

1671. *November 7.*

ON this day the following *species facti* was debated in the house. A certain creditor (to the effect he may either comprise or adjudge certain lands, whereto his debtor had right *jure sanguinis*, and as heir to the person who stood last vested and seased therein,) charges his debtor to enter heir in special to the said lands, as heir to his father, goodsire, or some other his predecessors, who stood last vested and seased therein; another creditor informing himself better, and getting true notice that it was his uncle, *exempli gratia*, who stood last infeft in these lands, and that he is his nearest heir, he charges him to enter himself heir in special to his uncle. Upon thir charges they both comprise or adjudge, according as the debtor compears to renounce or not to renounce; and afterwards competing for the mails and duties of the said lands, it was ALLEGED by the second creditor that he must be preferred, because the charge given by the first is null, at least their diligence is not so exact as his, in so far as he condescends not expressly by name and sirname on the person to whom he is charged to enter heir, and who stood last vested and seased in the said lands, but only by a general clause to enter heir to any of his predecessors who shall be found to have died last vested and seased in these lands; which seems as absurd as if he were charged to enter to lands without designing specially the lands.

To all this it was ANSWERED,—That it were a thing of very dangerous consequence to cast a comprising or adjudication upon such a *punctilio* of form as this, especially these general clauses having been very much frequented in the styles of special charges hitherto.

Some practiques not altogether unlike were called to mind, viz. One is made donatar to a ward, as falling in the King's hands through the decease of the goodsire; another discovering the goodsire was denuded before his death, and that the son was in fee, and so vassal, he procures a new gift of the ward, as vacant by the death of the son who was last vassal. In a competition betwixt the two donatars, the Lords did prefer the last, because his gift contained *verum modum vacationis*.

There was another, viz. A creditor comprises from his debtor the fee of some lands wherein he stood infeft, with all right whatsomever he had to the said lands; another creditor knowing he had only a servitude or an infeftment of annualrent in these lands, he comprises expressly his right of the annualrent; who, in the competition, ALLEGED he ought to be preferred to him who had comprised a *non-ens*, viz. the property, which noway belonged to the common debtor. Yet the Lords inclined to sustain the first comprising, because of the general words, And all other right standing in the person of the debtor; which must in this case be reputed equivalent to a special clause. *Quæritur, quid juris*, where, a comprising is led of lands as the same are expressed and bounded in the debtor's own charter, without saying any more? *Item*, where a man grants a precept of seasine for infefting me in all his lands, without special enumeration of any, or where some are named, and then a general clause adjected, And in all the rest of my lands, Whether this will furnish good action for poinding the ground of any part of his lands, or if it will reach lands acquired by him, yea or no?

The parallel will also hold, If one should take a gift of escheat in general, without expressing the particular horning and denunciation; or a gift of ward, without

telling the special way how it vaked, and by whose death ; or a gift of recognition, and not express the specific deed by which that delinquency or casualty was incurred ; or a presentation to a kirk, or a gift of an office, without telling *verum modum vacationis* ; or a general wadset of lands ; and another shall afterwards take a second gift of escheat, ward, non-entry, marriage, recognition ; or a second presentation or gift of a place ; or a special hypothec ; and they bear the particular deed, *et verum modum vacationis* : in a competition, the second would be fair to be preferred to the first. See *Act 23d, Parliament 1567* ; *Codex Fabrianus tit. de Sacrosanctis Ecclesiis, definit. 1, 4, et 82. Speciale pignus magis afficit rem quam generale*, says Gothofred in *notis ad leg. penult. D. In quibus causis pignus vel hypotheca remittitur* : which is applicable to the hail foresaid causes ; as also to two comprisings or two assignations, that the special is preferable to the general. *Vide infra, February, 1677, No. 550, § 3, Arbuthnot.* See Durie, *20th Nov. 1628, Watson and Stewart. Advocates' MS. No. 238, folio 109.*

1671. November 7.

ANENT APPRISING.

WHEN that imaginary ceremony of searching for moveables upon the ground of the lands, before the messenger can legally proceed to denounce them to be appraised, is used, an offer of cows or other cattle, to the value of the sum, will not impede the denunciation or apprising, nor the proving of the said offer will not be a ground whereon the comprising can be thereafter branled, as has been often decided ; and that for three reasons ; 1^{mo}, It is *aliud pro alio quam solutionem debitori facere non licet creditore invito.* 2^{do}, An offer of payment to the messenger *non relevat*, because he has no power to receive it, and therefore it should be made to the party. 3^{tio}, They should take their beasts themselves, dispose upon them, make penny of them, and so satisfy their credit. Yea in Cromartie's case, in 1664, the Lords found an offer of silver plate to the value of the sum owing, was not relevant to impede a comprising of lands, because it was not *argentum signatum* ; and it is species and illiquid, and so cannot compensate or pay. This agrees with *lex Quintus Mutius, 27. D. de Auro argento et mundo legatis.*
Advocates' MS. No. 239, folio 109.

1671. November 8.

SIR JOHN WILKY of Foulden *against* SIR JAMES CARMICHELL and OTHERS.

SIR JOHN WILKY of Foulden, pursues a declarator against Sir James Carmichell, Mr. Wm. Cheisley, William Brown, agent to the boroughs, and others, to hear and see it found and declared, That a bond granted by the said Sir John, as principal, and Sir James Carmichell, as cautioner, was void, null, and extinct, in so far as the same was satisfied and paid with the principal's own monies ; and consequently, that the assignation taken by the said Sir James, in Mr. Wm. Cheisley's