

No 67.

1673. July 26.

ANNANDALE *against* SINCLAIR'S CREDITORS.

Liferent escheat is burdened with apprisings led on debts existing before rebellion, and completed by infestment within the year and day; or by presenting a signature to the Exchequer, where the apprising is led against the King's vassal.

THE LORDS found, That a compriser upon debts anterior to the debtor's rebellion, being infest before year and day, is preferable to the donatar of the liferent escheat.

Clerk, *Mr Thomas Hay.*

Fol. Dic. v. 1. p. 257. Dirleton, No 178. p. 71.

* * Stair reports the same case :

IN the competition betwixt the Earl of Annandale, as donatar to the liferent of Hugh Sinclair and his Creditors, who had apprised his estate, it was *alleged* for the donatar, That he hath right to the mails and duties of the whole lands, because Hugh Sinclair was denounced and at the horn long before any of the apprisings were deduced, nor was he relaxed for year and day, and the rebellion runneth from the date of the denunciation, year and day being only indulged for a time to relax; so that it is beyond question, that no voluntary deed of the rebel, after denunciation, is valid against the superior or donatar. It was *answered* for the apprisers, That they are preferable, because they have apprised on debts anterior to the denunciation, whereupon if they had been infest *in cursu rebellionis*, without question their apprisings did fully denude their debtor who was denounced; and themselves not being denounced, it is more than if the debtor had relaxed himself within year and day; for apprising is a deed of law, and no voluntary deed of the rebel; and apprising, with a charge against the superior, hath been oft found to be equivalent as to the liferent to an infestment; but in this case there could be no charge, the King being superior, but the Creditors did all the diligence they could do, which was to give in signatures to the Exchequer long before year and day. It was *replied*, That the King's donatar was never excluded upon presenting signatures, and that, if in any case it ought to be allowed, it could only be when the appriser takes instruments upon presenting of his signature within the year, and protests, that if it be not expedie, his diligence may be holden as sufficient; for otherwise, witnesses might prove the presentation of signatures, which is dissonant to law, and of dangerous consequence; for thereby an appriser whose signature is past, and infest thereon, might be quarrelled by one pretending to have given in a prior signature; but, in other apprisings, the charge given to the superior is instructed by the horning and execution. It was *duplied* for the apprisers, That such instruments and protestations were neither pertinent nor accustomed, and were in no case tolerable, unless a signature presented after, were past before; and, as to the probation, it is offered to be proven by the clerks and members of Exchequer, that the signature was presented, which is much more than the

the instrument of a common notary, which in few cases proves without testimonies of the witnesses insert, and goes no further than testimonies of witnesses can go.

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THE LORDS found the allegiance for the apprisers, that *in cursu* they had presented signatures, relevant to be proven by the members and clerks of Exchequer, to prefer the apprisers to the donatar.

1676. July 25.

IN a competition betwixt the donatar of the liferent of Hugh Sinclair and the Creditors who had apprised his estate, it was *alleged* for the apprisers, That they ought to be preferred, because they had apprised *in cursu rebellionis*, for sums due before rebellion, and upon their apprisings had given in signatures to the Exchequer, *debito tempore*, viz. in such time as they might be affixed, revised, and presented. Likeas they were componed before year and day run, but before infestment could be expedite the year was run, and the donatar took a gift of liferent; and, as infestment upon apprising *in cursu* excludes liferent escheat, so a charge against a superior *in cursu* doth the like, and hath always been so sustained; but, where the King is superior, his Majesty and his officers cannot be charged, and therefore all that can be done is to give in a signature. It was *answered*, That the Creditors had a year to have apprised and presented a signature, and other superiors being charged, if they obey not, it is their fault, and so excludes them from the casualty of their superiority; but, it is not to be presumed, that the King's officers would do wrong by postponing any party; but it must be their own neglect who should have presented timeously, and protested for dispatch if they were near the year, which is not done; but if a naked giving in of a signature shall be sufficient, the King should be hugely prejudged in this and other casualties, as ward, non-entry, &c. And no witnesses can be allowed to prove in this case.

THE LORDS, before answer, recommended to the Lords of Exchequer, to take an exact trial *per membra curiæ*, when these signatures were presented, and what was the cause of the delay.

Stair, v. 2. p. 222. & 459.

1697. July 20. DALRYMPLE *against* HUNTER'S CREDITORS.

MR HUGH DALRYMPLE, advocate, as donatar to the liferent escheat of Alexander Hunter younger of Muirhouse, pursues a declarator against the Creditors. *Alleged*, The Creditors must be preferred to the donatar, because his annual rebellion is not after he was apparent heir by his father's decease, but most of it was run in his father's lifetime; and before year and day expired after the father's death, the Creditors had adjudged and charged the superiors to infest them; and so they must be preferred to the donatar. *Answered*, An apparent heir being year and day at the horn, before his father's death, *ipso momento* that

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Such casualties as escheat are *stricti juris*, and not to be extended. When a party's annual rebellion was not whole