

No 5.
had been
made move-
able by a
charge, given
by a defunct,
found to be-
come execu-
try, and not
adjudgeable.

made to the defunct, who was debtor to the pursuer; conceived in manner of an heritable bond, bearing annualrent; to be adjudged to the pursuer, for satisfying of the defunct's debt; to whom the defender called in this process of adjudication, had renounced to be heir, as is usual in these cases.—THE LORDS found, That this bond, and the right thereof, could not be craved to be adjudged by this manner of process of adjudication; in respect that the defunct had made the bond, and sum therein-contained, moveable, by making requisition therefor in his own time; whereby it was not heritable, to be fought by adjudication; but being thereby made moveable, would pertain to the executors of the defunct, and come under his testament, and so might be arrested or poynded; or, if the executors of the defunct should not confirm it, then the creditor might confirm himself executor, to the effect he might be paid, and that he might seek some other way than by adjudication.

A&. Aiton.

Alt. M'Gill.

Clerk, Gibson.

Fol. Dic. v. I. p. 10. Durie, p. 264.

1627. March 13. M'GHIE against LIVINGSTON.

No 6.
A compiser
found to have
no right to
rents, which
fell due prior
to his dili-
gence.
(See No 8.)

IN an action, at the instance of M'Ghie of Balmaghie against Livingston, for the mails and duties of his lands, conform to his infeftment; a compiser, who had comprised all right and title that the pursuer had to the lands, and who was also infeft therein, compearing and alleging, that he could not have right thereto; but the same pertained to him, by virtue of his comprising; the LORDS found, That the pursuer had right to the duties libelled, and not the compiser; because the pursuit was for years preceding the comprising; which they found pertained not to the compiser, albeit he alleged he had comprised *all right*, which the pursuer had to the lands, which gave him right for all bygone duties owing for the lands to the pursuer, even as effectually, as if the pursuer had made him assignee thereto; for the comprising was a legal assignation; and albeit it might appear, that the bygone duty owing before his comprising, could not be effectually comprised, the same being *res mobiles* which were affected with arrestments, and not comprisings; yet the defender contended, that they being bruiked and acclaimed by an heritable right to the land, they came under the comprising, which extended to all the pursuer's right which he had to the lands. And also he *alleged*, That, as by virtue of the comprising of an heritable contract, containing annualrent for a sum of money, the compiser would have right, not only to seek the principal sum, but all the bygone years annualrents, addebted to his debtor, by virtue of that contract, preceding his comprising; so ought it to be in this case, especially where the question is only betwixt him and the debtor, from whom he has comprised; and not betwixt him and any one of his

debtor's creditors, who had affected the faids bygone mails with arrestment. The allegiance was repelled, and the compriser found to have no right to the faids years duties, which preceded his comprising.

No 6.

Act. Herriot.

Alt. Cunninghame.

Clerk, Scot.

Fol. Dic. v. 1. p. 10. Durie, p. 289.

1629. July 11. Mr ARCHIBALD MONCRIEF against L. BALROUNIE.

A PURSUIT being moved by a compriser, for the mails and duties of the comprised lands; the comprising not being expedite before Martinmas 1628, but being dated the 12th or 13th day of the month, and the pursuit being for the year 1628; whereby the defender *alleged*, That his title being after both the terms, the pursuer had no right to that year's farms thereby: The allegiance was repelled; for the LORDS found, That seeing the denunciation preceded the term of Martinmas, and the comprising was expedite before Yule, which was the term of payment of the farms; and that the defenders convened for payment, were the same persons from whom he had comprised, and were convened for payment, and that no others were convened, who might allege intromission with the farms, or payment thereof *bona fide* to any other, beside the compriser; therefore the action was sustained upon this comprising, for the said crop, against these defenders, from whom he had comprised. Also the said comprising being quarrelled, because the party had not searched and fought, before the denunciation of the land, for the moveable, and poindable goods, at the parties dwelling-house; and that the comprising reported not that the officer had fought at the dwelling-house; but only bearing, that he fought upon the ground of the lands comprised; which he alleged was not enough, as said is, and therefore, that the comprising was null; seeing the moveable goods ought to be discuss'd by poinding, before the ground can be comprised; and which, the party *alleged*, could not be well discuss'd, except the moveables had been fought at the parties dwelling-house, and that the execution had borne the same.—THE LORDS repelled the allegiance, and sustained the comprising; albeit it bore not *per expressum*, that the moveables were fought for at the dwelling-place; for the same bearing, that the officer fought upon the ground of the land comprised, it implied, that he fought all the parts of that land, and consequently at the dwelling-house, if any was upon that land: And it was not found necessary; at the least it was found, that it would not annul the comprising, for not seeking at the parties dwelling-place, which was not upon the ground of the lands comprised; and found, that the execution needed not report the same; for, if any person had land in any distinct corner of the country, which the creditor intended to comprise, and that he had diverse dwelling-houses in other corners of the kingdom, far remoter, and distant from the lands comprised, it were iniquity to the creditor to be compelled to go to all these places, and search for moveables there; and this action for the mails and duties

No 7.

A comprising found to carry mails and duties, prior to its date; the lands being in the natural possession of the debtor.—

Search for moveables at the dwelling-house presumed, where the words of the execution general.