extinguish an adjudication or apprising of the whole lands. Answered, 1. *Non refert* whether the subject adjudged be land or annual-rent; for, if the debtor, upon requisition, should refuse to pay, the creditor is as little master of the money as if lands were adjudged, and the fifth part more is granted to creditors, not simply because they take lands for money, but also by way of penalty for the delay of their payment: for, as Stair observes, £100 is the usual penalty for 1000 merks of principal, which, with 50 merks of sheriff-fee, (that is the 20th part,) extends to 200 merks, the fifth part of 1000. 2. *Esto* special adjudications be redeemable within five, the fifth part is due as in lieu of penalty and sheriff-fee: as apprisings, redeemed within the legal, carry penalties and sheriff-fees, otherwise the adjudger would get no allowance of the expense of his adjudication, or of penalties: for the Act of Parliament, in the clause of redemption, orders only the payment, or consignation of the principal sum and annual-rent the time of the adjudication, the composition to the superior, and charges of infeftment. The Lords repelled these two allegeances, in respect of the answers; and found the fifth part also due.

Page 1, No. 5.

Nota. By the Act of Parliament, creditors, at redemption of partial adjudications, get nothing for expenses in lieu of the fifth part.

Page 2, No. 6.

1683. *January* 6. THE EARL of DUNFERMLING *against* The EARL of CALLENDAR.

IN the minute of contract of marriage, betwixt the Earl of Callendar and the Lady Dunfermling, *in anno* 1633, he having obliged himself to provide the conquest, debts being first paid, to her in conjunct-fee and liferent; it being alleged, That the said provision did extend only to lands and sums to be conquest, and not to teinds,—for that clauses of conquest are *strictissimi juris*, and land and teinds are *jura separata*;—Answered, The minute being drawn by my Lord himself, who was no lawyer, it appears, that, under the designation of lands, he understood teinds; for, having provided her to the conjunct-fee of the lands and barony of Livingston, without mention of teinds in the obligement, in the clause mentioning the rights and securities granted to her, it bears of the said lands, together with the teinds; which implies, that he looked upon lands to comprehend teinds in the first part of the obligement. 2. The conquest is provided to her in the same way as she is provided to the lands of Livingston, and consequently to the teinds of the conquest. 3. The Lady's opulent jointure of 20,000 merks being the only subject out of which there was any prospect of conquest, it were unreasonable to disappoint her thereof. 4. She being provided to sums, she had right thereto, whatever way employed, whether on lands, teinds, or bonds *jure surrogati*. The Lords, in respect of the conception of the minute above mentioned, found the Lady to have right to teinds. Here, it was not considered, if the teinds were under tack, or annexed to the lands. The Lords also found, That the price of lands sold by the Earl of Callendar, before the marriage, was not to be presumed remaining at the

time of the marriage, unless it were proven: *quo casu* it would be presumed that they were employed to acquire lands after the marriage; and a proportion of lands effeiring thereto would not be considered as conquest during the marriage: And, albeit the pursuer could prove that these sums were otherwise expended, yet it is not without debate, but that lands effeiring thereto ought to be subduced from the conquest; seeing, had not these sums been so employed, others with which the conquest was made might have been expended upon the occasion; and, money being a fungible, we are to consider the species on't, whether it be the individual money that belonged to the husband before the marriage, or not; but it is equally reasonable that the estate, before the marriage, be made up, which perhaps may be liable to the like obligement of conquest of the first marriage, as that debt due by the husband before the second marriage should be paid out of the conquest during the marriage, where there is no preceding estate; and if there be an estate, it is reasonable the debt be deduced out of it. *Vide* No. 352, [Laird of Niddery against his Brother James, February 1683;] and No. 391, [Frazer against Frazer, 6th December 1687.]

Page 85, No. 349.

1683. *February.* GRANT of KIRDELLS *against* BIRKENBURN.

GRANT of Kirdells, [mentioned *supra*, No. 131, Grant of Kirdells against Birkenburn, 8th December 1682,] having insisted that the defender should count for 7000 merks, as the price of lands contained in the disposition, and the value of the lands being proven not to exceed 6000 merks;—the Lords found that the defender, as a conjunct person, needed to hold count for that sum only; and, *quoad ultra*, was in the case of a stranger, the disposition bearing the receipt of the whole 7000 merks.

Page 27, No. 133, [1st.]

1683. *February.* BONNAR *against* WILLIAM ARNOT.

A FATHER having assigned a bond to his wife in liferent, and to their daughter, and the heirs of her body in fee; which failing, the one half of the fee to the wife, and the other half to his own brother:—by a distinct clause, in case the daughter died without bairns, the father, *per verba de presenti*, disponed the money to his wife and to his brother, by equal portions. The daughter having chosen a curator, left the sum to him in legacy at her death; which was questioned by her uncle, because she could not disappoint, by her testament, the conditional assignation in the last clause, which existed. Answered, The testator, being fiar by the conception of the assignation, she might dispose of the sum, although, by the last clause, the mother and uncle might have succeeded thereto, *ab intestato*, without a service. Replied, The testator could only have spent it, or disposed on't for onerous causes; and 'tis usual for parents, in bonds of provision to their children, to adject a quality, that the money should return, in case of their decease before such an age, or unmarried; which bonds the Lords have often found, particularly in the case of the children of Laureston, could not be assigned without an onerous cause. The Lords sustained the legacy left by the daughter, February 1683. But the contrary was afterwards determined