

No 50.

the son could not comprize, but *cum onere* of all debts due by the father, none of their names being insert in the list. It was *answered* for David Oswald, and the rest of the comprizers, that Mr Patrick Inglis having the full right of the lands settled in his person, and undertaking his father's debts, conform to a list, for which he was only personally liable, there being no inhibition served against him, it was lawful for any person to acquire a right from him to the lands, or to his own creditors to acquire a right from him by comprizing; and they having led comprizings within year and day of the comprizings led by the father's creditors, they ought to come in *pari passu*.—THE LORDS, as to the first debate, preferred Mr John Inglis of Nether Crammond, upon that ground, that not only he had a real right to the estate, but likewise that it was clad with possession, in so far as he instructed that Mr Cornelius had made payment of the rents to the creditors, and had obtained discharges to the said Mr John as having paid the same, before any comprizing led against him, and so albeit his infestment was base, it was clad with possession before any of their rights. As to the *second* point, anent the preference betwixt the comprizers against the father and against the son, they did consider the right and disposition made to the son, and finding that neither in the dispositive part, procuratory of resignation, nor precept of sasine, it was really affected with these debts; so that in the narrative it did only bear, that he had become personally liable to pay these creditors whereupon no inhibition was served, they found that all the comprizings being within year and day, they ought to come in *pari passu*, without any regard who was within the list or out of the list. See COMPETITION.

*Gosford, MS. No 917. 918. p. 594.*

No 51.

1678. *January 31.* MATHIESON *against* FISHER.

No cautioner can legally claim expenses given out by him after a decree is recovered against him, because they were needless and wilful, so that being once decerned, he ought to have paid the debt.

*Fol. Dic. v. 1. p. 127. Fountainball, MS.*

\* \* See This case *voce* EXPENSES.

No 52.

A cautioner, although he had not paid, was preferred, as executor-creditor, to the relict, he producing a

1681. *February 4.*

M'KENZIE of Suddy *against* The COUNTESS of SEAFORTH.

A CAUTIONER being distressed, and confirming as executor creditor to the principal debtor, and the relict as a posterior executrix creditrix competing, and *alleging* he had no right till he paid, and he *answering* that he was willing with