

1687. December.

DICKSON and FORRESTER *against* SIR GODFREY M'CULLOCH.

No. 18.

Effect of
comprising
of a ward-
tenement.

Nicol Edgar, who was infest upon a comprising of a ward-tenement, in the year 1654, having disposed the right of apprising to Sir Godfrey M'Culloch, *in anno* 1664, and died in April, 1667, Mr. George Dickson, advocate, upon a gift of ward from the King, pursued for the ward-duties since Nicol's decease, who left a minor very young.

Alleged for the defender: *1mo*, The apprising is extinct and satisfied by intromission with mails and duties before Nicol's decease; at least, *2do*, It was satisfied after his decease within the legal; *3tio*, There was an order used by a second appriser within the legal.

Answered for the donatar: Though the first allegiance be relevant, the second is not; for the ward opened to the superior by the vassal's death before extinction; and any posterior intromission could not prejudice the superior of his casualty, though it might secure the debtor against expiring of the legal; nor doth it concern the superior that the debtor may be prejudged, if the rents of his lands and marriage be more than the sums appraised for, seeing the superior did not hinder him to redeem the apprising before Nicol's decease; and he may have recourse against the compriser as accords; *3tio*, The order used after Nicol's decease, who had *jus quasitum* before the order, (but) will hinder the legal to expire against the second appriser.

Replied: Comprisings being but legal hypothecations for the debt, it is not reasonable the debtor's lands should be any longer affected, when the debt is paid by intromission within the legal, or otherwise. And if the debtor redeem by payment within the legal, the superior can only claim the money due upon the order of redemption as *surrogatum*; nor ought the debtor to be in a worse case by the compriser's leaving a minor behind him; *2do*, The act of Parliament extinguisheth by intromission as to all effects, and consequently as to the superior's pretensions; for after extinction the debtor becomes liable to the superior for all his casualties. And in Linsay's case *contra* Kirkconnel, July 20, 1671, No. 63. p. 10381. the Lords found intromission after the debtor's death within the legal to extinguish, so as the superior might have the benefit of the debtor's ward during his minority; *2do*, Comprisings of property cannot be more liable to the superior's casualties, than wadsets confirmed *de me*; for an apprising is introduced only to supply the defect of the superior's consent. Now, upon redemption of wadset of ward-lands, where the wadsetter's ward was fallen, the superior can have no more but the redemption-money, which may be very little, seeing any personal debts or compensations, at least existing before the ward of the wadsetter fell, will satisfy in a redemption of wadset; and the like should hold in the redemption or extinction of apprisings.

Duplied for the donatar: The superior being forced by law to take the compriser for his vassal, it is just that he have all the casualties arising by him; and it was the compriser's fault, that proceeded to take infestment without resting upon a charge, and the debtor's fault that did not redeem before the appriser's death; and

No. 18. it were unjust to shuffle vassals out and in, to the superior's prejudice; *2do*, The act of Parliament concerns the reversion and order as it is regulated between debtor and creditor, but not the superior's profits; and the practick cited does not meet, but is in favours of the superior, who may claim the benefit of extinction of the apprising, where he can have more benefit by the debtor's ward than by the appriser's, whose heir perhaps was major; and by law the superior may pay the debt when he is charged, and take the appriser's right; *3tio*, The apprising is liker a disposition than a wadset.

The Lords having made an act before answer, and there being several discharges of the intromissions before Nicol Edgar the appriser's decease, the Lords found, that there remained then a considerable part of the apprising unsatisfied, and decerned the intromitter for the years after Nicol's death, during the legal, which was current many years by the minority of his heir. But the Lords did not advise the second and third allegiance; whereupon there was a declarator of redemption raised by the defender; who being broke, and in the Abbey, none appeared for him at advising.

Harcarse, No. 1011. p. 286.

1696. *January 14.* CARNWATH *against* CREDITORS of NICOLSON.

No. 19.

A holding was found to be ward, though besides *servitia debita et consueta*, it expressed a sum of money.

Fountainhall.

* * * This case is No. 6. p. 6411. *voce* IMPLIED DISCHARGE.

1739. *July 24.* DONATAR of WARD *against* CREDITORS of BONHARD.

No. 20.

Found, That an appriser infest, though the ward falls not by his death, but by the death of the debtor, will yet exclude the superior, and be preferable to the donatar of ward, just as much as an annual-rent confirmed by the superior; because though the infestment be given by the superior in obedience only, yet is it in obedience to the law; and a strong argument was drawn from analogy of the act, allowing ward-lands to be set in feu, which feus, by constant practice, are held to be good against the ward, so that the donatar can draw nothing but the feu-duties.

Kilkerran.

* * * This case is No. 14. p. 16453. *voce* VASSAL.

The Wardatar of old had the keeping of the Pupil; See TUTOR—CURATOR—PUPIL.—Ward, in what cases excluded by the Superior's Confirmation; See CONFIRMATION.—When the Ward is excluded by Terce, Courtesy, &c. can this be proponed by third parties; See JUS TERTII.