

ADJUDICATION AND APPRISING.

201

(*Pais periculo petentis.*)

liferent might be against an apparent heir as well as against one infest; but this declarator was not obtained but as the liferent of a vassal who was infest.

No 18

A& Craig.

Alt. Nicolson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 13. Durie, p. 436.

1632. July 10.

BLACK against L. PITMEDDEN.

ONE Black, upon a comprising of lands from his debtor, charges Pitmedden to infest him, as being superior of the lands; who suspending, that the lands pertained to him in property, and were so possessed by him, and his authors, these thirty-six years bypast, so that he ought not to be compelled to infest any in his property: This was repelled, and the compriser ordained to be infest, without prejudice of Pitmedden's right of the property, which the LORDS declared should not be hurt by this infestment; but only found, that the compriser should be in that same state, for his right, as the author might have been, from whom he comprised, and would not put the parties to dispute upon their rights in this judgment.

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The law of the above cases altered, and the superior obliged to infest the appriser, without instructing his author's right.

A& Baird.

Fol. Dic. v. 1. p. 13. Durie, p. 647.

1636. March 11.

SCOT against ELLIOT of Stobs.

MARGARET SCOT having comprised lands, and charging Gavin Elliot of Stobs as superior, to infest her; who suspending, that he was heritable proprietor of the said lands, and had acquired the right from those who, and their authors, have ever been heritable proprietors; neither was any of his authors, or himself, superior at any time to that person, from whom she had comprised the lands, nor ever had acquired any right from that person, of whom her alleged debtor is alleged to have holden the said lands; and, it is against reason, that he should be compelled to grant a warrant to lease any in his heritage, where there is no right of superiority derived in his person, nor yet of property, from those who are alleged to be superiors to the compriser's debtor, but flows *aliunde* from other persons; notwithstanding whereof, the letters were found orderly proceeded, and the allegiance was repelled; but the LORDS declared, that the infestment, which the compriser should receive from this suspender, being done for obedience of this sentence, should be always without prejudice of the superior's right of property *prout de jure*, and that thereby his right should not be hurt; and it was thought he could not be a loser, receiving a year's duty for the lands, and bruiking the lands also, if he had a better right thereto than the compriser. *Item*, In this

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Superior must receive the appriser, *sed salvo jure cuiuslibet et suo.*

(Pais periculo petentis.)

No 20.

cefs the LORDS found, that no defalcation ought to be made of the year's duty payable to the superior, for the entering of the comprifer, through the lands being liferented by the relict of the debtor, from whom the comprising was deduced; but declared, that seeing this defender was in poffeffion, by virtue of her liferent, as acquired by him from her, or as in her name, that during her lifetime, that duty fhould not be paid to the superior, but ordained the comprifer to find caution prefently to pay that year's duty, immediately after the liferenter's deceafe.

Fol. Dic. v. 1. p. 13. Durie, p. 804.

1636. March 29.

COWAN against L. ELPHINGSTOUN.

No 21.  
The fame  
found.

ONE Cowan having comprised Bruce of Polknavie's lands, and charging the L. Elphingstoun superior, to infeft him therein, he fufpends; *alleging*, that his vaffal was at the horn, againft whom the comprising was deduced, and albeit he was not year and day rebel; yet the rebellion being *in curfu*, he as superior, by any entry of the comprifer, ought not to be prejudged of his casualty of the vaffal's liferent, when it fhould fall; this reafon was found no impediment to ftay the comprifer's entry, without prejudice always of the superior's casualty, when it fhould fall out *prout de jure*, which was not meet to be tried, nor difcuffed in this place: And another reafon was, that he could not enter him, while he were paid by the comprifer, of all the bygone feu-duties owing by Polknavie, and for which he was at the horn at the superior's instance; this reafon was alfo repelled, becaufe the comprifer was not found personally fubject to pay them, but the superior might point the ground therefor, which was referved to him. *Item*, The superior claiming a year's duty, the comprifer *alleged*, that he ought to pay no greater duty to the superior, for receiving of him, but only the quantity of the feu duty, as the vaffal's right bears, his holding being a feu, for paying of fourteen bolls of victual yearly, which he is content to pay, being liquidate, and no further. THE LORDS repelled the allegiance, and found that the comprifer ought to pay for his year's duty to the superior, an year's avail of the lands, as the fame is commonly worth to be paid by a tenant, and that the offer of a year's duty of the feu-duty is not enough.

Act. Cuninghame.

Alt. Stuart.

Clerk, Scot.

Fol. Dic. v. 1. p. 13. Durie, p. 809.

\* \* \* In an adjudication in implement of a difpofition, however, it was found, that the above privilege, in favour of apprifers, did not take place; for it was contended, that although fuperiors are obliged to infeft apprifers *salvo jure cujuslibet*, where they get a year's rent; as alfo, ordinary adjudgers for liquid debts,