1678. *November* 14. WILLIAM DALMAHOY *against* MR CORNELIUS AINSLIE.

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FOUND, that a sasine unregistered is not absolutely null, but may be the active title in an improbation of other rights on that land. As also the LORDS assoilzied from the production of the executions, letters, and claim of apprising, because the decreet of apprising itself was produced, and it was 36 years old, and they were in possession by virtue of it; but found the bonds and grounds of debt whereon it was led ought to be produced.

Fol. Dic. v. 1. *p.* 354 *Fountainhall, MS.*

1681. *February* 11. KENNOWAY *against* CRAWFORD.

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There was found no necessity to produce letters of apprising or execution thereof of an old date, but it was found necessary to instruct the debts on which the apprising proceeded, any time within the long prescription.

IN August 1635, Henderson of Clett did apprise certain tenements in Edinburgh, from George Austin, and was infeft thereon in February 1636. Patrick Austin obtained a disposition from George Austin at Martinmas 1637, and was thereupon infeft, and did also acquire right to Henderson's apprising, in February 1634. Kennoway of Ketlston used inhibition against Austin for a small sum, and upon that sum, and several others, did apprise the same tenements, in September 1635. James Kennoway having now right to Kennoway's apprising, and Thomas Crawford having right to Henderson's apprising, and Austin's voluntary disposition, there are mutual reductions, wherein Kennoway *insists* upon this reason, that Henderson's apprising is null, nothing being instructed of the sums, whereupon it proceeded. It was *answered*, 1*mo*, That after so long a time, there was no necessity to produce the instructions of Henderson's apprising. THE LORDS found there was no necessity to produce the letters of apprising, or execution thereupon, but that it was necessary to instruct the debts, whereupon it proceeded, any time within the prescription. 2*do*, Kennoway insisted against the voluntary disposition, upon this reason, that it is posterior to the inhibition served against the disponer in *anno* 1634. It was *answered*, 1*mo*, That the inhibition, or any action thereon, was prescribed; for albeit the citation in this reduction be within 40 years of the inhibition, yet the reduction was not libelled upon the inhibition, as the interest, but upon Kennoway's apprising; and there is only adjected of late, a reason of reduction upon the inhibition, which is neither a habile way, seeing in reductions *ex capite inhibitionis* the inhibitions are libelled upon in the reduction, as the title. 2*do*, This new adjected reason upon the inhibition is not within 40 years from its date. 3*tio*, Albeit the inhibition were not prescribed, it may be purged by payment, which is now offered. It was *answered*, That the inhibition could not be purged by payment, because an apprising was led upon the ground thereof, and is expired, which is now irredeemable, as was found in the case of Grant 24th Feb. 1666, *voce* INHIBITION. It was *replied*, That the inhibition being upon a small sum, whereof there were

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many in Kennoway's apprising, the apprising which is founded upon all the sums, cannot make this one sum, reaching but a proportion of the lands apprised, to be unpurgable, and to carry the right of the whole land, but in Grant's case the inhibition and apprising was entirely upon the same grounds. THE LORDS found that the interruption of the inhibition was not to be reckoned from the date of the citation of this reduction, but from the time that the reason *ex capite inhibitionis* was eiked; but superseded to give answer to that point, whether the sum was purgable by payment, till the conclusion of the cause, that it might appear, whether the inhibition was extinct by prescription, or if there was any other interruption. Kennoway did further insist upon this reason, that the voluntary disposition ought to be reduced, as being a gratification of the common debtor Austin, after Kennoway's apprising was deduced, and so null, by the last clause in the act of Parliament 1621, against fraudulent dispositions. It was *answered*, That the foresaid clause, being only in favours of the diligence of creditors, it could not be extended to this case, where the appriser had done no diligence to complete the apprising, either by infeftment or charge, for several years before the voluntary disposition, nor ever since; and therefore such legal diligences cannot be like such diligences which disable debtors to sell to their creditors at any time after, but only during the course of diligence, when it is followed out.

THE LORDS did also supersede to give answer to this point, till the conclusion of the cause.

1681. *June* 22.—JAMES KENNOWAY having right to an apprising of some tenements in Edinburgh, pursues reduction against Thomas Crawford and others, of the rights of the tenement *ex capite inhibitionis*, and other reasons. It was formerly found that the reason of reduction *ex capite inhibitionis*, not having been filled up till 40 years were past, from the date of the inhibition, that the inhibition was prescribed. The pursuer now further *alleges*, That the inhibition cannot prescribe by 40 years from the date of the executions, but from 40 years after the date of the right granted by the inhibited person; because inhibitions being to prevent posterior deeds of the person inhibited, the inhibiter *non valebat agere*, till such deeds were done. 2*do*, Though there were 40 years since the deeds done by the person inhibited, yet the prescription of the inhibition is interrupted by the pursuer's reduction, which *ab initio* relates his right, which is an apprising upon bonds, upon which bonds the inhibition was led; so that the action upon the apprising interrupts the prescription of the bonds, and consequently the inhibition following thereupon; seeing the pursuer hath not relinquished his right, but within prescription hath followed the same, and taken documents thereupon; and therefore interruptions do exclude prescriptions of all rights, principal and accessory; as interruption against a principal debtor excludes prescriptions against all the *correi debendi*, whether principal or cautioners, and all securities for that sum; and an annualrent out of many tene-

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ments, or out of one divided thereafter, taking effect by payment or interruption against any one, preserves the annualrent as to all. It was *answered*, That albeit prescription is excluded by possession or interruption, *quoad* all rights principal or accessory, yet it is not so as to legal acts, whereby no right is acquired, but only a stop put to opposite rights, such as inhibition, or arrestment, or process of reduction, or declarator; for though the user of these legal diligences should possess by his right, which doth much more exclude prescription than any process or citation, it cannot be pretended that these legal diligences would not prescribe by possession by the principal right; but it is clear that arrestments would prescribe by the late act of Parliament, not being proceeded on in five years, albeit the ground of the arrestment were not prescribed, yea albeit the creditor should pursue for payment upon the ground of the arrestment within these five years, which must much more hold in inhibitions; for that which properly prescribes, is not the inhibition but the action thereon; and there being here no action upon this inhibition for 40 years, neither possession nor action upon the ground thereof, though it had been directly upon the bonds, will preserve the inhibition from prescribing.

THE LORDS found that there being no action upon the inhibition for 40 years after the date thereof, and after the right reducible thereby, that a reduction upon the ground thereof, not relating the inhibition, did not interrupt the prescription of the inhibition or action thereupon; albeit it was alleged that the inhibition was given out with this reduction within the 40 years, which the Lords regarded not, seeing nothing was mentioned in the reduction of the inhibition till the 40 years were past; for they thought it was of great inconvenience to the security of land-rights, for which registers are only inspected for 40 years past, to find out inhibitions, which would not be secure, if possessing or pursuing upon the ground of the inhibition might perpetuate the same. *See* PRESCRIPTION.—INHIBITION.

Fol. Dic. v. 1. *p.* 354. *Stair, v.* 2. *p.* 858 & 880.

1706. *June* 20. STRACHAN *against* CREDITORS of EDZELL.

No 10.
Certification in a reduction and improbation cannot pass against warrants after 20 years, unless it be proved by the defender's oath, that they are still extant, and kept up by him.

STRACHAN, an adjudger of Lindsay of Edzell's estate, for himself, and assignee by other creditors, for near an hundred thousand pounds Scots, pursues a reduction and improbation against the whole other creditors; and the terms being run, and sundry partial productions being made, he craved certification *contra non producta*, and the principals of such bonds, whereof only extracts were produced. *Alleged*, This process being against a great multitude of creditors, defenders, and pursued only to force production, in order to a ranking and sale, it would be an intolerable hardship and vast expence to go and take out all the grounds and warrants of their adjudications, and other diligences from the respective clerks, up and down the kingdom *per omnes regni angulos*,