IV.i.41, who says ‘sometimes’. Kames, *Prs. of Equity*, 1st ed. 239.

¹⁷⁰ *Smith v. Taylor*, 19 July 1728, M. 1128, *Forbes v. Forbes’ Debtors*, 27 Jan. 1715, M. 1124. Bell *Comm.*, ii.196. These two cases related to Act 1696.

¹⁷¹ M. 1141.

¹⁷² Not reported, Hume *Sess. Pap.*, vol. lxxviii, No. 13.

¹⁷³ Not reported, Hume *Sess. Pap.*, vol. lxi, No. 69.

¹⁷⁴ Ersk. IV.i.41, 43, Bell *Comm.*, ii.194–5.

¹⁷⁵ Ersk. IV.i.41, Bell *Comm.*, ii.205, 206, Kames *Prs. of Equity*, 1st ed. 241, Montg. Bell i.182.

¹⁷⁶ Kilk. Bankrupt, p.63, *Johnston v. Burnet and Home*, 29 Jan. 1751, M. 1130–42, Elch. Bankrupt, 27, Kames *Rem DocXXXX*. li.246.

partner of that House, a separate advance which he as an individual has already made to John. The advance is accordingly made, and the money is paid to that partner in their presence; and of the same date the security is given. That security will fall, as far as relates to the original sum, equally with the prior debt. 'Tis a *novum debitum* 'tis true on the part of the company; but then the company advancing, knew and saw, that the money was to go in instant payment or a prior debt due to one of their own partners; so that the case is truly the same as if a security were granted for that old debt itself. A decision in Dict. Vol.I p.82.¹⁷⁷ In short the person making the advance, to have the benefit of the exception, must know nothing of the bankrupt's undue purpose of application of the money. By aiding him in that, he brings himself into the situation of the prior creditor 9 Mar. 1781 *Blaikie v. Robison*.¹⁷⁸ (17 June 1788 *Creditors of Seton against Drummond*.¹⁷⁹) This case I the rather put, that you will find a Judgement in the Dictionary vol. I, page 82 to the contrary.¹⁸⁰

But the Court have in many late cases seen the necessity of attending to the words of the Statute 'directly or indirectly' and applying the Act to all such devices for eluding it.¹⁸¹

Suppose in like manner that George is insolvent and that James, a personal but a favoured creditor, applies to him for payment of his prior debt of £1,000. John tells him, that he has it not, that he is insolvent, and that any Security to be then granted for it, will fall under the Act. But he suggests to James this device, for procuring, at one and the same time, payment of the £1,000 to him James, and the accommodation of a farther loan to him, John. The proposal is, that John as principal, and James with him as cautioner (being a person of intire credit), shall borrow from some third party, the sum of £2,000, and give

¹⁷⁷ *Buchanan v. Arbuthnot*, 25 Jan. 1733, M. 1128.

¹⁷⁸ M. 887, v. *Robertson*. See *Bell Comm.*, ii.185,188,190,229.

¹⁷⁹ Not reported, Hume Sess. *Pap.*, vol. xxiii, No. 4.

¹⁸⁰ *Buchanan*, *supra*.

¹⁸¹ See *Bell Comm.*, ii.198–9.

them bond for it; that £1,000 of this shall immediately be applied to pay James's old debt; that the other £1,000 shall go into John's pocket, and that James, as cautioner, shall have an infeftment in relief for the whole £2,000, in case he, as cautioner, shall be obliged to pay it to the lender. This proposal is accordingly executed, in the faith, that this infeftment of relief as being for a *novum debitum*, will be without the Act. Thereafter John is declared bankrupt; James, as cautioner, pays the £2,000; and he claims to be preferably ranked on his infeftment to its full amount. To the amount of a £1,000 his preference is clear; that being truly a *novum debitum*, pocketed by John, the principal debtor. But 'tis equally clear, with respect to the other £1,000, that he can have no preference; because that part of the advance went immediately into his own pocket, for payment of his prior debt; and to sustain the infeftment to that effect would in truth be just the same thing, as sustaining a security given him for that prior debt, 20 June 1788, *Grant* against *Grant*.¹⁸² *vide* 28 Febr. 1794 *Credrs. Of Monteith v. Douglas* 10 Decr. 1794¹⁸³ – finally supported the security as being given for what was a *novum debitum* on the part of the cautioner.

In the last place, suppose that John, being insolvent, is pressed by James, a prior creditor of his, for payment, and that in this distress he applies to George for the necessary sum. George says that he has not the sum ready, but that he is willing to bind for it, if James will take his security. James is content, and accordingly discharges John his former debtor, and takes a bill or bond for the sum from George. Of the same date, or soon thereafter, John grants George an heritable bond of relief for the debt thus by him undertaken. If George thereafter pays James his debt, and in the ranking of John's creditors, if he claims on his infeftment, that claim could not be listened to. For there is here an evident intention to elude the law, in which John is *particeps* from the first, and

¹⁸² Not reported, Hume Sess. Pap., vol. xxiii, No.11. Bell Comm., ii.212 note.

¹⁸³ M. 1146, Bell Ca. 127, Hume Sess. Pap., vol. xlvi, No. 153, adhered 20 Jan. 1795, cit. *Hamilton, Tr. for Monteith's Crs v. Douglas*. Bell Comm., *supra*. Montg. Bell i.182.

so the infetment is held as if granted to James himself for the original debt. 7 August 1788, *Carruthers against Douglas Heron and Compy*.¹⁸⁴

In all these cases, you observe, the vice and error lyes, in the lender's accession to the borrower's undue purpose of preferring anterior creditors – wherefore, if we suppose no evidence of that, 'tis of no moment that the bankrupt did truly apply the money borrowed in that way. The security will nevertheless be good to the lender, who was not obliged to enquire concerning the use his money was to be put to, and is nowise to blame for the bankrupt's contrivance, if he had no share in the execution – 21 July 1789, *Creditors of Grant against Grant*;¹⁸⁵ 18 Febr. 1790, *Sir William Forbes against Greig*.¹⁸⁶

In construing the word 'security', we are to apply it generally to every measure of operation, which either gives the creditor a lein or preference on any part of the debtor's funds, or which in any wise amplifies or improves the condition of his debt, and enables him to draw a larger dividend of the funds than he would otherwise have right to.¹⁸⁷ Thus if the bankrupt, being indebted to any one by bond, on which there is a long arrear of interest due, shall give him a new bond (of corroboration as 'tis called), in which he accumulates the arrears of interest into a capital, to bear interest in time to come; there can be no question, that so far as relates to the benefit of this accumulation, the measure falls under the act 1696. It does not indeed give the creditor a preference by altering the quality of his debt, but, what is the same in effect, it augments his debt, and so enable him to draw a larger dividend out of the funds, than he would otherwise have done, 30 Novr. 1790, *McMath*.¹⁸⁸ Nay more, it was lately found, what I should have reckoned much more

¹⁸⁴ Not reported, Hume *Ses Pap.*, vols. xxiii, No. 56, xxviii, No. 58. Adhered 19 Jan. 1790.

¹⁸⁵ 23 July, not reported, Hume *Sess. Pap.*, vol. xxvii, No. 43.

¹⁸⁶ Hume *Sess. Pap.*, vol. xxix, No. 89. See Montg. Bell i.182 – if the cautioner is not a prior creditor and there is no collusion, the security to a cautioner for the relief of his engagements is good.

¹⁸⁷ See Bell *Comm.*, ii. 198, 208.

¹⁸⁸ *Supra*, note 143. Bell *Comm.*, ii.198 note, 208. Montg. Bell, i.181, 294.

doubtful, and what did accordingly very much divide the Bench, that the Act entirely cut down and annulled a bond of corroboration, when granted not to the original creditor, but to his executor, so as to save him the delay and expence of a confirmation to his predecessor; by which means, as enabling him to proceed more expeditiously with his diligence, it was thought that he might sometimes gain a preference over other people, 1 March 1791, *McMath v. McKellar*.¹⁷⁹ The principle of this Judgement tends this length, that it shall be objectionable to grant a bill, or bond, or promissory note, as a document of a claim which was previously unvouched: because though it neither augment the debt, nor give it a real lien over any part of the debtor's property, yet still by the facility it bestows of doing summary diligence this registration of the bill or bond, it enables the debtor to outstrip others with his diligence, or to acquire a *pari passu* preference with others, when he could not otherwise have obtained it. I do not know, however, of any Judgement yet pronounced upon this precise case.¹⁸⁹

There is another class of deeds, about which doubts have been entertained, whether they fall under the Act, and upon which decisions have varied at different times.¹⁹⁰ I mean Trust Deeds – conveyances by the bankrupt of his whole effects to a trustee, for the conversion of them into money, and the payment of his creditors at large, so far as they will go. 'Tis true, it was never contended, that the bankrupt could fix down upon his creditors, against their will, any particular person as a manager and distributor of his estate for their behoof.¹⁹¹ That was quite untenable; for the bankrupt might thus have forced upon them for a factor, the person who would be most favourable to him, and do them the greatest injustice. It was, therefore, always admitted, that the creditors might displace the trustee, and choose another in his room, where he was the person

¹⁸⁹ See Bell *Comm.*, ii.197 and cases cited.

¹⁹⁰ Ersk. IV. i. 45 and note, Bell *Comm.*, ii.389, Kames, *Prs of Equity*, 1st ed., 245–6.

¹⁹¹ Kames, *supra*.

disagreeable to them; he in the meantime holding the subject as a name only for their behoof, and being obliged to denude, when required, in favour of the person chosen by the creditors. See Kaime's Vol. 3, No. 249¹⁹² – also Bell 1, p.570.¹⁹³ The same holds equally good, where the trust is of a revocable nature, and is truly not granted at the desire nor for the behoof of creditors, but is a mere private voluntary deed of the debtors, granted to persons in whom he himself has confidence, and intended in the main for his own interest in the management of his affairs – 10 March 1798, *Thomson v. Butter*.¹⁹⁴ But the plea was, that although the conveyance would thus fall, so far as it pretended to vest the management and distribution in a certain person trustee; still it would subsist as being in substance a conveyance to all and each of the creditors for their payment, in proportion to their debts, and would thus have the effect of hindering any one of them, to acquire a preference over another by diligence against the funds, or in any other manner of way. It was argued in support of this notion, that the Act 1696 could not apply to a deed of this sort, which so far from being fraudulent or partial, was the fairest and most equitable thing which the bankrupt could do – that it answered the very same end with that Act itself, namely the hindering of partial preferences; and that it was even immoral in any creditor to thwart or counteract him in his purpose.¹⁹⁵ The answer to this was, that as the law actually stood, although a creditor could not take a voluntary security from the bankrupt, yet he had the right to acquire one if he could, by his legal diligence. That a diligence, although led within 60 days, gave an undoubted preference, which the judges did daily, and could not refuse to, sustain. That, such being the case, any deed of the bankrupts' which should have the effect to deprive them, or any one of them, of this valuable privilege, was undoubtedly an alienation to their material prejudice, and

¹⁹² *Sel. Dec., McKell v. McLurg's Trs*, 30 July, 1766, M. 894.

¹⁹³ *Comm.*, 1st ed., referring to Lord Kames' observations on *McKell (supra)*.

¹⁹⁴ M. 1224.

¹⁹⁵ See Kames, *Prs. of Equity*, 1st ed., 245–6.

therefore quite beyond the powers of a person whom the law considered as already in effect divested of all interest in his estate, and as bound to continue neutral – quiescent in all questions of claim upon it. Between these different views, each of which had its weight, decisions continued to fluctuate for the space of nearly twenty years; some of the Judges continually urging the equitable principle of equal distribution; and others no less constantly maintaining the common law right of diligence, and legal execution. The decision which seems to have settled the point, is that of the 14 Novr. 1764, *Moodie* against *Dickson*,¹⁹⁶ which sustained the diligence of a single creditor, who refused to accede to the bankrupt's trust deed and insisted on her privilege of making the most of his funds for herself. Also 27 Jan. 1767, *Peters v. Dunlop's Trustees*¹⁹⁷ – affirmed in House of Lords 18 Decr. 1767.¹⁹⁸ Various decisions, but none of them reported, have been since given on the same side, and none the other way;¹⁹⁹ so that this point is now at rest. In like manner, though the debtor be not a notour bankrupt, yet if diligence has begun against him at any instance of any individual creditor, the posterior trust deed is utterly ineffectual, and does not hinder him from proceeding with and compleating his diligence, as if no such deed existed. The reason is that it is struck at by the 2d clause of the Act 1621, which specially guards the interest of such creditor beginning to use the diligence of the law. It has been so found in many cases, especially in *Wardrope v. Fairholme*, 19 Decr. 1744 (Falc.²⁰⁰); see also Dict. v. 1, p.85.²⁰¹ See also Bell, p.554–5.²⁰² The only difference is, that there the right of challenge is peculiar to the individual who has begun to do diligence. You will however observe that what I have now said relates only to trusts proceeding from a person who is notour bankrupt in terms of the Act 1696 or who is

¹⁹⁶ M. 1104.

¹⁹⁷ M. 1218, Hailes 179.

¹⁹⁸ F.C., iv. 389.

¹⁹⁹ See Bell *Comm.*, ii.390.

²⁰⁰ i. 30, M. 4860.

²⁰¹ *Mansfield v. Brown*, 28 Jan. 1735, M. 1205.

²⁰² *Comm.*, 1st ed., ii.388.

under diligence in terms of Acts 1621. How far a trust executed by a person who is insolvent, but has not been brought under the description of either of those Statutes, how far this falls under the same rule is a different question, and open certainly to a difference of opinion, but which has held to have been settled in the negative by the decision in the case of *Wright v. Hutchison*, 8 Decr. 1791.²⁰³ (See also 30 July 1766, *McKell v. McLurg* (Kames²⁰⁴)). In this instance the trust deed was sustained; the grantor not being bankrupt in terms of the Staute, so as to be disabled on that ground, and the deed being a fair and equitable deed, truly intended for the benefit of creditors, and therefore, it was thought, not *ultra vires* of an insolvent person, who is still owner of his estate in point of form, and is even truly and substantially owner as far as it relates to the power of executing deeds like this, which is nowise fraudulent or improper but on the contrary is calculated, that is, for doing equal justice to all claimants on his funds. You will observe, however, that supposing the general point to be settled that way, still there is room for ordinary questions of competition between such trustee or disponee, and non-acceding creditors. For supposing such creditors to arrest for instance the rents in the hands of one of the debtor's tenants, while the trustee as yet is neither infeft, not in possession, not has intimated his right to the tenants; certainly the arrester is preferable by the ordinary rules of law. 14 Febr. 1797, *Archd. Tod v. John Young*.²⁰⁵ The question relates therefore to these cases only where the disponee or trustee has made his right compleat before diligence is done by the non acceding creditor. See Bell p.588.²⁰⁶ Farther such trust deed will not hinder creditors to adjudge the debtor's estate in the hands of the trustee to the

²⁰³ M. 1221, Hume Sess. Pap., vol. xxxviii, No.14, cit. *Hutchison v. Gibson's Crs.* Ersk. IV.i.45 note, Bell Comm., ii. 388.

²⁰⁴ Sel. Dec. No. 249, p.32, M. 894, Hailes 104, v. *McLurg's Trs.*, *supra*.

²⁰⁵ Not reported, Hume Sess. Pap., vol. lxxiv, No. 53.

²⁰⁶ Comm., 1st ed., ii.386.

effect of accumulating their debts, and so doing themselves justice, **XXXX** v. *Lord Errol*, June 1797.²⁰⁷

The Statute farther qualifies the deeds which are **XXX** be its objects as voluntary deeds. This is an equivocal expression, which may either be construed as excluding all deeds but those which are granted under the compulsion of legal diligence, or in a narrower sense, as also excluding deeds that are granted in implement of a prior obligation. **XXXX**, accordingly has been a point of controversy,²⁰⁸ and **XXX** decisions were formerly given for the creditor having **XXX** prior obligation for security in his favour. (6 June 1790 *Dixon* – so the Court said.²⁰⁹ These are 20 February 1772, *Houstoun* against *Stewarts*²¹⁰ and 19 Novr. 1783 *Spottiswood* against *Robertson Barclay*.²¹¹ In the first of these Reports, you will find the argument on both sides stated **XXX** large: in the last of these cases, the Judgement being brought under review by reclaiming petition, the matter was thought so doubtful, that the prevailing party submitted to a compromise. In fact the point has since been settled otherwise by the Judgement of the 5 June 1793, *The Creditors of Brough* v. *Spankie*.²¹² And upon this ground, which seems to be reasonable, that once a person is notour bankrupt, he is bound to remain absolutely neutral as to the implement of all obligations whatsoever. If the person who has the obligation to give him security, can acquire one by doing diligence on that obligation in course of law, it is well. Let him proceed to do so. The bankrupt cannot oppose him therein; 16 Novr. 1799 *Primrose* v. *McLean*.²¹³ If not, or if he does not think of it, the debtor is not to take care of his

²⁰⁷ Not reported, Hume *Sess. Pap.*, vol lxxvi, No. 38.

²⁰⁸ Bell *Comm.*, ii. 209–10.

²⁰⁹ *Dixon* v. *Hamilton, Trs. For Twyford*, 16 June, not reported, Hume *Sess. Pap.*, vol. xxx, No. 48, where MS. note by Hume that L.P. desired the collectors of decisions to guard against considering this case as a decision on the effect of a prior obligation. Decree was given in this case on its special facts.

²¹⁰ M. 1170, 5 B.S.386, Hailes 468, cit. *Houston & Co.* Bell *Comm.*, ii. 209 note.

²¹¹ M. 1177, Hailes 931, Bell *Comm.*, ii. 209 note.

²¹² M.1179, Hume *Sess. Pap.*, vol. xliv, No. 33. Bell *Comm.*, ii. 210 and note.

²¹³ Not reported, Hume, *Sess. Pap.*, vol. lxviii, No. 9. Bell *Comm.*, ii. 210 note.

particular interest for him. The other creditors are entitled to take advantage of his negligence, and inattention, and the debtor is not by his voluntary deed to deprive them of that advantage. There is in short no substantial difference between the obligation to grant a deed, a security, and the obligation to pay a sum of money. The creditor, in either case, has equally trusted, for the time, to the personal credit of his debtor; who, after the 60 days, must not therefore interfere in his favour.²¹⁴

Before quitting this point, I must however observe, that no act or deed falls under the operation of the law, if it be such as is compleated without any interposition of the bankrupt's will.²¹⁵ Thus a person in his contract of marriage grants a precept for infefting his wife in a certain jointure, and being himself uninfeft he assigns his title deeds to her in order that she may infeft him also and thus validate her own liferent. She infefts him accordingly, at a distance of time when he is notour bankrupt. This act is not reducible: for it takes place at the time without his concurrence, or perhaps his knowledge, and in consequence of a compleat power previously bestowed when he was solvent, 12 Novr. 1799 *Thos. Milne v. Marjory Finlay*.²¹⁶ The deed of liferent itself, you observe, in such a case is not exceptionable, as being a *novum debitum* and for an onerous cause.²¹⁷ And as this liferent was validated and confirmed not by any new act of his will – any new deed – done in her favour – in his state of bankruptcy – but in pursuance of a previous power and faculty bestowed upon her – there was no room for challenge of this. However that be, the Court have alwise been cautious not to admit any proof by testimony, of verbal communing or agreements to grant the security at the date of the advance or contraction.

The disposition, any interposition, security or whatever it is, will alwise be held as of its

²¹⁴ See, however, later contrary view. *Bell Comm.*, ii.210.

²¹⁵ *Bell Comm.*, ii.200, 207–8, Montg. *Bell* i. 184.

²¹⁶ M. App. Bankrupt, 10, Hume *Sess. Pap.*, vol. lxxviii, No. 2, cit. *Mitchell v. Finlay*. Marjory Finlay was the wife of Jas. Milne. Also *McLagan's Tr. v. McLagan*, 21 May 1800 F.C., M. App. Bankrupt 11, S.L. *Old Sess. Pap.*, vol. 412, Nos. 24, 29.

²¹⁷ See *Bell Comm.*, *supra*.

own date only, unless a prior written obligation or agreement to grant it, can be produced: And indeed it would be dangerous to receive the vague and uncertain testimony of witnesses to previous communings of that sort, which in fact no one trusts to in matters of the kind – 19 Novr. 1788, *Black v. Allason*.²¹⁸

[It is fixed law, though contrary to Lord Kames' opinion,²¹⁹ that the nullity of the Act is total, and excludes the granter in the deed from even a *pari passu* preference with the other creditors.²²⁰

The effect of this nullity as to third parties acquiring right to the deed *bona fide* is governed by the common rule of law, which secures a purchaser against his author's fraud.²²¹]

It is also clear that every person is in this question accounted a creditor, and may pursue reduction on the Statute who has any sort of personal claim for implement or performance against the debtor as well as he who is creditor in a sum of money. For instance, if a person by minute of sale becomes bound to sell his lands, and afterwards, when bankrupt, grant a heritable security on these lands to a prior creditor, this is reducible at instance of the purchaser of the lands – 30 Novr. 1797, *Lord Kinnoul v. David Pagan*.²²² You observe, however, that under this act, as under the Act 1621, the privilege of reduction belongs to such creditors only whose debts were contracted before the date of the security in question – that is, before the date of the seisin taken thereon, 19 Novr. 1783, *Robertson Barclay v. Lennox*.²²³

²¹⁸ Not reported, Hume Sess. Pap., vol. xxiii, No. 58.

²¹⁹ *Prs. of Equity*, 1st ed., p.240.

²²⁰ *Bell Comm.*, ii. 244, 4th ed., ii. 216.

²²¹ See *Bell Comm.*, ii.190–1, i.309–10.

²²² Not reported, Hume Sess. Pap., vol. lxxviii, No. 29.

²²³ M. 1151, where this part of the judgement however is omitted. See *Bell Comm.*, ii.195.

[The Statute contains two other clauses. The first is in these words, ‘That all Dispositions, Heretable Bonds, or other Heretable Rights, whereupon Infetment may follow, granted by the foresaid Bankrupts, shall only be reckoned, as to this Case of Bankrupt, to be of the Date of the Sasine lawfully taken thereon, but prejudice to the Validity of the said Heretable Rights, as to all other Effects as formerly.’ This clause is not separate from but is plainly calculated to give a fuller effect to, the preceding one.²²⁴ Its operation is to oblige the other creditors of a debtor *vergens ad inopiam* to take infetments on their warrants for their own sakes, by which means other persons are prevented from trusting the debtor, whereas if their sasines might have been taken within the sixty days and if the date of the conveyance had been the rule, then all the creditors of the bankrupt who were any way connected with him, would have waived taking sasine, by which means persons contracting with him afterwards would have remained ignorant of the state of his credit.²²⁵ This part of the Statute is subject to the same limitation with the former in the case of *nova debita*, for if an heritable bond for a new debt is taken within a few days of the statutory term of sixty days and sasine proceeding immediately thereon happens to be within that space, such creditor will notwithstanding then be effectually secured. In short, this clause was meant only to hinder partial preferences among prior creditors, and has no relation to such creditors.²²⁶]

Judged of at different times, but finally settled as I have said, by Kilkerran No. 16²²⁷ – June 5 1793, *Credrs. of Brough*,²²⁸ – so mentioned. 12 Novr. 1799 *Mitchell v. Finlay*.²²⁹

²²⁴ Bell *Comm.*, ii. 213 &c.

²²⁵ Bell *Comm.*, ii. 213 &c.

²²⁶ Bell *Comm.* li. 207. Ersk. IV.i.43.

²²⁷ *Johnstone v. Burnet & Hume*, 1751, M. 1130–42, Elch. Bankrupt, 27, Kames Rem. Dec. li. 246, Ersk. *supra*.

²²⁸ *Supra*

²²⁹ *Supra*. Bell *Comm.*, ii.207. Ersk. *supra*, note.

An attempt has also been made at an extension of the Act in another respect, namely by holding, that in all questions under the Act the seisin is to be held as of the date only of the registration thereof. The reason against this is, that the Act of the same year anent the preference of real rights,²³⁰ which introduced this rule, was only meant for the competition of infeftments *inter se*, or with diligences requiring registration. On these grounds Judgement was given, 17 Feby. 1715 *Creditors of Menzies*, Dalrymple,²³¹ finding the date of the seisin the rule, and all doubts on the subject (for such were entertained Bn. No.109²³² doubts) were put an end to by a late decision to the same effect, 13 December 1782, *Douglas Heron and Coy against Maxwell*.²³³

The right of challenge on this clause of the Act belongs, not only to all creditors contracting before the date of the precept but to all contracting between that and the date of the seisin.²³⁴ For as, in the construction of the Statute the bond is of the date of the seisine, all persons who have by that time become creditors, have right to an equal distribution of the estate with the holder of that security. This had been called into question; but was settled 19 November 1783, *Robertson Barclay against Lennox*.²²³ The Statute does not contain any similar declaration with respect to assignments, for holding them as of the date of the intimation, by which they are published – and it was therefore found, that in all questions under the Act the assignment is to be held as of its own and real date. See 8 July 1788, *Hay against Thomson*.²³⁵ If, however, it is an assignment of moveable *corpora*, though dated long before the 60 days, still, if the bankrupt retains possession till that period, and only makes delivery while it is still running; then I

²³⁰ C.18, 12 mo. and record ed.

²³¹ 189, Bruce i. 87, M. 981. Ersk. *supra*.

²³² l. x. 109, pp. 270–1. He thought this rule might be of dangerous consequence.

²³³ M. 1244. Ersk. *supra*, note. Bell *Comm.*, ii.213. The date of registration was later by statute made the date. Bell *Comm.*, *do*.

²³⁴ Bell *Comm.*, ii.195.

²³⁵ M. 1194, Hume *Sess. Pap.*, vol xxv, No. 29, cit. v. *Sinclair & Co*. Ersk *supra* note, Bell *Comm.*, ii.215, 208. This was later altered to the date of intimation. Bell *Comm.*, ii. 215, 208.

conceive that the Act will reach it – because in truth it is only the delivery, which is here a voluntary measure, that gives the deed an existence. It is till then held a mere pretence and piece of simulation: so that the writing here falls to be accounted as of the date of the delivery.²³⁶ The intimation of assignment of *nomina*, is, on the contrary a matter that is quite within the power of the assignee, and what the bankrupt has no control over.

The last clause of the Act is in these words – ‘And because the infestments for relief, not only of Debts already contracted, but of Debts to be contracted for thereafter, are often found to be the Occasion or Covert of Frauds. It is therefore further declared, That any disposition, or other Rights, that shall be granted for hereafter for relief or Security of Debts to be contracted for the future, shall be of no Force, as to any such Debts that shall be found to be contracted after the Seisin, or Infestment following on the said disposition or Right, but prejudice to the Validity (thereof) in all other Points as accords.’²³⁷ This granting of infestments in security of debts not existing at the time, but afterwards, to be contracted, had it seems about the end of the last century become a very common practice; and it had been found to be the source of many fraudulent and iniquitous dealings.²²⁵ One practice was, that the creditor furnished with such security, purchased conveyances to common personal claims against the debtor (or perhaps took conveyances from other creditors under latent trust for them), and so communicated to them the benefit of his general indefinite infestment, and postponed at pleasure all the other personal creditors. Cautioners also (and their practices seem to have been chiefly in view) made a still more iniquitous use of such security, for engagements to be undertaken on their part. A person for instance got security in relief of all debts wherein he stood bound as cautioner for the granter at the time, or for which he should afterwards bind in that capacity. At any time when the debtor was distressed for money, the cautioner came

²³⁶ Bell *Comm.*, 1st ed. 188, 148. See ii. 216.

²³⁷ Bell *Comm.*, ii.218, i. 714–5.

forward, and joined him in a bond for it. *Johnston's Crers.* p.3. 4.²³⁸ The debtor thus pocket the money; the cautioner secured himself by his general infestment; and he thus postponed, not only all personal, but even heritable creditors, though having infestment prior to these loans, if it was posterior to the cautioner's infestment of relief. Or again, when diligence began to gather upon the debtor, this cautioner made payment to such creditors whom he was disposed to favour, and yet was himself quite secure of all his advances, which were covered by his previous general infestment in relief of his engagements. There was thus no sort of security in contracting, wherever such an infestment had been given; because it might be widened to any extent.

But father there were (more) objections in law to a security of this kind, even if it had given less opportunity to frauds. In the first place, when expressly granted for such future debts, it was an indefinite burden, and exceptionable upon that general ground of law.²³⁹ This had not been understood: for however indefinite, the Act does not apply if future. In fact this was not understood nor settled till some Judgements of the House of Lords in 1734 or thereabouts.²⁴⁰ Again such a security seems exceptionable under the principles of feudal law: for whenever a *dominium* is to be constituted, or a vassall and a superior – 'tis essential that there be from the first a substratum for that connection between them – something in which the one is vassall, and the other lord. There must be a loan of money, a present debt of some kind or other, to make an infestment in security applicable to the case. This principle subverts therefore from the bottom any security which is altogether fro future debts, and so is in truth a shadow, without a substance. But even where there is a present debt, it is equally adverse to feudal principles that the infestment should even extend beyond this, to debts which are contracted afterwards. That the feudal security

²³⁸ 1788, *Brown, Tr. of Johnston v. Johnston &c.*, S.L., *Old Sess. Pap.*, vol. 355 No. 15.

²³⁹ *Bell Comm.*, ii. 218.

²⁴⁰ *Cases of Coxtan, Lovat and Kersland*, followed in Ct. of Session in *McLelland's Crs.* *Bell Comm.*, 202 1st ed., ii. 218. See *Bell Comm.*, i. 728, 730, where the cases are given, *Ersk.* II, iii. 50. See too *Lectures*, vol. IV, p.403.

should from time to time, enlarge, and abate, extinguish and revive without the use of any new form of solemnity, and thus fluctuate at the pleasure of parties, according to the state of advances and operations between them, was contrary to the whole tenor of this part of the law. The idea of the creditor being not a vassall today (when he has been repaid his advance), and starting up a vassall tomorrow without any solemnity having been used, is quite inconcilable to the very idea of a feudal right, which is a grant of an estate, and in all points is strictly circumscribed with form.²⁴¹ The Statute 1696 in limiting such infeftments to debts contracted before the seisin, may therefore be regarded as in some measure declaratory, and in confirmation of the feudal law, rather than as the introduction of a novelty – on which account, and because the Statute speaks in general, it has been applied in some cases, where the particular frauds meant to be guarded against, could not, at least to any great extent, be practised. For instance James King of Newcastle granted an heritable bond to Smith, Wright and Gray, bearing receipt of £2,500, and giving precept to infeft them in security of that sum accordingly. But of equal date with this bond, Smith, Wright and Gray, gave King a backbond, bearing that in truth there had been no present advance of any sum, but that the bond was meant for their security of any sum whereof they then were, or might afterwards be in advance for King. This security being challenged under the Act, was accordingly reduced, except in as far as there was an advance at the date of the sasine; although from its bearing a special sum and precise amount, many of the common practical objections, resting on the want of information to third parties, did not apply to it. But the Court thought, that in as far as there was no debt at the time, it fell under the spirit of the Act and was an abortive attempt to create a feudal right without the proper substratum: that as there was no special covenant for advance of a certain sum as the cause of the security, but that security granted in consideration of

²⁴¹ See observations on the Bench in *Pickering, infra*, quoted in Bell *Comm.*, ii. 222 note.

future advances, which might or might not be made, and might be greater or less, or nothing at all – it equally fell under the intendment of the Act, as if it had been for such advances without limitation. It is in truth *fraudem facere legi*, and to give it the appearance of security for a present advance, when in truth it is for future and uncertain: for in such a case you will observe, neither party is properly under any obligation to the other. The granter of the security need not call for the money unless he will, nor need the debtor obey his call further than he chooses. See R.Dec. p.235.²⁴² This was on 16 January 1788, *Smith v. Pickering*.²⁴³ There had been a previous decision much to the same purpose, 13 June 1750, *Kinloch v. Dempster*, Kn. p.393, R.Dec. p.234.²⁴⁴ Upon similar principles the Court more lately found that heritable security was not applicable to a cash credit – 14 Novr. 1789²⁴⁵ appealed affirmed 25 Febr. 1791²⁴⁶ 10 March 1794²⁴⁷ – *Newham, Everett and Company against Creditors of Stein* – i.e. that the party receiving such accommodation could not effectually give the party granting it a security on his estate for the advances to be made him in pursuance of their agreement. Because, here at the date of the security there was no present debt, there being then no advance made to the party getting the credit. Indeed there is not properly even a full obligation to make any advance: for the Bank, if it discover good cause, may still refuse to make any such advance, and throw up the purpose, while matters are entire. Such being the case with the party who grants the credit, it follows, of course, that any one who interposes as cautioner for the principal party, who receives such credit, can as little get a valid infestment for his relief. For if there is no present existing debt between the two principle parties, then the

²⁴² Kames, vol. ii, in report of *Dempster*, *infra*.

²⁴³ M. 1155, Hume Sess. Pap., vol. xxii, No. 24, cit. *Pickering v. Smith, Wright & Gray*, Bell Comm., ii. 222, note. Ersk. IV.i. 43 note.

²⁴⁴ Kames, vol. ii, M. 10290–3, Elch. Competition, 10, Forfeiture, 13, cit. *Dempster v. Kinloch*. Bell Comm., ii. 219 note.

²⁴⁵ M. 1158, Hume Sess. Pap., vol. xxviii, No. 7.

²⁴⁶ H.L., 3 Pat. 345.

²⁴⁷ H.L., 3 Pat. 345, affirming 1 Feb. 1793, M. 14127, Hume Sess. Pap., vol. xliii, No. 2. Bell Comm., ii. 222 note, and i. 730. Ersk. *supra*, note.

cautionary obligation, which is accessory merely, behoves to be of the same future and eventual constitution, 2 March 1791 *Pitcairn* against *Selby's Heirs*.²⁴⁸ Under certain provisions, however, such heritable securities are made lawful, and effectual, by Act 33 Geo. 3d. ch. 74. No. 12.²⁴⁹ To these Judgements probably it was owing, that it lately came to be called in question, whether a security for a special definite loan, actually covenanted for, and *bona fide* meant to be made, be good, where the infestment is taken before the granter actually receives the money. This was the question lately agitated between *Sir George Abercromby* and *Sir James Norcliffe*, 29 July 1789,²⁵⁰ and decided in favour of the creditors so secured. And that it should seem well decided. For it does not appear that a security can be said to be for a future debt in the sense of the Statute, which secures a special definite advance accurately covenanted for and agreed to be made at the date of the seisine, and which is made accordingly in terms of that agreement. In one sense, a literal sense, it is no doubt a future debt; in as much as there is no loan till the money is paid. But if we attend to the objects and motives of the Statute, we must needs see that the debts which it meant to characterise by that name were debts precisely of the opposite description to the above – debts which have either not been at all covenanted on before granting the security, and are to arise in future *ex alia causa* – from some new covenant or transaction – or which, if they in a general way have been in contemplation, have been left loose and indefinite as to their existence, or extent, or both; and so are thus exceptionable, both in point of feudal principle, and as giving opportunity of fraud.

Where an infestment is given on a general bargain of that kind, there it is meant as the close of the transaction and completion of security. The parties do not mean that the legal

²⁴⁸ M. 1159, Bell Oct. Ca. 40, Hume Ses. *Pap.*, vols. xxxv, No. 86, and xli, No. 20. See sequel 12 Decr. 1794, M. 14118, Hume Sess. *Pap.*, vol. lxxxiii, No. 26. Bell *Comm.*, ii.223. Ersk. *supra*, note.

²⁴⁹ Bell *Comm.*, ii. 223. Ersk. *supra*, note. And 54 Geo. III. c. 137, § 14.

²⁵⁰ 30 July, M. 1156, Bell Oct. Ca. 57, Hume Sess. *Pap.*, vols xxvii, No. 52, and xxiv, No. 54, cit. *Dunbar's Crs. v. Abercromby*. Bell *Comm.*, ii.220 and note.

existence and attachment thereof shall remain pendent on any thing farther to be done by the creditor, but on the contrary that he shall have from that instant in his person an effectual constituted right of security for whatever debts may afterwards be owing him. It is therefore, properly, in the words of the Act, an infestment in security of debts to be contracted. Where on the contrary infestment is taken in the view of a special definite loan of money shortly to be made, that infestment is not the close of the security not the completion of the transaction. There is then no doubt a security existing in point of form, but not in point of legal operation and effect. In that view the infestment is but a step in the transaction, pendent, as to its influence, on the implement of the special covenant by advance of the stipulated sum, on the faith of which implement 'tis given, and untill which it is nothing to the creditor. Till then that person could not sue for exhibition of the papers, nor, if a bankruptcy happened, could he rank for a farthing, however compleat the form of security. This being the case then, that under such a special definite covenant both parties meant the reverse of the above, the advance of the money to be the close of the transaction, and the security to be in truth no effectual constituted legal security to the creditor, but a thing of form, entirely under the command of the debtor, it is nowise a security for future debt in the sense of the Statute. The infestment cannot be held as granted to the creditor (which are the words of the Statute) till the advance of the value, and when that is advanced, the debt and security spring up *simul et semel*. Farther, no Judgement has so far extended the phrase of future debts used in the Act, as to cause it reach conditional debts, which may or may not exist according to circumstances. No one supposes for instance that the Act strikes at an infestment of warrandice, or for relief of cautionary, or in security of an obligation to execute a trust, or to do the duty of an office.²⁵¹ For in all these cases there is an immediate existing obligation of one kind or

²⁵¹ Bell *Comm.*, ii. 219. But see L.P. Campbell's op., M. 1238, quoted by Bell *Comm.*, *supra*, note, as to security

another; the party is effectually and presently bound to some thing or other. The author is instantly bound to maintain the disponent in the right, or to indemnify him on eviction. The cautioner is instantly bound that the principal shall pay the debt, or execute the trust, or do his duty, and that the damage shall be paid in case of failure. The principal debtor is, of consequence, from the first bound to the cautioner, in an obligation of relief, to the same extent, and it is this present, constituted, obligation, that the infestment secures – 24 Novr. 1790, *Stuart v. Creditors of Phisgill*.²⁵²

In like manner a woman receives by her contract of marriage a security for her annuity payable in case of her survivance. This is also clearly beyond the reach of the Statute. It no doubt depends on the contingency of her survivance whether she shall ever draw any thing or not. But then from the date of the contract the husband is bound to her in that annuity, beyond recall, under that single condition. He is instantly and immediately her debtor, in these terms, and has so far abridged his freedom: whereas a future debt, in the sense of the Statute and indeed in common language, is a debt which entirely depends on the future will of the party – which he may contract or not, as he shall hereafter be disposed; and this certainly the person cannot say, who has put his hand to a stipulation of annuity for his widow; being thereby well and firmly bound, though only bound in the event stipulated and covenanted on. In the case of infestment to the cautioner for a cash credit, on the contrary, not only is it uncertain and contingent whether the cautioner shall ever have any thing to pay, but it is quite a matter at the pleasure of the granter of the credit, whether there shall even be a debt, to which to apply the surety's accessory obligation. I shall only add with respect to this clause, that the court have found the Statute not to apply to a disposition which is *ex facie* absolute and irredeemable, but is qualified by a backbond declaring that it shall subsist as a security for such debts as were

for discharge of an office.

²⁵² Not reported, Hume Sess. *Pap.*, vol. xxxiii, No. 20, cit. *Heron v. Physgill's Crs.*

due to the donee at the time, and what others he should transact with the creditors. 16 Febry. 1782, *Riddell v. Crers. Of Niblie*.²⁵³ 2 March 1791 *Sir A. Campbell v. Drummond*, the same.²⁵⁴ At first sight it may appear that this is a whimsical distinction, and opens a way for the entire evasion of the law. But there is a real difference between the two forms of transaction, in as much as the owner, giving a mere security, continues to retain the character of owner of the estate, and (but for the salutary provisions in the Statute) would entice third parties to contract with him on the faith of such his estate, when 'tis perhaps already covered with preferable debts, by means of this indefinite security; Whereas one who absolutely disposes away his estate as if in property, and keeps no hold of it but through a latent backbond, does, to the public, part with the character of owner: so that no one is tempted or authorised to contract with or credit him as such. If he does, it is contempt of the recorded titles, and so he has no favour to plead.

What you have now heard is a short analysis of our two principle Bankrupt Statutes. But you are not to understand, that those form a complete summary of our Bankrupt Law, or to imagine that no deed is reducible, which does not come under some one of the descriptions there given. They were made partly declaratorie, partly in aid and supplement of our common law, which has always reached the grosser kinds of fraud, in this as in every other department, and which continues to do so, in such cases where those Statutes will not apply.²⁵⁵ To illustrate this with a few examples. We have seen, that, under the Act 1621, in the case of an alienation to a conjunct or confident person, if the granter is shown to be insolvent at the time of trying the question, he is presumed to have been so at the time of the deed likewise, and that the burthen of astruction the deed – and

²⁵³ M. 1154. *Bell Comm.*, ii. 223, i. 725.

²⁵⁴ Bell Oct. Ca. 54, Hume Sess. *Pap.*, vol. xxxv, No. 85, cit. *Drummonds v. Campbell*. *Bell Comm.*, ii. 223. See also *Keith v. Maxwell*, 8 July, 1795, M. 1163, Bell Oct. Ca. 234, Hume Sess. *Pap.*, vol. lxxxvi, No. 80. *Bell Comm.*, ii. 223, i. 725.

²⁵⁵ *Bell Comm.*, ii. 227. At common law, in contrast to the Act 1621, a posterior creditor may challenge. Ersk. IV. i. 44. See *Bell Comm.*, ii. 172–3.

showing an onerous cause – is laid on the conjunct or confident person. But in the case of an alienation to a stranger, which does not fall under the Statute, if the creditor challenger will take upon himself to establish all these things – that the granter was insolvent at the date of his deed, and that the deed was gratuitous – and contrived with an unfair and fraudulent purpose between him and the disponent – there cannot be a doubt that this is a relevant charge at common law – and that he shall be admitted to a proof of it by facts and circumstances, and otherwise in common course. (See Bell p.99.²⁵⁶)

Thus suppose that a person is insolvent, and is about to fly the Country, and that in the view of securing his subsistence, he prevails with a connection of his (to whom he fully explains himself) to purchase his estate, and pay him the price, that he may carry it off with him. This transaction cannot be brought under the Act 1621, because it is not gratuitous, but for a just and true price really paid at the time: neither does it fall under the Act 1696, for the same reason, and because not granted in security to a prior creditor. But I have no doubt it is reducible at common law, as a direct fraud of which they are both partakers.²⁵⁷

In like manner, suppose that a merchant, or person in trade, but solvent at the time, settles, by a postnuptial contract, an unreasonable provision on his wife. It may, at common law, be restricted, at instance of his creditors, to what is just and reasonable, in case of a supervening insolvency. For merchants and others, by their situation exposed to sudden misfortunes, and fluctuations of circumstances, are obliged to consider this risk in arranging such concerns, and will not be permitted to lock up before hand, by such private and voluntary operation, any considerable part of their funds to which the world trusts in dealing with them. Though he be solvent at the time, the very measure of making

²⁵⁶ *Comm.*, 1st ed., ii. 184. See Ersk. IV. i. 35.

²⁵⁷ See Ersk. IV. i. 44, Bell *Comm.*, ii. 227–8.

an unreasonable settlement, shows that he had an eye, more or less, to the evil day. When that day comes, the husband is himself bound, in justice to his creditors to revoke his settlement *quoad excessum*. He acts wronguously in refusing so to do: and his creditors will therefore be heard to challenge it at common law in his stead. There are many instances of such restrictions at their suit,²⁵⁸ 30 June 1790 *Spiers v. Cooper*.²⁵⁹

Again – it has been said, 30 June 1790,²⁵⁹ that the first Clause of the Act 1621 affords no grounds to challenge a special conveyance given to a particular creditor *in solutum* of his debt;²⁶⁰ both because the debt is a just and true cause for granting it, and because the nature of it does not involve the creditor in any participation of fraud. But the same is by no means true of a creditor accepting an universal disposition to his debtor's effects in satisfaction of his claims. The debtor is necessarily made insolvent by that conveyance; and the creditor taking it, is necessarily made acquainted with and partaker of his debtor's fraudulent and undue purpose, of preferring him to all his other creditors, for satisfaction or security of debts, have therefore alwise, both anciently and latterly, been set aside, as fraudulent, though no diligence had been done by any other creditor, so as to bring the case under the second clause of the Act 1621, not the debtor been made notour bankrupt in terms of the Act 1696. Bn. p.267 No. 97,²⁶¹ P.E. p.321,²⁶² Dic. V.I. p.66–7.²⁶³ In like manner, even where the disposition is not *omnium bonorum* and in satisfaction, but in security only, and not absolutely universal; still, if other circumstances concur to show fraud, as if it take away the main and principal part of the debtor's substance, and be in favour of a number of relations and confidants, for their claims in preference to others; it

²⁵⁸ Bell *Comm.*, i. 687, ii. 178.

²⁵⁹ Not reported, Hume *Sess. Pap.*, vol. xxxii, No. 67.

²⁶⁰ See Bell *Comm.*, ii. 226–7, 177.

²⁶¹ Bankt. I. x. 97, Ersk. IV. i. 44, Bell *Comm.*, ii.226, 227, 154.

²⁶² Kames, 2nd ed.

²⁶³ *Tarsappie's Crs v. Laird of Kinfauns*, 1673, M. 899–901; *Carnston v. Wilkie*, 1678, M. 889; *Pollock v. K.S. of Leith*, 1679, M. 890; *Brown v. Watson and Drummond*, 1685, M. 891–2; *Kinloch v. Blair*, 1678, M. 889; *Cramond v. Bain & Henry*, 1737, M. 893, Elchies Fraud 5, notes 158.

will be voided as fraudulent, though it fall under none of the Acts. This was done in such a case, 28 January 1696, *Scrymgeour* against *Lyon*.²⁶⁴ (29 Febr. 1792, *Dalgleish v. Muir*)²⁶⁵ There is a convenient illustration of this principle of a later date – *Grant of Tillifour* was debtor to *Sir A. Grant*, and being insolvent and averse to Sir A., formed a scheme to disappoint him of his debt. He privately and without the knowledge of his creditors, executed three different heritable bonds in their favour. These were all written with one hand, in the course of one night; and next day, still without the creditor's knowledge, infeftment was taken on them. The malicious purpose against Grant was here evident. But there had been no diligence done either to make him notour bankrupt or to bring the case under the second clause of the Act 1621; and as the security was for prior debts, due to creditors who had no participation in the scheme, the first clause of that Act was equally out of the question. But Sir A. Nevertheless prevailed on the ground of actual fraud. Kn. p.55.²⁶⁶ Again, we have seen, that, the Act 1621 has relation to cases of insolvency only, and is for the benefit only of such creditors whose debts were contracted before the date of the deed. Nevertheless, wherever a collusive or simulate purpose can be shown, though in a challenge at instance of posterior creditors only; and though taken up at a time when the granter was not insolvent, but still with a view less or more to the possibility of such an event at a future day, there common law will reach the case.²⁶⁷ A father there had disposed his heritable property at a time when he was solvent, and with reservation of his own liferent in favour of trustees for behoof of his children. These trustees were infeft, but the father all along continued in possession of the subjects, and from this and other circumstances in the case it plainly appeared, that the deed upon the

²⁶⁴ M. 903, Fount. i. 705. Bell *Comm.*, ii. 228, Kames, 1st ed., 242.

²⁶⁵ Not reported, Hume *Sess. Pap.*, vol. xxxix, No. 45.

²⁶⁶ No. 9 Bankrupt, 9 Nov. 1748, M. 949–52, Elch. Fraud 19, Kames *Rem. Dec.*, ii. 167, cit. *Grant v. Grant* (or *Grant's Crs.*) Bell *Comm.*, ii. 229, Kames, 1st ed., 243.

²⁶⁷ Bell *Comm.*, ii. 184, 172–3. Lack of knowledge of fraud is an excuse to the creditor. Ersk. IV.i.44, Bell *Comm.*, ii. 184.

whole was a mere collusive and simulate conveyance, intended to serve a particular purpose. and as such it was set aside at instance of the father's creditors, posterior, as well as prior, to the date of the deed. This is agreeable to the older cases 12 Febr. 1669,²⁶⁸ and 2 July 1673, *Street v. Jackson*,²⁶⁹ 4 Decr. 1673 *Reid*.²⁷⁰

Many other cases of reduction on the head of actual instead of statutory or constructive fraud may be imagined. See 12 Febr. 1669, *Pollock*,²⁶⁸ 2 July 1673 *Street v. Jackson*.²⁶⁹ But it may be sufficient just to have mentioned the above by way of specimen; as indeed it were endless to think of discussing the subject at large. I shall only further mention that the inclination of the Court is now to carry the equitable principle of an equal distribution as far as they can, and to defeat whenever they can find any tolerable ground for it, every attempt at bestowing a partial preference. Hence though payment made to a creditor by delivery of goods is plainly beyond the reach of the Statute 1621, where no diligence has been executed, and though I can not say, that such a payment received from an insolvent person is voidable at common law, in ordinary cases (for it certainly is not) yet where circumstances concur to make the case unfavourable, to mark a determined purpose of injustice the Court will reach it. If, for instance, the debtor is a shopkeeper, and is about to fly the Country, and in this state, makes delivery of a parcel of goods to one creditor *in solutum*, and another parcel to another, and if the persons thus preferred are his relations and confidants, reduction will pass at common law – 15 Janry. 1788, *McNaughtan*.²⁷¹

We shall now take notice of the later Statutes relative to the distribution of bankrupt effects.

²⁶⁸ *Pollock v. Pollock*, M. 4909–10, Stair, i. 602.

²⁶⁹ M. 4914–9, Stair, ii. 197, cit. *Street and Jackson v. Mason*.

²⁷⁰ M. 4925–6, Stair, ii. 234, cit. v. *Reid*. Stair I. ix. 15, Ersk. IV. i. 44, Kames, 1st ed., 237.

²⁷¹ Not reported, Hume Sess. *Pap.*, vol. xxii, No 37, where the delivery of cattle by a drover to two near relations, *in solutum* of a prior debt, the debtor being known to be insolvent and about to give up business, was reduced at common law. The Court followed a prior case on 6 Decr. 1787, of *Smith and Laing v. Selkrig, Tr for Arthur & Co.*, not reported.

The Act 1696 was undoubtedly a most valuable supplement to the Act 1621, and redressed, right effectually, most of the probable grievances arising from the bankrupt's partiality, or his collusion with favoured creditors. But to make a complete equitable arrangement, it should have gone a step further, and have made provision also against a creditor's partiality to himself. It should have hindered him, that is, from acquiring a preferable security by his diligence done after notour bankruptcy, or from taking by means of diligence a payment or satisfaction in goods and effects, which he could not receive (in terms of that Act) by the will or deed of the bankrupt. Legal diligencies are no more than the acts of law, intended to supply the debtor's tardiness and failure of duty; and it was therefore inconsistent, that the creditor should have power to gain a preference by means of these, after a period when the Act had forbidden the debtor to bestow any such preference, and declared that the very attempt to do so was a fraud.²⁷² So however it was. The Act 1696 left every creditor at compleat freedom to acquire a preference by his legal diligence, after notour bankruptcy, equally as before.

As far indeed as concerned heritage, there was little need of any accidental provision on this subject; because the Statute 1661 ch. 62²⁷³ has already established a *pari passu* preference among all adjudications deduced within a year of the first effectual, whether the debtor was a notour bankrupt or not. And farther, even with respect to the moveable funds, if the debtor was deceased, the Court had in some measure corrected the iniquity of the common law, by their Act of Sederunt, 28 February 1662,²⁷⁴ which established the like *pari passu* preference among all confirmations and other steps of diligence, done within six months from the death of the debtor. But in the case of a bankrupt debtor still alive, the defect was most sensibly felt with respect to the moveable funds, which

²⁷² Kames, *Prs. of Equity*, p.233, 1st ed. Bell *Comm.*, 314 &c., 1st ed., ii. 73.

²⁷³ *Lectures*, vol. IV. Chap. X, p.458. Bell *Comm.*, i.754, ii. 403–4. Kames, *supra*, 231, 233.

²⁷⁴ See *Lectures*, vol. V. chap. XVIII, p.211. Bell *Comm.*, ii. 82 &c. Kames, 234.

continued to be partially carried off, by poundings and arrestments, at instance of the creditors most at hand, to the great loss, and often utter disappointment of those who had not the same access to information or the same means of defraying the charge of diligence. As far as I can discover the first attempt at a remedy, was by the Act of Sederunt, 9 August 1754,²⁷⁵ which established a *pari passu* preference among all arrestments executed within 60 days of notour bankruptcy or four months after, and the like among all poundings within the same time. P.E. p.314.²⁷⁶ This regulation was however but temporary, and was not renewed at the end of the appointed term.²⁷⁷

The only effectual remedy for these evils was to cut off all manner or preference or advantage from diligences used within a certain time, and both to divest the debtor of the administration of his funds, and each creditor of the power of acting and taking separate measures for his own interest, and to contrive some means for putting the bankrupt's whole moveable substance, summarily and at once, into the hands of a factor or trustee for the whole creditors; who should be vested with the right thereof, and have all requisite powers for recovering, managing and turning it into money, and who should make rateable distribution of the same among creditors, saving the preferences acquired by diligence preceding a certain time before bankruptcy.²⁷⁸ This great and desirable change was at last accomplished by the Statute of the 23d George 3d Ch. 18, which has since been amended and renewed by others 30th Geo. 3d c. 5 and Act 1793, 33d Geo. 3, ch. 74 and last of all 54 Geo. III, ch. 137.²⁷⁹ All of these were in alteration of a prior Statute 12 Geo. 3, ch. 72, which on trial had been found unsuitable, and liable to great abuses.²⁸⁰ The general plan of the present Statutes is to deprive the bankrupt of the power management

²⁷⁵ A.S. (1790 ed.) 478–9. 10 August.

²⁷⁶ Kames, 2nd ed. Bell *Comm.*, 316, 1st ed., ii. 73.

²⁷⁷ Bell *Comm.*, ii. 281.

²⁷⁸ See Bell *Comm.*, 434 &c., 1st ed., ii. 281.

²⁷⁹ Also there were Acts 39 Geo. III c. 53 and 44 Geo. III c. 24. Ersk., 5th Ed. pp.492, 776, notes.

²⁸⁰ Bell *Comm.*, ii. 282.

or possession of his estate, by a judicial sequestration; which step is followed with the election first of an interim factor and afterwards of a trustee by the creditors; to whom the whole right interest and management of the estate is made over by a conveyance from the debtor, or failing him by an act of the court to the end he may turn it into money, and make distribution of the proceeds among the creditors, according to their preferences acquired before the sequestration or bankruptcy, such trustee, and his whole proceedings and decisions being subject always to the control, superintendence, and review of the Court of Session on complaint by any one concerned. To which end a set of special directions are given by the Statute, and a course of conduct prescribed.²⁸¹ The following particulars may be attended to.

The main articles of this Enactment²⁸² were these, that when any debtor became bankrupt in terms of the Act 1696, or suffered his effects to be poinded, then on application of the creditor doing such diligence, the Court of Session should sequester his moveable estate, appoint a factor, and cause the debtor convey that estate to him.²⁸³ That in case of that creditor's failure to apply, any other creditor might also apply to the same effect, within 30 days of the execution of the diligence²⁸⁴ and that the same application should also be competent to the debtor himself, on finding that he is *lapsus facultatibus*.²⁸⁵ It next provides, that no arrestment or poinding, executed or compleated, within 30 days before the application to sequester, shall give any preference; but the debt, subject or proceeds thereof, be surrendered by the poinder or arrester, to the judicial factor, for the general behoof.²⁸⁶ The same provision was made against all payments made by the debtor

²⁸¹ Bell *Comm.*, ii. 282.

²⁸² 12 Geo. III. c. 72.

²⁸³ § 1.

²⁸⁴ § 21.

²⁸⁵ § 22.

²⁸⁶ §§ 17, 18.

after the application to sequester,²⁸⁷ and all sales unless a fair and adequate price in money.²⁸⁷ The Statute further chalked out a precise plan of procedure to be observed by the factor, or trustee, in recovering preserving and distributing the effects, and, contained many provisions, both for enabling and obliging him, effectually to do his duty therein.²⁸⁸ These it is needless to enlarge on, especially as this Statute, which was only temporary, has since been superceded by another calculated for the same end.

The Statute 1772 undoubtedly proceeded on a just principle, that of putting bankrupt effects under judicial management for the common behoof, and making rateable distribution of them to all concerned, without the expence of diligence or process. And in the main it was well contrived for that end, and was of essential service to the Country. But it was hardly to be supposed that the first experiment in this department, which involved so many considerations, was to be compleat and free of objection at all points: and it was accordingly found in course of time, that owing to certain omissions and errors it served as a cover for various iniquities and abuses.²⁸⁹

It was in particular found that it was often used as an engine against creditors, and for the sole purpose of protecting against their diligence, by debtors who either were not really bankrupt (though they might be in difficulties) or who had no real intention of making a surrender and distribution of their effects. The Statute gave great room for this abuse. It was in the first place not limited to the case of merchants and manufacturers, or others engaged in trade, (who alone are the proper objects of such Regulations) both as chiefly exposed to the misfortune of bankruptcy, and as having creditors in all quarters, who neither know their circumstances at contracting with them, nor soon hear of their decline.

²⁸⁷ § 19.

²⁸⁸ §§ 2–14.

²⁸⁹ *Bell Comm.*, 438 &c., 1st ed. See ii. 74. For one thing it was limited to moveable estate only. *Bell Comm.*, 438 &c., 443, 1st ed.

It applied to persons of all descriptions, landed men, tenants and others, not likely to be involved on sudden misfortune, and whose creditors were at hand. In the next place, the Act enabled one creditor, who had done diligence, to procure a sequestration, and so suspend the diligence of all concerned, however trifling to the debt due to himself, and whatever his connection with the bankrupt. Nay more it constituted the debtor himself judge of this matter; and enabled him, with the concurrence of a single creditor, to procure a sequestration on his own motion.

The consequence was, that tenants, and persons of all descriptions, who found themselves in any embarrassment, and were apprehensive of diligence, used the Statute as a means of warding off the danger, and securing themselves in the possession of their effects. A person so situated applied for a sequestration himself, or he concerted with some conjunct or confident person, or with some trifling creditor, to do diligence against him, and to apply for sequestration; and thus he at once put a stop to all legal proceedings against him. Thereafter, by the like means, he procured the nomination of a factor favourable to himself, very often the creditor applying; which person delayed or declined to follow out the procedure of the Statute.

[All this was changed by the Statutes 1783 and 1793.

1. The present Statutes limit sequestration to the estates of artificers, mechanics, or persons in trade.²⁹⁰ The person applying for the sequestration or his agent must swear to his being of this description. Landholders are thus excepted from the Statute, unless at the time of the bankruptcy, they *bona fide* were engaged in trade. Neither will it bring a tenant under the description of the Act that he occasionally deals in meal or cattle. On the

²⁹⁰ Act 1783, § 6, 1793 § 13.

other hand, it is not requisite that the person work with his own hands, for it is enough that he employ people under him.²⁹¹

2. The sequestration need not be granted unless the debtor is materially] involved, or at the instance of mean and suspected persons, or his funds and dealings are so trifling, as to be unfit for judicial management, the Act, which in this point is copied from the Law of England, indulges only certain creditors with the power of applying for a sequestration. If a single creditor applies he must be so to the amount of £100, if two to the amount of £150, and if three to the amount of £200.²⁹⁰ The creditor applying must make oath to the verity of his debt,²⁹² and if the application is at instance of one creditor or two and no more, the oath must bear that the debts are due to them for their own behoof, and not in trust for others; because without this, a number of small creditors, by indorsing their bills and other documents to one person, would thus make up the sum of £100 or £150 required by the Act, and so elude it, in obtaining sequestration of a trifling subject, contrary to the intent of the Law. Where three or more apply, this is not requisite, because if the debts amount to £200 (which they must in that case), the Act regards this itself, as sufficient evidence of the extent of the debtor's dealings. (not in the Act of 54th G. III.)

In the 3d place, as to the situation in which a sequestration may be obtained. If the debtor himself concur in applying, a sequestration may be obtained even when no diligence has been done against him so as to make him bankrupt. The debtor must concur also, where for a twelvemonth, he has not resided or had a house of business in Scotland (No. 16. 17²⁹³) and indeed, in that case, no sequestration can be had without his concurrence; but then he must be seconded with the concurrence of one creditor to the amount of £100, or

²⁹¹ See *Bell Comm.*, i. 448, 450–6, 1st ed.

²⁹² Act 1783 § 6, 1793 § 13. *Bell Comm.*, 458, 1st ed.

²⁹³ Act 1793, § 16, relates to the former sentence. See also §§ 10, 11 of the 1783 Act.

two to amount of £150, etc., just as if diligence had been done, and as if they themselves had applied. And in this case the sequestration itself, is an act of notour bankruptcy.

In the 4th place, the application to sequester at the instance of creditors is only competent by the present Statute (for it was otherwise by the Act 1772) in the circumstances of notour bankruptcy, as fixed by the Act 1696, with this difference, that insolvency need not be proved (indeed the nature of that summary remedy will not allow it) in support of a petition for sequestration. (Bell p.448²⁹⁴). Observe by No. 2²⁹⁵ every person who is a notour bankrupt, whose estate is sequestered under Act 1793 – which, on the debtor's application etc., may happen though no diligence has been done at all.

This Statute makes, also, an addition to those characters of notour bankruptcy, as far as concerns those persons who are out of Scotland, or are not liable to be imprisoned by reason of privilege, such as peers or persons retired to the Sanctuary or the like.²⁹⁶ Doubts had arisen, and not unreasonably, how far the characters of bankruptcy fixed by the Act 1696 were applicable to a person out of Scotland. See Dic. V. I, p.81.2.²⁹⁷ 1st, because, if he were out of Scotland when the charge was given, it behooved to be a charge upon 60 days *induciae*; and so the statutory time would be elapsed before any caption could issue. 2d, supposing him in Scotland when the charge was given, still, if he removed before caption issued, he is not in terms of the Act 1696, which supposes the flight etc. to be posterior not only to the charge but to the issuing of the caption. To cut off these, this Act declares,²⁹⁸ (No. 1 & No. 15 of Act 54th) that execution of a charge of horning, joined with an arrestment not loosed in 15 days, or a poinding of his moveables, or an adjudication of any part of his estate, for security or payment, shall make such a person a

²⁹⁴ *Comm.*, 1st ed., p.449. See ii. 286.

²⁹⁵ Act 1793 § 2.

²⁹⁶ See Bell *Comm.*, ii. 163–4, 156.

²⁹⁷ *Ld Kilkerran v. Couper*, 24 Feb. 1737, M. 1091. See Bell *Comm.*, ii. 160 note.

²⁹⁸ 1793 Act § 2; also 1783 Act § 2.

notour bankrupt as under Act 1696 and liable to sequestration. It thus dispenses with the caption required by the Act 1696, in these particular circumstances, to which that mode of diligence is inapplicable. This was plainly the meaning of the Act (to dispense with the caption) in the case of a person who was out of Scotland, and against whom therefore it could serve no purpose to take out a caption.²⁹⁹ But a critical plea was moved and at one time sustained, under the words of the Act, with respect to a person still in Scotland, but retired to the Abbey, whether a caption were not still requisite against him, as such caption might take effect in case of his being found beyond the precincts of the Abbey. But it was in the end found that the meaning of the Act was, that no caption need be issued in this case neither, *White v. Butter*, 23 May 1800 – 26 Novr. 1800.³⁰⁰

In the 5th place³⁰¹ – (No. 22 Act 54th) – within 15 days after the first deliverance on the petition praying for sequestration, the creditor applying is ordered to have that petition recorded in the Register of Inhibitions; which being duly done, and in case of sequestration following, these proceedings are, from the date of that deliverance, to have the effect of an inhibition against the debtor, at the suit of the whole creditors. That is to say, the debtor is disabled thereby from alienating or impairing his heritable estate, or from adding to the amount of his debts, to the prejudice (of course) of those who are his creditors already.

In the 6th place, under authority of this Act, ‘tis not only the whole moveable but the heritable estate also that is to be sequestrated,³⁰² and the Act contains various provisions for fully vesting that estate in the trustee. In particular, it orders (Act 54th No. 29³⁰²) that the Court shall pronounce an act or order, ordaining the debtor to execute in favour of the

²⁹⁹ Bell *Comm.*, ii. 164, 158.

³⁰⁰ F.C., M. App. Bankrupt 12, Hume *Sess. Pap.*, vol. lxx, No. 10.

³⁰¹ § 19, 1793 Act, § 13, 1783 Act.

³⁰² § 23, 1793 Act, § 19, 1783 Act, § 29, 1814 Act. Bell *Comm.*, 443, 1st ed., ii.282. Ersk., 5th ed., p.492 note.

trustee, a suitable and special conveyance of all his estate heritable or moveable, real or personal, and which order shall farther declare, that, in case of the debtor's delay or refusal to comply, the whole of his estate is vested in and adjudged over to the trustee, to the end of selling the same and turning it into money. An abbreviate of this act or order, is, (Act 54th No. 30³⁰³) within fifteen days after the date thereof to be entered in the record of abbreviates of adjudication; which being done, the act or order thus vesting the trustee for the behoof of all creditors is to operate and be regarded as a common decree of adjudication, pronounced, for the interest of all concerned, at the date of the 1st deliverance of the petition for sequestration, and accumulating, as of that date, their whole principle sums and interests, and adjudging for security and payment thereof. Thus all the expence of separate diligences is avoided. In a case of bankruptcy under Act 1696, if sequestration is awarded within 4 months after the bankruptcy, this brings in the whole creditors *pari passu* with all poinders or arresters; for it is a compleat transference of the whole moveable estate, of the date of the first deliverance. (No. 24³⁰³ Bell p.468³⁰⁴). In the 7th place, the Statute³⁰⁵ enables to dispose of the heritage not only by a judicial sale, but a sale in the way of voluntary roup, under direction of the trustee with the consent of a majority of the creditors, which is also a novelty in the Law of Scotland.

6th, by the last of these Statutes, Act 1793³⁰⁶ (Act 54th No. 2, No. 5³⁰⁷), all arrestments and poundings of the debtor's effects executed within 60 days before the bankruptcy or within four months thereafter, are made preferable *pari passu* one with another; so that as the law now stands, a creditor within that period, can as little acquire a security by diligence of the law, as by the act of the debtor. And this regulation, you will observe,

³⁰³ § 24, 1793 Act, § 20, 1783 Act.

³⁰⁴ *Comm.*, 1st ed., also 472–3.

³⁰⁵ § 33, 1793 Act, § 27, 1783 Act, § 42, 1814 Act.

³⁰⁶ §§ 2 and 6. Bell *Comm.*, 1st ed. 317.

³⁰⁷ Bell *Comm.*, ii. 74.

holds and is meant for the case even where there is not a sequestration, if the debtor be bankrupt in terms of the Act 1696. Farther, to save the trouble and expence of multiplied diligence and process of forthcoming, the benefit of this *pari passu* preference is extended to every creditor who has used arrestment – or who has a decree for payment or a liquidate ground of debt, if he shall but summon the poinder within the four months: allowing the poinder however always the expence of his diligence, and a preference also to the amount of 10 per cent only of the value of the poinded effects.³⁰⁸ (There is no provision in the Act 1795, as in Act 1783, dispensing with actual arrestment and sustaining a claim in multiple poinding raised by the arrestor as sufficient – see Bell 428³⁰⁹.) This part of the Statutes 1783 and 1793 has been favourably construed, so that if any one creditor raise an action against the poinder, any other creditor compearing in that action, and producing his interest is held as if he had summoned, 16 Jan. 1788, *Finlay v. Bertram & Gardner*.³¹⁰ In like manner, a multiple poinding, brought by any creditor, in the name of the first poinder, will be held a competent action wherein all other creditors may effectually compear and claim within the four months. Bell 432.³¹¹ You observe too that in the case of a sequestration following a bankruptcy, even this easy measure is not a requisite for gaining right to the *pari passu* preference. In that case, the thing poinded or arrested is made forthcoming to all the creditors without exception, though they should not summon nor apply for warrant or arrestment, nor take any one step whatever. No. 31.³¹² The reason is obvious. The sequestration, when once awarded, has a retrospect. It is held,³¹² in this question as having taken place so many days before its real date – 60 days before the first deliverance on the petition for sequestration. It is so declared in Act 54th

³⁰⁸ Bell *Comm.*, 317, 1st ed., ii. 74. The 10% which was given by the 1793 Act was repealed by 54 Geo. III. c. 137.

³⁰⁹ *Comm.*, 1st ed. See also p.509. And see also ii. 74,279.

³¹⁰ M. 1250, Hume *Sess. Pap.*, vol. xxii, No. 27. Bell *Comm.*, ii.280.

³¹¹ *Comm.*, 1st ed., ii. 280.

³¹² § 31, 1793 Act. See also 1783 Act § 24.

No. 40: and the factor as having been in possession from that date, for the common behoof; so that all need of separate procedure is excluded. But if there is only a notour bankruptcy without a sequestration, there is no room for any such fiction, because there is no common manager in possession, of any date whatever, for the behoof of all concerned.³¹³ See No. 31.³¹² It is therefore in that case requisite to the communication of the poinder's or arrester's interest by his diligence, that the other creditors take at least some step tending towards diligence to acquire a common interest with him in that subject. No. 24.³¹⁴ In computing the four months after the bankruptcy, which are allowed for summoning the poinder, the day of bankruptcy itself is not counted for one – but, as in the question of deathbed, that day is looked upon as one indivisible point of time, as a *terminus a quo* the four months begin to run, 15 June 1798, *Gentle v. Kirk*.³¹⁵ The Acts both of 23rd³¹⁶ and 33rd No. 29 (Act 54th No. 38) also declared any payments or preferences by any creditor and all transactions any way prejudicial No. 22³¹⁷ obtained after the application to sequester from the bankrupt to be null, for that application when followed with a sequestration, is held as divesting him, or at least putting him in *mala fide* to administrate. And this rule the Act of the 54th No. 51, No. 38 even extends to payments or preferences obtained after that time out of, or upon, such funds as are not situated within the jurisdiction of the Court. It obliges him, that is, to assign or abandon these ere he can draw any dividend out of the Scots funds in the hands of the trustee (No. 40³¹⁸). It also ordains (No. 50³¹⁹) with respect to any creditor who enjoys a good and preferable claim upon any part of the bankrupt's estate, and acquired before the 1st deliverance on the petition for sequestration, that this creditor shall deduct from his debt

³¹³ Bell *Comm.*, 1st ed., 323.

³¹⁴ § 2, 4 1783 Act, § 3, 6, 1793 Act, § 2, 5, 1814 Act.

³¹⁵ M. 1252, Hume *Sess. Pap.*, vol. lxxx, No. 36, v. *Kirk and Steedman*.

³¹⁶ § 22.

³¹⁷ Act 1783; § 29, Act 1793; § 38, 1814 Act.

³¹⁸ 1793 Act, § 51, 1814 Act.

³¹⁹ Also Act 1793 § 39.

the amount of any such lein or security, and shall only rank for the balance of his debt. In addition to these the Act of the 54th has made a variety of provisions for shortening the forms and lessening the expence of diligence, and for removing doubts, which had occurred, or inconveniences which had been felt, in the course of the common law. Among these is a clause, No. 12 of 33 G. 3rd. which (No. 14³²⁰) contrary to strict principle, allows the application of an heritable security to a cash credit, provided allwise that the security express a limited and certain sum for which it is to stand.

Lastly these Statutes have introduced a mode of obtaining for the bankrupt, whose estate has been distributed under the sequestration, a total discharge of his debts contracted thereto, so far as they may affect his person or moveable estate. This also is quite a novelty in our Law; and has been borrowed from the Law of England. Our law affords the means of a perpetual protection to the person from such a debt by a *Cessio Bonorum*, if the debtor has once been imprisoned. At common law too our Judges will protect from ruinous and oppressive diligence against any personal estate thereafter acquired. Any thing more than this, a compleat acquittal of all prior claims, may rather seem an unnecessary temptation in this age, to rash adventures and improper dealings of trade; to which we are at any rate too much addicted. 'Tis evident that nothing can so much tend to keep traders to their duty in that respect, as the knowledge that their debts are to stand against their substance for ever till payment, and that they can only hope an acquittal on easier terms, as a matter of favour and humanity, from the good opinion of each individual creditor, and the universal conviction of the rectitude of his conduct. The contrary rule is a subject of much complaint in the other country from which we have at this late period thought proper to borrow it. No. 43. 4.³²¹

³²⁰ 1814 Act.

³²¹ Act 1783. § 50 Act 1793, § 56 Act 1814.

The sequestration disables the debtor to administrate or convey. He can thenceforward grant no deeds to compete with the trustee's interest. But he is not divested till the act of Court which vests the trustee. Any one, therefore, in the interval 'tween sequestration and that act, may compleat an imperfect conveyance, and so prevail against the trustee, e.g. may intimate an assignation and carry the right, as found May 1797, *Buchan v. Farquarson*.³²² *Sed quaeritur*, how is this reconciled with clause 24 of Act 1793, which declares, that the vesting act has a retrospect to the 1st deliverance, and shall be held an adjudication of that date. As to the subjects requiring seisin, if seisin is taken after the deliverance, the deed is held of the date of that seisin, under Act 1696, and so is reducible as the debt of a bankrupt. By clause 33, no adjudication after the first deliverance is good for any thing against the trustee. The answer is. The Act vesting the trustee is by No. 24 declared equivalent only to a common decree of adjudication given of the date of first deliverance. To compleat his right, and exclude completion of voluntary rights he must (in terms of clause 25) get himself infest. If, therefore, a purchaser, or lender on heritable bond before sequestration, get infest before him, he prevails *jure communi*. And so as to intimation of assignations. See Bell p.509. 474–5.³²³ As to the personal estate, the words of clause 24 are somewhat stronger, and such as seem to imply that a compleat conveyance from the date of the deliverance. In *Farquarson's* case, sequestration was under the Act 1783, which did not bear such strong clauses.

³²² 24 Mat, M. 2905, Hume Sess. *Pap.*, vols. lxxvi, No. 15, and lxxxvii, No. 107. Bell *Comm.*, i. 308–9 note, ii.15.

³²³ *Comm.*, 1st ed. At 474–5 Bell said that the judgement awarding sequestration and giving the estate to a factor deprives the bankrupt of the power of administration but leaves the right of property in him. While adjudication in favour of the trustee draws back to the first deliverance this does not rest upon the nature of award of sequestration nor is it a bar to the completion of former voluntary rights between the date of deliverance and the decree of adjudication to the trustee. This doctrine was fully established in *Buchan*. See ii. 335–6, 340.