

(EXTINCTION.)

See Morice against Orrock, 20th July 1678. Stair, v. 2. p. 637, under the Title JURISDICTION.

See Lady Crowdieknows against the Creditors, from D. Falconer, v. 1. p. 93. and 124. under the Title COMPENSATION.

See Alison against Auchinlecks, p. 114. v. 1. of this Dictionary.

REDEMPTION of APPRISINGS and ADJUDICATIONS.

1625. July 2.

DR. KINCAID against HALIBURTON.

No 1.
Competent in an action of redemption, to take account of intromissions. Found, that he who redeems, ought to pay to the compriser, the year's duty due to the superior, although the superior had given it *gratis* to the compriser. Also, must pay the expences, although the compriser had got the business done *gratis*.

IN an action of redemption betwixt Doctor Kincaid and Haliburton, for redeeming of lands comprised by Haliburton, and which were thereafter comprised by Dr Kincaid, and who by virtue of his comprising, and legal reversion, intended the said redemption: In the which process, the parties comparing, and disputing in the cause, the defender *alleged*, That the pursuer ought to exhibit and consign the sums, for the which he had comprised, together with a year's rent of the lands, due to the superior, for admitting him his vassal upon the comprising, with the expences made thereupon, and profits thereof, conform to the act of Parliament, *anno* 1621, which being assigned and given up to him, he was content to renounce the comprising.—It was *answered*, That the defender ought not to have the whole sum assigned to him, whereupon comprising was deduced, nor the year's duty and expences, and profits foresaid, in respect that by virtue of his comprising, the defender had intromitted with more of the duties of the lands, than would satisfy him of all his expences, made upon the deducing of his comprising; and for the satisfaction to the superior, and all the profits thereof; and as much as would pay him the half of his principal sum, conform to the rental of the land, which he offered to prove was intromitted with by the defender, by virtue of his comprising; and the defender *contending*, That this trial ought not to be taken in this way, but that the pursuer ought to pursue thereupon by another action, and that he ought to be compelled to exhibit the money before the Lords, as is usual in all redemptions.—THE LORDS found, That it was competent in this same action, *hoc loco et ordine*, to take trial, what quantity

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No 1.

of the duties of the lands comprised were intromitted with by the defender, and found no necessity to put the pursuer to any other action, or further process for the same; and also found, That it was not necessary to the pursuer now to consign the money, to remain idle in the clerk's hands, in respect that the process would depend and ly over upon the probation to be deduced by the pursuer, for verifying of the defender's intromission with the duties of the comprised lands; before the event of the which trial, neither could there be any sentence given in this process, neither could it be certain, how much the pursuer should consign: But before declarator should be given to him, the Lords found, That he should consign what should be found resting unpaid to the defender; and in the mean time, during this dependence, the defender might keep possession of the lands, whereby he had no prejudice. In this process also the Lords found, That nothing should be imputed to the defender, as payment to him of any part of the sums, except so much of the duties of the lands comprised, as was really and actually uplifted and intromitted with by him; and the Lords found it not enough, to burden the compriser with that wherewith he had no actual intromission; albeit it was alleged by the pursuer, that whatever he might have intromitted with by the right of his comprising, it should be ascribed to him as payment of his debt *pro tanto*, seeing he having the right to meddle therewith, no other person could take up the same; and his omitting to meddle with the same, ought not to cause the same to be lost, and so prejudice the debtor who was thereby hurt, and might be heavily prejudged; in the like case, if the creditor who comprised should uplift how much he pleased, and suffer the rest to ly unuplifted, which might thereafter perish, or the tenants become *non solvendo*, and so might ever keep the debt upon the debtor, albeit he might pay himself by his comprising, which was repelled by the Lords; for they found, in respect of the words of the act of Parliament, that the compriser could be burdened with nothing, but that wherewith he had real intromission, and not with that, wherewith he might have also intromitted. But this point is well to be considered, in respect of the sensible prejudice of the debtor, if his creditor please to prejudge him; for it would appear at least necessary and requisite upon the compriser's part, that if he should be accountable only for so much as he receives, that he should do all lawful and exact diligence, to recover all whereto he hath right by his comprising, and what he cannot recover, no reason it should be ascribed to him for payment; but if he may recover it, it would appear to deserve another consideration, at least he ought to be denuded of the right to that which he meddles not with. And concerning this, the last part of the act of Parliament 1621 is to be considered, which appears to incline to burden comprisers, who may intromit, where the comprising is not frustrated by any deed, which will make it unprofitable. In this process also, the Lords found, that the pursuer ought not to repay to the defender the year's duty addrest to the superior, for receiving of him vassal upon

(REDEMPTION.)

No 1. the comprising, more than that which he paid to the superior; albeit it was alleged by the defender, that if the superior had received him *gratis*, for respect of blood or favour, or such other respect, as might have moved the superior, yet that was no reason that it should be profitable to this pursuer, but that he ought to pay the whole duty; which was repelled by the LORDS, in this case, where the superior takes a moderate composition from the compriser; and where the same doth not proceed upon any personal respect born by the superior to the person compriser, more than to another person; for it were hard to give the compriser of lands, holden of the King, any more than is debursed to the King's Officers, for composition; and the like ought to be with the same reason in comprisings of lands, holden of other superiors; but where there is donation for personal respects to the compriser, it is of another nature; for then also I think the judge may modify, and the compriser ought not to have all.

This last part of this decision was altered by the LORDS; for they found, upon the 17th of July 1625, in this same process, that he who redeems from a compriser, ought to pay the year's duty of the lands, which is due to the superior by the act of Parliament, albeit the superior had given it *gratis* to the compriser; for if he had received him in the lands for service, or because he was of kin or friendship to him, or for any other personal respects, that ought not to be profitable to the redeemer. And sikklike in the expences made by the compriser, in deducing of his comprising, albeit he had gotten all done to him *gratis*, yet it is no reason that the redeemer should be free of paying to the compriser of the ordinary expences, which in such cases are in use to be paid ordinarily by others; and this the LORDS found they would keep hereafter, always when such cases occurred.

Act. Hope, & Lawrie.

Alt. Nicolson.

Clerk, Gibson.

Eol. Dic. v. I. p. 22. Durie, p. 170.

No 2.

1628. November 29.

JAMES LIVINGSTON against L. BASS.

An apprifer may repair the houses, and, upon redemption, is entitled to reimbursement; but he ought to ascertain in an action, the state of them at the time of comprising, and get the warrant of a judge.

IN this pursuit, a compriser was found might bestow charges for entertaining of the house, and dwelling-place, being upon the comprised lands, for preserving of them in the same estate, wherein they were the time of his comprising; and also for entertaining the barns and byres, which were thereupon; as well which were upon the principal mains, as upon any other rooms, which were comprised; and albeit, the said rooms were possessed by the tenants, and had not been before laboured by the heritor; and that he might beir, and repair the tenants houses, the necessary expences whereof, debursed by the compriser, the LORDS found, ought to accrefce to the reverfion, and should be refunded to him, the time of the redemption of the lands from him; and, therefore, the LORDS found, that