

No 6.

An apprising was reduced *in totum*; a term's annualrent more than due, having been apprifed for.

1678. June 20.

SCOT *against* FALCONER and EDMISTON.

ROBERT SCOT pursues reduction of an apprising, led against him in the name of Sir John Falconer, upon a bond granted by him to James Edmiston, upon these reasons: *imo*, That the decret of registration, whereupon the apprising proceeded, is null; the bond being regiftrated in the Sheriff Court books of Edinburgh, without a warrant in the clause of registration, for that Court in particular, but only in general, *in any competent register within this kingdom*.

THE LORDS repelled this reason; and found the general clause sufficient for registering the bond, either in the books of Session, which is competent to all the lieges, or any other court where the debtor had his residence at the time of the registration, and thereby is within that jurisdiction.

2do, The second reason of reduction was, because the apprising was led before the time of payment, contained in the bond; which, though it bore a clause, *That in case two years annualrent run together unpaid, the principal sum should then be payable, as if that term had been expressed*; yet that could be no ground summarily to comprise, without a declarator; for, seeing apprisings had exorbitant advantages, they are *strictissimi juris*. It was *answered*, That the legal was yet running; and the Lords are in use to sustain, yea and to supply the defect of apprisings, as to the creditor's security; and though clauses irritant require declarator, when they are penal, and so purgeable, *pendente processu*; yet here the delay of the term is a favour granted conditionally, upon payment of the annualrent; and the failzie takes nothing from the debtor.

THE LORDS sustained the apprising; seeing the legal was current, and the non-payment of the annualrent was a negative proving itself, and not penal.

THE third reason was, that there is produced a discharge for a term's annualrent, which is apprifed for; and it hath ever been sustained, that where any part of the apprising is not due, the apprising falls in whole: and the advantage of making annualrent and penalty, principal sums, with the Sheriff fee, fall thereby. It was *answered*, That the apprising was led by an assignee, who was not *in dolo*, or *mala fide*. It was *replied*, and offered to be proven, That the assignee's name was but in trust, for the behoof of the cedent, who led the apprising himself.

THE LORDS sustained the reason and reply, to reduce the apprising *in totum*.

Fol. Dic. v. 1. p. 7. Stair, v. 2. p. 622.

No 7.

An apprising led by a trustee, for behoof of the cedent, upon a bond, of which part

1679. January 31.

IRVING *against* the Laird of DRUM.

FRANCIS IRVING having apprifed the estate of Drum, for his own, and his brother and sister's bonds of provision, extending to L. 36,000 principal; for which there were infestments of annualrents granted, with termly failzies; and for 21 (being accumulated in one principal sum by the apprising now expired), Francis

craves declarator of his irredeemable right to the lands apprifed. It was *alleged* for Drum, That he had raised reduction of the apprifing, which he had repeated, by way of defence, on these grounds: *1mo*, That the apprifing, in fo far as it was for Charles's portion, ought to be reduced; becaufe Charles, by his backbond, obliges him to relieve Drum of 4000 merks, wherein Drum was cautioner, for him, to Mowat, factor in Paris. The purfuer *answered*, *1mo*, That Francis, being an assignee, was not obliged to know of the back-bond. *2do*, Charles had obtained decret, of fufpention againft Drum, wherein he alleged upon this backbond, and failed to produce it. *3tio*, That backbond was no difcharge, but an obligation to deduce or detain. *4to*, Mowat's bond was for Charles's entertainment in France, which Drum, as heir to his father, who was obliged to aliment his brother Charles, should have paid himself.—The defender *replied*, That Charles's back-bond contained an exprefs clause of *retention of Mowat's fum, in cafe of diftreffs*; and that the back-bond was not produced at the time of Charles's decret of fufpention, becaufe there was then no diftreff. But now Mowat has diftreffed Drum, and apprifed his eftate; fo that there is not here alleged any ground of compenfation; which has no effect till it be proponed; but the back-bond having a clause of retention, is, in effect, a difcharge conditional, in cafe of diftreff; neither was Drum obliged to aliment his brother, he having a portion of his own; and, however, Charles having infifted upon no fuch ground, but having given his back-bond for *retention*, there can be no further queftion upon it. And, if need be, it is offered to be proven, that the apprifing, as to Charles's portion, is for his own behoof; and therefore, as to him, it is in the fame cafe, as if he had apprifed in his own name, and fo had fraudfully, & *contra bonam fidem*, comprifed, for that which he knew was not due, and which the Lords have ftill fufained, to annul apprifings fimplly.

2do, The purfuer has apprifed for a term's annual of Charles's fum, which was not due, and that fraudfully, *contra bonam fidem*; becaufe, by a decret of fufpention, at Charles's instance, produced, it is evident, that Charles, by his oath, acknowledges, that three terms of his annualrent were paid by Drum; which decret is long prior to the apprifing, and belonged to Francis as assignee; fo that he had knowingly apprifed for more than was due. And albeit the Lords are favourable in apprifings, for fecurity of creditors' juft intereft, yet *quoad* the exorbitant advantages thereof, by expiring of the legal, or by making the annualrents, penalties, termly failzies, to be principal fums, and to bear annualrent; the Lords confider the fame, ftictly. And here the portions are very great, confidering the burden of Drum's eftate; and the penalty is moft exorbitant; and the termly penalties apprifed for without declarator; which, at the date of the apprifing, amounted to L. 8000, and now to L. 15,000; and, by the act of Parliament 1621, anent apprifings, *there is no mention of the fatisfaction of penalties*.—The purfuer *duplicated*, That he had proceeded *bona fide*, and had never received one farthing of his annualrent, and had been at vaft expences, and did not infift for the expiring of the legal. And, apprifing being the ultimate diligence, the Lords

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and annual-
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An apprifing
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own behoof,
upon a bond,
of which part
was paid to
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ted at the
date of the
apprifing.

An assignee,
having know-
ingly apprifed
for more than
due, the ap-
prifing re-
ftricted to
principal and
current an-
nualrents,
without pe-
nalty, or ac-
cumulation of
annualrents.

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never modify penalties, unless there be defects in the apprising. For though the act of Parliament foresaid, as to the satisfaction of apprisings, mentions *not penalties, but principal sums and annualrents, &c.*; yet thereby principal sums are meant, as they are accumulated in the apprising, wherein the penalties are comprehended.

THE LORDS found the reason of reduction *relevant* to be proven by Francis's oath, that the apprising *quoad* Charles's sum was for Charles's behoof, to reduce the same, as to Charles's part, to his principal sums, and annualrents thereof, without penalties or accumulation; in respect of his bond, containing the clause of *retention*; and of Mowat's distress, by apprising after the decret of apprising; in which Drum failed to produce the back-bond; which could not then have been effectual: But in case it be not proven, that the apprising was for Charles's behoof, found, That the same ought not only to be retained, with the abatement of Mowat's sum, but they reduced the same as to the penalties, and termly failzies; and sustained the same, as a redeemable security for the remainder of Charles's principal sum, and annualrents thereof, due at the time of the apprising; being thereby accumulated into one principal; and thereby reduced, as to the whole penalties, and failzies in the apprising. And, as to the second reason; if, by Charles's bond, it appear, that the first term of his annualrent was only Martinmas 1662; that the pursuer had apprised for a term more than was due knowingly, after his assignation by Charles, found, *ad hunc effectum*, To reduce the sums to the principal and current annualrents only, without penalties, failzies, or accumulation of the annualrents.*

Fol. Dic. v. 1. p. 7. Stair, v. 1. p. 684.

1680. June 22.

GRANT against GRANT.

No 8.

An apprising valid, notwithstanding of articles of compensation against the appriser, who is not bound to propone compensation against herself.

WILLIAM GRANT having adjudged the wadset-right of the Bridge-town of Spey, from one Barclay, pursues for mails and duties. Patrick Grant compares, who *alleges*, That he has a posterior adjudication, which is preferable, because the first proceeds on a sum, contracted by a father to his son, in his contract or marriage, by which the tocher is also payable to the son; so that, though the contract be one-rous as to the wife, yet it is merely gratuitous as to the son.—It was *answered*, That, at the time of the contract, the father had a sufficient estate to pay his debt, beside this small provision of 1000 merks,—*Which the LORDS found relevant.* It

* Lord Fountainhall thus mentions the same case:—In the action betwixt Francis Irvine, and his brother, the Laird of Drum, the LORDS reduced Francis's comprising to the principal sum and annualrents, and lopt off the Sheriff-fees, and penalties, because it was deduced for greater sums than were truly resting owing at the time of the leading thereof; though it was only a quarter, or half a year's annualrent more, and Francis was only assignee, and so could not know of it. The LORDS, in some such cases, only restrict the comprising, but do not annul it.

Fountainhall, v. 1. p. 39.