

found the submission and decreet-arbitral were only probable by writ, and not by the arbitrators' oaths ; albeit the same was within 100 pounds Scots.

Page 84.

1666. *November 15.* GEORGE SKEEN *against* JAMES CHRYSTESON.

IN an action of adjudication, pursued at the instance of George Skeen, against James Chrysteson, for adjudging the right of an annualrent belonging to umquhile David Chrysteson, his debtor ; compearance being made for the said James, and he ALLEGING there could be no adjudication, because he stood infest in the property of the lands, out of which the annualrent, craved to be adjudged, was taken ;—

The Lords repelled the allegiance *hoc loco* ; and adjudged and found, That adjudications should not be stopped, they being only granted *periculo petentis* ; but prejudice to the defender to propone all his lawful defences *in causa*.

Page 84.

1666. *December 4.* SIR ALEXANDER URQUHART OF CROMARTIE *against* WALTER CHIRRON.

UMQUHILE Sir Thomas Urquhart of Cromartie, having borrowed from umquhile Mr William Lumsdain, the sum of 4000 merks, dispones, for his security and until he be paid, a tenement of land within the burgh of Banff, with the salmon-fishing upon the water of Doveran ; and, in the reversion, it is expressly provided, That it shall not be lawful to the said Sir Thomas to redeem the foresaid lands, but by consignment of the principal sum, and the haill bygone annualrents that should not be satisfied by his intromission. Sir Alexander Urquhart having right, by apprising, to the said lands and fishing, and reversion thereof, has intented action, for count and reckoning, against Walter Chirron ; who has now right to the wadset, for the surplus duty of the said fishing, for all years and terms since the date of the wadset ; in regard the foresaid right of wadset granted to Lumsdain, was only in security and repayment of his money. After dispute in the cause, the Lords found, that the foresaid right of wadset, being only a right for security, could not authorise the defender's author to bruik the haill duties of the foresaid fishing, or to intromit therewith ; and therefore, ordained the defender to condescend by what right he entered to the possession of the said fishing ; and how long his author did possess the same ; and what the yearly rent did extend to.

The defender CONDESCENDED as follows, *viz.* :—That he entered to possession of the said fishing, or to intromit, *in anno* 1650 ; and that, by virtue of the foresaid right of security, disponed to him by Mr William Lumsdain, son to umquhile Mr William. And otherways, that he had another right from the said Sir Thomas :—*In anno* 1657, 700 merks were eiked to the reversion ; of which right there is a power to possess till the redemption ; and that the fishing was worth 13 barrels of salmon yearly.

It was ALLEGED for the defender, That he could not be liable to count for the

salmon-fishing ; because it was a casual rent, like *jactus retis*, and so fell not under the act of Debtor and Creditor ; the act being only in relation to teinds and lands. *2do*. That he could not be liable but since the date of the act ; seeing the act could not be drawn back before the date. *3tio*. There was no caution offered for payment of the annualrent ; conform to the tenor of the act. *4to*. Albeit they were liable to count, that they behoved to have allowance of the annualrent of 700 merks, contained in the eik to the reversion.

Whereunto it was REPLIED by the pursuer, That his summons was not only founded upon the Act of Debtor and Creditor, but likewise upon the nature of his security ; which was for repayment of the money ; which clearly imports, that he being satisfied, either by intromission or otherwise, he should not bruik any longer the foresaid fishing. And this cannot be properly a wadset, seeing the wadsetter bears properly no hazard, but the same lies upon the granter of the wadset ; as appears by his own obligation, the time of the redemption, to consign, not only the principal sum, but likeways the haill bygone annualrents. And *2do*. Salmon-fishing is not such a casual rent, seeing it may be set in life-rent tack ; and so may be a certain rent. *3tio*. There is a like reason to count for salmon fishing as for teinds of land ; in respect of the Act of Parliament, bearing teinds of land and others. *4to*. Whatever the defender's author has intromitted with, more nor his annualrent, ought to be ascribed to payment *pro tanto* ; and so extinguish the wadset *pro tanto*.

The Lords found the wadset not to be a proper wadset, in regard of the conception thereof ; and that the granter of the wadset was obliged to consign the haill byrun annualrents, that should happen to be resting the time of the redemption ; notwithstanding of the eik to the reversion, whereby the wadsetter was put in the natural possession of the fishing : and therefore ordained the parties to count and reckon ; but reserved to themselves after count, *a quo tempore*, the surplus of the rents should be imputed *in sortem*.

Page 85.

1667. February 2. CHARLES KERR against JOHN RUTHERFORD.

CHARLES KERR, being infest in the barony of Abbotrue, upon a right granted to him of the same by the Earl of Lothian, his father ; pursues a removing, against John Rutherford, from that part of the said lands possessed by him.

It was ALLEGED for the defender, That he cannot be decerned to remove ; because he has an assignation from ———, rentaller of the said lands, to his rental right of the same. *2do*. Because the said lands are kirk lands ; and he is acknowledged kindly rentaller and tenant therein.

To which it was REPLIED by the pursuer, That the first allegiance ought to be repelled, *1mo*. Because the rentaller had no farther right than his own life-time ; and, it being now many years since he went out of the country, and there being no word come from him since, *non constat* that he is living ; so that the rental is expired. *2do*. And if the rentaller were living as *non constat*, the foresaid allegiance ought to be repelled, because that rentals, of their own nature, are only in favours of persons rentalled ; and are not assignable or disponsible in favours of any other person ; but, *eo ipso*, that they are assigned and disponed, they become, *ipso facto*, void and null. And the second allegiance ought to be