

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 SOUTHEK, 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.

No 12.

the more formal diligence of other comprisers ; especially, seeing Lundy apprised of new for the same sums, which will come in *pari passu* with the rest, being within year and day.—It was *answered*, That it is inherent in all jurisdictions, to continue processes to new diets, having kept the first diet ; and that the messenger, by the letters, is constituted sheriff ; and there is no question but sheriffs might, and did, prorogate diets in apprisings ; and the letters bear warrant to fix courts, one or more : And for the continuation, it was but to the next day, in regard of a great speat, the apprising being upon the hill in the open field, during rain ; and it being *modica mora*, to the next day ; which will give no warrant to an arbitrary continuation by messengers, to what interval they please : And as for the place, the Lords, by dispensation, may appoint what place they see convenient ; and albeit the dispensation had been of course, and that therein the clerks had failed ; yet the parties, obtainers of such dispensations, are secure thereby, and ought not to be prejudged.

THE LORDS sustained the apprising ; and found the requisition now produced sufficient ; and found, that the continuing of the diet for so short a time, to be no ground of nullity ; unless the competitors could allege a special cause, which they did, or might have alleged, whereby they were prejudged, by leading the apprising the second day, rather than the first. THE LORDS did also sustain the dispensation of the place ; and having perused the practice, produced at the instance of the Lady Lucia Hamilton, anent an apprising, led at Glasgow by dispensation ; They found, that the Lords did not annul the apprising on that ground ; but the LORDS ordained, That no bill, bearing dispensation, should pass of course in time coming ; but upon special reasons, to be considered by the Lords, or the Ordinary upon the bills ; and that messengers should not continue the diets in apprisings, but upon necessary causes ; and ordained an act to be insert in the books of feditur to that effect.

*Fol. Dic. v. 1. p. 4. and 5. Stair, v. 1. p. 752.*

1675. February 3. OLIPHANT of Provostmains against ———.

No 13.

A messenger dying after deducing comprising, but before he subscribed it, the Lords refused to allow another messenger, who only had executed the letters, but had not sat as judge, to subscribe it.

A BILL was given in, desiring, that a comprising being deduced, and the messenger having deceased in the interim, before he subscribed the same ; therefore, another messenger, who was his colleague, might be allowed and warranted to subscribe the said comprising.

THE LORDS considered, that the messenger that was in life, though he had been employed to execute the letters of the comprising, by denouncing and citing ; yet he did not sit, nor was colleague to the deceased messenger, or was judge with him, the day and time of the deducing of the said comprising ; and that a comprising being *processus executivus*, consisting of the executions, and of the process and sentence of comprising, upon the day that the debtor was cited thereto ; though divers messengers may act severally as to citation and denuncia-