

No 74.

session; and that the allegiance is not relevant, except it were likewise alleged that the said Andrew Ker was in possession by a deed of the pursuers. To which it was *replied* for the defenders, That the pursuer being a compriser, can be in no better case than his author, from whom he comprised; and if Sir George Ramsay, or his heirs, were pursuing for the same, whereupon the wadset was redeemable, they could not get payment of the same while they repossess the defenders in the wadset lands, whereof Sir George was in possession; and there is no necessity to allege that the said Andrew Ker is in possession, and that they cannot now get possession; so that except the pursuers will offer to prove that the pursuer or the said Sir George was legally dispossessed by the said Andrew, by virtue of a sentence, upon a better right, the allegiance proponed by the defender stands relevant. This being a singular case, the LORDS found no process for payment of the 5000 merks, unless the compriser, Torsonce, pursuer of this action, did not only renounce the wadset in favour of the defender, but also repossess him.

*Newbyth, MS. p. 26.*

1666. June 15.

GEORGE TAYLOR *against* JAMES KNITER.

No 75.

GEORGE TAYLOR having appraised some land in Perth, set a tack of a part of it to James Kniter, who thereafter appraised the same. Taylor now pursues a removing against Kniter, who *alleged* absolutor, because he had appraised the tenement within year and day of the pursuer, and so had conjunct right with him. It was *answered*, That he could not invert his master's possession, having taken tack from him. The defender *answered*, It was no inversion, seeing the pursuer, by act of Parliament, had right to a part, but not to the whole; and the defender did not take assignation to any new debt, but to an old debt, due to his father.

THE LORDS sustained the defence, he offering the expenses of the composition and appraising, to the first appriser, conform to the act of Parliament.

*Fol. Dic. v. 1. p. 599. Stair, v. 1. p. 377.*

1676. February 2.

DUKE OF LAUDERDALE *against* The LORD and LADY YESTER.

No 76.

A declarator of redemption craving the defender to renounce all right he had to certain lands, in any

THE Duke of Lauderdale having obtained a decret of declarator of redemption of his estate, dispoed to his daughter, the Lady Yester, redeemable by a rose-noble; and having charged the Lord and Lady Yester to renounce, and given in a draught of the renunciation as his special charge; it was *objected* by the Lord and Lady Yester, That, by the draught, they were to renounce all

right to the estate of Lauderdale, which they had or could pretend any manner of way, which ought to be limited by virtue of the rights redeemed, for there is no reason to exclude any other right, and particularly they condescend upon the right of some steads in Lammermoor, whereunto they have a several undoubted right of property, and which the Lords have already reserved, as accords of the law, and therefore there ought to be the like reservation of any other right they have. It was *answered*, That the decret of declarator bears expressly, to renounce all right whatsoever, which is the common stile of declarators of redemption; which, as it is specially a declarator of redemption, so it is generally a declarator of right; and therefore in the declarator of redemption, the defender might have proponed a defence upon any distinct right, which, if instructed, would have been accepted and reserved simply from the general clause; or, if there had been any evidence of it, it would have been reserved as accords; and the charger is yet willing that the like reservation be as to any right the suspenders shall condescend upon, or instruct and evidence; and there is here a special consideration that the special clause should stand, because there is an expired apprising of the estate of Lauderdale assigned to the suspenders by the Duke's desire, upon the same terms, with the tailzie and reversion contained in the contract of marriage, which, if it be not renounced by that general clause, would breed a new plea and process.

THE LORDS sustained the draught of the renunciation as to the general clause, as being conform to the decret of declarator *in foro*; but allowed the suspenders to condescend upon any several right, not containing the like reversion; and if they could produce and instruct the same, declared the same should be reserved simply; or if they could but give any good evidence thereof, the same should be reserved as accords.

*Fol. Dic. v. 1. p. 599. Stair, v. 2. p. 409.*

1676. February 9.

CLAPPERTON against KER.

THE right of a wadset being comprised, the compriser did require for the sum due upon the wadset, and pursued the representatives of the debtor. It was *alleged* for the defender, That he could not pay the money, unless the pursuer should put the defender in possession of the lands. It was *answered*, That the pursuer not having possession himself, and having loosed the wadset by requisition, he could not put the defender in possession; and the defender might have taken possession by his own right; and it was enough that he was content to renounce the wadset, especially seeing neither the pursuer nor his author had done any deed to put the defenders in worse case as to possession; and the possession was apprehended and still continued by an anterior compriser; and the pursuer had obtained a declarator, finding the said comprising to be satisfied and extinct, so that the defenders might easily recover possession.

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manner of way, was sustained; but the Court allowed the defender to condescend upon any right which he had separate from that acquired from the pursuer, which they declared should be reserved to him as accorded.

No 77.

Found in conformity with No 74. P. 9219.