1669. *February* 13. GILBERT M'LELLAN *against* LADY KIRKCUDBRIGHT.

No 48.
Possessory judgment runs not against *non valentem agere.*

GILBERT M'LELLAN being infeft by the Lord Kirkcudbright in an annualrent effeiring to 4000 merks out of the lands of Auchinflour, thereafter my Lady was infeft in property, or an annualrent out of the lands, at her pleasure, for her liferent use; and after my Lady's infeftment, my Lord gave a corroborative security of the property of Auchinflour, and stated the 4000 merks of principal, and the 2500 merks of annualrent in one principal, and infeft him thereupon in property, wherein Gilbert was many years in possession before my Lord's death: In the competition betwixt my Lady and him, he craved preference, because he was seven years in possession; 2*dly*, Because his first right of annualrent still stands, and was corroborated; and therefore, as he would undoubtedly have been preferred to my Lady for all his annualrents, for the sum of 4000 merks by his first infeftment, which is prior to my Lady's, and as an apprising by poinding of the ground for these annualrents, though posterior to my Lady's infeftment, would be drawn back *ad suam causam* to his infeftment of annualrent, and be preferred; so my Lord having voluntarily granted this corroborative security to prevent an apprising, it should work the same effect as if an apprising had been then led, and an infeftment thereupon, which would have accumulated the annualrents then past, and made them bear annualrent in the same manner as this corroborative security does.

THE LORDS preferred Gilbert for the whole annualrents of his 4000 merks, conform to his first infeftment; but would not sustain the corroborative security, being posterior to my Lady's infeftment, as if it had been upon an apprising, to give him annualrent for 2500 merks then accumulated; but found no moment in his allegeance of the possessory judgment, unless it had been seven years after my Lord's death, when my Lady might have preferred her right, and not *contra non valentem agere.*

Fol. Dic. v. 2. p. 91. *Stair, v.* 1. *p.* 604.

*** See Gosford's report of this case, *voce* QUOD POTUIT NON FECIT.

1673. *December* 17. HADDEN *against* MOIR.

No 49.
There is no benefit of a possessory judgment against *debita fundi.*

PATRICK HADDEN pursues the Tenants of the estate of Glenegies, for mails and duties. It was *alleged* for John Moir, Absolvitor, because he brooks by a wadset from Glenegies, by virtue whereof he had been in peaceable possession more than seven years; and albeit the pursuer be infeft on an apprising anterior to his wadset, the defender having the benefit of a possessory judgment, is secure till reduction. 2*do*, He is secure even as to the point of right in a re-

duction, because he being infeft base, the apprising was deduced before the first term of the tenant's payment, and the appriser infeft, so that the base infeftment was not a latent right *retenta possessione* the time of the infeftment upon the apprising; he did all possible diligence, and obtained possession the very next term. The pursuer *answered*, That albeit a base infeftment might be preferable to a posterior voluntary infeftment, obtained before the term at which the base infeftment could possess, yet that cannot extend to an apprising, which is a legal diligence. 2*do*, The pursuer is also infeft upon an apprising deduced for the avail of Glenegies marriage, which is *debitum fundi*; and albeit the apprising be after Moir's right, yet it is drawn back to the time the marriage fell, in the same way as an annualrent or feu-duty; and being *debitum fundi*, and in effect a part of the superior's *reddendo*, it is not excluded by a possessory judgment, as hath been often times found in the case of annualrents and feu-duties. The defender *replied*, That the avail of the marriage was exorbitant, whereas it is decerned to be L. 8000, Glenegies' rental being but L. 6000, and having as much debt as the worth of his land, which was not represented to the Lords, but suppress by collusion to exclude credirors; and albeit it be pretended that the defender was called, he is not compearing. It was *duplied*, That the vassal having such a rental, whatever his personal debts were, he could not evacuate the superior's casualty thereby, and the modification being *in arbitrio judicis*, it hath a great latitude, and could not be recalled; for the Lords may, and have modified, one, two, or three years rent for the marriage. No 49.

THE LORDS found the defender's allegeance upon the possessory judgment relevant against the first apprising, and found the question of right between the base infeftment and the apprising could not be determined in this process, but in a reduction; but found the apprising upon the marriage, to be drawn back to the time that the marriage was due, and that being *debitum fundi* it excluded a possessory judgment; and found if the avail was exorbitant to the prejudice of creditors who compeared not, the personal debts being suppress, the Lords would consider the same, and ordained condescendences to be given in, such as would make abatement beyond the Lord Ordinary's latitude.

Fol. Dic. v. 2. p. 91. Stair, v. 2. p. 242.

*** Gosford reports this case:

PATRICK HADDEN, having comprised the estate of Glenegies, did pursue John Moir for the mails and duties of a part of the lands possessed by him. It was *alleged* for the defender, That he could not be liable, because he was infeft upon a wadset to the said lands, prior to the pursuer's comprising the same, and by virtue thereof had been seven years in possession. It was *replied*, That albeit the wadset was prior, yet it was only a base right, never had with possession before comprising; likeas, the pursuer was infeft upon another com-

No 49.

prising, proceeding upon a decreet of liquidation of the avail of Glenegies' marriage, which was *debitum fundi*, and prior to the defender's wadset. It was *duplied* to the 1*st*, That albeit the wadset was a base right, yet the defender upon the first terms of payment, having done all diligence, and entered into possession, the intervening comprising could not be preferred, which is only allowed where those who have base rights are negligent, and may enter to the possession before the posterior public right; and, as to the comprising upon the decreet of the liquidation upon the avail of the marriage, it is no real right of its own nature, but a constitution of a debt, whereupon a comprising may follow, and there being no infeftment, it cannot prejudge a posterior wadset, whereupon infeftment followed and possession. THE LORDS did find, that the comprising and infeftment intervening betwixt the wadsetters base right, and first term of payment, was preferable in law, notwithstanding that the wadsetter could do no diligence before the term, and likewise, that the comprising upon the liquidation of avail of the marriage, was preferable to all base rights, albeit clad with possession, the same being *debitum fundi*, and due to the superior after liquidation, after which it became as real to affect the lands, as a feu-duty against all singular successors who were not confirmed by the superior.

Gosford, MS. No 650. p. 379.

No 50.

A second compriser not liable for bygone mails and duties to a first compriser, till he be cited, but cannot crave the benefit of a possessory judgment against a first compriser.

1675. *July* 15. BOYD *against* JUSTICE.

IN a pursuit at Bailie Boyd's instance, for mails and duties, as being publicly infeft upon a comprising, it was *alleged* for the defender, That he had possessed by virtue of an apprising at his instance, and so could not be liable for bygones, being *bona fide* possessor. It was *replied*, That the pursuer being first infeft by a public right had good interest to pursue for the whole mails and duties since his comprising, and as the common debtor would have been liable, so ought the second compriser, who had only *jus reversionis*. THE LORDS did sustain the defence notwithstanding, and found that a second compriser entering to the possession, was not liable for any mails and duties before citation. It was farther *alleged*, That the defender had the benefit of a possessory judgment, and so could not be decerned for mails and duties, until his right were reduced. It was *replied*, That the case being betwixt two comprisers, and not betwixt two heritors who had several dispositions of one and the same lands, nor betwixt the pursuer and the annualrenter who had comprised for bygone annualrents, the defender could not crave the benefit of a possessory judgment. THE LORDS did repel the defence, and found, that a second compriser having only *nudum jus reversionis* of the first comprising, albeit as to bygones he was *bona fide* possessor, yet he could not crave the benefit of a possessory judgment, not being in the case of an annualrenter, who had compris-