

(RANKING of ADJUDGERS and APPRISERS.)

No 28. verified, That, in anno _____, long before the comprising which was deduced in anno 1609 allenary, the said John Aflowen was infeft in the property, and, by virtue of his infeftment, was in poffeffion.

Fol. Dic. v. I. p. 16. Hope, (POINDING & APPRISING.) folio 208.

No 29.

1629. December 9. MONCRIEF *against* L. of BALNAGOWAN.

A COMPRISING for the King's blench duty, found preferable to all infeftments anterior, by difpofition or comprising.*

Fol. Dic. v. I. p. 16.

No 30.

An adjudication, for by-gone feu-duties, was preferred to prior comprisings for personal debts.

1675. July 7. MARGARET SCRIMZEOR *against* the Earl of NORTHESK.

IN a reduction, at the instance of Margaret, as heir to her father, who stood publicly infeft in the lands of Auchmouthie, against the Earl of Northesk, of his right and difpofition, made to him by Patrick Guthrie, who was common debtor, whereupon no infeftment followed until the year 1655; which was four years after the public infeftment upon the pursuer's father's comprising, and so was *a non habente potestatem*, the disponent being denuded: It was *answered*, for Northesk, That the reason was noways relevant; because, albeit his father's infeftment was posterior, yet his difpofition was prior to the comprising, and was granted for the feu-duties of the lands, which was a prior cause, and did affect the same before the pursuer's comprising; feu-duties being *debita fundi*, and a real right which affects the ground against all singular fuccessors. It was *replied*, That the said difpofition did only bear for an onerous cause and relief of cautionry, and not flowing from the superior, either by difpofition or assignation, could not give the defender right to the same; the superior having granted a discharge of the feu-duties, the same was extinct, and could not affect the lands against a singular fuccessor. It was *duplicated*, That the difpofition was affected with a back bond of the same date, bearing, that Northesk's being cautioner for the feu-duties, was the true cause thereof; neither could the feu-duties be said to be extinct, seeing the heritor was not discharged, who was principally liable. THE LORDS, having considered the first reason and reply, did sustain the reduction of the difpofition, as being voluntary, and flowing from Auchmouthie, after he was denuded by comprising, there being no decret obtained, nor the lands affected for the feu-duties; and the Earl of Panmure, as donator, having only granted a discharge, but no affig-

* Lord Kames mentions the above, from the authority of Hope's MS.; stating, that it is under the subject, *Blench Duty*. The Editor has not yet found any such title in the book. The particulars of the case, if afterwards found, will appear in an Appendix.

(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.