

therein condescended on did not make the sum moveable after the apprising ; and so was not equivalent to a charge.—*March 1683.*

*Page 41, No. 187.*

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1683. *March.* JAMES HENDERSON *against* SAUGHTONHALL.

FOUND, that, of bonds taken to a man and his wife, and the longest liver, the husband is *fiar*-substitute, though the wife survive ; and that the sum, though moveable, needs no confirmation.

*Page 42, No. 188.*

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1683. *March.* DAVID SCRIMZOUR *against* MARGARET HAY and her ASSIGNEE.

ONE having paid £100 sterling of £200, upon the creditor's obligation to warrant him as to that £100 ; was not found obliged to pay the other £100 to an assignee, till he got surety that he should be harmless as to the first £100 ; but was allowed retention upon that head, though the debtor was not yet troubled for it, the cedent being insolvent.

*Page 61, No. 257.*

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1683. *March.* BAILIE JUSTICE *against* NISBET and AIKENHEAD.

IN a competition between an appriser and one having right by a disposition of a date anterior to the denunciation, where the obtainer of the disposition had expedite a base infestment thereon, after the decret of apprising, but before the appriser had charged the superior ; which base right was confirmed by the superior after the appriser's charge ;—it was alleged for the receiver of the disposition, That he, having the first complete real right, ought to be preferred to the appriser, whose apprising and charge against the superior was but a diligence ; for, though a charge be equivalent to infestment, in a competition of diligences of the same nature, *viz.* apprisings and adjudications, it hath not that effect where a comprising competes with a voluntary right. 2. As the disobeyed charge did not infer contempt or *mora* in the superior, unless the appriser had offered a charter and a year's duty, nor would hinder him from nonentry, ward, marriage, &c. upon the death of the debtor, far less could a stranger-purchaser, who is completing his diligence, be prejudged by the charger, who is only obliged to notice what diligence is real and upon record. 3. Though it may be pretended that the legal diligence is favourable, a buyer's case is more favourable ; for it were harder to disappoint a purchaser, who pays a real price that may be affected by the seller's creditors, than to frustrate the diligence of a compriser, who is at no greater loss thereby than he had before. Answered for the appriser, A charge against the superior is esteemed equivalent to infestment, as to all effects except removing ; and it was not in the power of the superior,

after he was charged, to prefer a voluntary right. The Lords preferred the disposition having infestment and confirmation, in respect the disposition was prior to the appriser's denunciation; and so there could be no suspicion of fraud in the receiving thereof.

*Page 68, No. 289.*

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1683. *March.* MR HUGH DALRYMPLE *against* LORD CRICHTON.

ONE having, without an onerous cause, restricted his apprising to a less sum, in case the same was punctually paid at such a day; the debtor failing in payment, the appriser, after the day, claimed the whole sum in his apprising. Alleged for the debtor, That he offered to purge the failie by payment of the restricted sum; and the like was allowed in the case of the Lady Gray against Earl of Mareschal. The Lords allowed the party to purge, though it was a conventional irritancy: but here, the parties being relations, the point was not much controverted.

*Page 69, No. 291.*

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1683. *March.* JOHN GRÆME *against* The CREDITORS of INNERGELLY.

FOUND that the first infestment upon an apprising, or the first exact diligence for obtaining the same, makes, by Act of Parliament, the first effectual apprising; and that a posterior infestment, upon a prior apprising, cannot be drawn back in prejudice thereof; but that a bare charge against the superior is not the exact diligence the act requires, unless a charter and composition be also offered to him. In this cause an apprising was found simply null upon this ground, That a part of the sums apprised for, had been paid to the appriser himself. *Vide* No. 283, [Wright against Earl of Annandale, January 1683;] and No. 290, [Baillie of Torwoodhead against Gairner and his Son, March 1683.]

*Page 69, No. 292.*

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1683. *March.* LAMBERTON *against* HILTON JOHNSTOUN.

PLED, but not decided, that a creditor comprising the debtor or his cautioner's lands, equivalent to the value of his debt, could not, after expiring of the said apprising, apprise again, for the same debt, any other lands belonging to them, although he might have done so within the legal; seeing the creditor's selling the lands apprised within the legal, to others, would have imported satisfaction of his debt; so his retaining the same, till the legal expired, must have the like effect, since an apprising is a judicial sale. Here, the creditor had disposed the expired apprising to one of the cautioners, whose lands were denounced after expiring of the legal, and who, having satisfied the creditor, was recurring against the co-cautioners for relief.

*Page 69, No. 293.*