

(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 discerned 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

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the adjudger
do not offer
the superior a
charter and a
year's rent.

was thereon infest the 4th December that same year. In the ranking of the creditors, it was *insisted* for Dunkinty, that the charge on his adjudication made it the preferable one, and that King's should be postponed to his, as being without year and day thereof.

For William King it was *urged*, that the only rule for determining this question, was the act 1661, which establishes a *pari passu* preference of all comprisings which come within year and day of the first effectual one; and it further declares what shall be held to be the first effectual comprising, to wit, either that on which infestment has followed, or the first exact diligence for obtaining the same. Now, the lowest degree of diligence which can come under this description, is such a requisition of the superior, as he is bound in duty to comply with, and as will put him in *mora*, if he refuse to comply; less than this can hardly be thought a sufficient intimation to the superior, far less come under the description of exact diligence for obtaining infestment, which is required to entitle a compriser to a preference to all other comprisings, as the first effectual one. In this case, Dunkinty did not offer a charter and a year's rent, whereby the superior was no more bound to enter him, than if no charge at all had been given; and so it was decided, 6th February 1669, Black;* consequently, King's adjudication, on which charter and fine followed, is the first effectual one, and must be the title for connecting the real right of the lands in all time coming. And as the creditors cannot avoid taking the benefit of his infestment, they ought to be found liable to him for the expence, by which that title was made up.

Answered for Dunkinty, That he could not discover upon what reason or authority the interpretation now insisted for is founded; the law has required exact diligence, but it has no where mentioned or supposed ultimate diligence by denunciation or caption; horning alone has been thought sufficient to interpel the superior, so as thereby to debar him, by any voluntary act, from preferring a posterior adjudger, by giving him an infestment. And this seems agreeable to the reason of the thing, and the nature of the diligence; for an adjudication being a *pignus pratorium*, the superior, cannot, in that time,† compel the adjudger to enter, because it may be redeemed; and, for the same reason, there can ly no necessity upon an adjudger, to offer a charter or a year's rent along with his charge; besides, uniform practice has established it to be that exact diligence which the law has required, to make that adjudication effectual upon which it is used; and so it has been determined, 31st of January 1632, Ferguson.‡ See Stair, tit. Infestments of property, § 30, p. 211.¶ And it is begging the question, to say, King's infestment is the only title for connecting the real right of the lands in all time coming; for, if it was unduly given, it can have no effect: On the contrary, at whatever time Dunkinty shall obtain his infestment, it must draw back to the

* Black against French. Stair, v. 1. p. 599. See INFESTMENT. † *i. e.* during the legal.
‡ Ferguson against M'Kenzie. Durie, p. 616. See COMPETITION. ¶ Page 219. of the Edit. 1759.

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date of his charge, which, by itself, is sufficient to make his adjudication effectual; and if this is the rule of preference, no question can remain concerning the expences of King's infestment or his composition; for though by the statute, the creditors are burdened therewith, yet it is only in respect of the benefit which thence accrues to them; and where no such benefit arises, there is no foundation for the claim.

THE LORDS found, That Dunkinty having charged the superior upon his adjudication in *anno 1716*, the same is thereby the first effectual adjudication; and therefore, William King of Newmill cannot claim the composition paid by him to the superior, nor expences of his charter and infestment, *anno 1721 in hoc statu*, the other creditors having no benefit thereby; reserving to the said William King, action against the other creditors, in so far as they may have benefit from his infestment against the superior's claim of non-entry, or otherwise, as accords.

Fol. Dic. v. 3. p. 13. C. Home, No 182. p. 303.

* * * See INFESTMENT for this case, as reported by Kilkeran, p. 8.

No 37.

1752. July 9.

REPRESENTATIVES of MR DAVID COUPER, *against* The other CREDITORS of SKELBO.

IN the ranking of the creditors of Skelbo, it was *objected* to Couper's adjudication, that the summons of adjudication was executed before the days of special charge were elapsed, and therefore not regular. The LORD ORDINARY "sustained the objection relevant to postpone the said adjudication to such adjudications as were regularly led upon special charges."

Pleaded in a reclaiming petition for the representatives of Couper: The act of federunt of the 18th February 1721, which prohibits the raising and executing any summons of adjudication within the days of special charge, seems only to relate to adjudications posterior in date to it; for, that the act 106, Parl. 7. Ja. V. till explained by the act of federunt, was not clear as to this point. It does not say, that the days of special charge must be expired before letters of apprising can be directed, but only, That letters shall be directed, charging to enter within forty days next after the charge, and failing thereof, letters shall be directed to apprise: Which words might have been thus interpreted, That after a charge to enter heir, letters might be immediately directed to apprise; which, however, could only be carried into execution, if the person charged should fail to enter within the forty days: Nor is this more inconsistent with the nature of the thing, than is that daily practice which makes the days of a general charge, and the days of the *annus deliberandi*, to run on together.

'THE LORDS refused the petition without answers, and adhered.'

Pet. D. Grenc.

Dalrymple.

Fol. Dic. v. 3. p. 14. Fac. Col. No 27. p. 47.

L 1 2

No 38.

An adjudication postponed, because executed before the days of special charge were elapsed.