brother, did pursue him, as representing his father, upon this passive title,—that he had intromitted with the maills and duties of the lands of Kirkonal, wherein he died infeft.

It was ALLEGED for the defender, That he bruiked his father's lands by an expired comprising, which he had acquired, during the lifetime of his elder brother; and so, not being apparent heir, by the late Act of Parliament his right could not be questioned, either to make him liable to his father's creditors, that they may redeem the same, by payment of such sums of money as he had truly given out when he acquired the right, or to infer a behaviour against him, albeit his comprising was extinct by intromission within the legal.

It was REPLIED, That the benefit of the Act of Parliament was competent to the pursuer, notwithstanding of the allegeance; because the defender's elder brother, being then out of the country, and dying shortly thereafter, unmarried, he was always looked upon as the apparent heir to his father; and, by the death of the elder brother before the father, he was his only apparent heir, and so his case did fall within the compass of the Act of Parliament: and if it were otherwise, all creditors might be frustrated of the benefit thereof, by acquiring rights in the name of a second brother, contrary to the express meaning of the said Act; as was lately decided in the case of the Laird of Posso, where his eldest son, acquiring right to a comprising during his father's lifetime, at which time he could not be reputed apparent heir, yet, in respect of the meaning of the Act of Parliament, and that if his father had been dead, he was the only person could represent him.

The Lords did decern in favours of the creditors. And to the second part it was REPLIED,—That the comprising, albeit extinct by intromission within the legal, yet it being a title to possess until that had been questioned by a declarator, it was sufficient to defend him against a behaviour as heir by intromission; which can never be interpreted but where an apparent heir cannot ascribe his intromission to any other right or title.

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1673. *December* 23. MR JAMES OGILVY of CLUNY *against* KINLOCH of BANDOCH.

BANDOCH, being charged at the instance of Cluny, as assignee to a minute, whereby Bandoch was obliged to infeft Cluny's author in a miln of Aberbrothic, did SUSPEND, upon this reason:—That he ought to have a year's duty, seeing it was not his fault that the charger's author was not infeft; *quo casu* undoubtedly Bandoch, as superior, was not obliged to receive a new vassal, either upon resignation or comprising.

It was ANSWERED, That the charger being only assigned to a personal right, and his author never infeft, there could be no year's duty craved, he having disponed the land to Cluny's author and his assignees; so that he gave him power to assign the right to any other, who, coming in his place, was not obliged to pay a year's duty.

The Lords did find, that there was no year's duty due to the superior, which can only be craved where there is *mutatio vassali*, and the superior charged up-

on a comprising to enter the creditor; but, upon the vassal's resignation, which is voluntary, the superior is not at all obliged to receive a new vassal, but if he do it upon payment of a year's duty, which is a favour. *Page* 384.

1674. *January* 6. HENRY LYON *against* The APPARENT HEIRS of GEORGE HERRIOT, Bailie in the Cannongate.

HENRY Lyon, pursuing the apparent heirs for payment of their father's debts, conform to several tickets subscribed by him :—It was alleged for the defenders, That the tickets were holograph, and therefore did not prove *quoad datam*, but must be presumed to be subscribed on death-bed, and so cannot burden the heirs; likeas there is a reduction intented of the said tickets upon that reason, that they were subscribed *in lecto ægritudinis*.

It was REPLIED, That holograph writs are not null by way of exception, but only by a reduction, which ought not to stop execution, or a decreet against the apparent heirs; and all that can be acclaimed, is, that, if the defenders prevail in the reduction, the decreet, and all execution thereupon, shall fall in consequence: but if the pursuer can have no decreet that he may do diligence, in the mean time, other creditors, who are now *in cursu diligentiæ*, and comprising, will altogether be preferred, and the pursuer will not be able to come in within year and day.

The Lords did repel the defence, in respect of the reply; and found that holograph writs were not *ipso jure* null, so as to be a ground of a decreet against an apparent heir, but they ought to be reduced *via actionis*; especially where the pursuer would be altogether frustrated for want of diligence: but they thought sufficient to declare, that, in case the defender prevailed in the reduction, the decreet, and all that followed thereupon, should fall in consequence.

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1674. *January* 8. The LADY SAMFOORD *against* ALEXANDER WALKER.

THE old Lady Samfoord having set a tack of the lands of Nether Samfoord to the said Alexander, in October 1670, for the space of three years, she having died before Whitsunday, which was the term of his entry by the tack :—this Lady Samfoord, who succeeded to the liferent of the lands by her death, after expiring of the years of the tack, did pursue the tenant for two chalders of victual more than the tack-duty upon the ground,—that his tack was null, the granter being dead before the term of his entry; and so he was liable to the full duty of the lands, which did exceed the duty of his tack by two chalders of victual, conform to a tack produced, granted to a former tenant.

It was ALLEGED for the tenant, That he could not be liable; because the pursuer, having voluntarily suffered him to possess during the years of the tack, and received from him so much rent as, with the minister's stipends, and public burdens, which he had paid, did extend to the duty of his tack, and no more, she did homologate the tack, and so could not quarrel the same; especially the