

S E C T. IV.

Where voluntary Assignees are excluded by Law or Paction, whether the Right may be affected by Legal Diligence.

1619. February 3. BRUCE against BUCKIE.

No 91.

FOUND, That a comprising of a reversion needed not intimation, being judicial, and that the second comprising of the same reversion, first intimated, could not be preferred to the anterior comprising; and also found, that a reversion granted to any person and his heirs, excluding assignees, might be comprised.

Fol. Dic. v. 2. p. 79. Kerse, MS. fol. 226.

1680. July 30.

SIR WILLIAM BRUCE of Lochleven against GIB of Pow, and Other Wadsetters of Lochleven.

No 92.

SIR WILLIAM pursuing them to count and reckon on their reversions; *alleged*, They are only granted to the Earl of Morton and his heirs, and not to his assignees. THE LORDS sustained this to seclude Sir William, as long as he insisted on his voluntary disposition; but found this would not defend against him when he produced a right from the comprisers, unless the reversions were so personal as to seclude both assignees and comprisers.

Fol. Dic. v. 2. p. 78. Fountainhall, MS.

1748. Nov. 19.—1749. Jan. 12. Feb. 17. & June 13.

EARL OF CAITHNESS and ANDERSONS against SINCLAIR of Ulbster.

THE town of Wick, belonging in property or superiority to the Earl of Caithness, except a small part belonging to the bishop, was erected into a royal burgh by charter from King James VI. in the year 1589; wherein, after the preamble of its being a place well situated for trade, and therefore fit to be erected into a burgh royal, the erection runs thus: '*Facimus, constituimus, creamus, erigimus, incorporamus* totam et integram prædictam villam de Wick, cum omnibus et singulis domibus, edificiis, &c. &c. in unum liberum burgum burgale, &c. cum speciali et plenari potestate liberis inhabitantibus et burgensibus dicti burgi et suis successoribus in futurum, cum expresso avisamento et consensu consanguinei nostri Georgii Comitis de Caithness, et ejus hæredum et successorum, et non aliter seu alio modo, præpositum et quatuor balivos, dicti burgi incolas seu inhabitatores, una cum thesaurario, &c. &c. eligendi, eosque et toties quoties expediens videbitur pro causis rationalibus deponendi,

No 93.

The power of superintending the election of the Magistrates of a burgh, found transferable.

No 93.

‘ dimidiam partem summarum per dictos burgenses, pro suis, in dicto burgo, libertatibus, ad dictum nostrum consanguineum et suos successores in futurum spectandam, et alteram dimidietatem earundum summarum ad publicum bonum dicti burgi applicandam.’

John Earl of Breadalbane having got a disposition to the estate of Caithness from George, great-grandchild to the last-mentioned Earl, and also acquired right to several apprisings deduced against him of his estate and earldom, did, in the 1694, obtain a charter of resignation and apprising, granting, ‘ totas et integras terras et baronias,’ with the heritable office of sheriff and justiciary, ‘ una cum omnibus aliis terris hæreditariis, tenementis, &c. officiis hæreditariis, lie provostriis, privilegiis et libertatibus infra burgum de Wick, aliisque quibuscunque ad prædictum Georgium Comitem de Caithness pertinent. et spectant.’ And in 1718, the present Earl of Breadalbane obtained a new charter in the same terms upon the resignation of his father.

In the year 1719, the present Earl disposed the premises, as contained in his own charter, in favour of John Sinclair of Ulbster: And George Sinclair, now of Ulbster, being served heir in general to his father, expedes a charter on the procuratory obtained in the disposition to him.

It appears from the sett of the burgh, as recorded in the books of the Convention in the year 1708, that the old Earls of Caithness had always enjoyed the office of Provost; and they chose one of the Bailies, and the town chose the other; that the Provost and two Bailies chose seven Counsellors: But of later years, and by reason that the Earl of Caithness took no concern in the burgh, the town was in use to chose the Provost and two Bailies by the plurality of the poll, and the Provost and two Bailies chose the seven Counsellors, Dean of Guild and Treasurer.

But in the year 1716, when it would appear the Earl of Breadalbane had been laying claim to the privileges used by the late Earl of Caithness, there is a new set recorded in the books of the Convention of Royal Burghs, proceeding on the narrative, ‘ That by the charter of erection, the express consent of the Earls of Caithness and their successors to the election of the Magistrates of the said burgh was indispensably necessary;’ and appointing ‘ that a leet should be made by the Magistrates for the time being, consisting of two, out of which a Provost, and of four, out of which two Bailies are to be named, and that the same should be presented thirty days before Michaelmas to, and approved by the Earl of Breadalbane and his successors, as come in place of the Earls of Caithness; and that these Magistrates, when elected, are to chuse seven Counsellors, a Dean of Guild and Treasurer.’ And agreeably to this have the elections been made since the year 1716, Ulbster, upon his getting the conveyance from the Earl of Breadalbane, having been in the same manner acknowledged as the Earl was before.

There was now a process brought at the instance of John Anderson and four or five other burgesses of Wick, containing a variety of conclusions; and, *inter*

alia, for having it declared, That George Sinclair of Ulbster, as deriving right from the Earls of Caithness and Breadalbane, has no title to demand a leet out of which the Magistrates are to be chosen; and that the act of Convention of the burghs in the year 1716 should be rectified and amended, in so far as it is disconform to the original charter.

But as this must have been found *jus tertii* for the pursuers, the Earls of Caithness compeared, and being admitted for his interest, *pleaded*, That the fore-said privilege granted to the Earls of Caithness by charter of erection is personal, bestowed upon the Earls of Caithness *qua* such, and is therefore not alienable.

Upon which point the LORDS gave cross interlocutors: For on the 19th November 1748, they found, 'That the privilege granted by the charter 1589 to the Earl of Caithness, was not transmitted from, but still remains with the Earl of Caithness and his heirs and successors to the dignity.' But upon the 12th January 1749, 'they found the privilege alienable, and ordained the defender, Ulbster, to produce the rights voluntary and legal, whereby he pretends the same to have been conveyed; and upon the 17th February thereafter adhered, and remitted to the Ordinary to hear upon the import of the rights produced for Ulbster.'

THE LORDS who thought the privilege not alienable; after observing that it was not easy to say what could be meant by the words in the charter *cum avisa-mento* of the Earl of Caithness, insisted on its being no such right as could be transferred to another, as it had never entered into any of the Earl of Caithness's charters, but was only a quality in the charter erecting the town of Wick into a royal burgh, and no more than the guardianship of the burgh as to that particular point of chusing their Magistrates, a thing in its nature merely personal, and which the Earls had no power to transfer to another.

But, on the other hand, the majority of the Court considered this as a grant to the Earls on account of their interest of property and superiority in the town, and which, in the nature of the thing, behoved to follow that interest on account of which it was given; That, *2dly*, There was connected with it in the charter the right to the half of the sums payable by the burgesses on their admission, which was a patrimonial interest, and not intended to be ever separated from the other; *3tio*, That laying aside these considerations, the thing itself bore a close resemblance to a patronage, which, before the act 1690, giving patrons the right to the teinds, had nothing in it more patrimonial than this guardianship of the burgh, which no body even denied being alienable.

A variety of more arguments were thrown out one both sides; and the Court was first and last near equally divided. See p. 1848.

Kilkerran, (PERSONAL & TRANSMISSIBLE.) No 5. p. 399.

* * Lord Kames's and D. Falconer's reports of this case are No 8. p. 18422. *voce* BURGH ROYAL.