

(RANKING of ADJUDGERS and APPRISERS.)

nation to his right, would not defend against a compriser, who was really infeft, and ought to be preferred to Northesk, who had no right to the feu-duties thereafter. It being *alleged*, That the defender had an assignation from the Earl of Panmure, whereupon he might presently comprise; which being done, he would thereupon be preferred to the pursuer, upon that former allegiance, that it was *debitum fundi*, and did affect the lands before comprising: It was *replied*, for the pursuer, That they were not obliged, *hoc loco*, to debate that question; but should answer when the defender should get a legal title in his person to the feu-duties. THE LORDS, considering that the pursuer's comprising was expired, and would take away the right of the whole lands for an inconsiderable sum, did ordain, that they should debate presently of Northesk's comprising, or adjudging for the said feu-duties would be preferred to the comprising. Whereupon, it was *alleged*, for the pursuer, That the feu-duties being discharged by the last Earl of Panmure, the same were extinct; and this Earl, as heir, could not grant an assignation for that which was not in being. It was *answered*, That the discharge, being only granted to Northesk, as cautioner for the heritor, in a suspension, who made no payment; a discharge, by a cautioner, did not extinguish the debt; but he might take an assignation to pursue for relief: Likeas, the discharge bears an express obligation to renew the same in most ample form. The LORDS did find, That a cautioner, getting only a discharge of the debt to himself, to save him from horning and caption, and not being relieved by the principal debtor, may take an assignation from the creditor; who may lawfully grant the same, to the effect he may distress the principal, and seek his relief; such a discharge and assignation being noways inconsistent.

*Fol. Dic. v. 1. p. 16. Gosford, MS. No 773.*

1699. January 27.

GEORGE MACKENZIE of Rosehaugh, *against* The CREDITORS of Cockburn.

IN the competition of the Creditors of Cockburn, Rosehaugh was preferred upon an infeftment of annualrent; and, since the decret of preference, he adjudged the property for principal, annualrent, and penalty; and *alleged*, That he had right to affect the price of the lands sold by roup, not only for his preferable annualrents, but likewise for the annualrent of annualrent accumulated by the adjudication, as a legal consequence of his right.

It was *answered*: *Imo*, The decret of ranking is opposed, which being the rule of payment, and application of the price, he must be regulated by it. *2do*, An adjudication for the bygone of an annualrent, may be pleaded to be drawn back *ad suam causam*, where there is a preceding pointing of the ground, and an apprising or adjudication for the annualrents only; but, where an adjudication is led for principal, annualrent, and penalty, there is no preference or privilege

No 30.

No 31.

An adjudger, on an heritable bond, with infeftment, obtained no preference, for the annualrent of annualrent accumulated; the adjudication being on the personal obligation, not upon the pointing of the ground.

(RANKING of ADJUDGERS and APPRISERS.)

No 31. for the bygoners 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 obligation, and not upon the pointing of the ground, the same had no privilege to be drawn back as to the annualrents; but that he was only to be ranked thereupon 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 apprifed by Peter Meldrum in the 1654, and in the same year by Towie's grandfather; and Peter Meldrum stands infest on his apprifing under the Great Seal. Meldrum the apprifed, in the 1675, difponed to Mr William Hay, who was infest in the 1677, upon Meldrum's resignation. Mr William Hay, or his son, contracted debts, whereupon diligence going on againft him, there enfued a ranking and fale of the eftate: In which procefs, compeared Towie, and craved preference upon his grandfather's apprifing, which had been long neglected, through the misfortune of fucceffive minorities of his grandfather, mother, and himfelf; and his ground of preference was, that the creditors their rights depended upon Peter Meldrum's apprifing, who was their original author; and that Towie had right to come in *pari passu* with this apprifing, as being within year and day thereof.

The creditors *pleaded*, That Towie's apprifing never being completed by infestment, claiming only upon the act 1661, the benefit of Meldrum's apprifing and infestment, cannot now, fo long after the expiry of the legal, compete with fingular fucceffors, poffeffing by heritable rights conveyed from the firft effectual apprifing, whereupon infestment had followed.

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

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