

the tackfman's preference ; but the comprifer being feafed before the tack was clad with natural poffeffion and decreets, the comprifer was preferred ; and alfo becaufe he alleged, that the common author, from whom he comprifed, remained in real poffeffion of the lands himfelf, to the time of his fafine, which was admitted to his probation ; albeit the tackfman alleged, that the fummons, whereupon the decret followed, was executed before the comprifer's fafine ; and that he had been in natural poffeffion, before the fafine, of the mails and duties ; like as before the fame, the poffeffors of the lands being tackfmen to his author, they took new subtacks of him, and acknowledged his right, and paid to him their tack-duties ; which was all repelled, as is above written.

Act. *Nicolfon.*

Alt. *Cunninghame.*

Clerk, *Scot.*
Durie, p. 307.

No 8.

1629. July 10. L. OF CLACKMANNAN *against* L. BARROUNIE.

IN a reduction of a comprifing, becaufe the bond containing the fum, for which the comprifing was deduced, was heritable and not made moveable ; the tenor of which bond was, that the debtor, for the faid fum, was obliged to give his creditor infeftment in his land redeemable ; and containing a back-tack yearly, for payment of victual, for the farm of the land ; and alfo bearing, ' The debtor to be obliged, notwithstanding of the heritable difpofition of the lands redeemable, to pay the fum, at the term, therein-contained ; and in cafe of failzie, a penalty ;' this was the tenor thereof, and bore not, that the fum fhould be paid, either upon charge, or requifition to be made therefor, at the term of payment therein expreffed, or at any other term, when the creditor fhould feek the fame ; but only fimplly, that the debtor fhould pay it at that one term, fpecially expreffed in the bond ; after which term, diverfe years, the money lying over unpaid, the party creditor receiving payment of the duties of the lands, or annual-rent of the money, and thereafter comprifing the land, for not payment of the principal fum and penalty, the purfuer defired the fame to be reduced ; becaufe, after the term of payment contained in the bond, he had received payment of his annual-rent, and fo had taken him to his heritable fecurity of the land : And there was no claufe whereby he might feek the fum at any other term ; and fo it was not comprifeable ; and the rather, there never being a charge ufed by the creditor againft the debtor, before the comprifing.—THE LORDS fufained the comprifing, and affoizied from the reafon of reduction ; for the Lords found, that albeit the bond did not oblige the party to pay the fum, at any term after that term expreffed in the bond ; yet that was tacitly comprehended therein, otherwife the debtor could not have been holden to pay the fum, if it had not been precifely fought, but had lain over that fpecial term ; which were, in juftice, hard ; and found there needed no charge, feeing the bond required not the fame ; neither did the receipt of the annual, thereafter, prejudge the comprifing ; the

No 9.

A bond, in which no charge nor requifition is ftipulated, found comprifeable, although no charge given.

No 9. fame being only deduced, for the principal and penalty ; and which penalty extended not to so many annuals, as the creditor wanted unpaid to him.

A.G. *Advocatus* and *Mowat*.

Alt. *Nicolson, Burnet and Nairn*.

Clerk, *Hay*.

Durie, p. 460.

1665. December 2.

M'CULLOCH *against* CRAIG.

No 10.

A comprising found null, subscribed only by the clerk, and not by the messenger who was judge.

IN a pursuit, at the instance of Sir Hugh M'Culloch against Mr John Craig, as representing his father, Mr Robert Craig, by progress; which Mr Robert, was debtor by bond to Patrick Wood, and which bond was comprised; the right whereof, came in the person of the said Hugh M'Culloch; whereupon he pursued the said Mr John:—There being nothing produced, but a comprising, subscribed by James Allan, who was clerk to the comprising, and not by the messenger who was judge; the LORDS would find no process thereon.

Fol. Dic. v. 1. p. 5. Newbyth MS. p. 42.

1670. July 21.

LADY LUCY HAMILTON *against* the CREDITORS OF MONCASTLE.

No 11.

A warrant, upon a bill to lead a comprising at another head burgh, than that of the shire where the lands lay, was found null, since it was not at Edinburgh, which is *communis patria*.

IN the reduction, at Lady Lucy's instance, against the Creditors of Moncastle, it being *alleged* for Pitroan, one of the trustees, that he himself being a creditor, and inserted in the disposition *ab initio*, the same could not be taken away, but *scripto vel juramento*.—It was *replied*, That he ought to condescend and instruct *in quantum* he was creditor; specially, he being Moncastle's brother-in-law, and so a confident person.—THE LORDS did ordain him to condescend and instruct, otherwise they declared they would reduce his right as simulate.—*2do*, The defenders offered to purge the pursuer's comprising, she assigning them thereto.—To this it was *replied*, That the reversion of the comprising being expired, and the right thereby become irredeemable, she was not obliged to assign; but declared that she was content to discharge the comprising upon payment.—THE LORDS found the offer to discharge the comprising sufficient, and that she was not obliged to assign.—*3tio*, It was *alleged* for Kelburn, who was likewise a compriser, That his right could not be reduced upon these libelled reasons: That the lands were denounced at the head burgh of the regality; and that the comprising was led in Glasgow, which is not the head burgh of the shire; because, albeit regalities were suppressed at that time by the usurpers; yet *quoad* doing of legal diligence at the head burghs of regalities, there was no discharge thereof in their act and proclamation. And as to the *second*, the comprising was led at Glasgow, upon a special warrant from the English judges.

It was *replied* to the *first*, That by act and proclamation of the usurpers, all jurisdictions of Lords of regalities were discharged and suppressed; and these