It was farther ALLEGED, That albeit he was an apparent heir, and had acquired the right of the comprising, yet there being no order of redemption used, nor he satisfied by intromission, the declarator to find his right null could not be sustained; the Act of Parliament only allowing to use an order within the legal.

It was REPLIED, That the pursuer being willing to satisfy what was resting besides his intromission; and having raised a declarator for that effect, the same ought to be sustained, without any order of redemption.

The Lords did repel the defence, in respect of the reply; and found, That the defender, as apparent heir, being satisfied, by intromission, of the true sums paid for his right of the comprising; and after count, if there be any thing resting, the pursuer having offered presently to make payment, that the delarator being raised within the legal, it ought to be sustained; albeit there was no order of redemption. *Page* 662.

1677. *June* 28. THOMAS NAIRNE *against* CLAYHILLS of INNERGOWRIE.

IN a suspension, raised at Thomas Nairne's instance, for payment of the price of the lands of Bank, disponed to him by Innergowrie, upon these reasons:—

1*st*. That, by the disposition, he is obliged to infeft the suspender in his own lands of Innergowrie, in warrandice of the principal lands; and therefore ought to obtain a confirmation of the king, of the base right of the warrandice lands.

2*d*. Since the disposition of the warrandice lands, he hath granted an infeftment of three hundred merks of a yearly annualrent; which he ought to purge; seeing it may prejudge him of his recourse, in case of distress.

It was ANSWERED to the *first*, That the infeftments of the principal lands being public, and clad with possession, the warrandice lands, as to all posterior rights, is a public right; and there being no obligement in the disposition to confirm the same, the disponer, by our law and practick, is never found liable.

It was ANSWERED to the *second*, That there was no necessity to purge the annualrent, because the lands given in warrandice were triple more worth in rent than the principal lands; and so was more than sufficient to give relief in case of distress.

The Lords did find the letters orderly proceeded for payment of the price of the lands, notwithstanding of both these reasons; because, as to the first, there was no special obligement to obtain a confirmation from the superior; but, in case of forefaulture of the disponer, recognition, or liferent escheat, the suspender might obtain a confirmation himself. Likewise, he was expressly bound to pay the charges of the infeftment of the principal lands; as likewise, there was sufficient for relief, notwithstanding of the annualrent.

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1677. *June* 28. The KING'S ADVOCATE *against* AUCHINFLECK.

IN a declarator, at the Advocate's instance, against Auchinfleck, for the avail

of his marriage, it was ALLEGED, That the lands being comprised from him as apparent heir to his father, he was thereby denuded; so that the right of the marriage could not fall to the king but by the death of the compriser.

It was REPLIED, That he being of age, whereby the marriage did fall; and might be gifted before the comprising; that did not take away the right of the marriage, which might affect the lands, both as to the compriser and the apparent heir, whensoever he should be served, and use redemption.

The Lords did repel the defence; and found, That an apparent heir, being marriageable, whether male or female, before a comprising led against them, it did not prejudge the king or his donatar of the avail of the marriage.

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1677. *July 5.* The ARCHBISHOP of GLASGOW *against* THOMAS CRANSTOUN and ROBERT DAVIDSON.

IN a reduction of the gift of the clerkship of Peebles, granted by the late Archbishop Lightoun, to the said Cranstoun and Paterson, conjunctly and severally, and longest liver of them two, of the whole benefit, profits, and casualties of the said office, upon these two reasons:—

1*st*. That it was *a non habente potestatem;* Bishop Lightoun, the granter, never having been legally transplanted from the bishopric of Dumblane to the see of Glasgow; without which, by the common law expressing the several solemnities of transplantation, no bishop can have right to the place and office, to which he hath only a right of provision by signature. The second was, That the right of clerkship being made to two conjunct persons, and longest liver of them two, It was a dilapidation of the benefice; and seeing one of them might die before the granter of the gift, so the survivor, without any new title from a new bishop, could never enjoy that office, and the benefit thereof; but ought to be at the disposal of the new bishop.

It was ANSWERED to the *first*, That Bishop Lightoun being transplanted upon the demission of the pursuer, and provided to the benefice upon a signature passed the Great Seal, it was a lawful title, and needed not the ceremonies of a transplantation, which are not ordinary.

It was ANSWERED to the *second*, That a clerk's office being no part of a church benefice; and the fees and casualties belonging to them for their personal service *et ratione officii;* the bestowing of any such place is no dilapidation of the church rent: and it is ordinary and lawful to present conjunct persons, not only to be clerks, but to be commissaries, and to belong to the longest liver of them: and as to the case now in question,—*viz.* the commissariat of Peebles, which is so large, that there being four commissariat committees, at several places, there was reason and necessity for making more than one clerk.

The Lords, as to the first, did sustain the answer, and assoilyied from the reduction; upon that ground, That the canon law, and formal ceremonies of transplantation, being only appointed by the Romish church, and never established here since the Reformation, they found that the king's signature, under the Great Seal, gave a full right to the bishops, without transplantation; especially in this case, where Bishop Lighton's signature was founded upon the same pursuer's