(RANKING of ADJUDGERS and APPRISERS.)

No 24.
Posterior apprisings do not rank *pari passu* among themselves; but are preferable according to their dates.

1675. *July* 12. DAVID BOYD *against* ROBERT MALLOCH.

IN a pursuit at David Boyd's instance, as having right to a comprising of the liferent of the Lady Barefoot, and led at the instance of George Grahame against Robert Malloch, as having right to several comprisings led against the said Lady's liferent; it being found, that the first comprising, which was two years before Bailie Boyd's, being satisfied by intromission, the defender might count and reckon, and make payment of his intromission, by virtue of a second apprising, as being posterior to the pursuer's:—It was *alleged* for the defender, That he ought to be preferred, at least, ought only to account for the half of his intromission; because, albeit his comprising was posterior in date, yet it was first allowed by a deliverance, and so was the first complete right; and albeit this should not be sustained; yet it being dated within a month of the pursuer's comprising, by the act of Parliament, they ought to come in *pari passu*, being within year and day.—It was *replied*, That the leading of the comprising, and the subscribing thereof by the judge and clerk, makes the same complete; and albeit the allowance thereof be posterior to the defender's allowance in the comprising, it operates nothing to derogate from the priority, according to the date; neither can the defender's apprising, as being within year and day, come in *pari passu*; because, by the last act of Parliament, that privilege is only granted to all comprisings led within year and day of the first effectual comprising by infeftment, which being the defender's first comprising, which is satisfied by intromission, and which is two years before both the comprisings now in question, they ought to take effect without regard to the act of Parliament, according to their priority and date.——THE LORDS did repell the defence, and preferred David Boyd; and found, That the allowances of comprisings, by the Lords' deliverance, were not necessary nor essential to the compleating thereof; seeing, if it carry only a reversion to redeem a prior comprising, there needs no deliverance, which is only necessary for obtaining letters to charge the superior to infeft; and likeways they found, That the privilege of comprisers to come in *pari passu*, can only be craved where they are within year and day of the first effectual comprising; but if that be purged by the common debtor, as extinct by intromission, then all other comprisings, which are after year and day, are preferable according to their dates, and law and custom before the act of Parliament.

Fol. Dic. v. 1. *p.* 18. *Gosford, MS. No* 789.

No 25.
Adjudgers without year

1756. *January* 27. RANKING of the CREDITORS on the Estate of Tulloch.

IN the year 1736, Margaret Bayne, a creditor of Bayne of Tulloch, adjudged his lands of Tulloch, and was infeft in April 1740.

(RANKING of ADJUDGERS and APPRISERS.)

From July 1745 till November 1747, four other adjudications were deduced; but no infeftment followed on them.

No 25. and day of the firſt effectual adjudication, are ranked according to their dates, without regard to their infeftments.

In December 1747, the truſtees of Andrew Drummond adjudged the ſame eſtate, and on their adjudication were infeft.

In the ranking of the creditors, on a judicial ſale of the lands of Tulloch, it was allowed that Margaret Bayne was the preferable creditor; but a diſpute aroſe for the next preference, betwixt the four next adjudgers and the truſtees of Drummond.

The queſtion came to be, Whether in adjudications, without year and day of the firſt effectual one, the next adjudgers not infeft, or adjudgers after them being infeft, ought to be preferred?

Pleaded for the adjudgers infeft: The effect of the firſt adjudication and infeftment is not to denude the debtor of the property of the lands under redemption, but only to give the creditor a *pignus prætorium*, or right in ſecurity: An adjudication creates not a transfer of the property, but only an incumbrance on it; conſequently one cannot be fully diveſted but by infeftment; and therefore the laſt adjudgers firſt infeft muſt be preferred.

The general rule of the law of Scotland is, That in land-rents which are completed by infeftment, the firſt infeftment is preferable, even where the diſponer himſelf has only a perſonal right to the lands, and may appear to have been denuded of that perſonal right by his diſpoſition; yet his laſt diſponee laſt infeft is preferred to his firſt diſponee not infeft: In adjudications, which are only legal diſpoſitions, the ſame rule ſhould take place.

Pleaded for the adjudgers not infeft: An adjudication is not a *pignus pretorium*; on the contrary, in its origin in the ſtatutes of Alexander II. and James III. it was ſimply a ſale at a price, under a faculty of redemption, competent to the debtor within ſeven years.

In conſequence of this, the debtor being denuded of his right to his lands, in favour of the firſt adjudger, by charter and ſaſine, and nothing remaining with him but a right of reverſion, this right of reverſion is carried by a ſecond adjudication, as effectually without infeftment as with it.

When a debtor is denuded of a part of his lands by infeftment upon a proper wadſet, the right of reverſion, which remains with him, is fully carried by adjudication without infeftment; adjudications are legal conveyances under reverſion. The ſame rules, then, which apply to the reverſion of other redeemable ſales, or wadſet rights, apply to them.

The argument for the adjudgers not infeft, is ſtrengthed by expediency: For if every creditor without the year was obliged to take a new infeftment from the ſuperior, to prevent his being cut out by the ſubſequent diligence of other creditors, the burden upon creditors would be increaſed, and their fund of payment leſſened.

(RANKING of ADJUDGERS and APPRISERS.)

No 25. 'THE LORDS preferred the ſimple adjudications without infeftment, according their dates, notwithſtanding the infeftment upon the adjudication at the inſtance of Drummond's truſtees.'

Reporter, *Kames*. For the Truſtees, *Lockhart*. Alt. *Ferguſon*. Clerk, *Kirkpatrick*.

Fol. Dic. v. 3. *p.* 14. *Fac. Col. No* 180. *p.* 267.

*** In Lord Kames's Select Deciſions, the caſe is mentioned thus:

IN the year 1736, an adjudication was deduced of the eſtate of Tulloch, for the accumulate ſum of L. 9000 Scots; upon which Kenneth M'Kenzie of Seaforth obtained charter and ſaſine in the year 1744. This was admitted to be the preferable adjudication. None were led within year and day, nor for ſeveral years after. The ſecond adjudication is dated the 20th July 1745; after which, four follow in the year 1747, one in July, two in November, and one in December. The laſt mentioned adjudication was for a great ſum due to Mr Andrew Drummond banker in London, who being the lateſt, found it neceſſary to proceed to complete his adjudication by infeftment.

Theſe diligences being all produced in the ranking of the creditors of Tulloch, there was no oppoſition made to the preference of Seaforth's adjudication, which was acknowledged to be the firſt effectual adjudication, and no other within year and day. The other adjudications, being without year and day, did not come under the regulation of the act 1661, ranking adjudications *pari paſſu* which are within year and day of the firſt effectual. It was admitted on all hands, that the ranking of theſe adjudications muſt proceed upon the principles of the common law, as if the act 1661 had not been made; and the queſtion was, What muſt be the rule of preference? Mr Andrew Drummond pleaded a preference upon his infeftment, none of the other adjudgers being infeft. They, on the other hand, inſiſted for a preference, each of them according to their dates, upon this ground, That an adjudication is a judicial ſale under reverſion: That Tulloch accordingly was denuded of his property, which was effectually conveyed to M'Kenzie of Seaforth the firſt adjudger, who was infeft: That nothing remained with the debtor but a perſonal reverſion, which was effectually carried by the ſecond adjudication, without neceſſity of infeftment, and indeed without poſſibility of infeftment; becauſe a perſonal reverſion, which is the ſubject carried by the adjudication, admits not of infeftment. Following out the ſame train, the third adjudication carries nothing but the reverſion of the ſecond, and ſo on. In this view, the infeftment taken by Mr Andrew Drummond is altogether inept; and the whole adjudications engaged in the preſent competition muſt be preferred each of them according to their dates.

To this reaſoning it was *anſwered* for Mr Drummond, That an appriſing, which was originally a judicial ſale under redemption, was, by act 6, Parl. 1621,

degraded to be a judicial ſecurity. By intromiſſion during the legal, with as much as ſatisfies firſt the intereſt and then the capital, an appriſing is, by this ſtatute, declared extinguiſhed *ipſo facto*; which is agreeable to the nature of a judicial ſecurity, but inconſiſtent with a ſale under redemption. Accordingly, from the period of this ſtatute, when an appriſing or an adjudication is found ſatisfied by voluntary payment, or by intromiſſion with the rents, it is not found neceſſary that the land ſhould be re-diſponed to the debtor, nor that the debtor, upon his right of reverſion, ſhould uſe an order of redemption. No 25.

It may be true that our later writers, careleſsly uſing the language of the old law, talk ſometimes of the reverſion of an appriſing, and that poſterior appriſings require not infeftment, becauſe they carry only a right of reverſion. Lord Stair, in particular, ſometimes expreſſes himſelf in this manner. But he talks a very different language where it is his profeſſed purpoſe to explain the nature of an appriſing. He ſays, in the cleareſt terms, b. 3. tit. 2. § 38. of his Inſtitutes, 'That appriſing is but a legal diligence for ſecurity of the ſum, which ceaſing, it falleth 'without other ſolemnity, and the debtor's own infeftment ſtands valid without 'renovation; with which the infeftment upon the appriſing ſtood but as a pa-'rallel right for ſecurity.'

It was *replied* for the other adjudgers, That it was not the intention of the act 1621 to alter the nature of an appriſing; but merely upon a principle of equity, to oblige appriſers to account for intromiſſions, who, graſping at exorbitant advantages, were in uſe to appriſe the debtor's whole lands, without regarding the diſproportion betwixt the debt and the ſubject attached for payment. There is not the leaſt inſinuation in the act, that it was the intention of the legiſlature to introduce a new ſpecies of appriſings; and what is done by the act is conſiſtent with their nature as a judicial ſale. A proper wadſet held of the ſuperior is, in the ſtricteſt ſenſe, a ſale under reverſion; and when the lands are redeemed, a new infeftment is neceſſary to reinſtate the reverſer in his property. At the ſame time, if a creditor, graſping at exhorbitant profit, wreſts from his debtor a proper wadſet, with rigorous and uſurious clauſes; ſuch wadſet will be conſidered as improper, and a right in ſecurity only, which will be extinguiſhable by intromiſſion, without putting the reverſer under a neceſſity to take a new infeftment. The caſe is much the ſame with an appriſing or adjudication where there is no proportion betwixt the debt and the ſubject attached. Every diligence of this kind will ſo far be conſidered as a right in ſecurity only, that it will be extinguiſhed by intromiſſion, and put the debtor under no neceſſity to take a new infeftment. But however diſproportioned the debt may be to the ſubject, yet if the creditor, wanting no exorbitant profits, abſtain from the poſſeſſion, ready every hour within the legal to take the ſum due to him; he is in that caſe entitled to uſe his adjudication as a judicial ſale, and to lay hold of the property after the legal is expired. One thing is certain, that the act 1621 applies not to this caſe, but ſolely to the caſe of intromiſſion. And therefore, without diping ſo far into the argument as is done

No 25. above, it may be juſtly argued, that ſuppoſing, that by the force of the act 1621, intromiſſion converts an adjudication into a right in ſecurity, it by no means follows, that an adjudication muſt be a right in ſecurity where there is no intromiſſion.

" THE LORDS were generally of opinion, That the nature of an appriſing was not altered by the act 1621, eſpecially where there is no poſſeſſion, as in the preſent caſe; that after Seaforth was infeft upon his adjudication, nothing remained with Tulloch the debtor, but a perſonal reverſion, which is not capable of infeftment; and upon this preciſe ground the competing adjudications were ranked according to their dates; and conſequently Mr Drummond's adjudication *ultimo loco*, though infeftment was taken upon it."

This is one of thoſe intricate points which are not yet finally adjuſted upon principles of law or utility; and where, of conſequence, the Court leans ſometimes to one ſide, and ſometimes to another, according to the equity of the particular caſe in which this point happens to be diſputed. In the preſent caſe, every collateral conſideration inclined the Court to the judgment that was given. An argument, from expediency, moved them not a little; namely, the hardſhip of obliging every adjudger without year and day of the firſt effectual one to take infeftment; hard upon the creditors, and ruinous to the debtor. And it moved them alſo, that after the eſtate is totally exhauſted by adjudications, it ſhould be in the power of a creditor for a great ſum, coming long after the reſt, to ſweep the ſtakes merely by taking infeftment. I am apt to believe, that had the favour lain on the other ſide, the Court would have been more divided about the preſent point. And indeed, after all that is ſet forth above, many difficulties occur to me; one of which I ſhall ſtate, becauſe, as far as I can ſee, it appears unſurmountable. An adjudger takes infeftment, but forbears intromiſſion, waiting patiently for his payment. The debtor at laſt finds credit, and makes payment within the legal. *Quæritur*, Is it neceſſary that he ſhould have a diſpoſition of land from the adjudger, in order to be again infeft by the ſuperior? Upon the prevailing argument, this is indiſpenſibly neceſſary; for one infeftment of property cannot be taken away, but by another infeftment of the ſame kind. Yet I venture to affirm, that ſuch a thing is not dreamed of in our practice. We require no more ſolemnity in extinguiſhing an adjudication with infeftment, than in extinguiſhing an infeftment merely for ſecurity.

However this be, I cloſe the preſent ſubject with the following remark. Here a rule is eſtabliſhed for ranking adjudgers without year and day, where infeftment happens to be expede upon the firſt effectual adjudication. But what if the leading adjudication be made the firſt effectual by a charge againſt the ſuperior without infeftment? This alters the caſe totally; becauſe, upon this ſuppoſition, the debtor remains proprietor, and his infeftment ſtands good. It appears to me, that if this had been the preſent caſe, Mr Andrew Drummond, who ſtood

infeft upon his adjudication, muſt have been preferred to his competitors, none of whom were infeft. No 25.

Select Dec. No 99. p. 136.

1679. *November 7.* STRAITON *against* BELL.

No 26.
Infeftment upon the firſt appriſing, is communicated to all within year and day.—*Inde*, a ſecond not infeft, but within year and day, is preferable to a poſterior, not within year and day, though infeft.

JOHN STRAITON having adjudged certain tenements in Edinburgh, from the apparent heir of James Bell, purſues the tenants for mails and duties. Compearance is made for Gilbert Bell, who had compriſed the ſame tenements from the ſame apparent heir, and thereupon was infeft, and in poſſeſſion; and thereupon *alleges* preference, becauſe albeit Straiton's appriſing be prior to his, yet Straiton was never infeft.—It was *anſwered* for Straiton, That Carnegie was the firſt appriſer, and infeft; and that Straiton had adjudged within year and day after Carnegie's appriſing, and ſo needed no infeftment 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 infeft, 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 infeftment; *nulla ſaſina, 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 apprifer is not competing, nor cannot, becauſe his appriſing is extinct by intromiſſion, and conſequently his infeftment; and therefore it cannot ſtand as an infeftment, neither to the firſt appriſer, nor to any other.—It was *anſwered* for Straiton, That he oppones 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 infeftment would have been an infeftment 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 infeftment, ſo the act of Parliament might declare appriſing within a year to be effectual without infeftment; 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 infeftment was equivalent, as if it had proceeded upon Straiton's adjudication; though the firſt appriſing was ſatisfied by intromiſſion, yet the infeftment was not extinct *ſimpliciter*, but as to the firſt ap-