judger in the Duke's situation could not be *in mora* for delaying to take infeftment during the legal. No 87.

If this be not sufficient to bar voluntary deeds during the legal, a charge against the superior by the Duke would not have put him in a better situation; for supposing the superior to have been put *in mala fide* by this charge, if he should think of granting infeftment to a disponee, yet infeftment *de facto* granted, must have been effectual to the disponee if he was *in bona fide* to receive it. Therefore, if the interlocutor preferring Mr Scott upon the Duke's supposed *mora* be well founded, no adjudger hereafter can be secure against the voluntary deeds of his debtor without taking infeftment, were there a hundred of them, which will prove an intolerable burden, both upon the adjudgers and upon their debtor. Whereas, by continuing the litigiosity during the legal, no harm is done to the debtor but the depriving him of a power to borrow upon heritable bonds, which at any rate he will be deprived of if the adjudgers be obliged to take infeftment.

One way to prevent the unhappy consequences of this judgment, is, that each of the adjudgers shall take out an inhibition against their debtor. Another way is, that every one of the adjudgers should charge the superior conformable to the above mentioned decision Wallace of Cairnhill; finding, in effect, that an adjudication with a charge is effectual to bar voluntary deeds during the legal. Though, as observed above, it seems not agreeable to principles to make any difference with respect to this matter, between an adjudication with a charge, and an adjudication within year and day without a charge.

Fol. Dic. v. 3. *p.* 391. *Sel. Dec. No* 222. *p.* 287.

*** See this case as reported in Faculty Collection, No 72. p. 2833, *voce* COMPETITION.

DIVISION V.

Litigious by Infeftment.—By using an order of Redemption.—By Inchoate Inhibition.

1631. *March* 8. LORD CLACKMANNAN *against* LORD ALLARDICE. No 88.

A PARTY who had wadset his lands, and taken a back tack containing a yearly duty more than the legal interest, did grant an infeftment of annualrent over the same lands to another creditor; and lastly, discharged the said back-tack. In a competition betwixt the wadsetter and annualrenter, it was

No 88. *objected* against the wadsetter, That his wadset was usurious in terms of the act 251st, Parliament 1597. *Answered*, The back tack was discharged, the only branch of the transaction that was usurious; and as the common debtor neither did, nor could now make the objection, it is not competent to any other by the said act. *Replied*, Supposing the back-tack still subsisting, it would be competent to the annualrenter to object usury to his debtor's right; and this privilege could not be taken from him by his debtor's voluntary discharging the back-tack. *Duplied*, There is nothing in law to bar a common debtor to pass from any of his privileges, even after he has contracted debts real or personal, though these privileges, if subsisting, might be beneficial to creditors. The Lords found, that the back tack being renounced, though after the infeftment upon the annualrent right, the wadsetter had thereby right to the whole profits of the land, the objection of usury being thereby sopited.

Fol. Dic. v. 1. *p.* 559. *Durie.*

*** This case is No 17. p. 6317, *voce* Implied Assignation.

1631. *December* 10. Bennet *against* Bennet.

No 89.
A reverser used an order of redemption against the wadsetter, and afterwards assigned the reversion and order. Found, that in this case, every personal exception competent against the reverser was competent against the assignee.

John Turnbul of Barnhill having wadset to Raguel Bennet some lands under reversion, and within the space of a year, or less, after the date of this reversion, having impignorated to the said Raguel another piece of land, for a sum lent to the said John Turnbul, conform to this bond, granted thereon to the said Raguel; in which bond, the said John Turnbul was obliged not to use any order of redemption of the prior wadset land, by virtue of the said reversion thereof, except he also redeemed the other land, impignorated, as said is, and that no redemption or order should be lawful, except both the lands were redeemed *simul*, and both the sums consigned;—the said John Turnbul uses an order for redeeming of the said first land, conform to the reversion granted thereon; and after the using of the order diverse years, he makes Mr William Bennet assignee to the said order and reversion, and dispones his right to him; whereupon the assignee intenting declarator of redemption upon that order, the defender compearing, proponed his defence upon the said bond, *alleging* the order foresaid not to be lawful, in respect of the foresaid provision, contained in the said bond, which he alleged, as it would have been competent to have excluded the cedent, who granted the bond with the said provision, if he were insisting on that order, so it behoved to meet the assignee made to that same order;—and the pursuer *replying*, That this was a paction, *extra corpus reversionis*, done long after the reversion, and so cannot be reputed a part thereof, and which could not have been obtruded against the granter of the bond, who, in the using of the order of redemption, was obliged to nothing, but to that which was within the body of his reversion, and which he has punctual-