

1614. February 26. LAMB *against* HEPBURN and BLACKBURN.

IN an action of reduction of a comprising, pursued by James Lamb, against Mr Patrick Hepburn of Smeiton, and Patrick Blackburn,—THE LORDS reduced the comprising, because it was proven, that the half of the sum was paid; but they reduced it, *tantum, a tempore sententiæ.*

Hope, (POINDING AND APPRISING), MS. v. 2. folio 208.

1622. July 19. LAIRD OF LUGTON *against* ALEXANDER CRANSTON.

IN an action, pursued by the Laird of Lugton against Alexander Cranston and others, for reduction of their comprising of the living of East Nisbet.—THE LORDS found, that a comprising was null, wherein the sums of the comprising were greater, than the sums contained in the denunciation; and would not permit the defenders to reduce their sum, by their declaration, to the sums decerned for.

Fol. Dic. v. 1. p. 6. Haddington, MS. No 2656.

1630. February 11. KER *against* L. LEMPITLAW.

IN a reduction of Lempitlaw's comprising; because Lempitlaw, before the comprising, had discharged a part of the sum, for which he had comprised:—THE LORDS found not this reason relevant, but assolizied therefrom, in respect that this discharge was competent to have been proponed by the reducer, before the sentence whereupon the comprising was deduced; and he comparing and proponing fundry exceptions; this being omitted, it was found, that he could not reduce thereupon: but the LORDS declared, that in the redeeming of the comprised lands, defalcation should be made, of as much of the money, for which the lands were comprised, as the sum of the discharge extended to. Another reason of reduction bearing, That it was agreed by contract betwixt the parties, that if any of them should annailzie any part of the sums whereto they had right, to any person, that the annailzier should lose all right that he had thereto; and the L. Lempitlaw having sold his right, which was sufficiently qualified; absolvitor was also given from this reason, because the LORDS found, that this failzie against the contract, by making of the alienation, ought not to import the conclusion desired, and convened on by both parties in the contract, except the pursuer could qualify some prejudice sustained by him, through making the alienation contrary to the contract; which prejudice not being qualified, and the reducer sustaining no hurt thereby, the LORDS found the

No 2.
Pluris petitio.

No 3.
A comprising was found null, because the sums decerned for, were greater than those contained in the denunciation.

No 4.
A comprising was sustained, tho' led for the whole sum, after part of it had been paid by the compriser himself, in respect the debtor, who had appeared in the constitution, had omitted to state the payment.

No 4. failzie ought not to be sustained, to pursue a reduction thereon, but affoilzied therefrom, albeit it was so expressly convened betwixt the parties.

Act. Stuart & Lawrie.

Act. Nicolson.

Clark, Hay.

Fol. Dic. v. 1. p. 7. Durie, p. 491.

1631. July 19. E. KINGHORN against STRANG.

No 5.

A comprising led for more than due, being upon a decree, decerning for full mails and duties, as by-gone non-entry duties before declarator, was annulled *in totum*.

IN a reduction of a gift and declarator of non-entry, and of a comprising deduced thereupon, at the instance of George Strang, who was ever since in possession of the lands comprised; the declarator and comprising being deduced in anno 1574, or thereby, and this reduction being only lately intended by the E. of Kinghorn heritably infest in these lands; the reason of reduction being, that the barony of Kinghorn, whereof the lands libelled were but a small part, not being the 15th part of the whole, were disposed by the King to the Earl of Kinghorn's predecessors, in feu, for payment yearly of a feu-duty; so that before declarator of non-entry was decerned, the donator, pursuer of the non-entry, could not crave the mails and duties of the lands to be decerned to him, but only the proportional part of the feu-duty, contained in the vassal's infestments, for all years intervening, betwixt the time of the non-entry, and before the declarator; albeit, after the declarator for the subsequent terms, the donator might seek the mails and duties; and so that the decret being so given, and the comprising deduced thereupon were null.—THE LORDS found this reason relevant; albeit so long a time after this decret, comprising, and possession; and albeit the defender alleged, that this declarator might then well proceed for the mails and duties, of all years before the decret, since the non-entry, there being at that time, neither law nor custom to the contrary; for albeit the custom now kept, might seem to tend to the contrary, yet that custom ought not to be drawn back to such an ancient time, when there were not many such sentences given; which were hard now to evert, with all that has followed thereupon, *post tantum temporis* upon this ground; specially seeing that the pursuer has not alleged, nor can allege, that the whole barony was retoured ever, or that the lands libelled, which are alleged to be a part thereof, were ever retoured to any extent; without which had been retoured, he alleged, that the giving of the lands in feu, was no cause to have stayed the declarator, for the mails of the lands, for the years before the declarator. And if it had been proponed then, it would have been repelled, and so should not now be found relevant to reduce; and if it had been then relevant, being proponed, yet it would never have stayed the declarator; for the sentence would have proceeded for that proportion of the feu-duty, whereto the lands should have been proven to have extended, and for that quantity he might have comprised, so that it were iniquity now to evert his whole comprising upon this ground, because a part of that, for which he had comprising