No 31. for the bygones of the annualrent, more than for the principal ſum; and ſeeing Roſehaugh, as an adjudger, will be after all the real creditors, he can have no benefit thereby, as was found, the 22d of December, 1671, Campbell againſt ——. Stair, v. 2. p. 33. *See* RIGHT in SECURITY.

'THE LORDS found, That the adjudication being upon the perſonal obligement, 'and not upon the poinding of the ground, the ſame had no privilege to be 'drawn back as to the annualrents; but that he was only to be ranked there-'upon amongſt the other adjudgers.'

Fol. Dic. v. 1. *p.* 16. *Dalrymple, No* 12. *p.* 16.

1720. *June* 23.

Competition BARCLAY of Towie, with the other CREDITORS of Crimonmogat.

No 32.
Adjudgers within year and day, brought in *pari paſſu* after expiry of the legal, as well as before.

THE lands of Crimonmogat, belonging originally to John Hay, were appriſed by Peter Meldrum in the 1654, and in the ſame year by Towie's grandfather; and Peter Meldrum ſtands infeft on his appriſing under the Great Seal. Meldrum the appriſer, in the 1675, diſponed to Mr William Hay, who was infeft in the 1677, upon Meldrum's reſignation. Mr William Hay, or his ſon, contracted debts, whereupon diligence going on againſt him, there enſued a ranking and ſale of the eſtate: In which proceſs, compeared Towie, and craved preference upon his grandfather's appriſing, which had been long neglected, through the misfortune of ſucceſſive minorities of his grandfather, mother, and himſelf; and his ground of preference was, that the creditors their rights depended upon Peter Meldrum's appriſing, who was their original author; and that Towie had right to come in *pari paſſu* with this appriſing, as being within year and day thereof.

The creditors *pleaded*, That Towie's appriſing never being completed by infeftment, claiming only upon the act 1661, the benefit of Meldrum's appriſing and infeftment, cannot now, ſo long after the expiry of the legal, compete with ſingular ſucceſſors, poſſeſſing by heritable rights conveyed from the firſt effectual appriſing, whereupon infeftment had followed.

It was *alleged* for Towie, That the infeftment on Meldrum's appriſing, was, by the law, juſt one, as it had been upon his own; in which caſe, the competing creditors could not controvert, that he would come in equally with them, notwithſtanding of their deriving abſolute real rights from Meldrum; who could give none better than he had, ſince the Lords have found, that the right was not excluded by preſcription.

It was *anſwered* for the creditors, That the act 1661, was only intended to regulate the competitions of appriſers during the legal; and that the nature of the right, after the legal, or the conſequences thereof, was noways altered, but left *in ſtatu quo prius*: So that whoever is found to have the firſt infeftment, after expiry of the legal, whether led during the currency, or thereafter, has thereby an abſolute title of property, excluſive of all the other adjudications, though led

within year and day: Which ſeems plain from the act 1661 itſelf, particularly the preamble of the clauſe, which gives the reaſons for the ſtatutory part: A creditor living at a diſtance, was prevented by the more timeous diligence of other creditors; ſo that the preference depended upon mere chance, and not upon the negligence of the other creditors; this is regulated, by preferring *pari paſſu* all creditors doing the ſame diligence within year and day. The preamble further ſays, "That poſterior comprifers had only right to the legal reverſion, which does often prove ineffectual to them, not being able to redeem within the legal." Here the time during the currency of the legal is only in view; the inconveniencies ariſing to creditors during that time, is the motive of the ſtatutory part, and theſe are effectually prevented, by giving opportunity to the co-appriſer, to recover his payment within the legal, or to do ſuch diligence as may prevent the expiring thereof; which, without uſing orders or declarators, he may do by a ſimple ſuſpenſion, or ſummons of multiplepoinding, where the creditors will be obliged to produce their intereſts; and this continues the legal, at leaſt prevents one creditor's taking advantage of another upon the expiration. No 32.

Replied for Towie, That an infeftment upon an appriſing, after expiry of the legal, is no more excluſive of other appriſings, than during the legal. It was never before queſtioned, but that infeftment *quandocunque* taken, did accreſce to the remanent appriſers within year and day: As, for example, three perſons appriſe or adjudge, but the laſt without year and day of the firſt; if the firſt ſhall infeft after expiry of the legal, it will accreſce to the ſecond, in excluſion of the third; and yet, if the third ſhould firſt infeft, though the legal of the firſt be expired, they will all come in *pari paſſu*; becauſe, by the act of Parliament, the laſt is the firſt effectual: For the law conſiders not whether the appriſing be expired or not, but in general the firſt effectual appriſing; and, if the appriſing be not made effectual till after expiry of the legal, ſtill, as to all appriſers and adjudgers within year and day, it is a right to be communicated. And here is the miſtake of the creditors; an appriſing after expiry of the legal, even without infeftment, turns to be a right of property in a queſtion with the debtor; but, in competition with co-appriſers, they are no more but ſo many ſeveral creditors *miſſi in poſſeſſionem*, and by the law, the deed of one accreſces to the reſt; eſpecially as to the matter of their infeftment, which, by the ſtatute, is deſigned to be a common right: And, if it were otherwiſe, the inconvenience would be great; for whereas, now adjudgers often reſt upon a charge againſt the ſuperior, or infeftment taken by any of their number, every one for their ſecurity, behoved to take charters, during the legal, for themſelves; ſince otherwiſe they would be cut off by the firſt infeftment that ſhould exiſt after the legal, which would create the utmoſt expence.

It was *urged* for the creditors in the *ſecond* place, That if Towie prevail, it ſhall then be unſafe to purchaſe from any who has right by appriſing, or even from perſons who have abſolute rights; becauſe perchance ſome time or other they might have been founded on compriſings: Now the great deſign of our lawgivers

No 32. all along has been, to make onerous purchasers secure in all events; which, in a great measure, must be disappointed, if Towie's apprising be sustained, there being no records to show incumbrances by apprisings.

To which Towie *answered*, *Incommodum non solvit argumentum*; no law can be made so perfect to meet every inconveniency: But if this argument obtain, then apprisings hereafter, in the persons of singular successors, shall not be reducible upon nullities, or even upon payment made to the disponer. But the answer is obvious; every one who purchases upon an apprising, has an open intimation made to him, that he is purchasing *cum periculo*, and particularly with this, that he may have competing apprisings; it is a rare example, that an estate is carried off without more than one: So that the very nature of the right speaks loud to him, without another certification. Besides, our law has afforded public records, whence purchasers may be certified of apprisings; for by the act 1661, allowances are introduced; and before that time, as appears by that statute, apprisings were in use to be fully recorded and registered, which was a full notification.

"THE LORDS found, That the privilege introduced by the act of Parliament 1661, in favours of adjudgers, before, or within year and day of the first effectual apprising, is competent to the said adjudgers, before, or within year and day, against the singular successors of the first effectual appriser, as well after the expiry of the legal, as within the same."

Fol. Dic. v. 1. *p.* 20. *Rem. Dec. v.* 1. *No* 19. *p.* 40.

1665. *January* 7. GRAHAM of Blackwood *against* BROWNS.

No 33.
Manner of proportioning rents and expences among apprisers.

JOHN and William Browns having apprised certain lands, and William Graham having apprised the same, within a year after, pursues an account and reckoning against the first appriser, upon the last act of Parliament, betwixt Debtor and Creditor; and craves to come in *pari passu* with the first appriser, not only as to the mails and duties of the lands, intromitted with by the appriser, since the said act of Parliament; but also for those duties that were intromitted with before the said act; and that, because the act bears expressly, That such apprising shall come in *pari passu*, as if there had been one apprising led for both. It was *answered*, for the first appriser, that what he did uplift *bona fide*, before any process intented against him, at this pursuer's instance, he cannot pay back a part thereof to the pursuer; because he is *bona fide* possessor, and because the act of Parliament bears, That such apprisings shall come in *pari passu*; which, being in the future, must be understood to be from their intenting of process, at least from the date of the act, but not from the beginning.

THE LORDS having considered the tenor of the act of Parliament, found that such apprisings should only come in *pari passu*, from the date of the act; but that the bygones uplifted by the first appriser, before the act, should be account-