

(NATURE and EFFECT.)

1662. June 17 PATRICK HERON *against* MARTIN STEVENSON.

PATRICK HERON having obtained decret of removing *against* Martin Stevifon, he fufpends, on this reafon, that the decret was not upon liti-conteftation; but a time being affigned to the fufpender, to find caution for the violent profits, and he failing, was decerned without being admitted to any defence; and now *alleges*, that he ought not to remove; becaufe he obtained decret of adjudication of the lands in queftion, *against* the common author, and thereupon charged the fuperior long before the charger's decret of adjudication or infeftment. The charger *answered*, that the reafon ought to be repelled; becaufe the decret was given *against* the defender, comparing and failing as faid is. *2do*, The charger ftands infeft upon his adjudication. The purfuer was never infeft, neither did he ufe all diligence to get himfelf infeft, nor having denounced the fuperior, and in cafe he had fufpended, difcuffing the fufpention.

Fol. Dic. v. 1. p. 15. Stair, v. 1. p. 110.

* * * As to the effect of a charge in competition with voluntary rights, See COMPETITION.

1621. December 20. SMITH *against* WOOD.

IN an action betwixt Smith, burgef of Edinburgh, and Wood, wherein Smith charging the party perfonally for fums of money addebted to him, the other excepting, that Smith had comprifed the debtor's land for that fame fum, whereupon he had taken fafine, and thereby alleged that the perfonal execution ought to ceafe: THE LORDS found, that the creditor might have recourfe to his perfonal execution, notwithstanding of the comprifing and fafine, feeing the comprifer offered to renounce the comprifing, and make refignation of the lands comprifed *rebus integris*, he having no intromiffion further, nor profit of the money, which the LORDS found he might lawfully do, notwithstanding of the fafine.

Clerk, Hay.

Fol. Dic. v. 1. p. 15. Durie, p. 7.

1627. June 23. SINCLAIR *against* BRUCE.

IN a fufpention, *against* William Bruce of Symbester, raifed by one Sinclair, in Orkney, who was charged, by letters of horning, to pay, to the faid William, certain fums, contained in a decret of fpuilzie, obtained, by him, *against* the fufpender: The *reafon* was, That the charger had ufed comprifing of the fufpender's

No 11.

Effect of an adjudication, with a charge *against* the fuperior.

No 12.

Whether apprifing precludes perfonal execution?

No 13.

An apprifor allowed to retain his fe- curity, and yet do perfonal execution,

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No 13.
as he had not
attained pos-
session.

lands, for the said sums, whereupon he was infest; and which comprising and seafin was a real execution, which behoved to make all personal execution cease. THE LORDS found not this reason relevant; for, notwithstanding of the comprising and seafine, albeit the legal reversion was also expired, they found, That the charger might also use personal execution, by horning and caption, against the suspender, ay and while he were paid of his sums: And found also, That he might retain the right of the said comprising and infestment; and that he needed not to renounce the same before he took him to the other personal execution; but that he might keep that security: By the which the LORDS found, That he could not thereby be found to be satisfied of his sum, and secluded from the said personal execution, except that the compriser had obtained possession of the lands comprised. Neither was it respected, where the suspender *alleged*, That it was in the charger's default, that he wanted possession, seeing he had never done diligence to recover possession; nor could qualify any lawful impediment, which stayed, or could debar him therefrom; which was repelled, and the letters found orderly proceeded, ay and while he were paid of the sum.

Act. Baird.

Alt. Chairp.

Hay, Clerk.

Fol. Dic. v. 1. p. 15. Durie, p. 299.

1628. January 30.

MELDRUM against L. CLUNIE.

No 14.
If there be no
impediment
to prevent the
compriser's
possession, and
he does not
renounce; not
entitled to use
personal exe-
cution.
See No 16.

IN a suspension, by Andrew Meldrum against L. Clunie; he desiring to be relieved out of ward, wherein he was committed by Clunie; the LORDS found the reason of suspension relevant, upon a comprising of the suspender's lands, deduced by Clunie, for that same debt for the which he was incarcerated; which comprising stood unrenounced by the charger, albeit no possession was apprehended thereby. THE LORDS found this sufficient to produce liberty to the suspender; for the same behoved to be reputed as payment, seeing the party neither would renounce the same, nor shew any just cause which might make the same appear to be unprofitable to him, nor qualify any impediment, which of the law might have debarred him from the possession of the lands comprised, seeing he had never done diligence to recover the same. And so the LORDS found, That the creditor ought not to retain the comprising, and also detain the debtor in ward.

The like was done, the 9th of February, betwixt Hunter and ———; where the comprising was found to take away personal execution, so long as the comprising was not renounced; albeit the comprising was not clad with possession, seeing the compriser alleged not, that he was debarred by any lawful impediment, after diligence done by him.

Act. Mowat.

Alt. Lawrie.

Clerk, Gibson.

Fol. Dic. v. 1. p. 15. Durie, p. 336.