previous charge of horning or perſonal diligence, for employing the 20,000 merks in terms of the contract of marriage. No 2.

Forbes, MS. p. 18.

1759. *February* 16.

PATRICK NISBET, Merchant in Glaſgow, *againſt* WALTER STIRLING, Merchant there.

No 3.
Adjudication, in ſecurity of a debt *in diem*, refuſed, in reſpect no proof was offered that the debtor was *vergens ad inopiam*.

IN 1754, William Stirling, ſurgeon in Glaſgow, executed a bond of proviſion in favour of his daughter Janet, ſpouſe to Patrick Niſbet, merchant there; whereby he became bound to pay L. 250 Sterling, to her, over and above the tocher formerly contracted with her, and that at the firſt term of Whitſunday or Martinmas, after the deceaſe of his wife, Elizabeth Murdoch, mother of the ſaid Janet Stirling; and to pay L. 600 Sterling to their other daughter Eliſabeth.

Of the ſame date, William Stirling executed two diſpoſitions, in favour of Walter Stirling, the defender, his only ſon; the one of his land-eſtate, and the other of his debts, goods, and effects. Theſe diſpoſitions contained this clauſe: 'That the ſaid Walter, and the ſubjects hereby conveyed to him, ſhall be affect-'ed and burdened with the annuities, burdens, and proviſions, made and grant-'ed, or to be made, granted, and conceived by me, in favour of Eliſabeth 'Murdoch my ſpouſe, and the children procreate betwixt her and me.'

Upon the death of William Stirling, his ſon Walter ſucceeded to his whole eſtate, heritable and moveable, with the burden of his mother's jointure, and the above proviſions to his two ſiſters.

Patrick Niſbet having got right, from his wife, to the ſaid additional proviſion, inſiſted, as Walter was a young man of little experience, and had launched out into an extenſive trade, the conſequences of which were precarious, he ſhould find ſecurity for payment of the L. 250, when, upon the mother's death, it ſhould fall due.

The parties having diſagreed about the terms of this ſecurity, Patrick Niſbet brought a proceſs of conſtitution againſt Walter, before the magiſtrates of Glaſgow; concluding, That he ſhould be perſonally decreed to make payment of the debt againſt the term of payment; upon which he obtained decreet. During the dependence, he alſo raiſed inhibition and arreſtment againſt Walter; who thereupon preſented a petition to the Court, complaining of theſe diligences, as oppreſſive, and hurtful to his credit. The purſuer agreed to paſs from his arreſtments; but the Court likewiſe recalled the inhibition.

The purſuer next brought a proceſs of adjudication in ſecurity, founded upon his decreet of conſtitution; only ſuperſeding execution till the term of payment ſhould arrive. The defender appeared, and *alleged*, That all this was done *in æmulationem*; and that an adjudication in ſecurity, before the term of pay-

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ment of the debt, could only be granted when the debtor was *vergens ad inopiam.*

The Interlocutor.

The Lord Ordinary pronounced the following interlocutor: 'In reſpect, that 'an adjudication in ſecurity, before the term of payment of the ſum adjudged 'for, is an extraordinary remedy, not allowed, except when the creditor is in 'danger otherwiſe of loſing his debt, and there is no ſufficient ground of ſuch 'hazard alleged; and that the Lords, upon the like grounds, recalled an inhi-'bition uſed for the debt now intended to be adjudged for; ſuſtains the defence; 'and aſſoilzies.'

Pleaded, in a reclaiming petition, for the purſuer; by the law of Scotland, a creditor in a juſt and liquid debt, *cujus dies cedit, licet nondum venerit*, is entitled to the diligence of the law, for the ſecurity of his debt. He ought not, indeed, to be allowed to proceed to execution till the term of payment is come: but there can be no reaſon to hinder him from ſecuring his payment againſt that term. A debt due, *in diem*, is as onerous a debt, and equally entitled to ſecurity, as any other debt can be. A creditor in a debt already due, has many ways of recovering payment by immediate execution; whereas, a creditor, *in diem*, has his hands tied up from execution; and, if he is not entitled to do diligence for ſecurity, he muſt often loſe his debt, though his all were at ſtake, and although he plainly foreſaw the approaching bankruptcy of his debtor. The adjudication, which the purſuer demands, is no ſtep of execution. It is only a means of ſecuring the debt when it ſhall become due; and, till that period, can have no conſequences hurtful to the debtor, however uſeful they may be to the creditor. And ſuch diligence has been frequently admitted by the Court; Watkins *againſt* Wilkie, 2d January 1728, (Rem. Dec. p. 193. *See* ARRESTMENT); Sir John Meres *againſt* York-building Company, 27th February 1728, (Rem. Dec. p. 205. *See* ARRESTMENT); and in the caſe of Eaſter Ogle, January 24. 1724, (Rem. Dec. p. 89. *See* RANKING OF APPRISERS AND ADJUDGERS); it was found, 'That an ad-'judication in ſecurity for a daughter's bond of proviſion might proceed, and com-'pete with the other creditors, though the term of payment was not till her 'age of eighteen years, poſterior to the competition.'

This diligence for ſecurity is a juſt and legal remedy, competent to every creditor *in diem*; not an extraordinary remedy, to be granted only when the debtor is *vergens ad inopiam.* Where malice and emulation appear clearly to be the motives of proceeding, a creditor may indeed be barred from this legal ſecurity in particular caſes; but, in ordinary caſes, where nothing of that kind appears, the law muſt have its effect; and every creditor muſt be allowed to take proper care of his own intereſt. In the preſent caſe, the defender's circumſtances, as a young man, deeply engaged in trade, ſufficiently point out a reaſon for the purſuer's being anxious to have a proper ſecurity for his debt. The fortunes of all merchants are precarious; and it is a very nice and difficult matter to know when a merchant is *vergens ad inopiam*, as the greateſt bankruptcies often hap-

pen in the moſt ſudden and unexpected manner. Beſides, to be obliged, on an occaſion of this kind, to point out even juſt cauſes of ſuſpicion, would do a merchant's credit much more harm, than any right in ſecurity could do. And, if the defender apprehends any bad conſequences from this proceſs, he has it in his power to prevent it, either by giving perſonal ſecurity, or by offering a progreſs of lands, equal to the debt; which laſt is the more reaſonable, as it is plain, from the above recited clauſe in the diſpoſitions, that his father intended to make the proviſions of the daughters, a real burden upon the land eſtate, diſponed to his ſon; although he has erred in the conception of the clauſe, by making it too general for that purpoſe. No 3.

Anſwered for the defender, The ancient diligence of appriſing, in the law of Scotland, as well as that of adjudication, which was introduced to ſupply its place, by the ſtatute 1672, are properly executory diligences; and proceed upon the ſuppoſition that the debt is due, and that the debtor is *in culpa*, in not performing his obligation; and from the whole ſtile of our acts of parliament, and the words and procedure in theſe diligences, it is obvious, that they do not apply to debts that are not become due. So the Court decided, 18th July 1699, Chalmers *againſt* the creditors of Shaw, (Fount. v. 2. p. 61. *See* LEGAL DILIGENCE). No creditor has, *de jure*, a title to demand the legal diligence of adjudication, unleſs he can ſubſume, that his debt was due, and ought to have been paid before his demand of adjudication. At the ſame time, it is true, that the Court has ſometimes allowed adjudications to be led for ſecurity of debts before the term of payment. But this is not founded, either in the common law, or in any ſtatute. It is an interpoſition of the *nobile officium* of the Court; and is never exerciſed, but in caſes where a creditor, without ſuch interpoſition, is in imminent hazard of loſing the ſubject to be affected by his diligence. For inſtance, when other creditors, whoſe debts are become due, are carrying on diligence by adjudication; if a creditor, *in diem*, is not allowed to concur with them within the year, he muſt be totally excluded; and therefore the Court will allow him to lead an adjudication in ſecurity. Such was the caſe of Eaſter Ogle, mentioned by the purſuer; but no inſtance has occurred, where an adjudication was allowed before the term of payment of the debt; unleſs where the creditor was in apparent hazard of loſing his debt, if not allowed this extraordinary remedy: and, it is in all caſes incumbent on the creditor, who applies for ſuch extraordinary interpoſition, to prove the neceſſity of it, from the hazard he is in of the ſubject being evicted from him by the diligence of others. Without ſuch evidence, the Court will not interpoſe, to put a weapon in his hand, which the law does not give him, in order to diſtreſs a ſolvent debtor, who is ready to pay his debt as ſoon as it becomes due, or can be demanded.

The purſuer's doctrine, 'That ſuch diligence in ſecurity can have no effect a-'gainſt the debtor, till the debt becomes due,' ſtands on an improper foundation. Though the creditor can draw nothing by his diligence until the debt becomes

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due; yet it muſt, in the mean time, have very diſtreſſing conſequences with reſpect to the debtor. It commences a preſcription of year and day, within which all his other creditors muſt carry on adjudications, whether their debts are due or not. If this was to be allowed, it would be impoſſible to carry on commerce in any ſhape. Lord Stair, lib. 1. tit. 17. § 15. has laid down the rule of law very differently from what is contended for by the purſuer. His words are: 'Legal 'execution is not competent ordinarily till delay, becauſe none ſhould be pur-'ſued till he have failed; yet, in ſome caſes, the debtor may be purſued before 'the term, to pay at the term, as *ſi vergat ad inopiam.*' Here the rule is laid down, and the exception. The purſuer's plea would convert the exception into the rule; and by that means would throw every debtor, who is ready to pay his debts punctually, as ſoon as they become due, into the ſame diſtreſs as if he had already failed in payment, and made execution againſt his effects neceſſary. The diligence now inſiſted on is a ſtronger ſtep than either the former arreſtment or inhibition, which the Court diſmiſſed as nimious; and is evidently emulous and vexatious, as the defender's credit is undoubted, he being worth ſeveral thouſand pounds Sterling, and only engaged in the inland trade of manufactures, and not in any hazardous foreign trade. Neither are any of his creditors, or his other ſiſter, who has a much larger claim upon him than the purſuer, making any demand upon him; being perfectly ſatisfied with his ability to pay. And although the defender, for peace ſake, offered the purſuer ſecurity for his debt on reaſonable terms, which he rejected; yet he is under no obligation, by law, to convey his lands for payment of a debt that is not due.

'THE LORDS adhered to the Lord Ordinary's interlocutor, as on p. 60.; and 'found expences due.' (*See* INHIBITION.)

Act. *And. Pringle.* Alt. *Ferguſon.*
Cockburn. *Fol. Dic. v. 3. p. 2. Fac. Col. No 173. p. 307.*

1781. *November* 14.

Creditors of Sir THOMAS WALLACE-DUNLOP, *againſt* Meſſrs BROWN and COLLINSON, Bankers in London.

No 4.
Adjudication decreed, in ſecurity of contingent claims.

SIR THOMAS WALLACE ſold a part of his lands to Meſſrs Brown and Collinſon, at twenty-nine years purchaſe, according to a ſigned rental; which Sir Thomas became bound to warrant for twenty-ſeven years.

Upon this obligation of warrandice, Meſſrs Brown and Collinſon led an adjudication in ſecurity againſt Sir Thomas's other lands and eſtates; to which, in the ranking of Sir Thomas's creditors, it was

Objected by the creditors: No illiquid debt can be ſecured by adjudication; Erſkine, b. 2. tit. 12. § 9.; Stair, b. 3. tit. 2. § 15. An adjudication in ſecurity is of that ſort which has come in place of appriſings; with this difference only,