No 3.

they preferred him to the third comprifer, who claimed to be preferred to the Doctor, the fecond comprifer. The third comprifer *alleged*, as faid is, That the legal fell only under his comprifing; as he had denounced when the legal was extant, viz. after Haliburton's comprifing was complete, and perfected; and that Kincaid's comprifing, proceeding upon a denunciation, which could not extend to a legal, which was not then *in rerum natura*, could not carry the reverfion; but this plea was repelled. The contrary of this was found *in terminis*, in an action, betwixt Malloch and Murray againft Weir, in July 1620. But the LORDS found this laft decifion the moft juft, and would hereafter fo decide.

Act. *Hope* & *Lawtie*. Alt. *Nicolfon* & *Belfhes*. Clerk, *Gibfon*.

*** It is a common opinion, where comprifings are deduced for fums, whereof a part is paid before the comprifing, that the comprifing falls *in totum*, and will not fubfift for the reft of the fums, which are truly owing; and this was found in the action betwixt Lamb and Blackburn, and L. Smeiton, anno 1613, (*see* p. 95.): But there are many who doubt of the equity of that opinion, and think it no reafon, that the comprifing fhould fall for the fums which are truly owing, no more than horning and poinding, or arreftment, if they be executed for more than is owing, will not caufe the whole execution to fall, but only for fo much as is not a juft debt; and a decreet, obtained for more than is due debt, will not make the fentence to fall *in totum*: And this hath warrant alfo from the civil law, *de plus petitionibus*. But the reafon of the common opinion is, for the fraud of the comprifer, to apprife for that which he knows to be wrong, and his fraud is therein punifhed; but where there is no appearance, or fufpicion, of fraud, there the law admits place of excufe, *nam poteft exiftimari inique judicaffe, qui reum omnino abfolverit, cum conftaret & probatum fit, eum partem debere.*

Fol. Dic. v. 1. p. 10. *Durie, p.* 148.

1627. *January* 3. HAGIE *against* HER DAUGHTERS.

No 4.
A bond made moveable by a charge, found not adjudgeable.

HAGIE, relict of John Williamfon in Cupar, having charged her own children, three daughters, begotten by him, to enter heirs to their father; they having renounced; fhe fought adjudication of all his goods; and, among other things, of a bond of 3000 merks, efteemed moveable by a charge, and fo not to have been adjudgeable before her hufband's deceafe:—Many of the LORDS thought, that any moveable thing might be adjudged to a creditor, *quia nomina debitorum poffunt addici*; but the moft part fuftained the exception.

Spottifwood, (ADJUDICATION.) *p.* 8.

1627. *January* 30. COWPER *against* WILLIAMSON and BOGMILN.

No 5.
An heritable bond, which

IN an action of adjudication, at the inftance of a woman called Cowper, againft Williamfon and L. Bogmiln, whereby the purfuer craved a bond of fome monies

No 5.
had been made moveable by a charge, given by a defunct, found to become executry, 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 sought 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 poinded; 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.

Act. *Aiton*. Alt. *M'Gill*. Clerk, *Gibson*.
Fol. Dic. v. 1. *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 diligence.
(*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 compriser, 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 compriser; because the pursuit was for years preceding the comprising; which they found pertained not to the compriser, 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 compriser 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