No 68.
In a reduction of a disposition, at the instance of an appriser, on the ground that the disposition was granted after the citation and execution of another apprising, it was found, that the pursuer had the benefit of that other apprising.

1703. *January* 23. WILLIAM WILSON *against* Sir ANDREW BIRNY.

WILLIAM WILSON being a creditor to Short in Stirling, and having apprised his lands, he raised a reduction and improbation against Sir Andrew Birny, Lord Saline, of his rights on these lands, and, particularly, of a disposition he had thereto, on this ground, that the said disposition was granted posterior to the citation and executions of Gillespie's apprising, after which Alexander Short could do no voluntary deed, to the prejudice of the said apprising, conform to the 19th act of Parliament 1672, anent adjudications; and, though Wilson's own apprising, and denunciation thereof, be posterior to the said disposition, and that he has not the right of Gillespie's apprising in his person, but that my Lord Saline has acquired and purchased the same, yet he must have the benefit of the said apprising, because he led his own apprising within year and day thereof; and it being the first effectual apprising by infeftment, he, by the act of Parliament 1661, regulating the case between debtor and creditor, comes in *pari passu* therewith; and so Gillespie's denunciation of the lands to be apprised, being anterior to Short's disposition in favour of Saline, as Gillespie could reduce that disposition, so can he, being in the construction of law repute a part of the first apprising, all within year and day being esteemed as one apprising. *Answered* for Saline, That brocard, of debtors being incapable of granting voluntary rights, after their lands are denounced to be apprised, holds only as to gratuitous deeds, but nowise militates against onerous dispositions, especially where the disponer is not insolvent nor bankrupt, which is the present case: Likeas, it is *jus tertii* to Wilson to found on Gillespie's apprising, whereunto he has no right, but, on the contrary, is established in my Lord Saline's person, and so cannot be detorted to his prejudice; and, though the act of Parliament 1661 brings all in *pari passu* that are led within year and day, yet that is only *quoad* the benefit of the communication of the infeftment, to hold in the multiplication of expenses to creditors, but not as to other effects; and, particularly, that of quarrelling rights subsequent to the denunciation of the first apprising; for it is enough that my disposition is prior to the denunciation of Wilson's own apprising; and it were hard to make the execution of an apprising as effectual to incapacitate a debtor as an inhibition; for if that equivalence were sustained, then there would be little need for inhibition. *Replied* for Wilson, That law did not consider whether the voluntary deed was onerous or gratuitous, but only its date; and if posterior, then it was plainly reducible, as was expressly found in the case of a tack, 17th February 1629, Blackburn against Gibson, *voce* LITIGIOUS; and though he had no right to Gillespie's apprising, *quoad* its sum, yet he was founded *in jure* to plead it was his, as to all its privileges and preferences; and he had such a *jus quæsitum*, that Gillespie's discharging or renouncing it could not deprive him of his right of founding on it; so that no deed of Gillespie's could

extinguish it as to that. THE LORDS found he had the benefit of Gillespie's denunciation; and, therefore, reduced my Lord Saline's posterior disposition. See the like decided in President Falconer, 21st January 1682, the Creditors of Menzies of Enoch, *voce* LITIGIOUS; but afterwards the Lords inclined to alter this interlocutor. No 68.

1704. *June* 10.—WILLIAM WILSON being a creditor of Alexander Short, and having apprised, he raises a reduction and improbation of a disposition made by the said Alexander Short to my Lord Saline, his brother-in-law, of some lands, dated in January 1662, and registered in July 1663, (as mentioned *supra*, 23d January 1703;) and my Lord producing the extract under Sir A. Primrose, then Clerk Register, his hand, Wilson craved certification against the principal, which was not produced; and *alleged*, It was either false in the subscription, or, at least, in the date, to make it anterior to the denunciation of his apprising, which followed a very few days after the date that the extract makes it to bear. *Answered* for Saline, That he having given in the principal warrant to the register, and got an authentic extract, suppose the principal now, after forty years, could not be found, neither among the warrants nor records, he was not concerned, he having followed the faith of the public laws and custom, in trusting his writ with the registers; and, if amissing, neither fault nor negligence can be imputed to him; but the Clerk Register and his servants must be answerable for the same. *Replied* for Wilson, That there is nothing more certain, than that an extract could not satisfy the production, nor stop certification in an improbation, unless the principal be produced, otherwise great inconveniencies might follow; for one might forge a bond, or a discharge, and, putting them in the register, might prevail with the servants to get back the principal, and destroy them, and using the extracts, the party lesed calling for the principal in an improbation, if the extract shall be sufficiently verified, though the principal cannot be found, then a few knaves may ruin a thousand persons; for, if they be not obliged to produce the principal, there is no remedy left to discover the falsehood, if the extract of the forged deed be sufficiently probative against the alleged subscriber, without any more. THE LORDS considered there was much danger to the lieges on both sides; for a true deed, given in to the register, might be extracted and put out of the way, as well as a false; and why should not my extract, in that case, as well prove for me as if I had the principal? And it was of great importance on whom the loss should fall. There might be a special consideration of these principal warrants that were cast away at sea, coming from London in the year 1661, after the Restoration, that parties should not be answerable for these, or such as might be lost in sudden fires, as lately in that in the Parliament Close, where the registers were removed in great haste and confusion; but where no specialties can be pretended, it is of the highest

No 68. concern to annul my disposition, because I fairly and honestly gave it in to the register, and now it cannot be found. THE LORDS observed, there was an error and fault in burdening the quarreller of the writ called for with the search; for it may be easily presumed, that he will not be very curious to find it, and so he will not be serious, but rather superficial in seeking, his interest lying rather in suppressing it; and that it should be the other party, having the benefit of the writ, who should be trusted with the enquiry for it. And, in this case, there were two qualifications urged against the pursuer of the improbation; 1*mo*, That he had taken out an extract of the disposition called for himself, which, though no approbation or homologation of it, yet implied the warrants or records of it were then extant; 2*do*, Sasine had been taken on this disposition, before it was registered, where its date being narrated, would contribute much to fortify the same. THE LORDS, before they would put my Lord Saline to a proving of a tenor, ordained a farther search to be made among the warrants, records, *responde* books, and registrations *per licets*; and, if the report should be, *quod non est repertum*, then they would consider that point, how far an extract may stop certification in an improbation in this circumstantiate case, or remit him to prove the tenor. What danger the lieges are in from those under-servants who keep the registers, appears from many instances; and, particularly, a late one, where Captain Waddel prevailed with one of them, for a little money, to give him back a principal discharge, and was forcing the debtor to pay the sum over again, because he could not produce the principal, but only an extract, had not the trick been providentially discovered; for which his ear was nailed to the tron; which shews this sort of villainy is practicable, and every one may not be so fortunate in the discovery as this man was; and so it lays a foundation for ruining many, unless prevented by some suitable remedies.

Fol. Dic. v. 1. *p.* 523. *Fountainhall, v.* 2. *p.* 175. & 229.

*** The sequel of this case is printed, No 131. p. 6706. *voce* IMPROBATION.

No 69. 1712. *January* 10. WHITE *against* REID.

IT is not competent to one, deriving right from a rebel by assignation, after the single and liferent escheats are gifted and declared, to quarrel the gift, upon act 147th, Parliament 1592, as simulate and null, by the donatar's allowing the rebel to continue in possession.

Fol. Dic. v. 1. *p.* 521. *Forbes.*

*** This case is No 16. p. 37. *voce* ACCESSORIUM SEQUITUR PRINCIPALE.