1665. *February* 17. PRINGLE of Torsonce *against* KER of Sunderland-hall.

No 74.
A wadsetter pursuing for his money, found not to have access thereto till he had recovered the possession taken from him by a third party intruding, and delivered *vacua possessio* to the debtor. See No 77. p. 9221.

PRINGLE having apprised the right of a wadset from the Heirs of Sir George Ramsay, does thereupon require and charge for the money. It was *alleged*, That he cannot have the wadset sum, unless he not only infeft himself in the wadset, and renounce the same, but put the defender in peaceable possession, as he did possess the wadsetter, from whom the pursuer apprised, and who can be in no better case than the wadsetter himself. The pursuer *answered*, That he was willing to renounce all right and possession, but could not put the defender in possession; because a third party had intruded himself, without the pursuer, or his author's fault; and the wadset being but a pledge, the hypothecar is not liable *contra vim majorem*, but only *pro culpa lata et levi*. Therefore if a pledge be taken away by force, it hinders not the creditor to demand his sum. The like must be in intrusion, which is an act of force; and the pursuer, who hath only his annualrent, is not obliged to consume the same upon recovery, but the defender may do the same. The defender *answered*, That whatever might be alleged in the case of intrusion, if incontinent the wadsetter had intimated the same, and required his money, yet this intruder has continued a long time.

THE LORDS found the defence and duply relevant to stop the payment of the money till the possession were delivered, seeing the intrusion was *ex intervallo*.

Fol. Dic. v. 1. *p.* 599. *Stair, v.* 1. *p.* 271.

*** Newbyth reports this case:

THE Laird of Lintoun and Sunderland-hall having given a proper wadset of the lands of Keplaw to Sir George Ramsay, under reversion of 5000 merks, the Laird of Torsonce did thereafter comprise the right of this wadset from John Ramsay of Berwick, as lawfully charged to enter heir to the said Sir George, his father; and he having, upon this comprising, required the money, now pursues the Laird of Lintoun, and this Sunderland-hall, as heir to his father, for payment thereof. It is *alleged* for the defenders, There can be no process for payment of the 5000 merks, because the defender having put Sir George in possession of the wadset lands, by virtue of the wadset right, the pursuer, who comes in place of the said Sir George, by virtue of his comprising, ought to put the defenders in possession of their own lands, upon payment of the money, and which he cannot now do, since the same are possessed by Andrew Ker; so that until the pursuer put the defenders in possession of their own wadset lands, they cannot be obliged to pay the money. To which it was *answered*, That the pursuer is only obliged to renounce; and that he being a compriser, was not obliged to possess. So that if Andrew Ker has, *medio tempore*, entered to the possession, he is not obliged to dispossess him, and put the defenders in pos-

No 74. session; and that the allegeance is not relevant, except it were likewise alleged that the said Andrew Ker was in possession by a deed of the pursuers. To which it was *replied* for the defenders, That the pursuer being a compriser, can be in no better case than his author, from whom he comprised; and if Sir George Ramsay, or his heirs, were pursuing for the same, whereupon the wadset was redeemable, they could not get payment of the same while they repossess the defenders in the wadset lands, whereof Sir George was in possession; and there is no necessity to allege that the said Andrew Ker is in possession, and that they cannot now get possession; so that except the pursuers will offer to prove that the pursuer or the said Sir George was legally dispossessed by the said Andrew, by virtue of a sentence, upon a better right, the allegance proponed by the defender stands relevant. This being a singular case, the LORDS found no process for payment of the 5000 merks, unless the compriser, Torsonce, pursuer of this action, did not only renounce the wadset in favour of the defender, but also repossess him.

Newbyth, MS. p. 26.

1666. *June* 15. GEORGE TAYLOR *against* JAMES KNITER.

No 75.

GEORGE TAYLOR having apprised some land in Perth, set a tack of a part of it to James Kniter, who thereafter apprised the same. Taylor now pursues a removing against Kniter, who *alleged* absolvitor, because he had apprised the tenement within year and day of the pursuer, and so had conjunct right with him. It was *answered*, That he could not invert his master's possession, having taken tack from him. The defender *answered*, It was no inversion, seeing the pursuer, by act of Parliament, had right to a part, but not to the whole; and the defender did not take assignation to any new debt, but to an old debt, due to his father.

THE LORDS sustained the defence, he offering the expenses of the composition and apprising, to the first appriser, conform to the act of Parliament.

Fol. Dic. v. 1. p. 599. Stair, v. 1. p. 377.

1676. *February* 2.

DUKE of LAUDERDALE *against* The LORD and LADY YESTER.

No 76.
A declarator of redemption craving the defender to renounce all right he had to certain lands, in any

THE Duke of Lauderdale having obtained a decreet of declarator of redemption of his estate, disponed to his daughter, the Lady Yester, redeemable by a rose-noble; and having charged the Lord and Lady Yester to renounce, and given in a draught of the renunciation as his special charge; it was *objected* by the Lord and Lady Yester, That, by the draught, they were to renounce all