

(RANKING OF ADJUDGERS AND APPRISERS.)

No 26. prifer; therefore preferred Straiton, (though not infest,) to Bell's posterior apprising, though infest.

Fol. Dic. v. 1. p. 18. Stair, v. 2. p. 704.

1676. *January 28.*

M'LURG *against* MURRAY.

No 27.
Consequences
of the first ap-
priser taking
the gift of the
common debt-
or's escheat.

JAMES M'LURG, as donator to the liferent of Robert Charters, and having obtained general declarator, pursues for mails and duties of his lands; compearance is made for Matthew Murray, who alleged, abfolvitor, because the rebel was denuded of the lands in question, by an infestment, upon an apprising led against him within year and day of the first apprising, and completed by infestment within the year; whereby these lands having become the property of another person who was not rebel, it is equivalent, as if the rebel had relapsed within year and day, which would have purged the rebellion *quoad* the liferent-escheat, though not as to the single escheat; for this singular successor needed not relax himself, and needed not relax his author. And, if this were not sustained, it were easy for debtors to exclude all their creditors, by going to the horn, and continuing thereat year and day, and taking the gift of liferent in confident persons' names, whereby the creditors could have no access during the debtor's life. And it has been frequently decided by the Lords, that albeit voluntary dispositions, *in cursu rebellionis*, purge not the superior as to the liferent-escheat; yet dispositions *in cursu*, which are necessary, and granted in implement of dispositions anterior to the rebellion, or apprisings for debts anterior to the rebellion, are always preferable to the liferent-escheat. It was *answered*, for the pursuer, That this excipient has no apprising or infestment *in cursu*; but the only apprising and infestment within the year belongs to James M'Lurg himself; and it is *jus tertii* to the excipient to found upon James M'Lurg's apprising, which he may make use of, or not make use of, as he pleases. It was *replied*, for Murray, That, by the act of Parliament 1661, betwixt Debtor and Creditor, apprisings deduced within year and day come in *pari passu*, as if one apprising were led for both: *Ita est*, that Murray, although he has not apprifed within the year after the denunciation, yet his apprising is within the year of James M'Lurg's apprising; and so he may found upon the same, as if it were included therein, and James cannot pass from it without his consent; and, therefore, James cannot have the mails and duties, as donator of the liferent-escheat, but they will divide betwixt him and Murray: as apprisers, within year and day.

THE LORDS found, That James M'Lurg's apprising and infestment being within year and day of the denunciation, and for a debt prior to the denunciation, did exclude the liferent-escheat; and that Murray, having apprifed within year and day of M'Lurg, he could not pass from his apprising without Murray's consent; and so Murray ought to come in *pari passu* with M'Lurg.

Fol. Dic. v. 1. p. 18. Stair, v. 2. p. 407.

(RANKING OF ADJUDGERS AND APPRISERS.)

* * The case is stated thus, in Gosford :

No 27.

In a double pointing, raised at the instance of the tenants of one Robert Charters, who was heritor of a tenement of land in Edinburgh; it was *alleged*, for James M'Lurg, That he ought to be preferred, because he was donator to the common debtor's liferent-efcheat, which was fallen by his being year and day at the horn, before Matthew Murray's comprising. It was *answered*, for Matthew Murray, That, notwithstanding, he ought to be preferred, because the said James M'Lurg had comprised the said tenement, and was infeft within year and day of the rebellion, and so that liferent efcheat could not vaick, the King having a vassal: And albeit the said Matthew's comprising was after the said rebel was year and day at the horn; yet his comprising being within year and day of M'Lurg's first comprising, by act of Parliament 1661, he ought to come in *pari passu* with him, and so would be preferable to any subsequent gift to the first comprising. It was *replied*, That the first compriser was not obliged to communicate his right to the second compriser; there being no difference betwixt voluntary dispositions, whereupon infeftment followed, and comprisings; as one infeft upon an heritable right might take a gift of a liferent-efcheat, and thereby seclude all posterior infeftments, which were after rebellion; so James M'Lurg might seclude this compriser, who had done no diligence till year and day after the rebellion. THE LORDS did, notwithstanding, prefer Matthew Murray to the donator, and found, That his comprising being within year and day of the first, by the act of Parliament, he comes in *pari passu* with him, as if his comprising had been of that same date; and that the first compriser being infeft within year and day of the rebellion, did exclude all donators from the liferent-efcheat; so that, as to these lands contained in the comprising, the efcheat could not vaik, the King having a vassal; and therefore did find, that they had a like right to the mails and duties, according to the value of their comprisings, the second compriser paying the half of the charges, bestowed by the first compriser, for obtaining infeftment.

Fol. Dic. v. 1. p. 18. Gosford, MS. No 845.

1610. June.

HERRIES against ASLOWEN.

In an action of double pointing, pursued by the tenants of Cluny, against George Herries of Terrachlie, John Aslowen of Garren, and William Glendinning; it was found, That William Glendinning, who had comprised the property of the lands from Terrachie, for the bygones of an annualrent of 50 merks, whereon his author, the Laird of Partoun, was infeft, in anno 1593, by Terrachlie, should be preferred to the said John Aslowen; notwithstanding it was alleged, and instantly

VOL. I.

K k

No 28.

Apprisings and adjudications, upon *debita fundi*, are preferable to all others, prior or posterior.