
 FORMALITIES *of the* DILIGENCE.

1629. November 25. DICKSON *against* KER and YOUNG.

A CREDITOR comprising from his debtor land pertaining to him, and contending to be preferred to another creditor, who had also comprised, but after him; and the second compriser *alleging*, albeit he was last in comprising, yet he ought to be preferred; seeing the first comprising was deduced against one as infest, who was never infest; and he ought to have comprised against him, as charged to enter heir to his predecessor last infest; whereas he had not so charged his debtor to enter heir, before the comprising, as is appointed by act of Parliament 1621; whereas the second compriser had charged his debtor to enter heir, and thereafter had deduced his comprising; and so the said comprising was null;—and the other *answering*, That there needed no charge to precede his comprising, seeing the debtor was retoured heir, and charged the superior to enter him, who had suspended; likeas this first compriser had charged the superior to receive him, upon his comprising; who had also suspended against him, that he could not infest him, the debtor not being infest; and there it was found in that suspension, that the superior could not allege, that which was his own fault;—which being considered, the LORDS found, That the first compriser should be preferred, albeit the debtor was not infest in the lands comprised, and albeit no special charge was used before the comprising; which the LORDS found to be supplied by the debtor's retour, and charge against the superior, which was found to be equivalent to a *fasine*; albeit that suspension stood undiscuft, and that another creditor opposed against the comprising, and not the superior, nor the common debtor, (to either of whom it was not competent); and it was found to militate against the said other compriser; it being alleged, that the compriser was paid off a part of the sums for which he comprised, before the comprising, and so it was null; also that he was paid off a part, since the comprising, and so could not have the whole lands comprised: This was found relevant, and found admiffable by way of exception, without necessity to reduce thereupon.

A&S. *Stuart & Aiton.*Alt. *Nicolson & Craig.*Clerk, *Scot.**Durie, p. 469.*

No 1.

The want of a special charge, before comprising; supplied by the circumstance of debtor being retoured heir, though not infest.