after expiring, for three or six years at most; for, had it been designed to extend to all apprisings, it would have mentioned apprisings in general, and not *the said apprisings;* which clears it to be only a branch of the former paragraph. The benefit again of assigning localities was in favours of the debtor, that he might force the creditor to possess; whereas here the creditor is desirous to possess. Nor can the privilege take place, except where all the creditors that have done real diligence, especially such as come *in pari passu*, have localities assigned them: now, the defender could not assign any localities in his land, but what might be disturbed by other creditors who have transcendant anterior voluntary rights; 2. The adjudging for the fifth part more was no nullity; because the summons being libelled in order to a special adjudication, conform to Act of Parliament, when the creditor could not know but the debtor would have produced a progress, the conclusion could not be altered upon the not-production of the progress, although that made it have the effect of an adjudication of the whole estate; but then the fifth part more was adjected as a superfluous clause, and the adjudger claims no benefit thereby. Replied, 1. That debtors might not starve during the legal comprising, which is a severe diligence, the Parliament thought fit to astrict creditors to localities, that might pay their annual-rents in the mean time, and to give them the lands after expiring of the legal, which was but a moderate *laxamentum:* the reason doth equally hold in favours of all apprisings; and the benefit ought to be perpetual and not temporary only, seeing, again, it is provided by the clause, That possession apprehended by apprisers, is to be ratified as restricted; that demonstrates how it respects the case of a creditor willing to possess, as well as the case of one that is unwilling, and lies off; 2. The creditor having adjudged expressly for the failyies, he ought not to have adjudged for the fifth part, which is in lieu of the failyie and sheriff-fees; for they, by Act of Parliament, fall under the fifth part, and are not accumulate with the principal sum and annual-rents. The Lords found, That the clause restricting apprisers to localities was not temporary, but a perpetual law; and that, in respect the style of decreets of adjudication had not been uniform, the fifth part more should not prejudge this adjudication, but be restricted to the penalty, if that be not adjudged for expressly, and should operate nothing, if it be; and ordained an Act of Sederunt to be extended, declaring, That decreets of adjudication, where the debtor doth not produce a progress, should run for the principal, annual-rent, and penalties only, and not for a fifth part more; and that all such adjudications for an additional fifth part hereafter should be quarrellable by the debtors.

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1684. *Feb.* JOHN MUIR, Writer to the Signet, *against* SHAW and CHALMERS.

AN apprising being quarrelled as null, in so far as annual-rents paid were apprised for;—Alleged for the defender, That he being assignee to the bond, the ground of the apprising, and to the bygone annual-rents resting owing, and ignorant *facti alieni*, he had reason to presume all annual-rents were resting; so that his apprising for some that were paid could be no nullity, but only infer a restriction. Answered, Though such a mistake in an assignee to an apprising,

in so far as it is to his own behoof, might be excused, yet it must operate a nullity, in so far as the apprising is to the behoof of the cedent, who assigned to annual-rents generally, without restricting precisely to what were due; as such an apprising, led in the cedent's own name, would have been simply null. The Lords found the apprising, in so far as it was to the behoof of the cedent, simply null, and not to subsist as a real security: but, before pronouncing interlocutor, it was recommended to settle the parties. *Vide* No. 283, [Mr Edward Wright against Earl of Annandale, January 1683;] No. 290, [Baillie of Torwoodhead against Florence Gairner and his Son, March 1683;] No. 311, [Margaret Crawfurd against Oliphant of Condy, March 1685;] and No. 312, [Lady Hisleside against Matthew Baillie, February 1685.]

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1684. *February.* WILLIAM GORDON *against* ROBERT LEARMONTH.

ONE Downie, infeft upon an apprising of the lands of Balcomy, having disponed his right to Gordon of Lesmore, who was also infeft, and transferred the same to Mr William Hieson, who pursued exhibition of the apprising, and grounds and warrants thereof, against Balcome's apparent heir;—Alleged for the defender, That the apprising being in the hands of the debtor, or his apparent heir, it was *instrumentum apud debitorem*, &c. Answered, Though the brocard holds in personal rights, transmissible by assignation, which may be destroyed upon re-delivery, real rights are not extinguishable but by renunciations or conveyances. The Lords found the answer relevant.

*Page* 112, No. 419.

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1684. *February.* WILLIAM AULD *against* JOHN SMITH.

ONE having delivered a principal bond to his son-in-law unregistrate, who gave it up to the debtor, and got a new bond in his own name in lieu thereof; the creditors of the father-in-law pursued the debtor; and having referred the debt to his oath, he deponed, and acknowledged the matter of fact above-mentioned. Alleged for the pursuers, That the haver of a principal bond, wherein another person was creditor, could pretend no right thereto without an assignation; and the debtor who got it up from another than the creditor, had reason to suspect, that it was either found or fraudulently abstracted. Answered for the debtor and son-in-law, That they offered to prove, by witnesses, that the father-in-law declared to them he had given the bond to the defender, in order to be renewed in his son-in-law's name. The Lords, before answer, ordained the witnesses to be examined, and the debtor to be re-examined upon that point. *Vide* No. 467, [Reach against Polwart, November 1685.]

*Page* 125, No. 457.

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