

(EXTINCTION.)

after; during which, by the late act of Parliament, apprisings not expired in *anno* 1652, were declared redeemable, or by sums received from such as bought from the apprifer, a part of the apprifed lands.—It was *alleged* absolutor from that member, of satisfaction by the intromission during these three last years; because the act of Parliament does not expressly prorogate the reversion, but declares the lands redeemable within three years; but does express nothing to whom the mails and duties shall belong, which cannot be imputed against the apprifer, to satisfy the apprifing; because he enjoyed them as his own, the apprifing by the law then standing, being expired; *et bona fide possessor facit fructus consumptos suos*, and therefore a subsequent law cannot be drawn back, to make him account for that which he might have consumed the more lavishly; thinking it his own.—It was *answered*, That apprifings were odious, being the taking away the whole right of lands, for a sum without proportion to the true value; and therefore all acts retrenching them, ought to be favourably interpreted, especially where the apprifer gets all his own; and therefore the act declaring them redeemable, must be understood in the same case as they were before, and that was either by payment, or intromission.

THE LORDS repelled the defence, and sustained the declarator, both as to payment and intromission; and as to the sum the apprifer got for a part of the land, sold by him irredeemably, after the seven years legal was expired. And seeing the acquirer of that right was called; they found it also redeemable from him upon payment of the price paid for it, *cum omni causa*, and he to be accountable for the rents, unless the pursuer would ratify his right, as an irredeemable right; in which case the price should be accounted as a part of the sums apprifed for.

*Stair, v. 1. p. 341.*1669. *January 14.*

ALEXANDER M'KENZIE of Pitglassie against Ross of Auchinleck.

ALEXANDER M'KENZIE having right to two comprisings of the lands of Auchinleck, one in *anno* 1644, and another in *anno* 1647, which being *alleged* to have been satisfied within the legals, and the matter referred to an auditor, who reported these points to the Lords: *1mo*, Whether the apprifer should account for the mails and duties, so as to impute the same to both apprifings, as to years after the second apprifing, or to impute them wholly to the first apprifing during its legal, and then to the second apprifing during its legal.—It was *alleged* for the apprifer, that he having two titles in his person, it was free for him to impute his possession to either of them; and yet he was so favourable, as not to crave his option, but to impute proportionally to both; albeit in law, when receipts are not specially as to one cause, *electio est debitoris*. *2do*, When any payment is made by a debtor to his creditor indefinitely, it is still imputed to the annual rents in the first place, before it can satisfy any stock; so that any satisfaction gotten

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came bound to account for intromissions during the last three years, as well as the former seven.

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A person possessing upon two apprifings, must attribute his intromission to the first apprifing only, till it be satisfied.

Having sold a part of the lands within the legal, an apprifer found accountable, not for their real worth, but for what he had actually received.

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by him, must first be imputed to the annualrent of both the sums, and then to the stock of the first.—It was *alleged* for Auchinleck, That the intromission could only be attribute to the first apprising; *1mo*, Because by that right the appriſer entered in poſſeſſion, and cannot invert his poſſeſſion to a third party's prejudice. *2do*, The first appriſing *eſt potior jure*; for if the two appriſings were in different perſons, he that had the ſecond, could never attain poſſeſſion againſt the firſt. *3tio*, *In dubio ſolutio eſt imputanda in durioſorem ſortem*, and therefore to the firſt appriſing; for if imputation be made to both, the firſt appriſing will not be ſatiſfied within the legal, and the debtor's right will be taken away, which is moſt unfavourable. *4to*, The appriſer, as he did not poſſeſs by the ſecond appriſing, ſo he could not, becauſe the firſt appriſing carries the right of property, and the ſecond carries only the right of reverſion.

THE LORDS found the poſſeſſion was only to be attribute to the firſt appriſing, and not to the ſecond, while the firſt were ſatiſfied.

The next point was, that it was *alleged* the appriſer had ſold a part of the lands within the legal; and therefore the worth of theſe lands ought to be allowed in ſatiſfaction of the ſums.—It was *answered*, That the appriſer could not diſpoſe the lands ſimply, but only his right of appriſing, which would ſtill be redeemable from his aſſignee, as well as from himſelf.

THE LORDS found, That he was not accountable for the whole value of the lands diſpoſed, but for what ſums he actually received for the lands diſpoſed, to be proven *ſcripto vel juramento*.

The next point was, as to the prices of the victual, whether the fiars, or greateſt prices were due.

THE LORDS allowed the debtor to prove the greateſt prices, and alſo to produce the fiars, reſerving to themſelves the modification; next, as to the rental, the appriſer deſired a joint probation, eſpecially it being in the Highlands, where the witneſſes are ſuſpect.

THE LORDS would not grant a joint probation, but ordained the probation to be by witneſſes above exception.

*Fol. Dic. v. I. p. 2E. Stair, v. I. p. 580.*

1677. June 26. MALLOCH againſt the RELICT of David Boyd.

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In reckoning for intromiſſion, a comprifer ſtated expence of defending his right. This diſallowed; but found, he might retain out of any

A SECOND comprifer having purſued a declarator, that the prior comprifing was ſatiſfied by intromiſſion; and the defender having, in the count and reckoning, given in an article of deburſements for proſecuting and defending of proceſſes concerning his right; the LORDS found, That as to the extinguiſhing of the comprifing upon the account of intromiſſion, the expences in deducing the comprifing and obtaining infeſtment, were only to be allowed; but not any other extrinſic deburſements: But the comprifing being extinct and ſatiſfied, if there