No 4.

was neither deduced against him, nor he ever warned thereto, nor yet was the same intimated to him; so that it was lawful to him to pay his creditor, and satisfy whatever he was bound in to his creditor, albeit the creditor had made another assignee thereto; yet satisfaction being given by the debtor to the cedent, before any legal intimation made by the assignee, the same would have freed him also against the assignee; so ought the like to be in this case, where he knew nothing of the comprising.——THE LORDS repelled this reason, and found, That the discharge of the bond, being given to the compriser's debtor, after the comprising; whereby the bond was assigned to the compriser judicially, the bond could not thereafter be validly discharged by the creditor, in prejudice of the compriser, and the judicial assignation: For the bond contained an obligation, made by the granter thereof, to infeft this debtor to the compriser, in lands therein comprised; so that, if the discharge was granted by real fulfilling of the same, viz. That the maker thereof had given real infeftment to his creditor, as the bond obliged him, which was not done, *eo casu* the infeftment would have been profitable to the compriser, and accrefced to him; but that not being done, the discharge given, granting the bond to be satisfied, and no infeftment really given, but being discharged without implement, it was not found such a satisfaction, as thereby the compriser might be prejudged: And therefore it was found, That the compriser might still charge for giving to him the infeftment, obliged by the bond, notwithstanding of the discharge.

Clerk, *Hay*.

Fol. Dic. v. 1. *p.* 14. *Durie, p.* 764.

1727. *January* 31. The DUCHESS of ARGYLE *against* M'NIEL of LOSSET.

No 5.
In what cases a decreet of adjudication, without charge or infeftment, is an effectual diligence to carry a right of reversion.

IN a contract of wadset, Killellan dispones his lands to M'Niel of Losset, holding feu of the disponer, for yearly payment of 2000 merks of feu-duty; and the clause of reversion obliges the disponee to renounce his right of wadset, upon payment of 5000 merks. The Dutchess of Argyle, and M'Niel of Losset, having both of them led adjudications against Killellan the reverser, the question occured, 'If a simple adjudication, without a charge or infeftment, was effectual 'to carry this right of reversion, so as to exclude all adjudications without year 'and day?'

And it was *contended* for the Dutchess of Argyle, who had an adjudication with a charge against the superior, but not within year and day of Losset's, That her adjudication must be considered as the first effectual, with respect to the reverser's right, because the common debtor remaining still in the property of the land, burdened only with a pignus or wadset, he cannot be denuded, but by infeftment; and therefore, a simple adjudication, in this case, will convey no more

No 5. than a ſimple diſpoſition. Had, indeed, the lands been diſponed, holding of the reverſer's ſuperior, nothing remaining with the diſponer, but the naked faculty of redemption; this perſonal right might be carried by a ſimple diſpoſition or adjudication without infeftment; but here the lands were diſponed, holding of the reverſer himſelf; his infeftment was not taken away by the wadſetter's, but both ſubſiſted together; for a proof of which, when the wadſet-right is renounced, the reverſer will not need a new infeftment; whereas a reverſer who has diſponed his lands, to be holden of his ſuperior, muſt have a letter of regreſs, and a new infeftment. All which is to ſhew, that the reverſion here is real in the lands, and cannot be carried but by infeftment; and that therefore, with reſpect to this ſubject, more than lands, a bare adjudication without a charge or infeftment, cannot be reckoned an effectual diligence, in terms of the act 1661.

On the other hand, it was *contended*, That a decreet of adjudication, without charge or infeftment, is ſufficient to carry this right of reverſion. To make out which, the common debtor's right of ſuperiority in the lands, was diſtinguiſhed from his right of reverſion; the firſt ſubſiſting by infeftment, it was yielded, could only be tranſmitted by infeftment; the other ariſing from a perſonal obligement upon the wadſetter in the contract of wadſet, was a mere perſonal faculty, tranſmiſſible by a ſimple aſſignation or adjudication: For here it was noticed, the diſpoſition was in form of an abſolute conveyance; Loſſet, the diſponee, became thereby abſolute proprietor of the lands holding of the diſponer, and the right of redemption did not ariſe from any quality in the conveyance, but from the perſonal obligation upon the diſponee, which he bound himſelf in by the contract. Where, indeed, the wadſet is contrived in form of a qualified or conditional conveyance, conſiſtent with the radical right of property in the perſon of the reverſer, (*see* Lord Stair, tit. Wadſets, § 1.) to fall *ipſo facto* upon payment or conſignation of the wadſet ſum; there the reverſer continuing in the radical right and property of the lands, his right of reverſion cannot be carried otherwiſe than by infeftment; and that equally, whether he diſpone the lands holding of his ſuperior, or of himſelf: But, as is ſaid, where the reverſion is not a quality of the right, but a perſonal obligation upon the proprietor, the right ariſing therefrom cannot be other than perſonal, and tranſmiſſible as all other perſonal rights are.

Hence it was contended, the proper diſtinction is not betwixt wadſets holding of the reverſer, and holding of the reverſer's ſuperior; but betwixt wadſets where the conveyance is qualified, and where it is abſolute, with a perſonal clauſe of of redemption: In that caſe, the reverſer remaining radical proprietor, needs no new infeftment when the wadſet is extinguiſhed; and his right of redemption being in conſequence of his radical right of property, can only be carried by infeftment: In this caſe, the wadſetter is abſolute and ſole proprietor; and whoever has the right of redemption, muſt have the wadſet conveyed to him, with new infeftment; which is the only way this caſe can be expedited, if that ſingle

inſtance be excepted, where the right of redemption is competent to the ſuperior, who already ſtanding infeft as ſuperior, needs not a new infeftment as proprietor: And therefore, the reverſion here being only a perſonal obligation upon the proprietor to denude, may be carried by an adjudication without infeftment, as well as by aſſignation. No 5.

'THE LORDS found, That Loſſet's adjudication of the reverſion of the wadſet-right, was ſufficient to carry the ſame, without neceſſity of infeftment or charge againſt the ſuperior; and therefore, preferable to poſterior adjudications, with a charge againſt the ſuperior not within year and day.'

Fol. Dic. v. 1. *p.* 14. *Rem. Dec. v.* 1. *No* 91. *p.* 179.

1738. *December* 1. RAMSAY of Wyliecleugh *againſt* BROWNLEE.

No 6.
Whether an appriſing be a *pignus prætorium*, or a ſale under redemption.

FOUND, That an appriſing, and whole ſums therein contained, without diſtinction between principal ſum and annualrents, accumulate ſum and annualrents thereof, or acceſſories thereto, do belong to the heir, and no part thereof to the executor, notwithſtanding the appriſer died within the legal.

The queſtion aroſe upon the allegation of the reverſer, That the appriſing was extinguiſhed by the poſſeſſion of the appriſer's heir within the legal, which depended upon this, whether the bygone annualrents, at the appriſer's death, belonged to his executors, or to his heir? If to his executors, the appriſing was extinguiſhed by the heir's poſſeſſion, within the legal.

It had been a received notion, that the bygone annualrents, at the appriſer's death, fell to his executors; and there were ſeveral inſtances condeſcended on, of confirmations of ſuch bygones; and ſo much was the Court of that opinion, that when this queſtion was firſt ſtirred, the Preſident, and he only, ſpoke of it as a doubtful point. But when the matter came to be more maturely conſidered, the Court came unanimouſly into the above deciſion; as great inconveniences muſt have ariſen from a contrary judgment, and occaſion been given to many queſtions, not dreamed of, concerning eſtates poſſeſſed upon appriſings.

So, upon examining the nature of an appriſing, it was judged to be a proper ſale under redemption, whereby the land which deſcends to the heir, comes in place of the debt, which no more exiſts as to either principal or annualrents; whereas, were it a *pignus prætorium*, or legal diſpoſition in ſecurity during the legal, (which had been the common notion,) then the debt, ſtill ſubſiſting till expiry of the legal, the appriſer dying within the legal, the bygone annualrents of it would fall to his executors.

Fol. Dic. v. 1. *p.* 13. *Kilkerran*, (ADJUDICATION.) *No.* 3. *p.* 3.