1629. *February* 11. FRASER of Techmuiry, Supplicant.

No 28.

A SUPPLICATION was given in by one Fraser of Techmuiry, as heir retoured, by general service, which was produced, to his good-dame called Hay, who had comprised for a debt certain lands pertaining to the L. Philorth; making mention in his bill, that his good-dame the compriser deceased before the said comprising was allowed by the LORDS; therefore he being general heir to her, craved the said comprising, which he produced with his bill, to be allowed by the LORDS, and a command to the superior, to receive him as heir to the compriser, in the comprised lands. The desire of this supplication was granted, and no necessity was found, that the heir should be put to any new process for the effect desired, or that the apprising should be transferred in him, or the party either superior or debtor warned to hear the desire thereof granted, but the same was summarily granted, conform to the desire of the said bill.

Fol. Dic. v. 1. *p.* 471. *Durie, p.* 424.

1630. *February* 27. L. LOCHTOWER, Supplicant.

No 29.

THE Laird of Lochtower gave in a supplication, making mention that he had comprised his debtor's lands, to be holden of a particular person, who was not superior; which comprising was allowed by the LORDS, and charges were ordained to pass, to charge the superior to enter him, albeit he was not superior of these lands, and therefore he craved new charges against another, viz. the Lord Yester, who was the right superior, to receive him thereupon; the desire of this supplicant was granted, and summary charges ordained to be given against him at the compriser's instance, without any further trial, albeit the comprising and prior charges made mention of another superior.

Fol. Dic. v. 1. *p.* 471. *Durie, p.* 496.

1669. *February* 9. BLACK *against* DAVID FRENCH.

No 30.
A superior is not *in culpa* or *in mora* by a charge, until the appriser present to him a charter upon obedience, and offer him some money for his entry, and caution for.

THE lands of Milnburn being holden ward of the Dutchess of Hamilton, after Milnburn's death the Duke and Dutchess grant a gift of the ward to Mr Robert Black, who pursued for mails and duties; and likewise David French having apprised from Millburn, and having charged the Dutchess before Milnburn's death to receive him, he pursues the tenants for mails and duties, who suspend upon double poinding. In the competition it was *alleged* for the appriser, 1*mo*, That his apprising being a judicial sentence, did denude Milnburn the vassal, in the same way as if Milnburn had resigned in the Duke's hands,

No 30.
what farther the Lords should decern.

in favours of David French, after which Milnburn was totally divested, and no casualty could befal to the superior by his death; *ita est* that law hath stated a decreet of apprising in the same case as a resignation accepted; for though the vassal, against whom the apprising was led, should die, the apprizer will summarily upon a charge obtain himself infeft; so that the former vassal was totally denuded. *2do*, Here not only there is apprising, but a charge against the superior, which, *fictione juris*, is in all points, as if the appriser were actually infeft, and therefore the appriser, who first charges, albeit he insist not to use any further diligence, is ever preferred to all other apprizers infeft after. It was *answered* for Black the donatar, that he ought to be preferred, because the superior, who gave his gift, could not want a vassal, nor lose the casualty of his superiority without his own fault; but the appriser did not become vassal, neither by the apprising, nor by the charge, nor was it ever found that the liferent or ward of an appriser fell, unless he had been actually infeft; and it would be of very great disadvantage to creditors, if the naked charge should make their ward to fall, which they may pass from at their pleasure; therefore seeing the appriser could not be vassal, the former vassal behoved to remain vassal; and seeing the superior could not have a ward by the appriser's death, he behoved to have it by the former vassal's death; and albeit the charge be æquiparate to an infeftment, as to the competition of apprisers, whom the superior may not prefer, but according to their diligences, yet it is not holden as an infeftment to any other case; for thereupon the apprizer cannot remove the tenants; neither is the apprising equivalent to a resignation accepted; albeit it being an incomplete legal diligence, it may be completed against the superior after the vassal's death; yet not so as if the superior had received a resignation from the apprizer, which is the superior's voluntary deed; but there is nothing upon the apprizing to force him to give infeftment to the apprizer, until, conform to the act of Parliament, a year's rent of the apprised lands be offered to him, and therewith a charter offered to subscribe; which being done, upon his delay, fault, or contumacy, he may be excluded from the subsequent casualties, and cannot thereby be gainer, in prejudice of the appriser; but otherwise without his fault, he cannot lose the casualties. It was *answered* for the appriser, That the apprising and charge did state the appriser as vassal, and there was no inconvenience thereupon to creditors, more than if they had been actually infeft. *2do*, Our statute hath provided, contrary to the common feudal customs, that superiors must receive strangers, being creditors apprising, for payment of a year's rent, so that the superior can have no more but the year's rent, and not the subsequent ward also; and there being mutual obligations between the superior and the appriser, introduced by the statute, viz, that the superior should receive the appriser, and that the appriser should pay to the superior a year's rent; as in all mutual obligations, so in these, the delay of the one party in performance of his obligation, doth stop the execution, and effect of the other obligation to him, ay and while he perform; but *quando mora purgatur*, by performance of the one party, both obligations are

effectual as *a principio*; and therefore, albeit the appriser had been obliged to pay a year's rent when he were infeft, and did it not the time of the charge, yet now he offers to do it at the bar; *unde purgatur mora*, and the superior must receive him in obedience to the charge; which must be drawn back to the charge, and the LORDS cannot but find the letters, that is to say the charge orderly proceeded; neither can there be any fault in the appriser, that he did not then offer a year's duty when he charged, because it was not liquid nor constant what the year's duty was, and therefore he was only obliged to do it after the liquidation, and modification of the LORDS; and *lastly*, he having proceeded as all other apprisers have done by perpetual custom, he was in *bona fide* to acquiesce. It was *answered* for the donatar, That this former ground holds still good, that the casualties of his superiority cannot be lost to him, without his delay or fault; and the case is no way here as in mutual obligations, but as in a conditional obligation; for the statute obliges the superior to receive the appriser, he paying a year's rent, which being *per ablativum absolute positum*, is ever interpreted as condition, as if it had said, the superior shall receive him if he pay a year's rent; but by the statute there is no obligation put upon the appriser to pay the year's rent, for the payment is in condition, and not in obligation, and the appriser may ever forbear to seek the infeftment, and yet will obtain mails and duties, and so will possess, and exclude the superior, both from the casualties of his superiority, and his year's rent; therefore by the statute there is only a conditional obligation upon the superior, to receive the appriser upon payment of a year's rent; now the nature of all conditional obligations is, *pendente conditione et ante purificationem nulla obligatio*, so that till that time, whatever occurs is freely the superior's; and albeit the LORDS will now, upon offer of a charter, and the year's duty, give a sentence, the ordinary stile whereof is finding the letters orderly proceeded, without putting the appriser to a new charge; yet they do not thereby find, that at the beginning the charge was orderly without the offer, but that now it becomes orderly by the offer, and therefore hath only effect from the offer, and not from the charge, and prejudges not the superior of the ward falling before the offer. 2*do*, The superior at the time of the charge offered obedience, upon production of a charter, and a year's duty to the messenger who charged him, conform to an instrument produced, the appriser himself not having appeared. The appriser *answered*, That the superior ought to have drawn up a charter, and suspended, consigning the charter in the clerk's hand in obedience, to be given up to the appriser after payment of the year's rent, conform to the LORDS modification; and it was not enough to offer obedience to a messenger, or to require a year's rent, which is not liquid but by the LORDS sentence; and further *alleged* that it was lately found, that a liferent escheat falling after a charge, did not exclude the appriser, and there can be no reason, but the same should be in a ward. It was *answered*, that no such practique was produced, nor acknowleged, and that in a liferent escheat, the vassal (against whom the apprising was led) might collude, and

No 30.

No 30. might let himself go year and day at the horn, of purpose to prejudge the appriser; but the ward falling by his death, there is no suspicion of collusion, and the ward is due by the *reddendo* of the charter, but the liferent is only due by an extrinsic law, and custom.

THE LORDS found that the charge did not state the apprizer as vassal, so that the ward would have fallen by his death; neither did they consider the inconveniency of the superior, as wanting the superiorities by both parties, if he were contumacious, *aut in culpa*; but they found that the superior was not in *culpa*, or in *mora*, until the appriser presented to him a charter upon obedience, and offered some money for his entry, and caution for what further the LORDS should decern; and did not find the superior obliged to require the vassal so to do; and therefore found the superior here, not in *mora aut culpa*; and found the ward to belong to him, and preferred the donatar, and declared they would follow it as a rule in all time coming. See NONENTRY. VASSAL.

Fol. Dic. v. 1. *p.* 471. *Stair, v.* 1. *p.* 599.

*** Gosford reports this case:

IN a double poinding raised at the instance of the Tenants of Milnburn against Duke Hamilton and his donatar, of the ward and marriage of this young Laird of Milnburn, and the comprisers of the lands of Milnburn, by the creditors of Milnburn's father, it was *alleged* for French, one of the comprisers, That not only he had led a comprising, which was allowed, but he had likewise charged the Duke and Dutchess of Hamilton to enter him. To this it was *answered* for the superior, That a naked charge, without doing further diligence, did not prejudge the superior nor his donatars of the ward and marriage that fell to them thereafter, by the decease of their vassal; seeing the naked comprising and charge did not denude the vassal of his property; and consequently, by his death, the ward and marriage of his heir did belong to the superior; neither could it be craved upon that account, that the superior was *in mora* in not obeying the charge, in respect that neither there was a year's duty offered, which is due by the law, nor a charter presented. THE LORDS did find that the Duke and Dutchess ought to be preferred during the ward, and did declare that they would make it a leading case, that a superior being charged, could not be prejudged of the subsequent ward unless a year's duty were offered, or surety therefor, and a charter presented, or otherwise that he were denounced upon the charge, and thereupon the compriser entered by his superior: Notwithstanding it was *alleged* for the comprisers, That the decreet of comprising did denude the vassal, and the charge not being suspended, did take away from the superior all subsequent benefit of a ward, as well as the liferent escheat of the vassal falling after the simple charge, as had been decided before in other cases; and that a compriser having charged would be preferred to a second compriser, who was infeft by the superior, and would be preferred to him as to

all ward: For the LORDS found that there was a great disparity betwixt these cases, seeing a liferent escheat did only belong to the superior by the law, upon the vassal's rebellion, which was not so favourable, against a lawful creditor doing diligence; but the right of ward did belong to him by the *reddendo* of the vassal's charter, which could not be taken from him, unless he had received a new vassal, or that complete diligence had been done against him, at least that the compriser had offered *quod de jure facere tenetur*, without which he was not obliged to infeft him. Likeas in this case there was this specialty, that the Duke did offer to the messenger to infeft, being paid of a year's duty, and thereupon took instruments; and to the preference of the first compriser who had charged, to the second, who was infeft, they found the reason to be that it ought not to be in the power of the superior to prefer one creditor to another, seeing by collusion he might do the same, which did not meet the foresaid case. No 30.

Gosford, MS. No 111. p. 40.

1681. *February* 3. KERR *against* HENDERSON.

HARRY KERR as donatar by the Earl of Roxburgh, of the nonentry of some lands holden of the Earl of Roxburgh by Henderson, pursues declarator. The defender *alleged* absolvitor, because he is an appriser, and hath charged the superior to enter him upon an apprising before this pursuit. It was *answered*, *Non relevat*, unless he had offered to the superior a year's rent, with a draught of a charter to be signed, as was found in the case of Black donatar to the Duke of Hamilton against Hamilton of Milnburn, No 30. p. 6511, in the case of ward, which is a much heavier burden than the non entry, which reaches only the retour-duties by this declarator.

THE LORDS found the charge alone, without offering a year's rent, either of land or money, did not exclude the nonentry. **No 31.** Found in conformity with the above.

Fol. Dic. v. 1. p. 471. Stair, v. 2. p. 852.

*** Fountainhall reports the same case:

HENRY KER against Alexander Henderson, a pursuit of nonentry. *Alleged*, He bruiked by a comprising on which he had charged the superior. THE LORDS found the charge did not stop the non-entry except a year's rent had been offered to the superior.

Fountainhall, MS.

*** The like was decided 26th June 1681, Oswald against Cathcart, No 8. p. 5116. *voce* GIFT OF NONENTRY.