No 45. 1708. *December* 18. ERSKINE *against* HAMILTON.

THE LORDS allowed a party who had a real right upon lands to object against a competing adjudication, that it was null, being led upon a bond paid by the debtor, although he who quarrelled the adjudication derived no right from the person against whom it was led.

Fol. Dic. v. 1. *p.* 520. *Forbes.*

*** This case is No 88. p. 2225. *voce* CITATION.

1710. *November* 29.
HUGH MITCHEL of Dalgain *against* JEAN BAILIE, Relict of THOMAS SHEARER, Merchant in Glasgow, and THOMAS SHEARER, her Son.

No 46.
In an action for payment of teinds belonging to and possessed by the defenders, to which the pursuer claimed right by a charter of adjudication and infeftment thereon, the Lords found no process at the pursuer's instance, unless he would produce the adjudication itself, and instruct a right to the teinds in the person against whom the adjudication was led.

IN the action at the instance of Hugh Mitchel against Jean Bailie and Thomas Shearer, for payment of the teinds of two acres of land called Isholm, belonging to and possessed by the defenders, to which teinds the pursuer claimed right by a charter of adjudication and infeftment thereon;

Alleged for the defenders, The charter of adjudication is not a sufficient title, unless the adjudication itself, with a right to these teinds, in the person of him they are adjudged from were instructed; adjudications being only relative rights, taken and granted *periculo petentium.*

Replied for the pursuer, A charter and sasine is a good title against such as have no right at all. The pursuer is not obliged to produce his author's right, unless there were a competition upon a better right; as a tenant could not, in a process of mails and duties at the instance of an adjudger, object against the adjudger's title.

Duplied for the defenders, Every heritor hath a kindly right to the teinds of his own lands, so long as a better doth not appear.

THE LORDS found no process at the pursuer's instance, unless he produce the adjudication itself, and instruct a right to the teinds in the person against whom the adjudication was led. See TEINDS.

Fol. Dic. v. 1. *p.* 519. *Forbes, p.* 445.

1712. *January* 31.
ARCHIBALD, Earl of Forfar, *against* JOHN GILHAGIE, late Merchant in Glasgow.

No 47.
An heir of provision to the granter of a charter

ALEXNDER WADDEL, Merchant in Glasgow, having, *in anno* 1658, apprised from the heirs of Gavin Rae, a forty-three shilling nine-penny land of the

No 47.
raised reduction of a disposition by the vassal upon the ground that no infeftment followed on the first charter. Found that being obliged as heir to the granter of the charter to warrant it, it was *jus tertii* to him to quarrel any right founded upon it,

barony of Bothwell, feued to him by a charter from the Marquis of Douglas, in the year 1629, had charged the Marquis to receive him. The Earl of Forfar (who succeeded to the Lordship of Bothwell, as heir of the Marquis's second marriage,) raised a reduction and improbation against John Gilhaigie, to whom, in January 1669, the apprising was disponed by progress. The defender produced the charter 1629, and the decreet of apprising 1658, with his own conveyance from Waddel, but not the instrument of sasine upon the charter, nor the grounds of the apprising.

THE LORDS found, *1mo*, That the pursuer, as heir of provision to the granter of the charter, is bound to warrant it, and cannot quarrel the same, though no infeftment had followed thereon. For though an heir of provision be liable to a pursuit only after discussing the heir of line, whom the pursuer ought first to insist against; yet an heir of provision pursuing the person to whom he was *subsidiarie* liable in warrandice, may be excluded *exceptione* in the first instance, since *lites non sunt multiplicandæ*. *2do*, The LORDS found, That John Gilhaigie's author having apprised the said charter from the heirs of Gavin Rae, conform to the decreet of apprising and charge produced, the pursuer, as superior, has no interest to quarrel the apprising for want of the grounds and warrants thereof; it being *jus tertii* to him, who is neither the debtor, nor debtor's heir. And a man can only crave preference upon a ground arising from his own right, and not upon what ariseth only from the right of another. And though the pursuer might come in, did the defender produce no right at all; yet the latter's producing the apprising, which connects a progress to the charter granted by the Marquis, excludes the pursuer's claim; though it would not have any such effect against the heirs of the debtor in the apprising. See PERSONAL OBJECTION.

Fol. Dic. v. 1. *p.* 520. *Forbes, p.* 583.

*** Fountainhall reports this case.

1712. *February* 1.—THE old Marquis of Douglas, heritor of the Lordship of Bothwell, in 1629, feued off a parcel of it to one Gavin Rae, to be holden of his heirs succeeding to him in that Lordship, whereon Rae was infeft. One Waddel being creditor to Rae, obtains a decreet against him before the English Judges in 1658, and thereon led an apprising, which he afterwards disponed to John Gilhaigie. The Marquis, in his second contract of marriage, dispones the said Lordship of Bothwell to the heirs of that marriage, with this restriction, that he should not be obliged to warrant any feus he had granted out of these lands in the year 1629. The Earl of Forfar being the son and heir of that marriage, raises a reduction and improbation against Gilhaigie, of his rights to that feu, who produced the original feu charter given by the Marquis to Rae in 1629, with an extract of the sasine from the register in the low Parliament-

No 47. house, the principal being lost. *Item*, The apprising led by Waddel against Rae, and a charge against the Marquis, as superior, to receive him, with Waddel's disposition to Gilhaigie, and two receipts of the feu-duty by one John Burrets, the Earl's factor; and certification is extracted *contra non producta*, viz. the principal sasine on Rae's charter, and the grounds of Waddel's debts due to him by Rae, and his decreet against him whereon his apprising proceeded. Gilhaigie having applied to the Lords, complaining that this certification was taken out when he was lying sick, and had none to appear for him through poverty, the LORDS allowed him to be heard, and his defences resolved into these three points, 1*mo*, That the original charter produced was sufficient to debar the Earl from quarrelling the defender's right, seeing he was heir of provision to the granter, and so bound to warrant his deeds; especially, seeing the Earl's own right bore, that his father was not bound to warrant the feus he had granted out of the Lordship of Bothwell in 1629, whereof Rae's was one, though not particularly mentioned nor excepted; and it were dishonourable to suppose persons of such high quality would re-dispone lands to their children, whereof they were denuded before; that were to make them guilty of stellionate and double rights. And though the principal sasine be amissing, yet the abstract would be a good adminicle to make up its tenor; and though heirs of a second marriage are only liable in warrrandice *subsidiarie* after the heirs of line are discussed; yet here this order cannot take place, because he succeeds in the right of superiority of the lands to be warranted; and so the Earl can never quarrel this feu, clad with more than 40 year's possession in Gilhaigie and his author's person. *Answered*, The Earl of Forfar's succession to the Lordship of Bothwell is not so much as heir, as by a voluntary disposition, and so can never bind him to warrandice. *Esto* the Lord Angus, granter of that charter, had been bound; he might have alleged, that the charter was a feudal contract betwixt Rae and him, which, till completed by infeftment, was no feu; for *nulla sasina nulla terra*, and the extract can never satisfy the production in an improbation, nor stop certification where the principal does not appear. It is true, some competent time must be allowed to vassals to compleat their right by infeftment; but this must have a determinate period, and if not done, the superior is not bound to wait his leisure, but may look on the deed as deserted and de-relinquished, the contract being mutual; and seeing the superior, by his infeftment in the *dominium directum* is proprietor against all the world, except a subaltern feu right of property flowing from him be shewn; then the Earl is here no more superior but absolute proprietor, Gilhaigie showing no infeftment divesting him, nor a vassal infeft these fourscore year's bygone since Rae's charter in 1629; for the charter alone makes no feu, and is just in that case as if it had not been granted. The *second* defence was, though I do not produce the grounds and warrants of Waddel's apprising, viz. his bond from Rae, and the decreet against him (for the other grounds of the apprising, such as the letters

and executions *post tanti temporis intervallum* cannot be now quarrelled,) yet the Earl has no interest in them, seeing he derives no right either from Rae or Waddel; and so it is *jus tertii* to him. If a creditor of Waddel's objected this, he might seek preference, because of the want of them, but a superior can never do it; besides, the decreet being by the Session, it is *in publica custodia*, and you ought to extract it. *Answered* for the Earl, He oppones his certification extracted, which is of all others the strongest security; and as to the Session decreet, you not having condescended on its date, I was not bound to notice it; and law now reputes them false, forged, and feigned, and so can never support nor prop your apprising destitute of its foundation; and what signifies the charge against the superior, when neither a year's rent nor a charter were offered? *Replied*, The comprising bore the date of Waddel's decreet against Rae; and that being produced, it sufficiently certified the Earl, and was in place of a formal condescendence on its date. And, in a late case betwixt Irvine of Drumcoltran and Murray of Conheath, *see* APPENDIX, the LORDS refused certification against writs registered in their own books, where an extract of the bond called for was produced. *3tio*, *Alleged* for Gilhaigie, That the factor having exacted from him the feu duties, and the Earl at counting having allowed them, this was a homologation of the feu, and an owning him for his vassal, even as the receiving feu duties after a non-entry raised is a passing from it; and the superior's requiring his vassal to perform services due by the *reddendo*, after a recognition, is a renouncing the casualty, and acknowledgment of the vassal's right; or, if an heritor take rent from his tenant after a warning, without protesting, is a passing from the warning. *Answered*, A factor's deed, employed only to lift rents, can never prejudge his constituent, nor convey a real right to a person who has none, and would make a fiction go farther than the reality. If this could do the turn, what needs all this anxious care of taking *novodamus* expressly dispensing with and discharging all nullities, defects, or delinquincies whatsomever? Who can believe the Earl's counting with his factor can operate such mighty effects, as to constitute a feu where there is none? THE LORDS, by plurality, found it *jus tertii* in the Earl to quarrel the want of the grounds and warrants of Waddel's apprising; and that as heir of provision to the granter of the charter, he was liable to warrant it, especially having accepted the feu duties, and tacitly owned him as vassal, and only took advantage of the poor man's wanting some of his connecting mid-couples.

No 47.

1712. *February* 26.—IN the cause mentioned *supra* 1st February 1712, betwixt the Earl of Forfar and Gilhaigie, the Earl's lawyers made a new *allegeance*, that he, being superior, has right to redeem the comprising, and take the land to himself, conform to the clause in the end of the 30th act of Parliament 1469, which is that same power which the feudalists call *retractus dominicus* or *redemptio feudalis*; and it is offered to be proved, that Gilhaigie is

No 47. satisfied and paid of the sums in his comprising by his intromission, and what after counting shall be found wanting, he is willing to pay it. *Answered*, That old privilege indulged to superiors is much in disuetude, and few or no instances of it; but though it were in force, it can by no law nor form come in here. If Gilhaigie were seeking to enter, the Earl might reply on his power to redeem; or, if he, as superior, were pursuing a declarator of non-entry, and Gilhagie, to stop it, offered a year's rent, to be received as a singular successor, the Earl might exclude him by his privilege; but the process here is a reduction as proprietor, and not as superior. 2*do*, In that case, he must pay the debt as it stands, and not by a sham count and reckoning, putting nothing in his purse. 3*tio*, The offer is no ways receivable now, when the apprising is so long ago expired, but must be made within the legal, especially you having owned me as vassal, by accepting the feu duties of several years, and the project has no other design but by a tedious process to shuffle the poor man out of his right. The LORDS found the Earl could not redeem here, but prejudice to his raising and insisting in a new process for that effect *speciatim*.

Fountainhall, *v.* 2. *p.* 715. and 731.

No 48. 1714. *February* 10. CRAWFORD *against* CRAWFORDS.

THE LORDS found the action of exhibition *ad deliberandum* competent to all kinds of heirs male and of tailzie, as well as heirs of line; but found it relevant to stop process at an apparent heir's instance, that it was offered to be instructed that there was a nearer heir male.

Fol. Dic. v. 1. *p.* 520. *Forbes*, *MS.*

*** This case is No 9. p. 3986., *voce* EXHIBITION *ad deliberandum*.

1724. *February* 12.

JAMES, Duke of Hamilton, and Others, *against* NEIL MACALLUM and others In-dwellers in Glasgow.

No 49. Heritors infeft in fishings prosecuted parties for fishing in a certain river. Pleaded, the defenders fished in a part of the river not belonging to the pursuers. The pursuers found to have

THE Duke of Hamilton and other heritors who were infeft in the salmon-fishing upon the river Clyde, pursued Macallum and others, who came from Glasgow, and fished salmon in the said river.

It was *pleaded* in defence, That the pursuers had no right to that part of the water in which the defenders had fished, the same belonging to the town of Glasgow, who had a right of fishing, and the defenders had at least their tacit allowance.

Answered for the pursuers, That since the defenders could pretend no right to the fishing themselves, any person who had an express right to the salmon