

No 78. the instance of the compriser, in respect of the long time (*viz.* six years,) that had intervened betwixt the comprising and sasine.

Fol. Dic. v. I. p. 558. Spottiswood, (COMPRISING.)

* * * This case is No 4. p. 6989., *voce* BONA ET MALA FIDES.

No 79.

A posterior voluntary base infestment granted for onerous causes, and clothed with possession, found preferable in a possessory judgment to a prior comprising, in respect the compriser had been *in mora*, by lying out four years without doing any diligence.

1636. March 29. E. GALLOWAY *against* GORDON of Kingstair.

IN a double pouding, both contending who ought to be answered of the duties of the mill of Sorbie, which were comprised *in anno* 1632, by the Earl of Galloway, and who neither had done diligence, nor was infest upon the comprising; and the other party, after perfecting of the Earl's comprising, being infest in the said mill by the common debtor, by a base infestment, for causes most onerous, of debt paid by Gordon for Sorbie; and by virtue of his said infestment, he being in peaceable possession of the mill, and whole duties thereof, two years together uninterrupted, and continually to this year 1636, now controverted, and so they both claiming preference, by reason of their rights foresaid; wherein the Earl *alleged*, that the voluntary deed of the base infestment granted after his comprising, could not be respected, nor no act voluntarily done by the common debtor, who is now, and was then *non solvendo*, for his denunciation was enough to take away all deeds thereafter done by the debtor, in prejudice of his public act of denunciation; and he contended that his comprising, without either diligence or infestment, was sufficient to give him right to the mails and duties. THE LORDS repelled the allegiance, in respect the compriser was neither infest, nor had done any diligence by the space of almost these four years since his comprising, to obtain himself infest, and that he was not yet infest, therefore they preferred him who was infest in this judgment possessor.

Act. Stuart & Nicolson.

Ait. Gilmore.

Clerk, Gibson.

Fol. Dic. v. I. p. 558. Durie, p. 808.

No 80.

A disposition and infestment found to give the benefit of a possessory judgment, though granted after denunciation of an apprising which made the matter litigious.

1668. July 17. Sir WILLIAM STEWART *against* MURRAYS.

Sir JAMES MURRAY his estate being apprised by many of his creditors, Sir William Stewart, one of the apprisers, pursues the rest for count and reckoning of a proportionable part of the rents, in respect that his apprising is within a year of the first effectual apprising, and comes in therewith *pari passu*, by the act of Parliament, 1661, betwixt debtor and creditor. It was *alleged absolutor*, *imo*, Because the pursuer's comprising is incompleat, nothing having followed thereupon now these sixteen or eighteen years; and by the act

of the late Parliament, anent the registration of the allowance of apprisings, that is declared to be a necessary solemnity for all apprisings led since June 1652, and this apprising is not yet allowed. It was *answered*, that by the late act of Parliament, the certification of the want of allowance is not, that the apprising shall be null, but that posterior apprisings, first allowed, shall be preferred; but the act betwixt debtor and creditor brings in apprisings together, deduced within a year, according to their dates, without mention of allowance, and is posterior to the said other act, and cannot be derogated from thereby; nor does the act require infeftment, or any thing else, but takes away the preference of apprisings by the former act, as to such as are led within a year.

THE LORDS repelled this defence, and ordained the pursuer now to allow his apprising, which they found sufficient.

The defender further *alleged absolvitor*, Because the pursuer accepted a disposition from Sir James Murray, the common debtor, of a tenement in Edinburgh, bearing expressly, in satisfaction of his debt, which is now produced by himself. The pursuer *answered*, *imo*, That he was excluded from the benefit of that disposition by eviction, by the Earl of Panmure, who apprised before he was infeft; *2do*, That whatever it bore, it was but truly granted for security; for there is produced an assignation by Sir James, of certain sums to the pursuer, for the same debt, which could never have been, if the first had been made in satisfaction. The defenders opposed the disposition, bearing expressly in satisfaction, the benefit whereof accrescing to them, upon the pursuer's receiving the disposition, cannot be taken from them by any posterior writ of the common debtor; nor are they obliged to dispute whether it was valid or effectual, seeing it was accepted, and the eviction doth not annul the acceptance, but giveth place to the clause of warrandice contained in the disposition, which is personal, and reacheth only the common debtor, and not the defenders; *3tio*, It was the pursuer's own fault that he was excluded, in not infefting himself upon his disposition, which he received before Panmure's apprising. It was *answered*, that he could not compel the superior to receive him, and that the Bailies of Edinburgh required bygone cess and feu-duties to be paid before he was infeft, which he was not obliged to pay, seeing by the disposition he was to be free of all incumbrances. It was *answered*, that the Bailies of Edinburgh refuse nobody, as is known, and these incumbrances were but to be purged by a personal obligement of the common debtors; neither did the pursuer ever give back the disposition.

THE LORDS sustained this defence, and found the receiving and retaining the disposition in satisfaction, sufficient to exclude the pursuer.

It was further *alleged* for Patrick Murray of Deuchar, that he has right to the lands of Deuchar, not only by apprising, but by a voluntary disposition, whereupon he was infeft before the pursuer's apprising, and hath been, by virtue thereof, in peaceable possession these sixteen years, and so hath the be-

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nefit of a possessory judgment, and a prior more valid right. It was *answered*, that this voluntary disposition was granted after the denunciation of the pursuer's apprising; after which, the common debtor could not prefer any other creditor by his voluntary deed; and so the denunciation making the matter litigious, any posterior possession is vicious, and cannot give the benefit of a possessory judgment; neither is the disposition, being after the denunciation, a valid right; but especially it being considered, that the act of Parliament brings in this pursuer with the other prior apprisers, as if they had been in one apprising, and several of the other apprisings are led, and infeftment thereon before the disposition.

THE LORDS sustained this defence, and found that the denunciation did not take away the benefit of a posterior possessory judgment. *See REGISTRATION.*

Fol. Dic. v. I. p. 558. Stair, v. I. p. 553.

* * * Gosford reports this case.

SIR WILLIAM STEWART of Innernytie having comprised the lands of Skirline and Deuchar, belonging to Sir James Murray in *anno* 1654, did intent action against the prior comprisers upon the act of debtor and creditor, he being within year and day of the date of their comprisings, to make count and reckoning of their intromission, that he might come in *pari passu*. It being *alleged*, *imo*, That the pursuer's comprising was null, not being allowed and recorded conform to the late act of Parliament anent registration of comprisings not being brought in to be recorded within sixty days after the date thereof; the LORDS found, that by the said act of Parliament, the comprising was not declared null upon not registration, but thought that before process were sustained thereupon, it should be recorded. *2do*, It being *alleged*, that the pursuer could not make use of that comprising, because he had accepted of a disposition of a tenement of land in Edinburgh, in satisfaction of the debt due to him by Sir James Murray; as likewise of an assignation of a debt due by Innerlieth, whereby he might have been satisfied, if he had done diligence, and whereof he had not offered to make any retrocession; the LORDS found the defence relevant, being proponed for the creditors comprisers, who had done diligence, and will be great losers.

Gosford, MS. No 36. p. 13.

No 81.

1674. July 23.

JOHNSTON *against* JOHNSTON.

DENUNCIATION of apprising makes the subject litigious, after which the debtor cannot make any voluntary alienation in prejudice of the apprising.