1676. *February* 9. SIR PATRICK NISBET *against* HAMILTON.

No 65.
Competition between a comprising denounced, and a posterior voluntary right followed by infeftment, before the compriser was infeft. Not decided.

AFTER the lands of a debtor were denounced to be comprised; a voluntary right was granted by him, of an annualrent out of the same lands for an onerous cause; whereupon the annualrenter was infeft by a public infeftment, before any infeftment upon the comprising; and there being upon the foresaid rights a competition betwixt the compriser and the annualrenter: It was *alleged*, That after the lands were denounced, the debtor could not give a voluntary right of the same, being litigious, and affected with the denunciation: And on the other part, it was *debated*, that the debtor, not being inhibit, might give a voluntary right for an onerous cause, and the first consummate right ought to be preferred.

THE LORDS, in respect it was pretended there were contrary decisions, thought fit, not to give answer, until these should be considered.

Fol. Dic. v. 1. *p.* 182. *Dirleton, No* 328. *p.* 157.

1682. *December.* JUSTICE *against* AIKENHEAD.

No 66.
In a competition betwixt an apprising and a voluntary disposition, the Lords, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, although posterior to the charge upon the comprising, in regard the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights.

LUDOVICK KEIR having granted a wadset of the lands of Easter Crichton to Dr Scot, for the sum of 12,000 merks, and Dr Scot having disponed the wadset to Hepburn of Seaton, he thereafter dispones the same to John Justice, late Bailie of Edinburgh; and there being an apprising led at the instance of Janet Aikenhead, relict of Adam Nisbet writer in Edinburgh, against Dr Scot, of the foresaid wadset, and certain tenements of land in Edinburgh belonging to him; and John Justice having likewise apprised Dr Scot's right, pursues a declarator against the said Janet Aikenhead, for declaring her apprising to be satisfied by her intromissions with the rents of certain tenements of lands in Edinburgh, and that she ought to compt and reckon for that effect.—*Alleged* for the defender, That she could not be comptable for the rents of the tenements of land in Edinburgh, unless Bailie Justice compt to her for the rents of the lands of Easter Crichton, whereof he was in possession.—And it being *answered*, That Bailie Justice was not in possession by virtue of the apprising against Dr Scot, but by virtue of the disposition from him to the wadset, which was prior to the defender's apprising, and the infeftment was prior to the infeftment upon the apprising;——THE LORDS, upon that ground, having preferred the voluntary right and disposition, it was thereafter *alleged* for Aikenhead, That albeit the disposition was prior to the infeftment upon her apprising, yet seeing there was a charge given to the superior upon her apprising, prior to the infeftment upon the disposition made by Dr Scot, and a charge against the superior, being in law equivalent to an infeftment, she ought to be preferred; and albeit the pursuer were preferred by virtue of his right of wadset, yet seeing it was an improper

No 66. wadset, affected with a back-tack, and he being in the natural possession, was only preferable as to the back-tack duties, but must be comptable for the surplus.—*Answered*, That albeit in a competition betwixt two apprisers, and a charge against the superior, prior to the infeftment upon another apprising, the comprising with the first charge will be preferred; the infeftment granted by the superior to a second appriser is only looked upon in law to be but a voluntary gratification, which prejudges the other appriser's diligence, by virtue of the charge; and the reason is, because seeing apprisers may charge a superior, it is just that he that gives the first charge should be preferred; but that does not hold in the case of a competition betwixt an appriser who has charged the superior, and a party having right by a voluntary disposition, upon which infeftment has followed; who, albeit the infeftment be posterior to the charge, yet it is always perferable; because in that case the first infeftment is considered, and not the charge; and the reason is, because a party having right by voluntary disposition, cannot use diligence against the superior to force him to infeft him; whereas the compriser may go on in diligence, and force the superior to grant infeftment; and the superior was not liable to compt for the superplus, more than the back-tack duties of the wadset disponed to him by Dr Scot; because he had right to the reversion, by an apprising led against Ludovick Keir, granter of the wadset.——THE LORDS preferred Bailie Justice, in respect his disposition was prior to the denunciation of the apprising, albeit his infeftment was after the charge given to the superior upon the apprising; and found, that the charge was only to be considered in case of a competition of diligence among the comprisers themselves; but not in the case of the competition of voluntary rights.

Fol. Dic. v. 1. *p.* 182. *Sir P. Home, MS. v.* 1. *No* 297. *p.* 439.

*** President Falconer reports the same case:

IN the competition betwixt Janet Aikenhead, relict of Adam Nisbet, pretending right to the lands of Easter Crichton, by virtue of a comprising led against the common debtor, which was within year and day to a comprising, in Bailie Justice his person, whereupon the superior was charged; and Bailie Justice pretending right to the said lands, by virtue of a disposition granted by the common debtor, before denouncing of the lands to be apprised, and confirmed by the superior, after a charge upon the comprising against the same superior;—it was *alleged* by the compriser, That the charge against the superior was equivalent to an infeftment, and consequently, being prior to the confirmation, was preferable.—It being *answered*, That a charge against a superior upon a comprising, albeit it was equivalent to an infeftment in the competition of diligence betwixt comprisers or adjudgers amongst themselves, and did so bind up the superior, that he could do no deed to prefer one to another; yet it was not equi-

valent to an infeftment in the competition with a voluntary right, such as this is, especially the disposition, which is the ground of the voluntary right, being before the denunciation of the apprising; and the nature of voluntary rights being such as cannot be completed by diligence without a superior's consent, the superior at any time may confirm them, even after a charge upon a comprising, and that, if it were otherwise, it would tend to unhinge a purchaser's securities, there being no record of charges upon comprisings against superiors. ——THE LORDS, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, albeit posterior to the charge upon the comprising, in regard they found, That the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights. No 66.

Fol. Dic. v. 1. p. 182. Pres. Falconer, No 58. p. 38.

1707. *July* 15.

MR JOHN STEUART of Blackhall, *against* The ADJUDGERS of the Estate of Corshill.

No 67.
In a competition betwixt adjudgers and a disponee in relief, infeft; the disponee found preferable to personal creditors, whose adjudications were posterior, notwithstanding of a reserving clause in his disposition, in favour of prior creditors.

IN the competition betwixt the Adjudgers of the estate of Corshill and Mr John Steuart of Blackhill, who craved preference upon a disposition of relief granted to him by Corshill, clothed with infeftment before the leading of their adjudications; it was *alleged* for the Adjudgers, That the disposition of relief could be no ground of preference; because it bears this clause, 'That the 'granting thereof shall be nowise prejudicial to any former right granted by 'Corshill to his lawful creditors, *of* their just and true debts owing by him to 'them; whereby their anterior debts, though only personal were salved; because, 1*mo*, The exception is of any former right *of* their just and true debts owing by him to them, and not for their just and true debts; and the word *of* made the clause respect personal bonds, whereas the word *for* would more properly have related to real securities; 2*do*, The clause had been useless, had it reserved only prior real rights; for these could not be prejudicial thereby, and so needed not to be reserved; and *verba debent aliquid operari*; 3*tio*, Blackhall has looked upon that clause to be a reservation in favours of all the prior creditors, or else he would never have been at the trouble and expence to lead so many adjudications as he has done, for the very debts contained in the disposition; 4*to*, The words are to be interpreted *contra proferentem*, *i. e.* the party who ought to have cleared the meaning of them, and that is Blackhall; the clause being ingrossed in favours of creditors in a right granted to Blackhall, who may blame himself that real were not distinguished from personal creditors.