

This being taken by my Lord Gosfoord to interlocutor, the Lords demurred exceedingly thereon, whether such a receipt was a sufficient qualification of a debt against the granter, yea or no. At last, before answer to the relevancy of the allegiance, they ordained Mr. James Winrahame to be examined thereupon; as also Mr. Robertstone to adduce such witnesses as were present at the numeration of the money (if any was,) with what other adminicles he could adduce for evidencing the payment.

Upon the pronouncing of which interlocutor the pursuer produced a decret wherein Mr. Winrahame, being pursued already for relieving him of that sum, has deponed and denies, that to his knowledge, he was ever paid for these bolls of bear; which being seen, my Lord Gosfoord would suffer no probation which would any way choke the oath to be led, and therefore, with very much precipitation decerned Mr. Robertstone to pay the price acclaimed; so that Mr. Robertstone's referring it to his oath in the other process was the neckbreak of this.

*Advocates' MS. No. 332, folio 132.*

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1672. *February* JOHN MAISSON *against* ISOBEL RIND, Relict of JAMES MURE, and OTHERS.

IN January, 1672, there was called a reduction intended by John Maisson, portioner of Innerask, against Isobel Rind, relict of umquhile James Muire, and several other persons, heritors and possessors of a tenement of land lying within the town of Edinburgh; the case was as follows:—

John Laury, merchant in Edinburgh, dispones to Henry Seaton, his good-brother, in *anno* 1612, a dwelling house in Edinburgh, for relief of sundry cautionries wherein Henry stood engaged for him, with this provision, that how soon he should be relieved and repaid of his cautionries by this disposition, or otherwise, then this disposition to become null, and he, his heirs and assignees, shall be liable to renounce the same to the said John Laury, his heirs and assignees, &c. In 1613, Mr. William Kelly comprises this tenement, disponed, for the sum of 200 merks, contained in a bond granted by the said John Laury to him thereupon; and in *anno* 1631, he dispones and assigns this comprising to John Maisson; who now, upon the comprising, intents reduction of Henry Seaton's right, (which Henry had disponed to James Muire, and James dispones it to Isobel Rynd, his spouse, in liferent) against the said Isobel and others, upon this reason, that he offers him to prove the sums of money wherefore the said disposition was given to Henry Seaton, are more than paid by intromission with the mails and duties of the said tenement and others, at least they are relieved thereof by the granter; and so their disposition, conform to the quality it bears in its own bosom, expires, and all that has followed upon it becomes null, and his comprising now takes place.

The pursuer urging we might take a term in the reduction, I ANSWERED, we would take no term, because the pursuer's active title being allenary a comprising led in 1613, it could never be a ground of this pursuit, because long ago prescribed.

REPLIED,—The allegiance ought to be repelled, because at the time of the leading of the comprising, compearance was made for Henry Seaton, who had got a disposition of the appraised land from the common debtor, and who by Mr. Thomas Hope, his procurator, craved preference; which was accordingly done, and the tenement appraised, but prejudice to Seaton's right. As also compeared a liferentrix of a part of that house, (who even excluded Seaton's self, so that he did not attain the possession of that part till her death,) and got preference *quoad* her liferent: so that this pursuer and his author being debarred by thir two rights from the possession of the comprised lands, no prescription could run against his right, *quia contra non valentem agere non currit prescriptio*.

DUPLIED,—This being only a partial defence, and there being more lands in his apprising than in thir two rights debarring him, and he not being able to show any impediment stopping him, why he might not have done something as to these; the remainder must be clearly prescribed. *2do*, What was liferented is also prescribed, because offers to prove that it is more than forty years since the liferentrix's death, and so since the removal of the impediment. *3tio*, In the comprising, neither is Seaton nor the liferentrix preferred, but only a declaration of the inquest that they apprise, but prejudice of these two rights; yea (which is more,) they could not judge on the competition of rights; and, therefore, seeing they could not debar your author, you ought to have pursued within the forty years, and not having done so, the right is prescribed.

My Lord Craigie found *quicquid erat residuum* more in the apprising than the two above-mentioned rights, prescribed; found the right also prescribed *quoad* what was liferented, we always proving her death above forty years ago. As for the declaration in the apprising about H. Seaton's disposition, whether the same was such an impediment as barred him from all action, he demurred thereon. *Vide infra*, No. 483, [*Macmorran* against *Robertson*, June, 1676.]

If this happen to be repelled, then it will resolve in a count and reckoning; in which (because H. Seaton paid other cautionries for Laury than those for which the disposition was expressly given,) it will fall to be debated if those who derive right from H. Seaton will be bound to renounce the lands, they being found paid of the sums and cautionries expressly enumerated in the disposition, and are the cause thereof; or if they may detain the land till they be paid of all other debts they were constrained to pay as cautioners for Laury the disponder. About which see a little *supra*, at No. 301, [*January* 16, 1672.]

*Advocates' MS. No. 333, folio 132.*

1672. *February.*

MAGNUS AYTOUN *against* JOHN LAUDER.

MAGNUS AYTOUN, pursuing for mails and duties upon his apprising of my Lord Ramsaye's lands of Dalhousy and Caringtoun, compearance was made for John Lauder, the first appriser, and it was alleged that Magnus could have no decret for mails and duties till the first appriser were satisfied by him of the expense of leading his comprising and expeding his infetment, conform to the act of Parliament in 1661.