

(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 infestment followed, and comprisings; as one infeft upon an heritable right might take a gift of a liferent-efcheat, and thereby seclude all posterior infestments, 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 infestment.

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

1610. June.

HERRIES against ASLOWEN.

No 28.

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 Terrachlie, 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

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

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No 28. verified, That, in anno _____, long before the comprising which was deduced in anno 1609 allenary, the said John Aflowen was infeft in the property, and, by virtue of his infeftment, was in poffeffion.

Fol. Dic. v. I. p. 16. Hope, (POINDING & APPRISING.) folio 208.

No 29.

1629. December 9. MONCRIEF *against* L. of BALNAGOWAN.

A COMPRISING for the King's blench duty, found preferable to all infeftments anterior, by difpofition or comprising.*

Fol. Dic. v. I. p. 16.

No 30.

An adjudication, for by-gone feu-duties, was preferred to prior comprisings for personal debts.

1675. July 7. MARGARET SCRIMZEOR *against* the Earl of NORTHESK.

IN a reduction, at the instance of Margaret, as heir to her father, who stood publicly infeft in the lands of Auchmouthie, against the Earl of Northesk, of his right and difpofition, made to him by Patrick Guthrie, who was common debtor, whereupon no infeftment followed until the year 1655; which was four years after the public infeftment upon the pursuer's father's comprising, and so was *a non habente potestatem*, the disponent being denuded: It was *answered*, for Northesk, That the reason was noways relevant; because, albeit his father's infeftment was posterior, yet his difpofition was prior to the comprising, and was granted for the feu-duties of the lands, which was a prior cause, and did affect the same before the pursuer's comprising; feu-duties being *debita fundi*, and a real right which affects the ground against all singular fuccessors. It was *replied*, That the said difpofition did only bear for an onerous cause and relief of cautionry, and not flowing from the superior, either by difpofition or assignation, could not give the defender right to the same; the superior having granted a discharge of the feu-duties, the same was extinct, and could not affect the lands against a singular fuccessor. It was *duplicated*, That the difpofition was affected with a back bond of the same date, bearing, that Northesk's being cautioner for the feu-duties, was the true cause thereof; neither could the feu-duties be said to be extinct, seeing the heritor was not discharged, who was principally liable. THE LORDS, having considered the first reason and reply, did sustain the reduction of the difpofition, as being voluntary, and flowing from Auchmouthie, after he was denuded by comprising, there being no decret obtained, nor the lands affected for the feu-duties; and the Earl of Panmure, as donator, having only granted a discharge, but no affig-

* Lord Kames mentions the above, from the authority of Hope's MS.; stating, that it is under the subject, *Blench Duty*. The Editor has not yet found any such title in the book. The particulars of the case, if afterwards found, will appear in an Appendix.