

(RANKING OF ADJUDGERS AND APPRISERS.)

No 10.

1678. July 27. RICKARTON *against* COUNTESS OF TRAQUAIR.

THE LORDS found, The coming in of posterior comprifings *pari passu* with the first, must be calculated year and day from the date of the first apprising, and not from the date of the infeftment\*.

*Fol. Dic. v. 1. p. 17. Fount. v. 1. p. 12.*

1705. December 27.

FOTHERINGHAM of Balandean, *against* MARGARET BUTTER.

No 11.

An adjudger, though not within year and day, having charged the superior, admitted *pari passu* with a prior adjudger, who obtained a charter before the charge, but omitted to take infeftment till long after.

IN the competition for the mails and duties of Buttergask, Fotheringham of Balandean, and others, having produced the first adjudication, Margaret Butter was admitted *pari passu*, in respect that she produced a charge against the superior: but a petition was presented by Fotheringham, and others, craving preference, in respect they produced a charter from the superior, prior to the charge whereupon their author stood infeft.

It was *answered*: The charter was, indeed, dated the 1st of December 1694, three or four months prior to the charge on Butter's adjudication: but the infeftment did not follow till the 15th of May 1697, above two years after the charge. And seeing the obtainers of the charter were not careful to complete the same by sasine, which only gives a real right to the lands adjudged, the charge is a legal and complete diligence of its own nature, as effectual as if infeftment had followed of that date, or so soon as it could have been expedite. If the superior had given a charter, then the superior's partiality, in granting a charter to one comprifing, and refusing it to another, cannot prejudice the creditor who charged, seeing the obtainer of the charter did not complete it till two years after the charge.

'THE LORDS adhered to their former interlocutor, admitting the last adjudger *pari passu*, in respect of the charge, and the first adjudger's negligence.'

*Fol. Dic. v. 1. p. 17. Dalrymple, No 69. p. 89.*

\* \* Lord Fountainhall thus states this case:

IN a competition for the mails and duties of the lands of Walton of Blair, betwixt Margaret Butter, relict of William Haliburton, and Fotheringham of Balandean, and others, she craved preference on her adjudication; because, in the terms of the 62d act, parl. 1661, her author had first charged the superior to in-

\* The names of the parties are not in the printed copy of Fountainhall.

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feft her, which, by the current of decifions fince, has been fufained to make it the firft effectual apprifing, or adjudication. *Answered*, for Fotheringham, That he had obtained a charter from the Earl of Strathmore, fuperior, three months prior to your charge; and, though I be not infeft till after it, yet my diligence, being completed by infeftment, will always be preferred to you, who have refted on a naked charge, and proceed no farther. *Answered*, Though your charter be prior to my charge, yet the fafine taken thereon is two years pofterior; and fo there being fo vifible a ceffation and delay in perfecting the right, I muft be preferred. THE LORDS confidered, if there had been but the intervention of a few days, or weeks, betwixt the charter and fafine, that a charge coming betwixt might have had the lefs to plead; but there being a *mora* of two years, the obtainer of the charter was plainly negligent; and, therefore, found her the firft effectual adjudger, but brought Fotheringham in *pari paffu* with her; for our law feems to require no more diligence at apprifers' or adjudgers' instance, within the legal, but only a charge againft the fuperior. But the queftion occurred, this fame feffion, in the cafe of one Grant, a wright in Edinburgh, if, after the legal is expired, a fimple charge againft the fuperior can compete with an actual infeftment, expedite on an adjudication or comprifing; and what the effect and import of fuch a charge is within the legal, for making a rule in time coming in all fuch competitions.

*Fol. Dic. v. 1. p. 17. Fount. v. 2. p. 303.*

1695. January 31.

DEWAR *against* FRENCH.

WHITELAW reported the competition between Mr David Dewar, advocate, and David French, writer, anent Major Arnot's wadset on Lovel of Cunnochie's lands. THE LORDS found Dewar's adjudication null, and would neither fuftain the one extract nor the other, becaufe both of them laboured under nullities and defects; the one omitting the deducing of the bond, at leaft having it interlined; the fecond not decerning the tutors and curators, and not mentioning the charge to enter heir. But fome of the Lords thought he might yet be allowed to extract a formal decret from the warrants, feeing French was then Mr Dewar's fervant and trustee, and fhould have obviated thefe nullities. But this point was ordained to be further heard.

The competition between Mr David Dewar and David French, was reported on 6th December. They were both adjudgers of the eftate of Cunnochie, from Major Arnot, who had right thereto by difpofition from John Scot, but was not infeft thereupon. David French had both a fufpenfion on multiple-poinning, and a reduction, and craved to be preferred to Mr David, albeit his adjudication was feveral years pofterior, becaufe Mr David's proceeded only upon a general charge againft the Major's heir, which did not fufficiently denude him, whereas he had likewife raifed a fpecial charge; likeas he was firft infeft, in fo far as he had perfected

No 11.

No 12.

Adjudgers of a difpofition, with procuratory and precept, but no infeftment, ranked *pari paffu*; the one having taken infeftment, the other not.