found it would, if his father, notwithstanding of the said apprising, continued in the possession of his lands to his death, and if the appriser never attained the possession in his lifetime; *sed de hoc multum dubito, nec æquitatem ejus capere possum;* but I think the Lords rather meant it should be a behaviour, if the apparent heir meddled before the establishing a right in his person.

Advocates' MS. No. 213, *folio* 104.

1671. *July* 11. Anent Execution of a Summons.

A MESSENGER'S execution, bearing in the general that he charged the haill within-named persons in the summons, without condescending on their names, will not be sustained, unless he take up his execution, and mend it by inserting *specificè* the names and sirnames of these he charged, and then abide at it.

Advocates' MS. No. 214, *folio* 104.

1671. *July* 5 and 11. Macraw *against* Lord Macdonald.

July 5.—In this action, ALLEGED, 1*mo*, No process; because neither executed personally, nor at his dwelling house. ANSWERED,—Ought to be repelled; because, conform to a warrant and dispensation from the Lords, contained in the summons, he was cited at the market cross of Inverness, as the nearest burgh in the Lowlands, *ob non tutum accessum* that could be had to his dwelling place. REPLIED,—A warrant *non relevat* to sustain such a warning or citation, unless it proceeded on a bill given in to the hail Lords, who, *re cognita*, allowed of the same. (This is the thing the lawyers call *citatio edictalis.)* DUPLIED,—He could never be heard to question his citation, because the sole effect of citation being *ut pars citata certioretur*, it is offered to be proven it came to the defender's notice. Craigie was content to give them the Lords' answer upon this point, whether such warrants behoved to pass on special knowledge of the hail Lords, or if they were sustainable as passing in course.

The Lords found they would sustain them, as they have been used to pass of course in times bygone.

2*do*, ALLEGED,—The citation is not yet lawful, because it bears not a copy to have been left at the said market cross, which is a necessary solemnity, and being omitted vitiates the execution. ANSWERED,—The execution stood good notwithstanding of the said allegeance; because it bears he duly and lawfully charged him; which words, duly and lawfully, presuppose all the requisite formalities to have been used. They were to have the Lords' answer on this also.

The Lords found that they would sustain the execution, if so be the messenger will take it up and mend it by adding these words, that he left a copy of the charge at the said cross, and abide by it.

Advocates' MS. No. 199, *folio* 101.

July 11.—In the foresaid action of Macraw against Macdonald, at No. 199, there was a third point then taken to interlocutor, (which then I omitted,) viz. if the messenger's execution on the first summons should not be sustained, because it wanted these words of a copy left; whether the execution upon the act and letters would be effectual, at least for this, that it would stop prescription, seeing it was given within some very few days of prescription. The Lords found, *esto* the first execution were null, and so that no process could be sustained on the second, yet that the second would have stood good, *ad hunc effectum*, to interrupt the forty years' prescription, and that *qualisqualis insinuatio sufficit in isto casu. Vide* A. Fabrum *in Cod. Lib.* 3. *Tit.* 8. *De Litiscontestatione defin. secunda. Vide l.* 13. *D. de Regulis Juris, in secundo sensu prout id exposuit* Bronchorstius. *Vide infra, No.* 285; [*5th December*, 1671,] *et supra, No.* 17, [*Riddocks* against *Sorleys*, 16*th June*, 1670.] *Vide l.* 15. *D. de inofficioso test.*

Advocates' MS. No. 215, *folio* 104.

1671. *July* 12. DOUGALL MACPHERSON *against* MURRAY.

THIS being a competition betwixt two comprisers, it was ALLEGED by Macpherson, that Murray's comprising was null upon four several heads. The first was, that it was led and deduced upon an heritable bond, which was never made moveable; at least, if it was made moveable, it was allenarly by a requisition made to the cautioner; which could never be a ground for a comprising against the principal; and that the comprising behoved yet to be null, because it bore nothing of the requisition at all.

(This apprising was led by one Mr. Thomas Lundie against Sir James Keith's estate of Caddom.)

This being taken to avizandum, the Lords found requisition being made sixty days before a term to the cautioner, (they being all bound conjunctly and severally in the bond,) was a ground good enough whereon the principal's lands might be comprised; as also that the comprising needed not narrate the said requisition; but find they may produce it now; and ordain the other party to see it.

The second nullity was, that it was a comprising led against the heir male, the heir of line not being called and discussed. To this it was ANSWERED, that he was discussed in so far as, he compearing by his procurator in a process intented by the said Murray, a day was taken for condescending and proving what estate belonged to the heir of line, to the effect he might discuss the same; and he failyeing, the term was circumduced against him.

This being also taken to interlocutor, the Lords found this sufficient discussion; and therefore, notwithstanding of the said second pretended nullity, sustained the comprising.

The third was, that the messenger, who was judge to the comprising, had prorogated diet from one day to another; whereas their said diet is ever most peremptory.

The Lords' answer being also sought on this, they found a messenger sitting judge to a comprising was not only sheriff in that part, but also supplied the room of the sheriff of the shire, before whom, of old, all comprisings were led;