

rest of the lands comprised, were united, and where the saine was appointed to be taken; but that the searching should be at all the lands, otherways the comprising to be null.

A^ct. Hope. Alt. Nicolson and Oliphant. Gibson, Clerk.
Fol. Dic. v. 1. p. 5. Durie, p. 103.

No 5.

1624. July MONCRIEFF *against* TENANTS OF LAWES.

IN an action between Mr Archibald Moncrieff, and the tenants of Lawes, in Ross, the LORDS sustained the comprising, albeit there was no searching and seeking of moveables, at the dwelling house of him against whom the comprising was led, but only upon the ground of the lands comprised; which they found sufficient.

Fol. Dic. v. 1. p. 5. Spottiswood (COMPRISING) p. 42.

No 6.

1624. November 20. FORSYTH *against* L. SMEITON.

IN an action betwixt Marion Forsyth and L. Smeiton, the LORDS found, a comprising sufficient; whereby two lands being comprised upon two denunciations, made at two several times; to wit, a denunciation for the one land, done at one time, after searching for poindable goods, was used first upon the ground of that land; and the other denunciation, made for the other lands, after searching was made upon the ground of that other land denounced: Which searching, at the second land denounced, being made after the denunciation of the first land, the defender *alleged*, rendered the comprising altogether null; seeing he alleged, that the searching ought to have been made upon all the lands comprised, and every one of them, before denunciation could be made, for comprising of any of the lands; and that he alleged that it was not sufficient, that the searching preceded the denunciation of each several land; but there behoved to have been searching at all the lands, before any denunciation could be made at all, of any land: Which allegiance was repelled, and the comprising sustained; for it was found sufficient, that the searching preceded each denunciation.

Durie, p. 150.

No 7.

A comprising contained two parcels of land. Search for moveables was made on the one parcel, before denunciation for it; and on the other, before denunciation for it. This found sufficient; and that it was not necessary to search on both, before denouncing for either.

1627. July 11. WALLACE *against* HARVEY.

IN a suspension betwixt Wallace and Harvey, Harvey having comprised certain lands from Wallace, his debtor, and being therein seised, obtained decret of removing; which being desired to be suspended, and reduced upon this reason by Adam Wallace; because the said Adam had obtained tack of the same lands,

No 8.

A tack is granted before lands are denounced to be comprised. If the tackf-

No 8.
 man obtain
 possession be-
 fore the com-
 prifer be in-
 feft, the
 tackfman will
 be preferred.

from whom they were comprised, and that for fums of money truly adebted to him ; which tack was fet before the lands were denounced to be comprised ; and the comprifer anfwering, that he fhould be preferred to the tackfman ; becaufe, albeit the tack was fet of a date anterior to his denunciation ; yet the fame was conferred to a time of entry ; before which entry his comprising was perfected ; fo that the tack not being clad with poffeffion, before his comprising, and by confequence not being real ; his comprising intervening before the entry, albeit after the date thereof, was fuch an impediment, as rendered the tack ineffectual, which could not be real by poffeffion before the entry ; and therefore cannot prejudge his real right of comprising, it being a deed legally done in feeking execution neceffary for his juft debt ; whereas the tack was a voluntary deed, done betwixt two good-brethren, and fo the more fufpicious. And the fufpender opposing his tack, anterior to the comprising, and offering to prove the verity of the debt owing to him by the fetter thereof ; and alleging that his tack being fet in May 1623, and the entry to be at Martinmas, the fame year, which could not be fooner, in refpect the crop growing upon the lands that year, the fame being poffeffed by tenants, the intervening comprising ought not to prejudge his tack ; efpecially feeing his comprising was lefs real than his tack, before that he was feafed upon his comprising ; it being true that he was not feafed until the year 1625, two years after the comprising, and time of entry of the tack ; whereas the tackfman, the firft year after the entry, viz. the year 1624, and alfo the year 1625, had obtained decreet againft the tenants, for the duties of the faids lands, and payment conform thereto.—THE LORDS preferred the tackfman, in this poffeffory judgment, to the comprifer ; albeit the comprising was deduced, and ended before the entry of the tack, feeing the comprifer had done no diligence two years after the comprising, to obtain himfelf feafed thereon in the lands ; fo that his comprising, without fafine, being no more real right than the tack, without poffeffion, before the entry ; and the fame tack, before fafine upon the comprising, being clad with poffeffion, was fufained to maintain the tackfman in poffeffion, until his tack fhould be taken away, in fome ordinary purfuit, by way of action, or by fome better argument ; but if fafine had been timely taken upon the comprising, or diligence done to have obtained the fame, the Lords inclined *eo cafu* to think, that the intervening comprising before the entry of the tack, would have been an impediment, why the tack would never have been effectual againft that comprifer ; no more than it could have been prejudicial to any, who, before the entry, had heritably bought the lands from the fetter of the tack : But the not doing of diligence, to obtain fafine fo long after the comprising, without the which fafine or diligence it was not real, was the reafon of this decifion ; the comprifer was alfo brother-in-law to him, from whom he comprised, and the tackfman was his brother.—Thereafter, upon the 17th July, the LORDS preferred the comprifer ; becaufe the tackfman's decreet and poffeffion were condefcended on by him, to be after the comprifer's fafine ; whereas, if they had been before his fafine, the tack thereby would have been real, and was the caufe of

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.