

(RANKING of ADJUDGERS and APPRISERS.)

infest upon his adjudication, must have been preferred to his competitors, none of whom were infest.

No 25.

Select Dec. No 99. p. 136.

1679. November 7. STRAITON against BELL.

JOHN STRAITON having adjudged certain tenements in Edinburgh, from the apparent heir of James Bell, pursues the tenants for mails and duties. Compareance is made for Gilbert Bell, who had comprised the same tenements from the same apparent heir, and thereupon was infest, and in possession; and thereupon alleges preference, because albeit Straiton's apprising be prior to his, yet Straiton was never infest.—It was answered for Straiton, That Carnegie was the first appriser, and infest; and that Straiton had adjudged within year and day after Carnegie's apprising, and so needed no infestment to complete his right: But by the act of Parliament 1661, between Debtor and Creditor, it is declared, That all apprisings or adjudications within year and day of the first effectual apprising, shall come in *pari passu*, as if one apprising had been led for them all.—It was replied, That this clause being correctory of the ancient law, whereby the first appriser being infest, excluded all the rest from mails and duties, until they redeemed the first, it doth only bring in posterior apprisers, as to mails and duties, but cannot make the rights real without infestment; *nulla salsina, nulla terra*; so that though they might defend thereupon against the first appriser, claiming the whole duty, yet they cannot against a third party; and here the first appriser is not competing, nor cannot, because his apprising is extinct by intromission, and consequently his infestment; and therefore it cannot stand as an infestment, neither to the first appriser, nor to any other.—It was answered for Straiton, That he opposes the clause of the act of Parliament, bringing in all the apprisers within year and day, as if one apprising had been led for all: In which case the infestment would have been an infestment upon all the apprisings; and therefore, though the first apprising were extinct, the rest stood valid, or otherways that clause would be elusory, and no posterior appriser could rest upon it, seeing he could not know how or when the first appriser might be satisfied; and as law makes a charge as effectual as an infestment, so the act of Parliament might declare apprising within a year to be effectual without infestment; which it hath done in another way, by declaring all these apprisings to be, as if one apprising had been led for all.

THE LORDS found, That Straiton's adjudication being within year and day of the first effectual apprising, the infestment was equivalent, as if it had proceeded upon Straiton's adjudication; though the first apprising was satisfied by intromission, yet the infestment was not extinct *simpliciter*, but as to the first ap-

No 26.

Infestment upon the first apprising, is communicated to all within year and day.—*Inde*, a second not infest, but within year and day, is preferable to a posterior, not within year and day, though infest.

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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.