

distinct, and whether the parties did acknowledge the same, and made objection against them.

It was REPLIED, That this could not be proven but by the oath of party or writ.

It was DUPLIED, That, if this hold, all decreets-arbitral import nothing, seeing they never express the points in debate, nor the probation ; but seeing both parties did trust the arbiter, though they may question his opinion or judgment, yet they cannot refuse his oath what was done in matter of fact, or what was produced or acknowledged before him, especially *ex intervallo* ; unless, immediately upon intimation, or pronouncing his decret, they had protested against any particular which he had sustained, either in relevancy or probation.

The Lords, before answer, ordained the arbiter's oath to be taken.

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1681. *January 27.* The BISHOP of ABERDENE *against* The VISCOUNT of KENMURE.

THE Bishop of Aberdene, having right to an infeftment of annualrent, in security of 10,000 merks, out of the barony of Corsmichael, pursues a poinding of the ground.

Compearance is made for the Viscount of Kenmure, who ALLEGED Absolvi- tor ; because, before this infeftment of annualrent, the lands in question were appraised by one M'Bryer, whereunto the Viscount of Kenmure stands now infeft by progress from M'Bryer.

It was ANSWERED, That M'Bryer's appraising being disponed to the Laird of Lawers, he ratified this annualrent ; and the Viscount, having right by progress from Lawers, cannot quarrel the same.

It was REPLIED, That this ratification is not relevant against a singular successor ; for, though Lawers had disponed his appraising in corroboration of this annualrent, it would have had no effect against singular successors, unless Lawers's consent had been a ground of their infeftment ; otherwise all singular successors would be insecure, and the excellent statutes for securing purchasers would be elided : for a person, having an irredeemable disposition, may give ratifications, assignations, and back-bonds restricting, which would be effectual, if drawn in question before he were infeft, even against his singular successors by assignation ; but, if the matter were not made litigious before infeftment, after infeftment such personal rights from the authors would have no effect against singular successors. And albeit appraisings may be so restricted and affected during the legal, when they are but legal diligences for security, and if they become litigious before expiring of the legal, they will be effectual against singular successors, acquiring right even after expiring of the legal ; otherwise the effect of all these personal deeds ceases so soon as the appraisings become irredeemable rights ; or else a great part of the securities of the kingdom being founded upon infeftments, acquired from appraisers after the legal was expired, they might all be rendered uncertain.

It was DUPLIED, That this ratification was within the legal ; and, being once effectual against singular successors, cannot, *ex post facto*, cease to be effectual by

expiring of the legal. And seeing payment, by intromission or otherwise, within the legal, will still be effectual against singular successors purchasing after expiring of the legal, so must renunciations or restrictions be, which require no registration; and this ratification is in effect a restriction, that the apprising shall not reach the lands in prejudice of the annualrent. *3tio*. This annualrent is homologated by this Viscount of Kenmure, who paid the sum to the Bishop's author, Whitekirk; and M'Bryer's apprising returning in the person of Kenmure, the apparent heir, whose right is within ten years, and so under a legal reversion, by the late Act of Parliament 1661, the ratification is upon the defender's own grounds.

The Lords sustained the ratification and annualrent, ratified by the homologation, being now drawn in question during this new legal: but did not determine the first point, whether the ratification, being within the first legal, would be effectual anent singular successors, after expiring of that legal; for though payment or intromission do continue ever to be effectual, that is by statute. But whether restrictions, voluntary renunciations, or reversions, unregistrate, would be effectual against singular successors purchasing after expiring of the legal, that being a general concernment; the Lords forbore to determine therein, this cause being determined upon the foresaid specialty.

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1681. *February 1.* OGILVIE of MILNTOUN *against* MOSSMAN and FORDYCE.

OGILVIE of Milntoun being infest, as heir to his goodsire, in the lands of Craigduff, did pursue reduction and improbation of a wadset thereof, granted to Mossman, upon this reason:—That it was granted *a non habente potestatem*, his father never having been infest; in which process he had obtained certification against any pretended infestment of his father's; which being extracted, he now insists upon this reason of reduction, that the wadset was granted *a non habente potestatem*. The defenders do now produce the father's seasine of Craigduff, and thereupon alleged Absolvitor from the reason. The pursuer opposed the certification extracted before this session, whereby his father's seasine was taken away: and certifications being the greatest security to terminate pleas, and fix rights, it cannot be called in question so long after the extract, albeit a reduction thereof were raised; much less summarily.

The defender ANSWERED, That albeit certifications in improbations are seldom recalled after the full end of the process in which they are granted, as if it be a simple improbation, without other reasons of reduction, where the certification terminates and ends the process; yet where the certification is but an interlocutor, and no definite sentence, and the process yet depending, that certification, upon strong and pregnant grounds, instantly verified, may be summarily recalled; and there can be no more pregnant specialty than in this case, where this pursuer, being apparent heir to his father, and master of all his writs, to shun his father's debts, suppresses his father's infestment, who bruiked, as heritor, the lands in question, and enters heir to his goodsire.

The Lords reponed the defender against the certification, if he could adnunciate the seasine produced.

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