interest had been libelled at all, and could only be a security for the interest running from its date: And the adjudger having after transacted for 20,000 merks, which is within the 25,000 merks adjudged for, is sufficiently secured. No 71.

Objected to the heritable bond; Wallyford having adjudged within year and day of the first effectual adjudication, is entitled to be ranked with it; and, in consequence of the infeftment upon it, to exclude the posterior heritable bond: At least, the heritable bond being granted after the estate was made litigious by his adjudication, cannot compete with it; unless it could be said he was *in mora* in following it forth, which he was not, being not obliged to further diligence, as he was entitled to the benefit of his co-adjudgers infeftment, whereby his right was completed; and he also insisted in an action of mails and duties.

Answered, The act bringing in co-adjudgers *pari passu*, does not regulate their preference with other rights, and here Wallyford was *in mora*.

THE LORDS found, That the adjudication led by Mr Alexander Maitland behoved to subsist for the restricted sum of 20,000 merks and interest, in terms of the agreement betwixt the Earl of Lauderdale and the said Mr Alexander: And found, that notwithstanding of Wallyford's adjudication being within year and day of the first effectual adjudication, and his having raised a process of mails and duties in the 1696; yet, as he suffered the same to ly over from the 1699, to the 1706, the date of Sir Robert Blackwood's infeftment, and for several years thereafter, the said adjudication could not compete with Sir Robert Blackwood's infeftment, nor could interpel the proprietor from granting a voluntary infeftment on his estate.

Reporter, *Kilkerran*. Act. *Ch. Binning*. Alt. *T. Hay*. Clerk, *Kirkpatrick*.

D. Falconer, v. 2. p. 120.

1764. *July* 26.

The DUTCHESS of DOUGLAS *against* WALTER SCOT Merchant in Leith.

No 72.
A creditor by heritable bond preferred to a prior creditor by adjudication who was *in mora*.

ON the 27th February 1747, Henry Ogle obtained against Lord Cranston an adjudication of his Lordship's lands of Crailing, holding of the Crown, and of the lands of Wauchope, holding of the late Duke of Douglas.

Ogle raised a horning on the 11th of April thereafter, which he executed against the Duke on the 21st of the same month; and having assigned his debt and diligence to Richard Grieve, a process of mails and duties was brought by him in August, in which an interlocutor was pronounced in December following.

The Duke of Douglas adjudged the above lands on the 21st of July that same year; but took no other step.

No 72. On the 29th May 1750, Lord Cranston granted an heritable bond to Walter Scot on the lands of Wauchope, upon which he was infeft on the 8th June thereafter.

In 1753, another creditor having insisted in a ranking and sale of the lands of Wauchope, a competition ensued between the Dutchess of Douglas, who had right to the Duke's adjudication, by disposition from his Grace, and Mr Scot.

The Lord Ordinary having preferred the Dutchess, Mr Scot reclaimed; and, as the case seemed to be of great importance in point of precedent, the Court ordered it to be heard in presence.

Pleaded for Mr Scot: All questions as to land-rights must be decided upon feudal principles, *nulla sasina, nulla terra.* The original infeftment constitutes the first real right, which vests the property: The renewal of that in the person of the heir, purchaser, or creditor, transfers it; for the proprietor cannot be divested, but in so far as another person is vested; consequently, in all such competitions, the first complete feudal right gives the preference; so that the second disponee, with the first infeftment, is preferable to the first disponee with the second infeftment, however culpable the common author may be. The same principle must also hold in competitions between adjudgers who are disponees by act of the law, and disponees by act of the debtor; and, upon that principle, the security of the records depends.

That an adjudication, even with a charge, does not divest the debtor, is incontestible; it does not make the adjudger vassal, but the casualties of superiority continue to fall as before; Dirl. tit. Comprising; Stair, lib. 2. tit. 3. § 30. It does not afford a title to pursue a removing, or other real action; 25th March 1626, Lockhart:* It does not exclude the terce or courtesy, nor, *e contra*, does it entitle the wife or husband of the adjudger to a terce or courtesy of the lands adjudged; Stair, lib. 2. tit. 6. § 17. It does not require a special service: In short, till infeftment follows, it is but a personal incomplete right; and such being the situation of the Duke's adjudication, Mr Scot ought to be preferred on account of his having acquired the first complete real right.

Answered for the Dutchess: She is preferable, *first*, because it is an established principle, that legal diligence cannot be disappointed by voluntary deeds of the debtor; were it otherwise, all legal diligence might be disappointed, as voluntary alienations are much sooner executed than attachment by process at law. Hence, a creditor, who proceeds to affect his debtor's subjects by a process of adjudication, or using an arrestment, cannot be hurt by any deed of the debtor's; and it required the force of a statute to limit the effect of the litigiosity occasioned by the diligence last mentioned to five years. Upon the same principle does inhibition restrain the debtor; and the only difference between it and the other diligences is, that, in it, the prohibition to alienate is expressed, in them, it is only implied, which is perhaps the reason why the litigiosity created by it lasts longer.

* *See* Removing.

This principle received the sanction of statute-law, by the act 1621, cap. 18. No 72.
which, *inter alia*, provides against bankrupts making '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, com-'prising, or other lawful means, duly to affect the dyvour's lands,' *&c.* And, by the act 1672, which introduced adjudications in place of apprisings, it is declared, 'That the adjudger shall be in the same situation after citation in this 'process of adjudication, as if apprising were led of the lands at the time, and 'a charge given to the superior thereon;' which the Dutchess, as she has a decreet of adjudication, mentions, only to show the length statute-law has carried this matter of litigiosity. But there is a material difference between the litigiosity created by a decreet of adjudication, and that created by the citation only, or by the other diligences enumerated in the act; because these do not appear in any record; that does from the register of abbreviates; which affords a good answer to Mr Scot's argument from the alleged danger to the security of the records, in case he should not be preferred.

The Dutchess does not pretend, that the effect of litigiosity, even upon record, will debar one who had contracted with the debtor before the process of adjudication from using the right that was in him *ab ante*, and completing it by executing a procuratory or precept without any act or deed of the debtor, which alone the process of adjudication prevents; though it appears, from prior cases in this Section, that this was once very much doubted, and not settled but by a series of decisions. In this, therefore, as well as in the necessity of recording, a decree of adjudication resembles an inhibition, which does hinder the debtor from making a prior personal debt real, by granting a warrant for infeftment after the inhibition; but does not hinder the creditor from taking infeftment on a warrant granted before it.

Though, in ordinary processes intended to constitute a debt, or declare a right to lay a foundation for diligence, litigiosity ends on pronouncing decreet, after which there is no longer a *lis pendens*; yet that will not hold in a process of adjudication, which is itself a diligence of the strongest kind, but to complete which there is wanting an infeftment or charge; and, till one of these follows, the litigiosity must continue as the creditor is only *in cursu diligentiæ*; Stair, lib. 3. tit. 2. § 20.

A decree of adjudication then renders the subject so litigious, that though the creditor proceed no further, yet the debtor cannot disappoint it by any deed, at least within a competent time, as Stair speaks, which is allowed to the creditor for completing it by an infeftment or charge; so that the question is, What time the law has allotted for the duration of the litigiosity and *cursus diligentiæ?*

This is an arbitrary question, and no precise time has been fixed. It appears *voce* LITIGIOUS, (*Mora*), that the shortest prescription ever sustained was that of six years, in the case observed by Spottiswood in 1627;* but, in the lat-

* M'Culloch against Hamilton.

No 72. ter cases, the *mora* was of ten, twelve, and seventeen years; so that, to postpone the Dutchess because of a *mora* for two years and ten months, would be too great a stretch, especially as the act 1621 annuls all voluntary rights, without any limitation: If a general rule were to be fixed, the period pitched upon in the old decision, or that in the statute concerning arrestments, might perhaps be proper; but to decide that the litigiosity on the Dutchess's adjudication expired in less than three years, would leave the question as dubious as ever; and here it must be observed, that the *mora* is not to be computed from the date of the adjudication to its production in the ranking, but from the date of the adjudication to the granting the voluntary right; for, if the litigiosity then continued, that right was void, and could not convalesce *tractu temporis*.

2*dly*, The Dutchess's adjudication is within year and day of the first adjudication, rendered effectual by a charge, and therefore preferable, as if it had been the first effectual one. Before the act 1661, a charge on a comprising gave it a preference to other comprisings. And, by the words of that act, 'First exact diligence for obtaining the same,' a charge has been universally understood, and held to be exact diligence, without the necessity of entering into a process with the superior; Stair, lib. 2. tit. 4. § 32. and lib. 4. tit. 35. § 25. And in the decisions since the act which have preferred the posterior voluntary right, the *ratio decidendi* constantly given, is, that the comprising or adjudication had been allowed to lie over without infeftment or charge, (*See* LITIGIOUS); and, in the law-books, an infeftment and charge are equiparate; Stair, lib. 3. tit. 2. § 20. not only with respect to other creditors, but third parties, such as tenants, whom an adjudger who has charged can remove; Stair, lib. 3. tit. 2. § 23.

Nor does this doctrine endanger the security of the records; for the letters of horning will be found in the signet-office; and, if they were taken out, it is to be presumed they were executed; at least, it is the business of the party to inquire; but, it is sufficient that the adjudication is shown by the record; after which, the creditor ought to inform himself, whether a charge had been given or not; for all the record does, or can do, in many cases, is, to put a party on his guard. Nor has ever any inconvenience been felt for want of a particular register of charges; but great would be the inconvenience, if every adjudger was obliged to take infeftment to secure himself from voluntary deeds; for this would bring a deal of trouble on the creditor, and a heavy load of expence upon the estate of the unfortunate debtor. Hence, in the case of Wallace of Cairnhill, *voce* LITIGIOUS, (*Mora*), it was well argued, that there could be no *mora* after the charge, at least, during the legal; and accordingly it was decided, that the adjudication with a charge was preferable to an annualrent-right, though the adjudication had lain over for four years before the voluntary right was granted; which is a judgment in point.

If then, Grieve's adjudication, on which a charge was given, be preferable to Mr Scot's, so must the Dutchess's, as it is within year and day of it, and consequently entitled to the whole benefit of it by the act 1661, which statutes,

No 72.

that all adjudications within year and day of the first effectual one, by infeftment or charge, 'shall come in *pari passu* together, as if one comprising had 'been deduced and obtained for the whole respective sums contained in the 'foresaid comprisings.' The plain meaning of which is, that the first adjudger is to be considered as trustee for all the after adjudgers within year and day of him, whose adjudications are held *fictione juris* to be contained in his; so that they have no occasion to proceed further, but may rely upon his diligence; which accordingly most adjudgers have done, almost never putting themselves to the trouble even of another charge.

That the adjudgers, within year and day of the first effectual one, should be in every respect on the same footing with him, will be still more clear, on considering the alteration introduced by the act 1661. Before it, the second adjudger carried no more than the reversion of the first. By this act, he divides the subject with him, as if his debt had been contained in the first adjudication. Now, it would be absurd to make him share the right, and yet not communicate to him the benefit of the charge given by the first adjudger, in order to protect him as well as the other from voluntary deeds. Besides, Stair lays it down as uncontrovertable, that, though the first adjudger be paid, the second has, notwithstanding, the benefit of the diligence, lib. 3. tit. 2. § 14.; lib. 4. tit. 35. § 25.; which evinces, that one adjudication is held to have been led for both; and, if the second adjudger has the benefit of the first adjudication, in this respect, why not in every other? And, how can the benefit of it be divided, without derogating from the law, which says, that one comprising shall be considered as led for both? Accordingly, so the decisions have gone, Boyd *contra* Justice, *voce* POSSESSORY JUDGMENT; Straiton *contra* Bell, No 26. p. 255; Brown *contra* Nicolas, No 65. p. 2821.; which last is only quoted to show the opinion of the Court at that time concerning the communication of the infeftment or charge on the first adjudication.

If the benefit of the first adjudger's charge be denied to the second adjudger, so must that of the first adjudger's infeftment; the consequence of which would be ruinous to the debtor, as every adjudger would be laid under the necessity of infefting himself. Hitherto the nation has entertained a contrary opinion, as is obvious from every ranking that comes into Court; in none of which are there as many infeftments as adjudications; but, on the contrary, it appears that every posterior adjudger has trusted to his having the benefit of the diligence of the first. To find, therefore, that the diligence of the first is not communicated, would introduce a novelty troublesome to creditors and destructive to debtors.

There are two specialties in this case which ought to have some weight. 1*st*, The Duke of Douglas, the second adjudger, was himself superior of the lands adjudged; and, as he must have known of the charge given him by the first, it is no wonder he did not think of charging himself.

No 72.

2dly, The first adjudger insisted in a process of mails and duties in 1747, against the tenants of the lands in question, of which, as well as of the charge, the second adjudger should have the benefit; and, according to the decision above mentioned, Boyd *contra* Justice, the Duke might have appeared in that process, and been ranked *pari passu* on the rents.

Replied for Mr Scot: He admits, that, by the common principles of law, as well as by the act 1621, legal diligence cannot be frustrated by the voluntary deeds of the debtor; but then this general rule is qualified with this exception, unless the creditor fall *in mora*, and delay unnecessarily to complete his diligence. Hence, in the case of horning, which is one of the diligences mentioned in the statute, it has been several times determined, that a delay of some months in denouncing has stopped its effect, Home and Lyle *contra* Dalrymple, *voce* Horning; Young *contra* Kirk, No 162. p. 1078.; Drummond *contra* Kennedy, No 164. p. 1079. The analogy between the cases and the present is obvious. The statute says nothing of denunciation; but that being the completion of diligence by horning, the Court justly thought, that any unnecessary delay sufficed to secure third parties from any challenge upon it.

Apprising is another diligence classed along with hornings in the act; which is demonstration, that it was not reckoned a complete diligence; for, had that been the case, it would have been left to protect itself from voluntary deeds; and therefore, an adjudger, who, after obtaining his decreet of adjudication, goes no further, is *in pari casu* with a creditor who fails to denounce upon the charge.

That an apprising or adjudication with a charge, is not an ultimate step of diligence, beyond which the creditor is not obliged to go, is laid down by Stair, lib. 3. tit. 2. § 21.; Bankton, lib. 3. tit. 2. § 48. 49.; and Erskine, lib. 2. tit. 12. § 6. 10.; and so the Court has ruled in a multitude of cases collected in the Dictionary, *voce* Litigious. The delay was sometimes longer, sometimes shorter; but these decisions concur in establishing this proposition, that an unnecessary delay removes the ligitiosity, by which the debtor's hands were tied up, and third parties interpelled; and it would be extremely hard that this litigiosity should continue for 30 or 40 years.

As to the *second*, It is not left to conjecture for what purpose or end the correctory statute 1661 was enacted; for, its preamble expressly bears, That it was for the relief of creditors living at a distance, who 'were frequently prevented by more timeous diligence of other creditors.' The evil which the law meant to remedy, related singly to the competition of comprisers among themselves, and the way it took to remedy this evil, was, to bring them all in *pari passu* within a certain time. To fix which, the first effectual adjudication was, *ad hunc effectum*, declared to be that on which infeftment had followed, or exact diligence been done to obtain it; which, by after practice, was explained to be a charge against the superior; so that the expression in the act, 'as if one comprising had been led for the whole,' imports no more than a communication of

the first effectual comprising to the rest in competition with one another, but not such a communication as to influence the rights of third parties, which must be governed by the general rules of law; and so it has been understood by all our lawyers and decisions, Stair, lib. 3. tit. 2. § 39.; Bankton, lib. 3. tit. 2. § 54.; Erskine, lib. 2. tit. 12. § 14.; Brown *contra* Nicolas, No 65. p. 2821.; Aikenhead, No 66. p. 2823.; 28th July 1739, Chalmers of Gadgirth *contra* Sir James Cunningham, which is not in any printed collection, but is upon record, B. M. F.;* and, as the communication introduced by 1661 is not confined to particular adjudications within year and day of the first effectual one, but extends to all prior adjudications, the consequence of the Dutchess' argument, if good, would be, that every such prior adjudger, though he had done nothing on his adjudication for 30 years, would be preferable to all posterior purchasers or creditors, and even to those who had contracted with the debtor before the first effectual adjudication, but had not taken infeftment till after a charge or infeftment had followed upon the adjudication. No 72.

Duplied for the Dutchess: An adjudication, after expiry of the legal, differs very much from what it was during the currency of the legal. It is to be considered as a judicial conveyance after the legal is run, not as a step of diligence rendering the subject litigious; and therefore, in competition with another conveyance, the first infeftment will give the preference; but, while the legal is current, the law does not oblige creditors to take measures for obtaining a feudal title; because it is uncertain, during the legal, whether a right will ever be absolutely vested in them. Infeftment is indeed necessary to an adjudger for securing him against the effect of voluntary deeds granted *prior* to the citation in his adjudication, (which was the case with all the voluntary deeds preferred by the decisions quoted for Mr Scot); and an infeftment or a charge is necessary to make an adjudication effectual in the sense of the act 1661; but neither is necessary to secure the adjudger against voluntary deeds posterior to this adjudication; therefore an adjudger cannot be *in mora* during the legal; for, though it is reasonable that the debtor's hands should not be for ever tied up, yet, so long as the adjudger can reap all the benefit of his diligence, when considered only as a diligence, and not in the other light of a disposition, without taking a step so extensive as infeftment, he is not guilty of negligence; and, upon this principle, was decided the above mentioned case of Cairnhill, which is the latest but one quoted by Mr Scot. A shorter time for completing seems to be allowed by the old than by the recent decisions, owing probably to there being of old no certain record by which creditors or purchasers could discover adjudications, which they now can do; and, in fact, for many years past, no considerable estate has been purchased, or sum of money lent on heritable security, without searching the record of adjudications, which Mr Scot did before he lent his money, and was informed by it of the Duke's adjudication, upon which he demurred, till a sum was deposited for clearing it; but which was not

* *See* APPENDIX.

No 72. so applied. But, if Mr Scot now prevails, it does not occur of what use this record of adjudications will be.

THE LORDS found, 'That, in this competition, Walter Scot, the annualrenter, is preferable, and prefer him accordingly.' And, upon advising a reclaiming bill and answers, 'Their Lordships adhered.'

N. B. It was at first further *pleaded* for the Dutchess, That the Duke being himself superior of the lands of Wauchope, his adjudication consolidated the property with the superiority, and was therefore preferable to all other adjudications or voluntary rights, according to Stair, lib. 3. tit. 2. § 22.; but this was afterwards given up as untenible; *see* Lord Bankton, book 2. tit. 11. § 14. *See* LITIGIOUS.

For Scot, *Lockhart et Swinton.* For the Dutchess of Douglas, *Burnet et Rae.*

J. M. *Fac. Col. No* 142. *p.* 332.

SECT. XII.

Infeftment upon Resignation with other Rights.—Charters of Resignation and Confirmation.—Liferents with other Rights.

1666. *January* 17.

LORD RENTON, JUSTICE CLERK, *against* FEUARS of COLDINGHAM.

No 73. A charter upon resignation, where the original infeftment was not produced, was sustained *in re antiquo*, in opposition to other charters of posterior date.

MY Lord Renton, as being infeft in the office of Forrester, by the Abbot of Coldingham, containing many special servitudes upon the whole inhabitants of the Abbacy, as such a duty out of waith goods, and out of all timber cutted in the woods of the Abbacy, with so many woods, hens, and a threave of oats, out of every husband land yearly; pursues declarator of his right, and payment of the bygones since the year 1621, and in time coming; both parties being formerly ordained, before answer, to produce such writs and rights, as they would make use of; and these being now produced, the pursuer *insisted*, *primo loco*, for declaring his right as to the threave of oats.—It was *alleged* for the defenders, absolvitor, because they had produced their feus granted by the Abbot of Coldingham, prior to the pursuer's infeftment, free of any such burden.—It was *answered*, The defence ought to be repelled, because the pursuer has not only produced his own infeftment, but his predecessors' and authors' infeftments, and his progress to them, viz. the infeftment granted to David Evin, of the forrestrie, containing all the duties aforesaid, which is before any of the defen-