1680. *July* 28.
The KING'S ADVOCATE and his SOLICITORS *against* YEOMAN.

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The Lords modified his (Yeoman) marriage to two years rent of his whole, as well these as his other, lands, (for that is the *minimum*, and three years rent is the highest), and decerned personally for it, as well as the ground of the apprised lands to be poinded, only in so far as the sums of the comprising would extend to, and no further, because it was not expired. Many Lords thought, during the legal, this ward and marriage only fell by the debtor's, and not by the appriser's decease. However, this teaches the creditors of ward vassals how dangerous it is for them to be infeft on their apprisings; and though they have a remedy, by taxing the ward lands, yet, when the sum apprised for is small, the expense may exhaust it, and the law of comprisings gives no allowance therefor at the time of redemption.

Fountainhall MS.

*** Stair reports this case:

Sir William Purves, as donatar to the marriage of Yeoman of Dryburgh, pursues for the avail thereof. The defender alleged, That no marriage could be due by the death of an appriser, dying within the legal, because an apprising is but *pignus prætorium*, and a collateral surety during the legal, and doth not divest the King's ward-vassal, but is in the condition of an infeftment granted for relief, or while a sum thereby secured were satisfied, both principal and annual-rent, by intromission; for if, by such rights, the granter was divested where they are extinct, they behoved to be re-invested; but it is uncontroverted, that his first infeftment is effectual to him in that case, without any new infeftment; and therefore the casuality must fall to the King, not by the appriser and his heir, but by the debtor and his heir, during the legal, as was found in the case of Lindsay of Mount, donatar to the ward of Kirkonnel, who, pursuing for the mails and duties, "was found to have right thereto, albeit there was an apprising of the estate, and that so soon as the apprising should be satisfied, whether before or after the death of the appriser;" so that the donatar of the debtor's ward was found to have right to the ward-duties; and seeing it is beyond controversy, that the ward cannot fall both by the death of the debtor and appriser, the debtor's donatar being found to have right, the appriser's donatar can have no right; and as this is law, so it is most inconvenient, both for the King and lieges, for the King's ward-vassal may for an inconsiderable sum cause apprise, and so free his heir of the ward and marriage; and now when, by apprising and adjudication, all come in *pari passu* that are within year and day, there should be as many marriages as there are adjudgers; whereas creditors, by apprising and adjudication, seeking nothing but payment of their just debts, if the ward and marriage of the heir

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should fall, they could have no relief against the debtor, and might lose more than the whole sum. It was answered, That an appriser being infeft, is alone the King's vassal, until the apprising be satisfied; and it is inconsistent with the feudal right, and the uncontroverted law and custom, as to the casuality of the superiority, that any thing can come to the superior by the debtor, who is truly denuded, and hath no more than the right of reversion while the apprising remains unextinct; albeit by statute, for the ease of the lieges, " apprisings are declared null and extinct without resignation or new investiture to the debtor;" which custom, *a pari*, hath extended not only to satisfaction by intromission, but by payment or otherwise, and even to securities for relief and satisfaction, whereby the debtor's investiture is held as revived; yet, till satisfaction, the debtor is not vassal, as appears clearly by these instances; as, *first*, His deed could not recognosce the land; *2do*, His rebellion would not infer a life-rent to affect the adjudged land, nor would the non-entry of his heir affect the same, nor any casuality fall by him or his heir; which is evident by the practick alleged, where the donatar of the debtor's heir, insisting for the ward-duties, " was found to have no right, till the apprising against his predecessors were satisfied;" but it was found, " that so soon as the apprising was satisfied, whether after or before the appriser's death, the debtor's donatar would then have access." But the case here in question not being the ward-duties, having a tract of time, but a marriage, the appriser dying before the apprising was extinct, and the heir marriageable before the apprising was extinct, the casuality doth thereby belong to the King; and as to the inconveniencies, the nature of the right over-rules the same; and it is more ordinary, that the creditor appriser is righter than the debtor, and would yield more profitable casualities; nor can the King be excluded by contrivance of a small adjudication, because his donatar, at his pleasure, may redeem and satisfy the adjudication, and the adjudger will be obliged to assign him to the sums, and all casualities will thereby return upon the debtor; and as to the inconveniency of concurring adjudgers, though all of them should run the hazard of ward, the nature of the right does import it, and they might shun it, by assigning their sums to one adjudger for all; nor hath it ever been found, that all the adjudgers become the King's vassals, but only the one that is infeft, though the statute *fictione juris* brings all the adjudgers within the year *pari passu* as if one adjudication had been led for all, yet this is the very terms of a fiction, and the adjudger first infeft is the King's vassal, at least during the legal, till all the adjudgers be infeft: And as to the inconveniency, that creditors may be burdened, who seek but their own, it hath been a known practice to apprise or adjudge, in the name of a ward-vassal, to shun this inconvenience, which shows it to have been the common opinion, that the appriser's heir would be liable in ward and marriage.

The Lords found, That the marriage fell by the death of the appriser, even within the legal, his apprising not being then extinct, and his heir being marriageable, and that the marriage could not fall by the death of the debtor, against whom the apprising was deduced.

Stair, v. 2. *p.* 791.