

covered against the party charged to enter heir, because it is a part of the execution of the sentence, which cannot precede the sentence itself. This was found between John M'Martin and Andrew Couper, who were striving upon priority of diligence, who should be first infeft by the Earl of Cassilis, superior of the lands which they had both comprised, wherein Andrew Couper's comprising being prior was not sustained, in respect he had used both the charges, viz. general and special, before the sentence, and so against the inviolable custom observed in such cases.

In the same action, Andrew Couper's comprising being challenged as null, because the ground of it was an heritable bond, never made moveable by a charge, (which was a plain nullity of the law, and took away the comprising *in solidum*;)—THE LORDS would not take away the comprising standing *ope exceptionis*, but found it behoved to be reduced.

The like found between the Lord Balmerino and Gilbert Elliot of Stobbs, 10th July 1634.

*Fol. Dic. v. 1. p. 169. Spottiswood, p. 43.*

1662. July 10.

JOHN KER *against* KER of Fernilee, and Others.

JOHN KER having granted a bond, whereupon he being charged to enter heir to several persons his predecessors, and having renounced, their lands were adjudged; John took assignation to the adjudication himself, and pursued the defenders for exhibition of the rights and evidents of the lands, and delivery thereof. The defender *alleged* absolvitor, *imo*, Because the pursuit being upon the pursuer's own bond, now again assigned to himself, *confusione tollitur obligatio*.

THE LORDS repelled this defence.

*2do*, Absolvitor, because the pursuer can have no interest upon these rights proceeding against him, as apparent heir to these predecessors, and now assigned to him, because there were other apparent heirs, specially condescended on, nearer of blood. The pursuer *answered*, *Non relevat*, to take away his infeftment, which behoved to be reduced. *2dly*, *Non competit* to the defenders, unless these nearer apparent heirs were compearing for their interest. The defender *replied*, That the infeftments having obtained no possession, and having proceeded only upon a charge to enter heir against the pursuer by collusion; it was competent by exception, seeing there was no service, nor possession, nor any thing done that the nearest heirs were obliged to know; and it was also competent to the defenders not to deliver the writs to any having no right thereto, they being liable to deliver them to the nearest heir of the true owner.

THE LORDS repelled this defence against the exhibition, reserving it to the delivery, in which they found it competent to the nearer appearing heirs, without reduction.

*Fol. Dic. v. 1. p. 169. Stair, v. 1. p. 124.*

No 7.

No 8.

An adjudication being challenged as following upon a charge to enter heir, the person charged not being the nearest heir, this was found competent to the nearer apparent heir without reduction, tho' infeftment had past upon the adjudication.