these rights, both of wadset, eik to the reversion, and comprising by intromission or payment; for which they ordained count and reckoning: but refused to ascribe the possession to the wadset, and eik to the reversion, only until they were satisfied; so that the reversion of the comprising might expire, and thereby the whole right of the lands taken away for an inconsiderable sum; which was done upon the pursuer's consent and declaration that he was willing that all these rights should be satisfied, providing that the legal of the comprising should be declared to be still current. But if it had been decided *in jure* and strictness of law, it is thought, that, after the deducing of the comprising, and that William Downie had acquired right thereto, his possession could only have been ascribed to the comprising, and not to the wadset or eiks to the reversion, which were no valid titles of possession; and so the removing should have been sustained.

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1671. *February* 9. LORD RENTOUN, JUSTICE-CLERK, *against* The LAIRD of CRAIGIHALL.

IN a double poinding, raised at the Countess of Leven's instance, against the Justice-Clerk and Craigihall;—It was ALLEGED for the Justice-Clerk, That he ought to be preferred; because he had arrested and obtained a decreet to make forthcoming, against the Countess, of all sums addebted by her to the Laird of Lamertoun; whereas Craigihall had only arrested, and led a comprising against the lands of Eastnisbet, which were given in wadset and security to Lamertoun, by the Earl of Leven; but was never infeft, nor had done any diligence upon the comprising.

It was ALLEGED for Craigihall, That he ought to be preferred; because his arrestment was prior, and he was *in cursu* to make forthcoming against the Earl of Leven, before he died; and, upon a bill, was reponed against the Justice-Clerk's decreet to make forthcoming: And for his comprising, albeit he was neither infeft, nor had done diligence, yet, as to all subsequent years' duties, he ought to be preferred, because a naked comprising is a sufficient title to pursue for maills and duties.

The Lords did prefer Craigihall, not only upon his arrestment, but upon his comprising, as to all subsequent years; and found, that a compriser was not obliged in law to do diligence, but that a comprising is a sufficient title against all others who have not a better right.

Thereafter the Justice-Clerk did ALLEGE, That he was donatar to the single and liferent escheat of the Laird of Lamertoun, and had thereupon obtained a general declarator, and intented a special action, against the Countess. But this right was reserved to be debated thereafter.

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1670. *February* 14. GEORGE BANES *against* The BAILIES of CULROSS.

IN a subsidiary action pursued against the Bailies, for suffering one Henry

Bennet, who was their prisoner for debt, to escape out of the tolbooth; and therefore craving that they should pay the debt;—It was ALLEGED for the Magistrates, that they could not be liable for the debt, because the prisoner being a miserable person, having nothing of his own to maintain himself, he was still kept in prison, except when he was suffered to go to the hospital, where he was allowed his dinner, and another time to see his dying child, who had no body to attend it; and at these times there was a keeper ordained to attend him; so that immediately when the pursuer took instruments of his being at liberty, he was re-incarcerated, and kept in prison until he died there.

It was REPLIED, That the Magistrates had no power to grant any such liberty; and that it was sufficient that the pursuer had taken instruments that he was abroad and out of prison; seeing *squalor carceris* is a punishment for bankrupts, appointed by the law, which cannot be disposed with by inferior magistrates without making of themselves liable for the debt; as was decided by the Lords, March 27, 1623, in a case, Smith against the Magistrates of the Town of Elgin, where the Magistrates were found liable upon that ground of law.

The Lords, notwithstanding, did sustain the defence, and assoilyie the Magistrates; because that the dispensing with the prisoner to go abroad being for most necessary causes, and the prisoner being attended by a keeper, who did return him to prison in as good a condition as he was in, so that the pursuer could allege no prejudice. They found, that such dispensations could be no ground to make the Magistrates liable, where, in effect, the prisoner was still under custody; and that the cause of enlargement was upon the account of humanity and charity: And found, that the two cases did not quadrate in several circumstances.

That same session, within a few days, the like was decided,—The Town of Brechin against the Magistrates of Dundee,—upon this ground, That they had suffered one Dundass, their prisoner, to go to the fields, and cross the water of Tay in a boat: Notwithstanding whereof, this allegeance was found relevant,—That they offered to prove that he never went abroad but for his health, or necessary business, but with a keeper or guard, which was granted for his health by the advice of physicians; and when he crossed the ferry, it was in the Town's own boat, with a guard, and was never suffered to land in Fife's side; but that day, and all other days that he was suffered to go abroad, he was returned to the tolbooth, and was never one night out of prison. Which being the general custom of the Burgh of Edinburgh, and other towns, the Lords found it relevant to liberate the Magistrates from the debt.

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1671. *February* 17. NICOLL CAMPBELL *against* ANDREW HADDON.

IN a suspension, raised at the said Nicol's instance, of a charge on a bond granted by him, for the sum of £1900, upon this reason,—That the suspender being nowise debtor to the charger, for his own debt, but at the desire of Samuel Meikle, a goldsmith, he became cautioner to the charger; and the bond being drawn blank, he being an illiterate man, who could neither read nor write, he only gave orders to the two notaries to subscribe for him, upon express con-