1676. *February.* The MARQUIS of ATHOLL *against* ———

THE Marquis of Atholl, as donatar to the escheat of , pursues a declarator thereof. ALLEGED,—That the execution of horning was null, wanting both the date and place where the charge was given. ANSWERED,—They offered to abide at the charge as truly given: and for the defects, they would take up their execution, and amend and supply it both as to date and place; on which they condescended. 2*do*, ALLEGED,—That the party is denounced at the wrong market-cross, viz. the regality, whereas he lived within the sheriffdom.

ANSWERED,—He behoved to reduce upon that head.

REPLIED,—They needed no reduction, because it was a nullity introduced by statute, and, *nullitas juris*, it was receivable by way of exception; acts 264 et seq. in 1597; and this is Hope's opinion in his lesser Compend. See Hope's Compend. cap. 12, anent Removings, *pag. mihi* 54 *et* 55.

DUPLIED,—It was a nullity truly consisted *in facto*, and abode probation, and therefore could not summarily be discussed *hoc loco;* and as for Hope, though a great lawyer, and to whose pains we are much obliged, yet all he has written is not canonic. *Vide supra*, 252, (11th November, 1671,) and No. 423, (Home *against* Craw, 11th November, 1673.)

The Lords declared in favours of the pursuer, reserving to the defender his reduction as accords.

2*do*, The Lords do not regard the act of Parliament, but find it in desuetude, and therefore do not annul hornings, inhibitions, or other diligences now, albeit they be not executed at the market-cross of the regality within which the lands lie: both in regard that formality has fallen in a general disuse; and, 2*do*, because sundry regalities have no market-cross to denounce at.

3*tio*, Where a man dwells in a different shire from that wherein his lands lie, and he be denounced at the market-cross of that shire where he dwells, though not at the market-cross where the lands lie, and he abide year and day at the horn, his liferent escheat will fall. (*Supra*, 11*th November* 1671, No. 251.) In which point I found some lawyers in a mistake, because some denunciations are no ground of escheat, but only to found a caption; but these are when one is denounced, *ex. gratia*, at the market-cross of Edinburgh, within which sheriffdom he neither dwelt at the time, nor had any lands lying. See more of this at length in other papers beside me. Yet see 23*d March*, 1630, Oliphant contra Earl of Marshall.

Advocates' MS. No. 463, *folio* 239.

1676. *February.* ANENT APPRISINGS.

I HEARD it questioned, if the first apprising can redeem the second and pay it, as the second appriser can redeem the first. *Videtur quod sic:* for the first compriser has all the right was standing in the debtor's person; *ergo*, he may purge and redeem as the debtor might have done. But it seems more consonant to the

analogy of law that he cannot, for he could not comprise the legal of the posterior apprising, because the time of the leading of his comprising it was not then in being, it was a nonens. *Vide* Dury, 18*th November*, 1624, *Kincaid and Haliburton.*

Cujace, *ad Titulum C. Etiam ob chirographariam pecuniam pignus tenere posse*, affirms from Accursius, and the laws there cited, that *primus creditor potest offerre debitum secundo. Vide February*, 1680.

To the argument for the first opinion it may be answered, he has all the right was standing in his debtor's person: but, *ita est*, this was not a right competent to the debtor then, because the second comprising was not then led, and so could not be carried with the first apprising. It may be replied, that the debtor had the power to pay that debt, whether personal or real, as personally bound for it, (if so be it was contracted before the denunciation of the first comprising,) *ergo idem jus competet* to the first appraiser. 2*do*, All right that accresces to the debtor becomes the first compriser's; *ergo, ex post facto*, this posterior right of reversion becomes his also. It may be duplied, that a comprising being a real right, will not draw, carry, nor affect the power and faculty to pay personal sums, seeing that is moveable. And for the accrescing, since all the favour indulged by the law to second comprisers that are not within year and day, (and before the act of Parliament 1661, whether he was within year and day or not,) is allenarly the right of redeeming the prior apprisings; why shall this be communicated to one who has far more considerable benefits, viz. the full right of property if the legal expire? And yet I cannot see how the second appriser should refuse payment; that purging his damage and interest, *cum omni causa.*

Vide supra, No. 154, [*February* 25, 1671,] where it is subtilely debated, if a liferent can be comprised, or an apprising not yet led be disponed. *See Hope's Compend. cap.* 10, *Of Comprisings, pagina* 49.

Advocates' MS. No. 464. *folio* 240.

1676. *February.* CAMPBELL *against* BLAICKWOOD.

ONE Campbell pursues Blaickwood in Awell for spulyie. His defence is, lawfully poinded. ANSWERED,—The execution of poinding is null, because, 1*mo*, Only subscribed by the initial letters of the officer poinder his name. 2*do*, It is apprised at the wrong place, and not at the market-cross of the jurisdiction where the lands lie of which the poind was taken. 3*tio*, It is but an informal minute; not bearing the names of the apprisers at the market-cross, nor any offer back of the goods to the party, nor that there was any apprising of them on the ground of the lands, as ought to have been done. REPLIED,—The initial letters are sufficient, because it is offered to be proven that it is his usual way of subscribing: which was found relevant by the Lords. See the like in Dury, 20*th January*, 1631, *Houston* contra *Houston.* Denied the second: whereon it was admitted to the pursuer's probation. As to the third, offered to get an extended execution of poinding at which they would abide as true in all the formalities thereof: which the Lords allowed, being to avoid a spulyie. See the information of this cause beside me.

Advocates' MS. No. 465, § 1, *folio* 240.