

whereby it is provided, that the superior may take the lands comprised to himself, he satisfying the compriser of his sum, and expenses, which he offered presently to do; which he alleged is the rather receivable from him, who had acquired this heritable right, and was prejudged therein by this compriser; and which comprising being yet unexpired, as any other creditor might comprise the legal, and thereby redeem the same; so with more equity ought he to be admitted to out-quit the comprising, that his own right might convalesce;—and the compriser answering, That it was not time now to make this offer, because he had allowed, by the Lords' ordinance, a year's rent to be retained by the suspender, in his own hands, to which he had no right, and which he had possessed, for satisfaction of the year's duty acclaimed by him as superior, for entering of the compriser; which allowance must be equivalent, as if he had paid and really delivered a liquidated sum for that year's entry, *quo casu* if he had so paid, the suspender's offer could never have been thereafter received; and where it is said, that the suspender, as creditor, may do this, as if the legal were comprised and redeemed from the compriser, (the comprising being yet unexpired;) he answers, that this offer cannot be respected upon that pretence, neither can it be admitted, except the legal were comprised, and redemption used by virtue thereof; which not being done, he cannot so summarily evacuate the effect and force of his comprising, by and against all form and order of law;—the Lords repelled the allegiance, and found the reason of suspension relevant; and found, that the suspender paying the principal sum of the comprising, with the whole annual-rents thereof since that time, and the expenses of the comprising, and the charges thereof, that then the compriser should assign his right to the suspender; and found, that the allowing to the suspender a year's duty of the land, the same being possessed by him, was not alike as if the compriser had actually paid a year's rent to him, and that he had received real payment thereof, and therefore that that allowance was no cause why the reason should not have been found relevant.

Act. Stuart.

Alt. Baird.

Clerk, Hay.

Fol. Dic. v. 2. p. 411. Durie, p. 709.

1671. June 10.

SIR FRANCIS SCOT of Thirlstoun *against* LORD DRUMLANRIG.

Sir Francis Scot having obtained decret of adjudication of the lands of Brankinside and others, and having charged the Lord Drumlanrig to receive and infest him, he suspends on this reason, that he was willing to satisfy the sums contained in the adjudication, upon assignation made to him thereto, and so was not obliged to receive the charger. It was answered, That albeit King James the Third's act of Parliament anent apprisings doth provide, that for a year's rent, superiors shall receive apprisers, or otherwise shall take the land to themselves and pay the sums; yet that gives not the superior an option, but bears, failing of paying a year's

No. 82.

No. 83.

After an apprising or adjudication has been purchased by the superior, it is competent to the debtor to redeem it, upon payment of the like

No. 83.
sum, without
paying an
year's entry.

rent, the superior may satisfy the sums, and take the land in his own hands; but where that was offered, it was never by custom or practice allowed, that the superior should exclude an appriser; but whatever were in the case of apprisings, that power was never granted to superiors in adjudications, whereupon they were still obliged to receive adjudgers without a year's rent, until the late act of Parliament; and the said old statute giving an option to the superior, is not to be extended to adjudications, nor was it ever by any subsequent law or consuetude extended thereto. It was answered, That by the ancient feudal law, a superior could not have been compelled to receive a stranger vassal, albeit a creditor, yet the statute of King James the Third did remeid this in favours of creditors, and obliged superiors either to receive apprisers for payment of a year's rent, or else to pay the sum apprised for; but long after that time, there was no mention of adjudications, which were a supplement of the Lords, that where the apparent heir being charged, did renounce, the creditor should not be frustrated, but might obtain adjudication of the lands, *contra hereditatem jacentem*; which, except as to that point of form, is the same with an apprising, under another title; and albeit as to the year's entry, the Lords would not extend the same to an adjudication; it was upon this special reason, that in the act of Parliament 1621, anent apprisings, the same is declared redeemable upon the sums apprised for, and a year's rent for the entry; yet in the very next act in the same Parliament anent adjudications, the year's entry is left out, which was thought by the Lords to be done by the Parliament of purpose, and so not to be extended by the Lords; but otherwise, the same reason was for the entry in adjudications as in apprisings, which the Parliament has now found by their late act; and therefore the matter of the entry is not to be drawn in consequence to the superior's option.

The Lords found that the superior had his option, and might refuse to receive the adjudger, offering to satisfy the sums in his adjudication, upon assignation made to him thereof; and declared that the same should be redeemable from the superior upon the like sums without any thing for a year's entry; and that in all things else, the superior and vassal should be in the same case as if the adjudger had been entered to that effect.

Fol. Dic. v. 2. p. 411. Stair, v. 1. p. 731.

* * * Gosford reports this case:

Sir Francis Scot having adjudged the lands of Brankenside and Coats, and charged the Lord Drumlanrig to enter him his vassal, he did suspend upon this reason, That by a late act of Parliament, adjudications and comprisings were declared to be of a like nature *in omnibus*, but so it is, that if the charger had comprised, and thereupon charged him to enter him his vassal, by an act of Parliament of King James the Third, all superiors are only liable to enter the compriser upon the payment of a year's duty, or to satisfy the sums contained in the comprising, and take the right thereof to himself, which he was now willing to do.

It was answered, That the reason was nowise relevant, as being founded upon the act of Parliament, because the adjudication, which is the ground of the charge, was prior to the late act of Parliament, whereby it is only statuted, that a year's duty should be paid by adjudgers as well as comprisers, but that an act can only have respect to the future; and as to that act of King James the Third, it being special as to comprisings, it cannot be extended as to adjudications, which were not then *in rerum natura*, they being only allowed as a legal course against apparent heirs by act of Parliament in King James the Sixth's time, *in anno* 1621, by which act superiors are ordained to receive the adjudgers, without so much as the payment of a year's duty, and have not in their power or option to enter, or to refuse, upon payment of the sums contained in the adjudication; and accordingly adjudgers did never pay any composition for their entries until the late act of Parliament; and if this election were sustained in favours of superiors, either as to adjudgers or comprisers, which was never before found by any decret, it would be of great importance as to all debtors whose lands are comprised or adjudged, they being in a far worse condition to have to do with their superiors than their creditors, when they should use an order of redemption, and crave possession of their lands. It was replied for the suspender, That he was founded *in jure communi*, and by the feudal law was not obliged to receive a vassal against his will, and albeit the act of Parliament 1621 ordaining adjudications to proceed against apparent heirs, who renounce to enter heirs to their predecessors, to be a good right to the lands adjudged, and that they shall be redeemable as comprisings by a second or third adjudger, or the apparent heir, if he shall be reponed *in integrum* against his renunciation upon minority; yet there is nothing in that act which obliges the superior to enter the adjudger; and if he should satisfy the sums, and take a right to the adjudication, the vassal, or a second adjudger, cannot pretend any prejudice, because the lands may be redeemed from the superior in the same manner as from the first adjudger; and, upon payment of the sums contained in the adjudication, the superior will be obliged to enter the vassal again to his own lands.

The Lords having seriously considered this case, and resolving to make it a practick, and to be a leading case, did find the reason of the suspension relevant, and that superiors offering to satisfy the sums contained in the adjudications, the adjudgers were obliged to assign the same, whereby they might bruik the lands as their property; but, in case of redemption by the apparent heir, they found, that he should enter him again vassal, without payment of a year's duty as composition; which they did likewise find as to comprisings, where the debtors should use an order of redemption within the legal against the superiors; which they did upon these considerations, *1mo*, That the election and option of superiors to enter comprisers, or to satisfy the debt, was expressly given by the act of Parliament 1469, putting it in their option; and that privilege not being taken from them by any act or decision of the Lords, they had good right thereto; and adjudgers being in no better condition than comprisers by the act of Parliament 1621; and the reason

No. 83. being as strong for superiors to crave that benefit in adjudications as in comprisings, they being alike founded *in jure* as to both, that they should not be obliged to receive a vassal against their will, but by satisfying his debt might purge his interest, and so take off the creditor's prejudice; they thought it just, that superiors should be in that same condition as to adjudgers as they are to comprisers by the act of Parliament, it being special and alike, there being *par ratio*; 2^{do}, The superiors being founded *in jure communi*, and by the feudal law not being obliged to change a vassal, the privilege granted to comprisers by the act of Parliament being special, and the like not granted by any posterior act to adjudgers to enter them, or pay the sums contained in the adjudication, they thought it a favour to put them both in the like condition, privileges being *stricti juris*; as likewise, that the debtor's redeeming from the superior should be free of a year's duty, whereof they prejudged themselves, it being done by the adjudgers or comprisers in case they were entered, and so were in a better condition, and could pretend no prejudice by using an order against the superior, who ought to possess these lands as his property, the apparent heir having renounced to enter; and so upon the principles both of law and equity, the Lords decerned *ut supra*.

Gosford MS. p. 164.

1695. February 6.

SIR THOMAS KENNEDY and BAILIE BLACKWOOD *against* The EARL of CASSILIS.

No. 84.

In an adjudication after the new form by sale of bankrupt lands, it was found, that the act 1469, allowing superiors to purge appraisings, took no place.

The lands of Dalmorton, as a part of Girvanmains, being exposed to sale, they were bought by the fore-named persons. The Earl of Cassilis, superior, refused to enter them, but offered to pay the price, and take them to himself, conform to the 36th act 1469, allowing the over-lord to redeem, which is called *retractus dominicus vel feudalis*. It was alleged he could not, because the acts introducing the sale of bankrupt lands had provided no such thing in favours of superiors. 2^{do}, If the adjudications be expired, then the right of redemption ceases, his privilege continuing no longer than his vassal's, who could not redeem after the legal. Answered, You the buyer have no prejudice, *et nihil tibi deest*, for your whole sums are to be paid with the interest. The Lords thought this of universal concern to all the superiors in Scotland, and therefore allowed it to be heard in presence; for it was alleged, that in adjudications for perfecting dispositions of lands, the superior could claim no more but a year's rent, and the decreets in favours of those who now buy the estates of bankrupts at the roup are declared to be full and absolute rights, which they could not be, if they were subject to the superior's faculty of redeeming.

1695. December 17.—The Lords advised the point debated between the Earl of Cassilis and Sir Thomas Kennedy, and Robert Blackwood, mentioned 6th February, 1695. The Earl being required to receive them as his vassals, offered