of Blackhall, upon the act of Parliament 1621; therefore the uselessness of the clause, if not extended to personal creditors, is a greater argument it should be extended to them, than it is to say, That the disposition to Blackhall would be to no purpose, if the clause were to be extended to personal creditors; for the disposition being his own evident, he who is *in lucro captanto*, and took it with a reservation in favours of creditors, ought not to be allowed to explain that reservation, so as they who are *in damno vitando* shall have no advantage by it; 2*do*, As to the clause whereby Blackhall, after relieving of himself, was to hold compt to the other creditors for the superplus rent, conform to his intromissions; that was upon supposition that he did intromit, and that the rents were sufficient to both; in which case, being only liable for actual intromissions, he might retain for his own satisfaction in the first place, and leave the rest to the other creditors. But that event of his intromission did not exist. No 67.

THE LORDS found, That the disposition by Corshill in favours of Blackhall, operates in his favour a preference to the personal creditors, who had not secured themselves by anterior preferable diligence.

*Forbes, p.* 182.

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1709. *February* 8.

COLONEL JOHN ERSKINE of Carnock *against* SIR GEORGE HAMILTON.

No 68.
A party had conveyed an apprising to one person, and his heir afterwards conveyed it to another. The first having been recorded in the registers of sasines and reversions, the second was null.

IN the competition betwixt Colonel John Erskine, and Sir George Hamilton, (mentioned *supra*, December 18. 1708, *voce* CITATION, No 88. p. 2225.) for the right of the lands of Tulliallan, the Colonel founded on an apprising led at the instance of Duncan Lindsay, against Sir John Blackadder the heritor, and an infeftment thereon under the Great Seal, *anno* 1633, conveyed by Duncan Lindsay's heir to the Earl of Kincardine, the Colonel's author, in the year 1676, who, upon the heir's resignation, obtained that same year a charter under the Great Seal. Sir George Hamilton produced an apprising led by Patrick Wood in *anno* 1637, on a contract of salt, betwixt Sir John Blackadder, Patrick Wood, James Loch, and other six merchants, who, for the price thereof, were all infeft in March 1634, and assigned their rights, with some other debts, in trust to Patrick Wood, that he might lead an apprising for their respective behoof; to James Loch's eighth share of which apprising, Sir George Hamilton derives right from Sir Robert Miln, to whom James Loch disponed it.

Sir George Hamilton pleaded his preference to Colonel Erskine thus, Duncan Lindsay disponed his apprising in the year 1634 to Patrick Wood, who had a partial right to the reversion; which disposition, containing procuratory of resignation, and precept of sasine, being registered in the register of reversions, was, 14th January 1704, found to have the effect of a redemption and renunciation of the apprising, for securing Wood the reverser's right, against all poste-

No 68. rior rights of the lands disponed, granted by, or otherways derived from, Lindsay the disponer; so that the posterior disposition by Duncan Lindsay's heir, in favours of the Earl of Kincardine, was wholly null as to all intents and purposes, not only in so far as the same might prejudice Patrick Wood or his heirs, but also in competition with Sir George Hamilton, or any other person having a separate interest in the lands which are the subject of the competition. Because, after redemption made by Patrick Wood the reverser, nothing remained with Duncan Lindsay the appriser, that he or his heirs could transmit to any other; for of all real rights, apprisings within the legal are most easily extinguished, viz. by intromission with the rents of the subject, or payment of the debt instructed by simple discharges, &c. without necessity of formal resignation or renunciation in favours of the reverser; and *bona fides non patitur ut idem bis exigatur.*

*Answered* for Colonel Erskine, 1*st*, Patrick Wood had no right to the reversion *anno* 1634, when he took and registered his disposition, (being only a creditor to Blackadder the reverser by an infeftment for security), and could not use any order of redemption till the year 1637, when he came in Blackadder's place, by apprising the reversion; for, to allow the right of redeeming to creditors before they affect the reversion, were to make all second apprisings needless, seeing nothing but the reversion is carried by the second apprising. But *esto*, Patrick Wood had been the reverser, when a person having right to the legal reversion redeems or pays, the first right is not diminished or made worse, but conveyed to him *tanquam cuilibet*, and becomes irredeemable in his person. For, otherwise, creditors should be in a worse case than apparent heirs are by the act of Parliament 1661, in whose favours the legal reversion expires in ten years, which is absurd. And, by the act 22. Parl. 1. sess. 3. Ch. II. second apprisers redeeming and taking rights to first apprisings, are noways prejudiced of their right to the first apprising; but, on the contrary, it hath further privileges in their person, than it would have had while it continued with the first appriser. Now, can it be imagined that Patrick Wood, by taking a conveyance to himself, intended to cut off the legal in favours of the debtor, or other creditors he was noways obliged to? Which is not only against the maxim, *res inter alios acta aliis non prodest*, but would cast loose most of the purchases in Scotland, made up by persons, who, having partial or less preferable rights, bought in the rights of preferable creditors. 2*do*, The disposition in favours of Wood never having been completed by infeftment, did not denude Duncan Lindsay, who stood infeft upon his apprising; and therefore his heir might validly transmit the same to the Earl of Kincardine, or any other, 1676, Brown *contra* Smith, *infra*, *h. t.* And my Lord Stair observes, lib. 3. tit. 1. §. 21. That though backbonds, assignations, or even discharges, granted by apprisers within the legal, might be good against their singular successors by infeftment, if such deeds be rendered litigious within the legal; yet, after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable disposi-

No 68.

tions. *3tio*, If the disposition to Wood could operate a redemption, it could only be effeiring to his proportion and interest to redeem, which was but in security of an eighth part of the sums in his apprising. As a wife's registered renunciation of her liferent infeftment, in favours of a posterior wadsetter or annualrenter, would only secure the wadsetter or annualrenter against singular successors deriving right from the wife; but after such a wadsetter or annualrenter is paid, the husband's heir, or his other creditors, could not debar the wife or her assignee from possessing. And one of three cautioners taking assignation to the debt, and before intimation thereof to the principal debtor, or other cautioners, another completing a right to it by an intimated assignation, or decreet of furthcoming upon arrestment, the LORDS would save the cautioner *quoad* his own part wherein he was debtor, as to which the assignation had the effect of a discharge, but would prefer the arrester or second assignee for the other two cautioners shares. And the registration of the disposition in favours of Wood, was only for publication, in so far as the disposition was virtually an extinction and renunciation for securing Wood's right. *4to*, Patrick Wood might, notwithstanding the registration, have past a charter, and been infeft upon the disposition; and, whatever the disposition could operate in his favours, it must have the same effect to prefer Colonel Erskine, who, by progress, derives right from Patrick Wood, who disponed what right he had to the Earl of Kincardine. Seeing the shortest way for Patrick, who never was infeft, to transfer Duncan Lindsay's disposition, was either to get another right from Lindsay or his heirs, in favours of the person to whom he disponed his own, to save the pains of infefting himself, that he might be qualified to dispone, or to subscribe consenter to Lindsay's disposition. And so it is, that Colonel Erskine has Wood's personal right by the disposition, and Lindsay's real right by infeftment conveyed to him, and thereby as good right to Lindsay's apprising, as if he had never disponed to Wood, but only to him, or as if Wood had been infeft on the disposition, and denuded in his favours.

*Replied* for Sir George Hamilton, *1mo*, The infeftment granted by Sir John Blackadder *anno* 1634, to Patrick Wood, and the other copartners, did include an assignation to any right of reversion competent to Sir John. The 22d act of the 3d sess. of K. Charles the second's first Parliament is not applicable to this case; for there is a great difference betwixt an appriser acquiring right to a prior apprising within the legal, and one having right to the reversion by the disposition. Two apprisings unexpired might very well consist in one person, and the creditor take the benefit upon the legal's expiring before the common debtor redeem; but where one having right to the reversion, by disposition and infeftment, acquires an apprising within the legal, the apprising is absorbed in his right of property, and could no more subsist in his person as a distinct Sovereign right, than it could have subsisted in Sir John Blackadder's person, had he acquired the apprising before he was denuded by the disposition and infeftment in favours of Wood and his copartners, during the standing of whose right (though

No 68. redeemable) Sir John had only the right of reversion from them. Besides, in the conventional right of reversion disponed by Sir John Blackadder to the co-partners in the salt contract, a trust was implied, that the receiver should not make use of it to exclude the granter's own right, or to disappoint any quality or condition in the disposition, viz. that the effect thereof should cease upon payment of the sums for security whereof it was granted. And therefore the apprising acquired by Wood, while he had the reversion, could only be sustained as an accessory security at furthest for the sums truly resting to Wood, and paid by him to Duncan Lindsay for the right of apprising. 2*do*, Though a simple disposition, being only a personal right, would not convey the infeftment, or denude the granter, in prejudice of a posterior disposition completed by infeftment; yet payment made by a reverser, in satisfaction of the sums in the apprising disponed, with publication of the disposition and renunciation in the register of reversions, did entirely extinguish the apprising. 3*tio*, It doth not alter the case, whether the reverser's right was total or partial, seeing he had an infeftment of property in the whole lands *pro indiviso*; and albeit payment of an apprising may be made in part, there can be no redemption in part. 4*to*, Whether Patrick Wood could have retained Duncan Lindsay's apprising as an irredeemable right or not, it is certain that he neither acquired, nor designed to retain it as an expired apprising; in that he did not take infeftment thereupon, but did register the disposition and renunciation in the register of reversions, to publish to all the lieges the extinction thereof, and that it was no longer to be considered as an apprising that could become irredeemable, either against Sir John Blackadder the debtor, or any other deriving right from him to the subject; especially considering, that, as said is, there was a trust implied in Sir John's disposition to Wood; and whatever Wood acted in relation to the subject of the salt-contract, was to accrue to all the partners included in the same infeftment, granted to Wood and them in security of their debts *pro indiviso*. Consequently, Wood could not convey Duncan Lindsay's apprising to the Earl of Kincardine, but as it stood in his own person, that is, not as an expired apprising, or an irredeemable right, but only as a simple redeemable security for two thousand four hundred merks he paid to Duncan Lindsay.

*Duplied* for Colonel Erskine; In the year 1634, when Patrick Wood got the disposition from Lindsay, there was no further tie betwixt him and the other creditors in the salt-contract, save only, that their securities were in the same paper, which inferred no communication of right, but only saved the pains of writing the contract, and what followed upon it, eight times over; for, *quot sunt personæ, tot sunt obligationes*.

THE LORDS found, that Duncan Lindsay's apprising being conveyed in favours of Patrick Wood, and registered in the register of sasines and reversions, any subsequent disposition by Lindsay the appriser, or his heirs, in favours of the Earl of Kincardine, or his authors, was null as to all effects; but found, that

Patrick Wood could lawfully dispone the apprising to the Earl of Kincardine, or his authors, to subsist as a security for the sums truly paid. No 68.

*Forbes, p.* 318.

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1724. *February* 26.

Mr WALTER STIRLING, *&c. against* The ANNUALRENTERS upon the Estate of Ballagan.

No 69.
In a competition with an infeftment of annualrent, found that a charge upon a comprising gave no preference.

IN the ranking of the creditors of Ballagan, a competition arose betwixt the annualrenters and adjudgers; whereof the case was, that the heritable bonds and writs in favours of the annualrenters, were prior to any step of diligence upon the adjudications; but the infeftments thereupon were posterior to the adjudications and charge against the superior; and the adjudgers were never infeft.

For the adjudgers it was *pleaded*, That by act 62, 1661, confirmed by constant custom, an adjudication with a charge is equal to adjudication with infeftment, which must prefer it to all posterior infeftments. And there is good ground it should be so; for, if a charge against the superior is the last step the law directs to be taken during the legal, superseding the necessity of infeftment till after expiration thereof, the charge ought to be considered as an absolute security during that time; otherwise every adjudger would be under a necessity of taking immediate infeftment, to his own great inconvenience, and the utter ruin of the debtor.

It was *answered*, That these charges against the superior tend only to regulate the competitions of adjudications one with another, but were never designed to give a preference in competition with voluntary rights; as was expressly found, Justice against Aikenhead, No 66. p. 2823. For an adjudication with a charge, is not so much as a real right to require a special service; how can it then compete with an infeftment?

THE LORDS found, That the heritable bonds and writs in favours of the annualrenters and infefters, being prior to the adjudications; the infeftments on the rights of annualrent, though posterior to the adjudication and charge thereon, are preferable to the said adjudications.

It was likewise *pleaded* in favours of the annualrenters, That the charge against the superior, at the adjudger's instance, was executed against an apparent heir not infeft, who could grant no infeftment; and consequently the charge was null. But the LORDS took it up upon the abstract point, and determined accordingly.

*Fol. Dic. v.* 1. *p.* 182. *Rem. Dec. No* 48. *p.* 95.