No 12.

the more formal diligence of other compriſers; eſpecially, ſeeing Lundy appriſed of new for the ſame ſums, which will come in *pari paſſu* with the reſt, being within year and day.—It was *anſwered*, That it is inherent in all juriſdictions, to continue proceſſes to new diets, having kept the firſt diet; and that the meſſenger, by the letters, is conſtituted ſheriff; and there is no queſtion but ſheriffs might, and did, prorogate diets in appriſings; and the letters bear warrant to fix courts, one or more: And for the continuation, it was but to the next day, in regard of a great ſpeat, the appriſing being upon the hill in the open field, during rain; and it being *modica mora*, to the next day; which will give no warrant to an arbitrary continuation by meſſengers, to what interval they pleaſe: And as for the place, the Lords, by diſpenſation, may appoint what place they ſee convenient; and albeit the diſpenſation had been of courſe, and that therein the clerks had failed; yet the parties, obtainers of ſuch diſpenſations, are ſecure thereby, and ought not to be prejudged.

THE LORDS ſuſtained the appriſing; and found the requiſition now produced ſufficient; and found, that the continuing of the diet for ſo ſhort a time, to be no ground of nullity; unleſs the competitors could allege a ſpecial cauſe, which they did, or might have alleged, whereby they were prejudged, by leading the appriſing the ſecond day, rather than the firſt. THE LORDS did alſo ſuſtain the diſpenſation of the place; and having peruſed the practice, produced at the inſtance of the Lady Lucia Hamilton, anent an appriſing, led at Glaſgow by diſpenſation; They found, that the Lords did not annul the appriſing on that ground; but the LORDS ordained, That no bill, bearing diſpenſation, ſhould paſs of courſe in time coming; but upon ſpecial reaſons, to be conſidered by the Lords, or the Ordinary upon the bills; and that meſſengers ſhould not continue the diets in appriſings, but upon neceſſary cauſes; and ordained an act to be inſert in the books of ſederunt to that effect.

Fol. Dic. v. 1. *p.* 4. *and* 5. *Stair, v.* 1. *p.* 752.

1675. *February* 3. OLIPHANT of Provoſtmains *againſt* ———.

No 13.
A meſſenger dying after deducing compriſing, but before he ſubſcribed it, the Lords refuſed to allow another meſſenger, who only had executed the letters, but had not ſat as judge, to ſubſcribe it.

A BILL was given in, deſiring, that a compriſing being deduced, and the meſſenger having deceaſed in the interim, before he ſubſcribed the ſame; therefore, another meſſenger, who was his colleague, might be allowed and warranted to ſubſcribe the ſaid compriſing.

THE LORDS conſidered, that the meſſenger that was in life, though he had been employed to execute the letters of the compriſing, by denouncing and citing; yet he did not ſit, nor was colleague to the deceaſed meſſenger, or was judge with him, the day and time of the deducing of the ſaid compriſing; and that a compriſing being *proceſſus executivus*, conſiſting of the executions, and of the proceſs and ſentence of compriſing, upon the day that the debtor was cited thereto; though divers meſſengers may act ſeverally as to citation and denuncia-

tion, yet none of them could be looked upon as the judge and the pronouncer of the ſentence, who ought to ſubſcribe the ſame, but the meſſenger that did actually ſit as judge, and, upon the verdict of the inqueſt, did decern and adjudge. *Fol. Dic. v.* 1. *p.* 5. *Dirleton, p.* 112. No 13.

1704. *February* 22. LIVINGSTON *againſt* GOODLET.

No 14.
The want of a charge which had formerly induced a nullity in appriſings, now in diſſuetude.

The Court have no power to prorogate legals.

ANNA LIVINGSTON, and James Edmonſton of Broich, her huſband, purſue for mails and duties, on a compriſing of the lands of Gairdoch; Goodlet of Abbotshaugh compears, and craves to be preferred, as having appriſed theſe lands long before, and you are neither within year and day, nor did you uſe an order of redemption within the legal, ſo my appriſing being expired, I am proprietor, and you cannot compete with me. *Alleged*, Your appriſing is null for want of a previous charge of horning, to make the debt moveable; and which was ſuſtained as a nullity, 20th July 1622, Cranſton *againſt* the Laird of Eaſtniſbet, (*See* APPRISING, No 2.) and this ſhould be the rather ſufficient to open the legal, to make it current, and your appriſing redeemable, that the lands are ten times above the value of the ſums appriſed for; and it were very hard to carry away a great eſtate for a ſmall ſum, and by an odious expiration to ruin debtors, and to exclude all other lawful creditors; and here the nullity is pleaded to no other intent, but to prevent an exorbitant unjuſt advantage, for ſhe will pay him his whole principal ſum, annualrents, penalties, and accumulations, with the intereſt thereof ſince the diſburſing, and all expence he can crave; ſo no more is intended, but to get acceſs, as a poſterior creditor, to the remanent part of the debtor's eſtate, after he is ſatisfied *cum omni cauſa*. *Anſwered*, The old deciſions did ſeem to require a charge previous to the leading a compriſing; but ſince the year 1627, (now 70 years back), the deciſions have clearly run in the contrary, as appears from the practiques cited by Stair, book 3. tit. 2., and which is become ſo firm and uncontroverted, that it is now looked upon as a principle; and though a compriſing be led for never ſo ſmall a ſum, if within the legal it be not wholly paid, but ſome part of it is ſtill reſting, there is no remedy; it carries the property, if you be not within year and day, to come in *pari paſſu* with it; or if you have neglected to uſe an order of redemption, within the legal, to ſtop its running; or, 3*tio*, If you cannot ſubſume and prove he is ſatisfied and paid by intromiſſion, or otherwiſe, within the legal; then, if there were never ſo ſmall a part of it reſting, that carries the property of the whole lands appriſed *ob pœnam negligentiæ*, whatever the diſproportion be betwixt the ſum and lands; and upon this bottom, of expired compriſings, ſtands the ſecurity of moſt of the eſtates of Scotland, which, like a corner-ſtone, is *non tangendum, non movendum*.—THE LORDS repelled the nullity for the want of a charge; ſeeing that has been omitted to be done paſt memory; and, as to the advantage taken of carrying away the eſtate by an appriſing for a ſmall ſum, the LORDS found that it was not in their power to remedy: they have, in-