

(NATURE and EFFECT.)

No 16.

A comprifer may chuse, whether to retain possession, or use personal diligence; but cannot take advantage of both.
See No 14.

1631. *January 22.* L. CLOVERHILL *against* MOODIE.

CLOVERHILL having comprised Moodie's lands for debt, and, nevertheless, charging Moodie, by horning, to pay; and, upon that horning, having letters of caption; Moodie suspended, that the comprising ought to stay personal execution, or else, that the creditor should renounce the same. THE LORDS found, That, if the suspender would enter the charger to the possession of the lands comprised, to be bruiked by him, conform to the comprising, he ought to accept of the same, *quo casu*, no personal execution of caption ought to be granted against the debtor; albeit that the debtor's wife was infest in the lands, and that she would not renounce her right, in favour of the compriser, which the LORDS found the debtor could not be compelled to obtain; but, without her consent, found the comprising and possession sufficient; and, if the compriser would not accept of possession, that he ought, *eo casu*, to renounce his comprising; for they found, That he ought not to keep both, viz. both to use caption, and to retain the possession and comprising; but that he had his choice of any one of them.

Act. ———

Alt. *Gibson.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 15. Durie, p. 557.*1631. *December 7.* SCARLET *against* PATERSON.

No 17.

An appriser, who did not renounce, but whose possession had not yet produced full payment, found entitled to poind, but not to execute caption.

HELEN SCARLET having comprised from John Paterfon, a tenement, the legal whereof was expired; before which comprising, the lands were burdened with an annualrent, which exhausted almost the yearly profit of the land, and mails thereof: She, after decease of her debtor, and expiry of the legal, pursues the son of her debtor, as behaving himself as heir to him, to make payment to her of the sum, for which she had comprised; and he *alleging*, That by the foresaid comprising, she must be reputed satisfied, and cannot return to seek personal execution for that debt, whereof she was satisfied by the comprising, the legal whereof was expired; and so she was become heretrix of the land, unless she would renounce, and resign her comprising and infestment *habili modo*: And the pursuer *replying*, That the comprising cannot hinder the creditor to seek payment, and to use all competent means to obtain payment, besides the comprising, seeing the same is unprofitable for her, through the burdening of the said anterior infestment of annualrent; and she needs not renounce the comprising, but being paid she shall renounce the same: And the defender *duplicing*, That albeit the annualrent should exhaust the whole mails of the lands, (which was not granted,) yet the heritable right thereof subsisting in the compriser's person, was more worth than the whole debt of the comprising.—THE LORDS found the