

(RANKING OF ADJUDGERS AND APPRISERS.)

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was not excluded, but behaved to be in the same case, as if it had been after: But found, That the other apprisers, before they came in, behaved to satisfy the composition proportionally by the tenor of the act. (See RIGHT IN SECURITY.)

Fol. Dic. v. 1. p. 17. Stair, v. 1. p. 162.

1671. July 4.

LAIRD OF BALFOUR *against* MR WILLIAM DOUGLAS.

No 9.

The coming
in *pari passu*,
calculated
from the date
of the appri-
sing, not of
the infest-
ment.

THE Earl of Airlie's estate being apprifed by Mr William Douglas since 1652, after the legal was expired, Mr William was infest; and, after his infestment, the Laird of Balfour apprifed the same land, and thereupon pursued the tenants for mails and duties. It was *alleged* for the first apprifiser, that he must be preferred; *imo*, Because he has the only right, having an apprifing expired, and infestment thereon, before the pursuer's apprifing was led, so that *eo momento* that he was infest upon his expired apprifing, the common debtor was fully denuded, and there was no right of reversion, or any other in his person that could be apprifed thereafter. It was *answered*, that by the act of Parliament 1661, between debtor and creditor: It is provided, that all apprifings led within year and day of the first effectual apprifing, shall come in therewith *pari passu*; and therefore, the pursuer having apprifed within year and day after the first apprifiser's apprifing became effectual by infestment, he must come in with him *pari passu* by the said act, which makes no difference of expired, or unexpired, apprifings; and, by that same act, the debtor is not so denuded by the expiring of the legal and infestment, but that year and day is still allowed to subsequent apprifisers, which, in effect, is a prorogation of the legal as to con-creditors. It was *answered*, that the act of Parliament is opposed, bearing that apprifings before, or within year and day after the first effective apprifing shall come in *pari passu*, as if one apprifing had been led for all, which necessarily imports the calculation of the year to be from the date of the first effective comprifing, and not from the date of the infestment or diligence; for the coming in, as if one apprifing had been for all, must relate to the decret of apprifing, which, as it is clear by the letter of the statute, so also by the narrative and motive thereof, bearing that creditors did not know the condition of their debtor's estate, which might be apprifed before they could do diligence; whereas, before, they had only the benefit of reversion, for remedy whereof, the Parliament brings in all apprifings that are before, or within a year after the first effectual apprifing, which before would have carried the sole property, and *fictione juris*, states all these apprifings as led in one day, so that the remedy is sufficient, by having a full year after the date of the apprifing, and correctory statutes are to be strictly interpreted; and, if the date of the diligence be the rule, an apprifing, after twenty years, might be brought to admit a new one deduced after all that time, and not only so, but the mails and duties would belong proportionally to the last apprifiser, for twenty years before

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it was led. It was *answered*, that the year indulged by this act of Parliament to con-creditors, must be from the time the apprising is effectual, for the words of the statute bear all apprisings before, or within a year after, the first effectual comprising, &c. so that the year must not run from its being an apprising, but from its being an effectual apprising; and so from the infestment or diligence; neither is the inconvenience shunned otherwise, for the only way then known for publication of real rights, was the register of sasines, and not the register of the allowance of apprisings, which is only made necessary by an act since, and it is very easy to make similar executions of apprisings, by taking away the copies of denunciation of the ground, and citation at the dwelling house of the debtor, but if once a sasine be in the register, all provident men take notice thereof, and albeit a charge be sufficient instead of a sasine which is not regiftrate, yet the ordinary way of completing apprisings, which the law notices, is infestment; and seeing apprisings are now rigorous rights, carrying any estate without consideration of the value, acts correctory of them ought to be extended *ex equo*, and the more ways con-creditors have for getting notice of the apprising of their debtor's estate the better; neither are the evil consequences, upon the other hand, of any moment; it being the first apprifer's fault (if not his fraud) that he obtains not infestment, nor does diligence therefor; for he may of purpose ly dormant, not only till year and day run, but until the legal expire, and thereby cut off the diligences of all other creditors; as in this very case, the irredeemable right of an earldom shall be carried for L. 1500, and all the other creditors excluded, so that the apprising is so far from making the case better, that it makes it much worse, as latent and fraudulent; for it cannot be imagined, that if the second apprifer had known that the first apprising was led, but that he would have used diligence within the year, at least within the legal; for so soon as he saw a sasine in the register, he did immediately apprise.

THE LORDS preferred the first apprifer, and excluded the second; and found, that the year is to be reckoned from the date of the first effectual apprising, and not from the diligence, whereby it becomes effectual. In this process, the LORDS sustained this reply, that the first apprising was for the behoof of the common debtor, or his eldest son; and that they would purge the same, by payment of what sums were truly paid for it to the apprifer, according to the said act of Parliament 1661, without any reduction or declarator.

Fol. Dic. v. 1. p. 17. Stair, v. 1. p. 747.