boration would not, on the forfeiture of the granter, be reſtricted; ſo neither ought an adjudication to be reſtricted to the original capital and ſimple intereſt.

'THE LORDS ſuſtained the claim.' *

No 19.
Is intereſt on an accumulated ſum, being in ſo far intereſt upon intereſt, of the nature of a penalty?

Act. *Lockhart.* Alt. *The Crown Lawyers.* Clerk, *Juſtice.*

Fol. Dic. v. 3. p. 11. Fac. Col. No 107. p. 158.

Dalrymple.

1760. *December* 11. WADES, *againſt* The HEIR of MARSHAL WADE.

No 20.
Sums ſecured by adjudication, carried by a general clauſe of all debts and ſums of money.

MARSHAL WADE, upon the 5th of May 1747, executed at London a deed in the Scots form, by which he diſponed to George and John Wades, his natural ſons, 'all and whatſoever debts and ſums of money, real or perſonal, reſting or due to him 'by any perſon or perſons in Scotland, by bond, bill, account, or any other manner 'of way.' A particular clauſe was afterwards ſubjoined, by which he bound his heirs and ſucceſſors, to ſubſcribe and deliver to his ſaid ſons equally betwixt them, valid and ample diſpoſitions and aſſignations of the whole premiſſes, containing procuratories of reſignation, precept of ſaſine, and all other neceſſary clauſes.

The only ſubjects which belonged to Marſhal Wade in Scotland, at the time of his death, were certain tack-duties due by the York-buildings company, ſome of them ſecured by adjudications, in the following manner: Sir Alexander Murray of Stanhope, granted a leaſe of his mines in Tweeddale and Argyleſhire, to the Duke of Norfolk, Marſhal Wade, and others, for thirty years, commencing 25th March 1725. Theſe partners granted a ſub-tack to the York-buildings company, for payment of the tack-duty to Sir Alexander Murray, and an additional ſum of L. 3600 Sterling yearly. For ſecurity of this additional ſum, the company did infeft the Duke of Norfolk and his partners in their eſtates in Scotland, for payment of an annuity of L. 3600 Sterling, equivalent to the tack-duty.

The York-buildings company having failed in payment of theſe tack-duties, the partners uſed inhibition againſt them; and in the years 1732, 1736, 1738, and 1746, deduced different adjudications of the company's eſtates, for payment

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* This caſe was appealed, a circumſtance mentioned inaccurately in the Faculty Collections, and entirely omitted in the Folio Dictionary.—The Lord Dun, Ordinary, had rejected the claim, principally on account of alleged precedents. A petition, againſt this interlocutor, was refuſed. Mar. 7. 1753. July 10. 1753. A ſecond petition was preſented, arguing, that the precedent, chiefly inſiſted on, was not in point. THE LORDS altered the Lord Ordinary's interlocutor, and their own, and ſuſtained the claim.— Mar. 9. 1754. But the following was the judgment of the Houſe of Lords:

'It is ordered and adjudged, That the ſaid interlocutor of the 9th March 1754, complained 'of, in the ſaid appeal, be, and the ſame is hereby reverſed; and that the interlocutor of the 'Lord Ordinary, of the 7th March 1753, and the ſaid interlocutor of the Lords of Seſſion, of 'the 10th of July following, adhering thereto, be and the ſame are hereby affirmed.'

Journals of the Houſe of Lords, 25th March 1756.

No 20. of the duties that were then due, and for ſecurity of what ſhould become due thereafter, during the continuance of the leaſe.

Marſhal Wade's ſons brought a proceſs againſt William Wade, his nephew and heir at law, concluding, That he be decerned to make up titles to theſe adjudications, and convey them to the purſuers, in terms of the diſpoſition above mentioned. The defence inſiſted upon for the heir at law was, That the foundation of the claim being a general diſpoſition of all debts and ſums of money reſting by bond, bill, &c. it could not carry a right to the accumulate ſums in theſe adjudications; in reſpect an adjudication is to be conſidered as a legal ſale or diſpoſition to the debtor's lands, redeemable upon payment of the debts, and ſo not comprehended under the general deſcription of debts or ſums of money.

Pleaded for the purſuers, The original debt is ſtill due to the creditor, after he has led an adjudication for his ſecurity, as well as before. It is ſtill competent, to the creditor, to uſe perſonal diligence by horning and caption againſt the debtor. He may adjudge any other ſubject belonging to him, poind his moveables, or affect his perſonal eſtate by arreſtment. This demonſtrates, that his debt ſtill ſubſiſts, and is not extinguiſhed by the adjudication. A proper wadſet is in a very different ſituation: The money is ſunk as the price of the lands, and is no longer a debt, till requiſition be uſed. An adjudication is no voluntary purchaſe, but a diligence which a creditor is obliged to uſe for recovering payment of his debt. Though, in ſome views, it may be conſidered as a ſale againſt the debtor, ſo as to deprive him of the right of redemption, if he does not uſe it in due time; yet, with regard to the creditor, it is never conſidered in ſuch a view as to extinguiſh his debt, but only as a right in ſecurity, which he may relinquiſh at pleaſure, and betake himſelf to any other method of recovering his debt that he ſhall think beſt.

As an adjudication is conſidered to be a *pignus prætorium* with regard to the creditor, it is alſo conſidered in the ſame view with regard to the debtor, when ſuch is his intereſt. Thus, the adjudger who enters into poſſeſſion is obliged to account for his intromiſſions, in the ſame manner as every other creditor who enters into poſſeſſion upon a right in ſecurity; and if he is paid within the legal, his diligence is declared by the act 1621 to expire *ipſo facto*. If the adjudication was conſidered as a ſale, whether redeemable or irredeemable, it could never be extinguiſhed by intromiſſions.

In like manner, compenſation is pleadable againſt a debt ſecured by adjudication; 18th June 1675,* Laird of Leys againſt Forbes; 12th November 1675,† Home againſt Home; March 1682,‡ Lord Saline againſt Callendar; 17th March 1682, Baillie *contra* Hillſide. § On the other hand, it is equally certain, that compenſation cannot be pleaded upon a ſum ſecured by proper wadſet, before re-

* Stair, v. 2. p. 330. † Stair, v. 2. p. 368. ‡ Sir P. Home, v. 1. No 241.
§ *See* General Liſt of Names.

quiſition; 12th November 1675, Home *contra* Home.* The reaſon is, that, until requiſition, there is no debt; which clearly ſhows the difference betwixt the nature of a wadſet-right and an adjudication. No. 20.

Anſwered for the defender, An appriſing in the oldeſt ſtatutes, confirmed by the opinion of lawyers, is uniformly conſidered to be a legal ſale under redemption: And though it may be true, that, notwithſtanding the adjudication, the creditor is at liberty to uſe diligence upon his original ground of debt; and though he may uſe it as a ground of compenſation to that extent; yet that will not change the nature of the diligence, or prove that it is not a proper ſale, redeemable upon payment of the debt.

That this was conſidered as the nature of an appriſing, is evident from the following authorities; Leg. Burg. cap. 94. 95.; Stat. Alex. II. 24.; Rob. I. cap. 9.; Ja. III. act 36. This is more particularly and fully explained in the act 1469, with Sir George M'Kenzie's obſervations upon it. An appriſing, therefore, was always looked upon as a legal vendition and alienation of the debtor's lands, under redemption, in the ſame manner as a contract of wadſet. Though ſeveral alterations have been introduced by the ſubſequent ſtatutes, with regard to appriſings and adjudications; yet there are no words in any of theſe laws, that point out an alteration in the original nature of appriſings. Agreeable to this reaſoning, the Court decided, 19th November 1680, Dalgarnock *contra* Tolquhoun; and 3d February 1738, Eliſabeth Ramſay *contra* the Creditors of Clapperton. †

No regard can be paid to what was pleaded for the purſuers, That an adjudication bears no reſemblance to a contract of wadſet, where the wadſetter is not conſidered as a creditor, till after requiſition; whereas, an adjudication is not a voluntary purchaſe, but is conſidered as a right in ſecurity, which the creditor may relinquiſh when he thinks proper. Suppoſing this to be true, it does not follow, that an adjudication is not a judicial ſale, or that the creditor is not conſidered as proprietor, until the land is redeemed, or he renounces the diligence. Beſides, neither Marſhal Wade, nor the purſuers, have ever ſhown any inclination to renounce what intereſt they may have in the ſeveral adjudications, or the infeftments following thereupon.

It cannot alter the caſe, that, by the act 1621, an adjudger, who enters into poſſeſſion, is obliged to account for his intromiſſions, like any other creditor in ſecurity; and, ſo ſoon as he has uplifted enough to pay his debt, that the adjudication expires *ipſo facto*. This equitable regulation was introduced to preſerve an equality betwixt the appriſer and the reverſer; but, in every other particular, the ſtatute left appriſings upon the ſame footing a formerly. This was the opinion of the Court in the above-mentioned caſe, Ramſay againſt the Creditors of Clapperton.

The defender cannot admit, that compenſation is pleadable in the preſent caſe. The deciſions appealed to by the purſuers, do not ſeem to be clear, or agreeable

* *See* General Liſt of Names. † Ibid.

No 20.

to the principles of law; *Legibus, non exemplis, judicandum.* In the caſe of Saline, Lord Harcarſe obſerves, that this point was not fully conſidered. In order to found compenſation, there muſt be a debtor and a creditor to make a concourſe: But as there is no debtor, unleſs the lands, for the accumulate ſum, and annual-rents thereof, theſe cannot be pleaded as a ground of compenſation; nor will they be the foundation of diligence, by poinding or arreſtment; nor will the accumulate ſum be ſuſtained as a ground for adjudging the debtor's ſeparate eſtate.

Replied for the purſuers, It cannot be pleaded, that a debt is extinguiſhed by leading an adjudication, where the creditor is neither in poſſeſſion, nor the legal expired; Stair, p. 400.; act 19. 1672. The law plainly ſuppoſes, that all manner of diligence, whether perſonal or real, is competent to an adjudger who has not attained poſſeſſion of the lands, without diſtinction whether the legal be expired or not; and when diligence can be uſed upon the debt, it is impoſſible to deny that the debt is ſtill ſubſiſting.

'THE LORDS found, That General Wade's diſpoſition libelled on, does carry the debts that were due to him by the York-buildings company, as well thoſe ſecured by the adjudications, charter, and infeftments, as thoſe that were not.'

Reporter, *Shewalton.* Act. *Ferguſon.* Alt. *Hamilton Gordon.* Clerk, *Home.*

Fol. Dic. v. 3. *p.* 12. *Fac. Col. No* 257. *p.* 474.

1764. *January* 25.

WILLIAM WILSON Aſſignee of JANET STEEL *againſt* ADEXANDER EARL of HOME.

No 21.
An adjudication ſubſiſts as a ſecurity for expences, only to the amount of the penalties for which it is led; and, if led jointly for behoof of the executor and the heir, the penalties fall to be proportioned between them.

IN the year 1638, James Earl of Home, as principal, and others as cautioners, granted two bonds to Lawrence Henderſon, one for 3000 merks, with L. 300 of penalty, payable to Henderſon; and, failing him by deceaſe, to Barbara and Janet Henderſons, his daughters; the other for 4000 merks, with L. 400 of penalty, payable to Henderſon; and, failing him by deceaſe, to his daughters Agnes and Janet equally, their heirs, executors, or aſſignees.

Henderſon, in 1659 and 1660, by ſeparate conveyances, aſſigned theſe bonds to other two daughters, Iſobel and Margaret equally, their heirs and donators.

In 1663, the Earl, as principal, and certain cautioners, granted bonds of corroboration of theſe two debts, with intereſts due on them, to the ſaid Iſobel and Margaret Henderſons, their heirs, executors, or aſſignees; one for 3630 merks, and 400 merks of penalty, and another for 4840 merks, and L. 500 Scots of penalty, with intereſt from the next term.

Margaret Henderſon, who had right to one half of theſe debts, married Henry Alcorn, but without conveying to him her right; and, of this marriage there was a ſon, Richard Alcorn, heir to his mother, in her ſhare of theſe debts.