

1679. February 20.

The TENANTS of MORTON *against* the EARL of QUEENSBERRY.

No 35.

Order of redemption used by a second appriser, effectual to a third, who thereby may redeem both first and second, nor can the order be passed from to his prejudice.

THE Tenants of Douglas of Morton raise a double pouding, wherein compearance is made for Stuart of Corbellie, as having right from his father, who was assignee to an annualrent, provided in liferent to a widow for the bygones, whereof apprising was led, and for the Earl of Queensberry, as having right to an apprising and infestment of the lands, led by Hunter of Auchinbanzie; there was also a second apprising of the same land, at the instance of Gordon of Trowhen, but not within year and day of Hunter's apprising, and also an apprising at the instance of John Sharp, within year and day of Trowhen's apprising; the apprising upon the annualrent was preferred in the first place, but the liferenter's intromissions with the rents of the lands, out of which the annualrent was paid, even before the apprising, were found deduceable out of the apprising; but the annualrenter's intromission with the other lands, being but an extrinsic compensation, was not sustained against the assignee, unless the same had been liquidate before Auchinbanzie's assignation or intimation, or unless his assignation had been gratuitous. It was *alleged* for Queensberry, That his apprising was expired, and that though Trowhen had used an order within the legal, yet the Earl had acquired right to this apprising, and no order being used upon Sharp's apprising, he was utterly excluded. It was *answered* for Sharp, *imo*, That he offered to prove that Hunter's apprising was satisfied, in so far as within the legal, he had ratified a disposition to be granted by the common debtor, of a part of the said apprised lands, equivalent in worth to Hunter's sum; or, that the first apprising being satisfied by intromission, Trowhen's apprising becomes the first apprising, and Sharp's apprising being within year and day of Trowhen's, he may come in *pari passu* with it; at the least, Trowhen having used an order within the legal, *jus est acquisitum* thereby to Sharp, who may not only redeem from Trowhen his own apprising, but thereby succeed in his place, and upon the order used by him, redeem Hunter's apprising. It was *replied*, That Hunter's consent to the sale of a part of the apprised lands, could not be imputed to him in satisfaction of his sums; because the disposition of the said lands was in satisfaction of a sum, whereupon inhibition was used before contracting of the sums, on which these three apprisings were led; upon which inhibition, all the three apprisings might be reduced, which was found relevant. *2do*, Supposing the first apprising had been satisfied, the third apprising could never come in with the second, though within a year of it; because, by the act, Debtor and Creditor, it is clear, that no apprisings come in together, but such as are within year and day of the first effectual apprising, which stands effectual to them all, as if one apprising had been led for all; and therefore, though it were satisfied, it remains a security for the rest, they being within year and day. THE LORDS found, That although the

(RANKING OF ADJUDGERS AND APPRISERS.)

first apprising was satisfied, the third apprising not being within year and day of the first, could not come in with the second, though within year and day of it. *3^{to}*, It was *alleged*, That the order used by the second appriser, albeit thereby the first had been redeemed, the third would be excluded, because the second appriser redeeming the first, he would succeed in his place, and he would be deemed to denude in favours of the second, so that he might found upon the first apprising, which would exclude the third, having used no order within the legal, and therefore, though it might redeem the second apprising, yet it never could redeem the first. Nor was there any thing to hinder the second appriser to pass from his order. It was *answered*, That declarators of redemption do not transmit, but evacuate and annul the apprising redeemed; and, though the second appriser redeem, it could not be redeemable, without the satisfaction of its own sums, and of the sums in the first apprising; yet that was only as *utiliter gestum*, so that the third appriser redeeming from the second, the legal reversion gives him right to the order used by the second appriser, which he could not pass from to the prejudice of the third appriser.

THE LORDS found the second appriser having used an order, the same was effectual to the third appriser, who thereby might not only redeem the second, but the first apprising, and could not be passed from to the prejudice of the third appriser.

Stair, v. 2. p. 700.

No 35.

1680. December 21. FORBES of LAVOCK *against* BUCHAN.

THE LORDS brought in a comprising, led two years before the first effectual one, perfected by infestment, *pari passu*, as if it had been within year and day of it, though the 62d act, Parliament 1661, seems only to speak of apprisings posterior to the first effectual one, and not of prior apprisings, except they be within year and day of them.—*2dly*, They found such a comprising, coming in *pari passu*, gave a right to the lands *pro indiviso*; so that the one might hinder the other from removing the tenants, unless he can instruct, that he will improve the writ, or get a better tenant by the removal.

Fol. Dic. v. 1. p. 17. Fountainball, MS.

No 36.
An apprising, led two years before the first effectual one, brought in *pari passu*.

1741. November 17. WILLIAM KING of Newmill *against* INNES of Dunkinty.

INNES of Dunkinty being creditor to Stewart of Castlehill, obtained decret of adjudication of his lands, upon the 14th June 1716, and on the 26th of December thereafter, he charged the superior with horning. William King being likewise a creditor of Castlehill's, obtained decret of adjudication of his lands upon the 1st January 1718, and having applied to the superior, and paid the usual composition, he obtained a charter of the said lands of Castlehill, *anno* 1721, and

No 37.
The first charge on an adjudication, renders it the first effectual one, though