No 6. and that the concourse of both estates in the person of Sir William, did not absolutely extinguish the obligement of relief, but only during the time that the estate was in one person.

Fol. Dic. v. 1. *p.* 195. *Stair, v.* 2. *p.* 821.

1693. *January* 25. BURNET of Carlips *against* NASMITH of Posso.

No 7.
Though an apprising during the legal, purchased in by the heir served, becomes thereby extinct *confusione*, it is not the same, where it is purchased in by the heir having a disposition of the apprised lands, though thereby liable to the debt apprised for *præceptione hereditatis*, because *præceptio hereditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*.

THE LORDS found that a backbond (though personal) affected a comprising even against a singular successor, during the currency of the legal, being but a collateral security; and that though the 10 years were elapsed since Posso acquired in these rights upon his father's estate, whereof he was apparent heir, yet, that the said 10 years were interrupted by the extract of the summons at Carlips' instance against him, taken from the signet, and by the decision 19th June 1668, marked by Stair; which the Lords found equal to an execution, though now lost; the Lords judging these acquisitions often fraudulent and unfavourable, viz. Burnet against Nasmith, *voce* HEIR APPARENT.

1693. *November* 8.—ON a bill given in by James Nasmith of Posso against Burnet of Carlips; it occurred to the Lords, to reconsider their former interlocutor given in this cause, that though a back-bond will affect the granter, yet how far it meets his singular successor, not by a voluntary disposition, but by a legal diligence of apprising or adjudication from him, even after it is perfected by infeftment; the LORDS resolved to hear it farther as a weighty and material point. *See* Stair's Institutions, b. 3. tit. 1. § 21. and the two decisions there cited in 1676; viz. Brown against Smith, No 76. p. 2844.; and Gordon against Chein, *voce* PERSONAL and REAL; and 10th March 1629, Shaw *contra* Kinross, *voce* PERSONAL and REAL.

1693. *December* 28.—THE LORDS advised the tedious and intricate debate between Burnet of Carlips and James Nasmith of Posso; and as to the *first* point, they were all clear that a back-bond granted by an appriser, militated not only against himself, but also against his singular successors, in two cases; if either the apprising was *in cursu* and not expired, or if the apprising stood *in nudis terminis* of a personal right, and no infeftment taken upon it. But the question here occurred, that the back-bond was given by Sir Michael after the apprising acquired by him was expired; and though there was no infeftment upon it, at the time when he subscribed the back-bond, yet shortly thereafter infeftment followed, and whether from that time downwards the back-bond could meet, or affect singular successors? For it was acknowledged, that, in heritable voluntary dispositions, such a back-bond given by the disponer, would not meet the receiver of the disposition, and that there was the same parity for an expired apprising, because then it was no more *pignus legale* for security of the money, but the appriser turns proprietor: But it was *alleged*, there was a dif-

ference, seeing a discharge by an appriser, intromission with the mails and duties, a renunciation, or any other declaration of his will meet his assignee, but not so in a disposition: Whereupon the LORDS waved this point, and proceeded to the *second*, which was clearer; and found that the comprising led against Brown of Sneip, coming into the person of his son, (whom Carlips offered to prove, then represented his father as heir,) it was a consolidation and extinction, and that the comprising could not subsist in his person. It is true, if he had been only apparent heir, the acquiring of these rights would only have exposed them to be redeemable within ten years, conform to the act of Parliament 1661; or if the diligence had been on bonds granted by the apparent heir himself, and afterwards returned to him, it would have inferred a passive title by the act of sederunt 1662, made on the occasion of Glendinning against Nithsdale, *voce* PASSIVE TITLE: But here, where they alleged he was actually heir to the debtor, the LORDS thought it an extinction, he becoming both debtor and creditor; and though it was urged, that Carlips had consented under his hand, to Sir Michael Nasmith's acquiring that comprising, and so that was an homologation and acknowledgment that it was not extinct; yet the LORDS considered the consent behoved not to be divided, but taken with its quality and condition, that the lands apprised should be sold for his payment and relief; and seeing that is not done, but the lands carried away by Sir Michael's apparent heir, who has bought in the comprising, the consent cannot be obtruded against him. The LORDS also discoursed on the *third* point, whether an appriser fell under the exception of the act of Parliament 1621, anent singular successors purchasing *bona fide* for a price, and in satisfaction of their just debts; and if an appriser can be reputed a purchaser in propriety of law, he being at most only a legal buyer, and not for an adequate price, the lands being oftimes worth more than the sum in the comprising; and statutes being *stricti juris*, are not to be extended *de casu in casum;* though it was alleged there was the same equity for both: But this point was not decided. No 7.

1694. *January* 24.—THE LORDS advised the farther debate, in the case between Alexander Burnet and James Nasmith, (mentioned 28th December 1693,) and found, that though the coming of an apprising into the person of an heir served was an extinction, he being *eadem persona cum defuncto*, and so there is *concursus debiti et crediti, et confusio;* yet where it is not by a legal title of a service and retour, but by a *præceptio hæreditatis*, and a disposition of the apprised lands, that it was not equivalent to the being heir; for though it was more than a passive title, and gave him *active* right to the lands disponed, so that one could not be served heir therein, yet it was not an universal active title and representation *in omne jus defuncti*, and therefore found there was no extinction in this case.

Fol. Dic. v. 1. *p.* 195. *Fountainhall, v.* 1. *p.* 550. 567. 585. 597.