

No 9. fame being only deduced, for the principal and penalty ; and which penalty extended not to so many annuals, as the creditor wanted unpaid to him.

A.G. *Advocatus* and *Mowat*.

Alt. *Nicolson, Burnet and Nairn*.

Clerk, *Hay*.

*Durie, p. 460.*

1665. December 2.

M'CULLOCH *against* CRAIG.

No 10.

A comprising found null, subscribed only by the clerk, and not by the messenger who was judge.

IN a purfuit, at the instance of Sir Hugh M'Culloch against Mr John Craig, as representing his father, Mr Robert Craig, by progress; which Mr Robert, was debtor by bond to Patrick Wood, and which bond was comprised; the right whereof, came in the person of the said Hugh M'Culloch; whereupon he pursued the said Mr John:—There being nothing produced, but a comprising, subscribed by James Allan, who was clerk to the comprising, and not by the messenger who was judge; the LORDS would find no process thereon.

*Fol. Dic. v. 1. p. 5. Newbyth MS. p. 42.*

1670. July 21.

LADY LUCY HAMILTON *against* the CREDITORS of MONCASTLE.

No 11.

A warrant, upon a bill to lead a comprising at another head burgh, than that of the shire where the lands lay, was found null, since it was not at Edinburgh, which is *communis patria*.

IN the reduction, at Lady Lucy's instance, against the Creditors of Moncastle, it being *alleged* for Pitroan, one of the trustees, that he himself being a creditor, and inserted in the disposition *ab initio*, the same could not be taken away, but *scripto vel juramento*.—It was *replied*, That he ought to condescend and instruct *in quantum* he was creditor; specially, he being Moncastle's brother-in-law, and so a confident person.—THE LORDS did ordain him to condescend and instruct, otherwise they declared they would reduce his right as simulate.—*2do*, The defenders offered to purge the pursuer's comprising, she assigning them thereto.—To this it was *replied*, That the reversion of the comprising being expired, and the right thereby become irredeemable, she was not obliged to assign; but declared that she was content to discharge the comprising upon payment.—THE LORDS found the offer to discharge the comprising sufficient, and that she was not obliged to assign.—*3tio*, It was *alleged* for Kelburn, who was likewise a compriser, That his right could not be reduced upon these libelled reasons: That the lands were denounced at the head burgh of the regality; and that the comprising was led in Glasgow, which is not the head burgh of the shire; because, albeit regalities were suppressed at that time by the usurpers; yet *quoad* doing of legal diligence at the head burghs of regalities, there was no discharge thereof in their act and proclamation. And as to the *second*, the comprising was led at Glasgow, upon a special warrant from the English judges.

It was *replied* to the *first*, That by act and proclamation of the usurpers, all jurisdictions of Lords of regalities were discharged and suppressed; and these

Being taken away, legal executions ought to have been done at the head burghs of the shires where the registers were kept, likeas it was their custom to do so.—To the *second* it was *replied*, That any warrant to lead an apprising at Glasgow, was *periculo petentis*, and contrary to the general practice, and reason; seeing denunciations are used at the head burghs of the shires where the lands ly, as being the only places where the lieges may have notice thereof.—THE LORDS did sustain the reduction, notwithstanding of the answers; upon this ground: That Kelburn's comprising was not led according to the laws, for the time then in being; and that Kelburn ought to have observed the same, as to the denunciation at the head burgh of the shire; which was hard, seeing he had done according to a standing act of Parliament; and that the usurper's act and proclamation was not special as to legal executions, which had no relation to processes; but only did discharge the Courts of regalties, and the service and vassalage due to the Lords of regalties.—The cause for which the Lords sustained the second reason was; that albeit they grant warrants to lead comprisings at Edinburgh, because it is *communis patria*, where all public records are kept, and notice may be had of legal diligences; yet they found, that, upon a naked bill, no such warrant ought to be granted for leading of comprisings, at any other head burgh, but that of the shire where the lands ly.

*Fol. Dic. v. 1. p. 4. Gosford, MS. No 311.*

1671. July 12.

The HEIRS of Mr THOMAS LUNDY against The EARL of SOUTHESK, and Others.

THE estate of Sir James Keith of Powburn, being apprifed by several of his creditors, they now compete for preference. Mr Thomas Lundy, who led the first apprifing; was more than year and day before the rest; and thereupon his heir craved preference.—It was *alleged*, the apprifing was null: *imo*, Because it proceeded upon a bond, carrying a clause of requisition, and the claim of the apprifing, did not libel thereupon; so that, albeit it be now produced and done, *debito tempore*, yet the claim was not sufficiently instructed without it. *2do*, The messenger did unwarrantably continue the court of apprifing, till another diet, without any necessary cause, which was never accustomed before, and is of very evil consequence; for thereby messengers, at their pleasure, may continue; and weary out the persons concerned; who might propone defences, or produce suspensions; and are not obliged to attend the pleasure of the messenger. *3tio*, The apprifing was at the Beitch-hill of Cupar, which is not within the shire where the lands lie; and, albeit there be a dispensation in the letters; that ought not to have been granted; because apprifings should only be in the head burgh of the shire, or, *in communi patria*, at Edinburgh; but especially, seeing the warrant was obtained from the Lords of course, among the common bills; without being read or considered, and so, is *periculo petentis*, and cannot prejudge

No 11.

No 12.

Upon any urgent occasion, the messenger, who is judge in the apprifing, may continue the court of apprifing, till another diet.