No 50.

the son could not comprize, but *cum onere* of all debts due by the father, none of their names being insert in the list. It was *answered* for David Oswald, and the rest of the comprizers, that Mr Patrick Inglis having the full right of the lands settled in his person, and undertaking his father's debts, conform to a list, for which he was only personally liable, there being no inhibition served against him, it was lawful for any person to acquire a right from him to the lands, or to his own creditors to acquire a right from him by comprizing; and they having led comprizings within year and day of the comprizings led by the father's creditors, they ought to come in *pari passu*.—THE LORDS, as to the first debate, preferred Mr John Inglis of Nether Crammond, upon that ground, that not only he had a real right to the estate, but likewise that it was clad with possession, in so far as he instructed that Mr Cornelius had made payment of the rents to the creditors, and had obtained discharges to the said Mr John as having paid the same, before any comprizing led against him, and so albeit his infeftment was base, it was clad with possession before any of their rights. As to the *second* point, anent the preference betwixt the comprizers against the father and against the son, they did consider the right and disposition made to the son, and finding that neither in the dispositive part, procuratory of resignation, nor precept of sasine, it was really affected with these debts; so that in the narrative it did only bear, that he had become personally liable to pay these creditors whereupon no inhibition was served, they found that all the comprizings being within year and day, they ought to come in *pari passu*, without any regard who was within the list or out of the list. *See* COMPETITION.

Gosford, MS. No 917. 918. *p.* 594.

No 51.

1678. *January* 31. MATHIESON *against* FISHER.

No cautioner can legally claim expenses given out by him after a decree is recovered against him, because they were needless and wilful, so that being once decerned, he ought to have paid the debt.

Fol. Dic. v. 1. *p.* 127. *Fountainhall, MS.*

*** *See* This case *voce* EXPENSES.

No 52.
A cautioner, although he had not paid, was preferred, as executor-creditor, to the relict, he producing a

1681. *February* 4.
M'KENZIE of Suddy *against* The COUNTESS of SEAFORTH.

A CAUTIONER being distressed, and confirming as executor creditor to the principal debtor, and the relict as a posterior executrix creditrix competing, and *alleging* he had no right till he paid, and he *answering* that he was willing with

the goods confirmed to pay the debts wherein he was bound.—THE LORDS sustained his confirmation, providing he produced a right to the debt, or a discharge thereof before extracting.

No 52. right to the debt, or discharge of it, before extract.

Fol. Dic. v. 1. *p.* 126. *Fountainhall, MS.*

1685. *November* 20. BURNET *against* VEITCH.

No 53. A decree of adjudication in relief was allowed to be extracted before distress, but under the quality, that it should not take effect till distress.

ROBERT BURNET, writer to the signet, seeking an adjudication against Veitch of Dawick's lands, and the clerk scrupling, he moved it to the Lords, that the ground of it was a bond of relief, and as yet there was no distress. THE LORDS allowed the extract of the decreet of adjudication to go out, with this quality, that it should not take effect till distress. This was opposed by Pitmedden and others, as informal, seeing in effect it was no debt till there was distress or payment, and is but a conditional obligation, *et dies incertus*, which cannot be the ground of any diligence; yet he might lose his relief, being prevented by others, unless he came in *pari passu* with them on his bond, or else cause the creditors, to whom he is bound, adjudge; which they may refuse, as being sufficiently secured.

Fol. Dic. v. 1. *p.* 126. *Fountainhall, v.* 1. *p.* 376.

*** *See* This case by President Falconer, No 12. p. 140.

1686. *November*. DICKSON *against* GOVAN and MYLNE.

No 54. An apprising found null because led, not by the creditor, but by the cautioner upon his bond of relief, before he was either distressed or had made payment.

JOHN PETER of Whitsleid as principal, and John Bonar as cautioner, having granted bond to Mr John Aitchison for 2000 merks, as also John Peter being due to John Bonar other 500 merks, upon which John Bonar is infeft in an yearly annualrent out of a tenement of land in Edinburgh; and he having obtained a decreet of poinding of the ground for four year's annualrent, upon which he apprised the tenement; and George Dickson, as having right by progress to an adjudication of the same tenement, pursues a reduction and improbation against James Govan and Alexander Mylne, as heir to John Bonar, of the foresaid apprising; and the terms being run, and the pursuer having craved certification, *contra non producta; alleged* for the defenders, That they had produced sufficiently to exclude the pursuer's title, the apprising being prior to the pursuer's adjudication, and so there could be no certification *contra non producta. Answered*, That the decreet of poinding of the ground, whereupon the apprising proceeded, was only in absence, and is intrinsically null; for the bond being only a bond of relief, as to the 2000 merks, there could have been no decreet of poinding of the ground as to the annualrent of that sum, unless John Bonar had been distrest, and had actually made payment of the annualrent to Aitchi-